REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 1 OF 2017

HASSAN JILLO BWANAMAKA..........................1ST APPELLANT

MWANASITI SHEE MASHA..............................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(**An appeal against the original conviction and sentence of Hon. I.Ruguru (SRM) arising from a judgment delivered in Mombasa Chief Magistrate's Court Criminal Case No. 786 of 2013 on 4th January, 2017)**

JUDGMENT

The Appeal

1. The 1st Appellant was charged with four counts in the trial court. The four counts were being in possession of unauthorized explosive contrary to section 6(1)(a) as read with section 29 of the Explosives Act Cap 115 of the Laws of Kenya (Count I); being a member of unlawful society contrary to section 6(a) of the Societies Act, Cap 108 of the Laws of Kenya (Count II); being in possession of paper or implements of forgery contrary to section 367(a) of the Penal Code (Count III); and incitement to violence contrary section 96(a) of the Penal Code (Count IV). The 2nd Appellant on the other hand was only charged with Count (I) and Count (IV) in the same trial court.

2. Upon trial, the 1st and 2nd Appellants were both convicted of Count I and were each sentenced to seven years imprisonment. They were acquitted of the other counts. The particulars of Count 1 were that on 21st March 2013, at about 3.00pm at Majengo Mapya area in Likoni District within Mombasa County, they were jointly found with explosives namely three hand grenades with identification numbers Hd Gr69, 147-86/9 and 28-83/349-2 without authority from an explosive officer.

3. The 1st and 2nd Appellants thereupon preferred this appeal by way of a Petition of Appeal filed in this Court dated 12th January 2017. Their grounds of appeal are as follows:

a) That the learned magistrate erred in both law and facts by convicting the Appellants on a count that is duplex.

b) That the learned trial magistrate erred in law and facts by convicting the Appellants after the prosecution had failed to prove their case beyond reasonable doubt.

c) That the learned trial magistrate erred in law and facts by convicting the Appellants without considering their strong and corroborated defences hence arriving at a wrong conclusion in law.

d) That the learned trial erred in law and facts by sentencing the Appellants excessively and in violation of the relevant provisions of the law.

4. In the course of hearing the appeal, this Court was informed by a letter dated 12th February 2018 by the Officer in charge of Shimo La Tewa Maximum Prison that the 1st Appellant had died while undergoing treatment at Shimo La Tewa Health Centre. A signal to the same effect dated 14th December 2017 was also filed in Court. The unfortunate death of the 1st Appellant meant that his appeal thereby abated.

5. The appeal by the 2nd Appellant proceeded to hearing on 5th September 2018, and Mr. Chacha Mwita, the learned counsel for the 2nd Appellant, relied on two sets of submissions that he filed in Court on 30th and 31st May 2018, while the learned Prosecution counsel, Mr. Jami, made oral submissions.

6. M. Mwita's main arguments are that Count I as framed was defective for being duplex, as it included two independent sections of the Explosives Act with separate definite penalties being section 6 and section 29 of the Explosives Act. Reliance was placed on the decision in **Mary Wiathera Kamuiru & 3 Others vs Republic (2016) e KLR** that if there is no evidence to support the preferred charge, an acquittal will be ordered on the basis of duplicity of the charge**.**

7. It was further submitted that the Prosecution failed to prove their case beyond reasonable doubt as its evidence was inconsistent, contradictory and lacked corroboration from its primary witness. In particular, that the evidence of the events of 21st March 2013 showed that no witness testified as to the 2nd Appellant having stayed in the house where the alleged grenades were recovered, and no evidence was adduced as to who specifically made the recoveries of the grenades and the sequence of the said recoveries was not corroborated.

8. In addition, that no evidence was adduced on the requirements of section 6 of the Explosives Act, especially as regards the manufacture and weight of the explosives, as held in **Wendo Idi Zuberi vs Republic (2017) e KLR.** The evidence of PW3 was also faulted on the grounds that he failed to display that he was an expert witness with special knowledge and skills, and did not substantiate his findings on the make of the grenades**.**

9. It was also submitted for the 2nd Appellant that her defence was consistent and solid, and it collaborated the alibi that was offered as she had never lived with the 1st Appellant as alleged. Lastly, it was submitted that the sentence meted on the Appellants was excessive as the maximum sentence provided by section 6 of the Explosives Act is two years imprisonment, and no reason was given why the maximum sentence of seven years imprisonment provided under section 29 was imposed.

10. Mr. Jama on his part submitted that the only issue before this Court is that of duplicity of the charge, which he asked this Court to dismiss on account of the 2nd Appellant having being represented by counsel during the trial, who did not raise any objection to the charge. Further, that an appeal will only be allowed on account of duplicity of the charge if the Appellant is found to have been prejudiced thereby.

11. However, that in the present appeal the nature of the offence was possession of an unauthorized explosive, and that the only aspect of the charge that was arguable is whether that possession of explosives was for purposes of pursuing an unlawful act under section 29 of the Explosives Act, of which reasonable suspicion had been created even though the Appellants were acquitted of this charge. Therefore, that the imposition of the sentence of seven years imprisonment provided for under section 29 of the said Act was safe in the circumstances.

12. Reliance was placed on the decision in **Reuben Nyakango Mose & Another vs Republic (2013) e KLR** for the position that duplicity is contemplated in the Penal Code, and it was submitted that if the charge sheet is found to be bad for duplicity the same is not fatal and is curable under section 382 of the Criminal Procedure Code.

13. Mr. Jama asked this Court to depart from the decision in **Wendo Idi Zuberi vs Republic (supra)** as regards whether a grenade is an explosive, as the expert in the trial Court found that the grenade contained a powerful explosive namely TNT, and that is why the Prosecution proceeded under the Explosives Act rather than the Firearms Act which defines a grenade as ammunition. This Court was in this regard urged to adopt an interpretation of explosives that would include a grenade, as the list of explosives in the Explosives Act is not exhaustive.

14. In reply, Mr. Mwita distinguished the decision in **Reuben Nyakango Mose & Another vs Republic (supra)** on the ground that the charges therein were those of burglary under section 304 of the Penal Code and stealing under section 279 of the Penal Code which duplicity is allowed by law under the schedule of offences in the Penal Code. However, that in the present appeal the Prosecution has not referred the Court to any schedule or form that allows for an offence under section 6 of the Explosives Act to be put together with an offence under section 29 of the Act. In addition that this Court cannot be asked to adopt an interpretation of explosives that is not provided for by legislation an which requires scientific and specialized knowledge.

15. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The Evidence

16. The Prosecution in this regard called ten witnesses to testify in the trial court. The evidence that was adduced as regards the 2nd Appellant was as follows. PW1 (CPL Abio Ware Galore) and PW7 (PC Bakari Mwandolo), testified that they did not know the 2nd Appellant. PW2 was George Mutonga, the DCIO at Likoni at the time, and he testified that on 21st March 2013 he searched the house that he had been informed by the 1st appellant belonged to the 2nd Appellant, and recovered several items therefrom including three grenades which were itemized in the trial Court. According to PW2, the 2nd Appellant was not present during the search, and he was also not present when the 2nd Appellant was arrested.

17. PC Okello was PW5 and he testified that he participated in the said search when the said grenades were recovered, and also stated that the 2nd Appellant was not present during the search. PW6 (PC Samuel Kamiti) was also present during the search and reiterated the evidence by PW2 and PW5. PW6 in addition testified that he later located and arrested the 2nd Appellant. Sergeant Arthur Onyango was PW8, and he also testified that he participated in the search and produced some of the items that were recovered from the house alleged to belong to the 2nd Appellant as exhibits. PC David Kinoti was the investigating officer, and he testified as PW10 and produced the remaining exhibits.

18. The other witnesses who testified were SSP Eliud Langat as PW3, and he stated that he was based at the CID headquarters Bomb Disposal Unit and that he examined certain exhibits which were suspected to be grenades, and presented his report thereof. Likewise, PW4 was CIP Daniel Gutu, a forensic document examiner based at CID headquarters, who examined documents which he found to be fake currency notes. Joseph Onyango, a Deputy Registrar General in the office of the Attorney General, was PW9, and his testimony was that

MRC was not registered by the Registrar of Societies.

The Determination

19. After considering the grounds of appeal, submissions thereon and evidence adduced in the trial Court, I find that the main issues raised by the 2nd Appellant in her appeal are firstly, whether the charge sheet was defective for duplicity; and secondly, whether she was convicted for the offences of being in possession of unauthorized explosive on the basis of consistent, reliable and sufficient evidence.

20. On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.

21. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.

22. Section 6 of the Explosives Act provides for the restriction of storage and possession of unauthorized explosives as follows:

> **"(1) No person shall keep, store or be in possession of any unauthorized explosive—**
>
> > **(a) unless it has been manufactured as provided by section 4(1)(a), and does not exceed two kilograms in weight; or**
> >
> > **(b) unless it has been manufactured as provided by section 4(1)(b), and is kept, stored or possessed in such manner and in such quantities as have been approved in writing by an inspector.**
> >
> > **(2) Subsections (2), (3) and (4) of section 4 shall apply *mutatis mutandis* in the event of any contravention of this section or of any of the conditions imposed thereunder."**

23. Section 4 of the Act provides for the restrictions on manufacture of unauthorized explosives and the applicable penalties as follows:

> **"(1) No person shall manufacture any unauthorized explosive unless—**
>
> > **(a) it is manufactured solely for the purposes of chemical experiment and not for sale, and in quantities not exceeding five hundred grams in weight at any one time, or two kilograms in all; or**
> >
> > **(b) it is manufactured solely for practical trial as an explosive and not for sale, and in such quantities and under such conditions as may be specified in writing by an inspector.**
>
> **(2) Any person who contravenes the provisions of this section or any conditions imposed under the powers thereof shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or, in default of payment, to imprisonment for a term not exceeding two years, and the explosive in respect of which the contravention has taken place shall be forfeited.**
>
> **(3) The owner and the occupier of any premises in or on which an unauthorized explosive has been manufactured in contravention of this section shall be deemed to be the manufacturer, unless such owner or occupier (as the case may be) satisfies the Court before which he is charged that he was unaware that any such contravention was occurring or had occurred.**
>
> **(4) The burden of proving that any manufacture of an unauthorized explosive was solely for purposes of chemical experiment or practical trial and not for sale shall, in any prosecution under this section, be upon the accused."**

24. The ingredients of the offence of being in possession of unlawful explosives in section 6 of the Act is being in possession of explosive which:

> (a) have not been manufactured solely for the purposes of chemical experiment and are not for sale, and
>
> (b) do not exceed two kilograms in weight; or
>
> (c) have been manufactured solely for the purposes of chemical experiment and are not for sale and are kept, stored or possessed in such manner and in such quantities that has not been approved in writing by an inspector.
>
> These ingredients were also restated in **Wendo Idi Zuberi vs Republic (supra) .**

25. Explosives are defined in the Act to mean:—

> **"(a) gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein or not, which is used or manufactured with a view to**

produce a practical effect by explosion or a pyrotechnic effect;

(b) any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined; or

(c) any other substance which the Minister may, by notice in the *Gazette*, declare to be an explosive, but does not include ammunition as defined in the Firearms Act (Cap. 114)."

26. The Firearms Act defines ammunition as follows:

"ammunition" means any cartridge, whether a blank, tracer, explosive, incendiary, gas-diffusing, signalling or any other cartridge of any other kind capable of being discharged from or used with a firearm and includes—

(a) any grenade, bomb or other missile whether explosive or not and whether or not capable of or intended for use with a firearm;

(b) any mine whether for use on land or at sea, depth-charge or other explosive charge;

(c) any other container or thing designed or adapted for use in or as weapon for the discharge of any noxious liquid, gas or other substance;

(d) any projectile, powder or other charge, primer, fuse or bursting charge forming part of any cartridge or any component part thereof; and

(e) any ammunition or pellets for use in an airgun, air rifle or air pistol;"

27. There is thus a defect that is already apparent in the charge sheet in the sense that the particulars of the charge indicated that the 2nd Appellant was found in possession of explosives namely three hand grenades, which does not disclose an offence under section 6 of the Explosives Act, as a grenade is not an explosive under the section. I am minded in this respect that the law on the framing of charges requires clarity in the charge sheet as stated in section 134 of the Criminal Procedure Code as follows:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

28. The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars."

29. Section 29 of the Explosives Act on the other hand provides for the offence of possession of control of an explosive for an unlawful object as follows:

"Any person who makes or knowingly has in his possession or under his control any explosive, in circumstances which give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of an offence and liable to imprisonment for a term not exceeding seven years, and the explosive shall be forfeited."

30. Therefore, in addition to being in possession of an explosive, an additional ingredient required to be proved in the said offence is that the said possession is for purposes of perpetrating an unlawful object, which the trial Court found was not proved. The said charge also suffers from the defect that it was not supported by the particulars as a grenade is not an explosive.

31. Specifically on the arguments made on duplicity, I am guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic** **[2013] e KLR** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu vs Republic*** ***[2007] eKLR*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R*** ***[2010] eKLR,*** stated as follows:

"Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge,

contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal*****. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."**

32. The Court of Appeal in **Paul Katana Njuguna vs Republic (2016) eKLR** further explained that the offence of robbery with violence includes the elements of the offence of robbery, and if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the Criminal Procedure Code.

33. The Court of Appeal in that case appreciated the defect in charging an accused under both sections, but went further to discuss the effect of that defect. It was held that what courts needs to have in mind is whether or not a failure of justice occurs with that defect. That the confusion that would arise due to the duplicity did not occur in that case since the accused in the case fully cross examined the witnesses and raised no complaint both before the trial court and the High Court. So that while it would be undesirable to charge an accused person under both sections, it would not be prejudicial to that accused person if there is no risk of confusion in the mind of an accused as to the charge framed and evidence presented, in which case a charge which may be duplex will not be found to be fatally defective.

34. The converse position therefore is that if the charge sheet reveals two independent offences where one cannot be subsumed in the other in the sense of all the ingredients of one of the offences being included in the other offence, and the evidence adduced pursuant to such a charge does not disclose any of the offences, then this is a defect that is not curable under section 382 of the Criminal Procedure Code.

35. *It is notable in this respect that in* **Reuben Nyakango Mose & Another vs Republic (supra)** the charge therein that was alleged to be duplex was that of burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code, which offences can be subsumed in each other, and which are allowed to be charged together. The Court of Appeal held as follows in this regard in the said case:

"It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge. "

36. I am of the view that the defect in the present appeal is not one that is curable under section 382 of the Criminal Procedure Code, as there are two offences disclosed by the charge, namely unlawful possession of an explosive whose the ingredients have been enumerated in the foregoing, and possession of an explosive with a view to perpetrating an unlawful object, which offences require specific and separate ingredients to be proved, and which attract different penalties under the law. In addition, as shown above, the said offences were not supported by the particulars. Lastly, it is my opinion that there was prejudice caused to the 2nd Appellant in this regard as it would not have been clear what offence or sentence was applicable to her.

37. *It is my considered opinion that t*his ground of appeal alone is sufficient to dispose of this appeal, and it is not prudent in the circumstances to consider the remaining issues which would go into the merits of the findings of the trial court, given that I have found that the proceedings were based on a defective charge.

38. The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

39. In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

40. I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that there was gaps in the evidence as to the 2nd Appellant's possession of the grenades, especially as it was all circumstantial, and was inconsistent. This is particularly in light of the testimony by PW7, who was the agent of the landlord of the premises where the grenades were allegedly found, that he had no knowledge of

the 2nd Appellant, or of the existence of her tenancy of the said premises contrary to testimony to this effect by PW2, PW5,PW6 and PW8. In addition, a retrial would be prejudicial to the 2nd Appellant, who has already spent close to two years in custody.

41. I therefore allow the 2nd Appellant's appeal and quash her conviction for the offence of being in possession of unauthorized explosive contrary to section 6(1)(a) as read with section 29 of the Explosives Act. I also set aside the sentence of seven years imprisonment imposed upon the 2nd Appellant for this conviction, and order that the 2nd Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

42. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2018.

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

D. O. CHEPKWONY

JUDGE