



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO. 61 OF 2018**

**TOBIAS OGADA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Being an Appeal from the findings, judgment, conviction and sentence of the**

**Chief Magistrate's Court at Mombasa (Hon. Julius Nang'ea)**

**in Criminal Case No. 203 of 2017 dated 5<sup>th</sup> July, 2018]**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**TOBIAS OGADA.....ACCUSED**

**JUDGEMENT**

1. The appellant, **Tobias Ogada**, was charged in the Chief Magistrate's Court at Mombasa in Criminal Case No. 203 of 2017 with the offence of robbery with violence contrary to section 295 as read with section 296(1) of the **Penal Code**. In the alternative he was charged with the offence of being in possession of a firearm contrary to section 4A(1)(a) of the **Firearms Act**, No. 6 of 2010. He was however acquitted of the main charge and convicted of the alternative one.

2. In support of its case the prosecution called four witnesses. According to PW1, **Zahrqa Abdul Murbe**, on 6<sup>th</sup> February, 2017 she was at home when she heard commotion downstairs with shouts of 'thief! thief!' Being the head of the area community policing, she ran downstairs where she found youths chasing after the appellant as he was being beaten. As the appellant was running he aimed in the air with what looked to PW1 as a gun and the youths snatched the same from him. PW1 then reported the matter to Makupa Police Station who took the gun. It was her evidence that she did not know the appellant.

3. In her cross-examination, PW1 stated that she recorded her statement on 16<sup>th</sup> February, 2017 and that she had sent the youths to take the gun to the village elder, called **Mwanaisha**, as she went to report the matter to the police. According to her, the police took the gun the same evening.

4. PW2, **Cpl Ali Boya**, based at Makupa Police Station, on general duties, was on 6<sup>th</sup> February 2017 at around 6.30 pm on foot patrol in Majengo, Mombasa when the OCS informed him of an incident in the area and sent him to find out what was happening. It was his evidence that near the DO's office in the company of his colleagues, they found the appellant injured and youths were beating him saying that the appellant had a gun. The police were then led to the home of the village elder, PW1, who gave them the gun which they identified as a revolver 89 containing 2 empty cartridges. They then took the appellant to the police station and charged him.

5. In cross examination PW2 reiterated that they met PW1 with the gun outside her home and that she was the one who handed over the same to them though she was not the one who alerted them of the incident.

6. PW3, **PC Staval Okinda**, was on patrol with PW3 when the said information from the OCS was relayed to them. Upon rushing to the scene at the DO'S office, Majengo, they found the appellant being beaten by a mob and they were informed that he was armed with a gun and had robbed a woman of property. The youths then informed them that a member of the area community policing by the name of **Zahra Abdul** had the gun and they were led to her home where she handed over the gun to them. In his evidence the gun was a revolver 89 containing 2 spent cartridges. After that they took the appellant to Makupa Police Station. In cross examination she confirmed that they found PW1 with the gun outside her house.

7. PW4, **PC Omar Fadhila**, was the investigating officer, who was instructed by the OCS on 6<sup>th</sup> February, 2017 to investigate the case involving a robbery suspect who had been arrested by the members of the public with the assistance of police officer and who was in their custody. He then recorded the statements of the witnesses. According to him the suspect, the appellant herein, was seriously injured and he therefore took him for treatment. It was his evidence that a gun which was used in the robbery was recovered and it had two bullets. The same was sent for analysis and were returned with the analysis report confirming that the gun and the rounds of ammunition were firearms in law. According to him, he took the firearms from the officers. He however testified that the robbery victim feared to testify.

8. Upon being placed on his defence, the appellant testified that on 6<sup>th</sup> February, 2017 he went to work at Changamwe, Mombasa as a driver with Harris Motors. It was his testimony that he had been sent to buy to go and pay motor vehicle clearance charges and produced a bill of lading and other clearance for the goods. It was his evidence that he was in charge of 4 vehicles all fitted with tracking devices though the devices did not reflect. According to him, they were not allowed to drive away until the devices reflected in all the vehicles. Therefore they waited to depart the following day. On the following day at 6.20 pm, when he went to Majengo to buy fish, there was a stampede and people were running in different direction and he was hit in the head. After that he heard people shouting 'thieves'. He lost consciousness and later found himself at Makupa Police Station with the police claiming that he was a thief. He was then taken for treatment. In his evidence the charges preferred against him were strange to him.

9. In support of his case the appellant called **George Willis Omondi**, the appellant's former employer who testified as PW1. In substance his evidence was that he did not know the circumstances of the appellant's arrest.

10. In this appeal the appellant has raised the following grounds of appeal:

**1) The learned magistrate misdirected himself in fact and law by holding that he was persuaded that the accused/ appellant was in possession of the firearms.**

**2) The learned magistrate misdirected himself in fact and law by finding that there was overwhelming evidence to charge the Appellant yet the prosecution witnesses failed to prove that there was evidence to support the charge against the Appellant.**

**3) The learned magistrate misdirected himself in fact and law by finding that the prosecution had proven the charge of possession of a firearm against the Appellant beyond reasonable doubt.**

**4) The learned magistrate misdirected himself in fact and law by convicting the Appellant pursuant to Section 179 (2) of the Criminal Procedure Code.**

**5) The learned magistrate misdirected himself in fact and law by sentencing the Appellant to seven (7) years in prison.**

11. It was submitted on behalf of the appellant by his learned counsel, **Mr Thiatha** and **Mr Gachiri**, that from the evidence on record, it is clear that the charges against the Appellant were never proved and the Learned Chief Magistrate erred in finding the Appellant guilty of possession of firearms. Based on the evidence, it was submitted that there was no explanation as to how the gun found its way back to PW1 after she had sent the youths to take it to the Village Elder, one **Mwanaisha**.

12. It was submitted that both PW2 and PW3 identified the gun as a Revolver 89. However PW4 produced in evidence a Rifle, 2 rounds of ammunition and a memo form. To the appellant, the discrepancies in the evidence of PW2, PW3 and PW4 are wanting. They are all police officers with some training on various types of guns. However while PW2 and PW3 stated they recovered a Revolver, PW4 on the other hand produced in Court a Rifle. To the appellant, this is a serious discrepancy in the prosecution case. In support of this submission, the appellant relied on a definition from Google and Wikipedia which defines a Revolver and Rifle as follows:-

- **Revolver** - (a wheel gun) is a repeating **handgun** that has a revolving cylinder containing multiple chambers and at least one barrel for firing.

- **RIFLE**- A gun, especially one fired from shoulder level, having a long spirally grooved barrel intended to make a bullet spin and thereby have greater accuracy over a long distance. Example, a hunting rifle.

13. To the appellant, it is clear from the definitions and descriptions that a rifle is a totally different gun from a revolver and the two are distinguishable. As such, the evidence by the prosecution does not add up to the charge that was brought against the Appellant, who was charged with possession of a revolver but a rifle produced in evidence.

14. It was further noted that the Complainant, one **Halima Ahmed** did not testify in Court. According to the appellant, the other discrepancy is the village elder. While PW1 states the Village elder as **Mwanisha**, PW2 and PW3 on the other hand confirmed the Village Elder was one **Zahra Abdul**, who happens to be PW1. It was therefore submitted that this Court is left at pains to identify the Village Elder and the type of

Gun that was recovered, sent for analysis and produced in Court as an exhibit.

15. The appellant also took issue with the fact that the alleged youths who allegedly arrested the Appellant were never called to Court to testify, if they recorded their statements. The appellant wondered why PW1 sent the said youths to deliver the gun to the “Village Elder” instead of taking the gun to Makupa Police Station as she went to report.

16. It was his submission that the evidence of the prosecution witnesses does not add up at all and that no fingerprints or DNA was ever lifted from the alleged gun at the time of analysis to link the Appellant to the alleged gun. If this test would have been carried out, then the Police would have been able to identify the person who held or possessed the gun.

17. In the foregoing premises the appellant submitted that it is clear from the Prosecution witnesses that:-

1) the alleged gun could not be linked to the Appellant,

2) the alleged gun could not be positively identified as 2 Police Officers, PW2 and PW3 recovered a REVOLVER while PW4, the Investigating Officer produced in Court a RIFLE.

3) The Appellant was facing the charge of possession of a REVOLVER but what was produced in evidence was a RIFLE.

18. In the appellant’s view, the Prosecution failed to prove their case on possession beyond reasonable doubt. The Court was therefore urged to overturn the findings of the Chief Magistrate as the same was not based on law, facts nor the evidence given in Court but was arrived at the wrong conclusion based on the evidence on record. It was sought that the conviction and sentence imposed on the Appellant be set aside in their entirety, and the Appellant be acquitted of the alleged offence.

19. On behalf of the Respondent, it was submitted by **Miss Ogega**, Learned Prosecution Counsel, that the evidence of PW1 was corroborated by that of PW2 and PW3 that they found the appellant being beaten by a mob while injured and that he was holding what looked like a gun. The said gun, a revolver containing two spent cartridges, was recovered and taken to the Village elder. This was confirmed by the examiner who found that it was a firearm under the **Firearms Act**.

20. According to the Respondent, the contradictions and discrepancies highlighted on behalf of the appellant did not occasion any injustice and are not sufficient to warrant the decision being upset since the prosecution proved its case beyond reasonable doubt. With respect to the failure to call the village elder, it was submitted that the prosecution is not obliged to call a superfluity of witnesses as the case was proved by the evidence of PW1, PW2, PW3 and PW4. In her view, the conviction was safe and the sentence under section 4 of the Act fair and legal.

### **Determination**

21. I have carefully considered this appeal and have re-evaluated and re-analysed the evidence adduced before the trial court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance.

22. To my mind the issues which fall for determination are two. First is whether the appellant was found in possession of the gun in question and secondly whether the said gun was produced in evidence. According to PW1, when she heard commotion, she ran downstairs where she found youths chasing after the appellant as he was being beaten. As the appellant was running he aimed in the air with what looked to PW1 as a gun and the youths snatched the same from him. It is therefore clear from the evidence of PW1 that she actually saw the appellant aiming in the air with what looked like a gun. The submissions made by counsel for the appellant that PW1 only arrived after the youths had taken possession of the gun cannot therefore be supported by evidence.

23. It is true that there were discrepancies between the evidence of PW1 on one hand and that of PW2 and PW3 as to who handed over the gun to the police. However as was held by the Court of Appeal in **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992**:

**“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”**

24. This was the position in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6** where it was noted that:

**“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”**

25. The rationale for this position according to the Court of Appeal in **Erick Onyango Ondeng’ vs. Republic [2014] eKLR**, is that:

**“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence.”**

26. As a guidance the Court of Appeal of Tanzania in Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 concluded that:

**“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”**

27. To my mind the correct approach is therefore the one elucidated in Philip Nzaka Watu vs. Republic [2016] eKLR, where the Court of Appeal held that:

**“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”**

28. Therefore as was held in Njuki vs. Rep [2002] 1 KLR 77:

**“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.**

29. In this case if the gun was positively identified to have been in possession of the appellant the contradictions as to how it found its way into the hands of the police would not be necessarily be fatal to the prosecution case since the movement of the gun once an accused has been dispossessed thereof is not an ingredient of the offence of possession of firearms.

30. In this case however, according to PW2 and PW3, the gun which was recovered from PW1 was a revolver. Presumably that is the same gun that was taken for analysis since according to the Exhibit Memo Form what was forwarded for analysis, what was sent was a Revolver Serial Number RG89 with two 9mm spent cartridges. However in his evidence, PW4 produced a rifle, 2 rounds of ammunition and the examination form. The question that arises is whether what was produced in evidence was the same weapon that was recovered from the appellant. There was no evidence that a Rifle is the same weapon as a Revolver. In fact according to google and Wikipedia, the two weapons are not the same.

31. Apart from that there was no evidence that the weapon was dusted for fingerprints. As **Musinga and Kimaru, JJ** noted in Elijah Wainaina Kihuyu vs. Republic [2006] eKLR:

**“Regarding the gun that was allegedly shown to the police by the appellant, the same was not dusted for fingerprints to determine whether the same had been handled by the appellant. The exhibit memo form that was submitted together with the gun to Ballistic experts showed that the gun had been found by P.W.6 on 21/5/2002 at 5.00 a.m. That was not true because according to the evidence on record, the alleged recovery took place after 8.00a.m. In view of our findings as hereinabove we hold that the appellant’s conviction was unsafe and consequently, we allow the appeal, quash the conviction and set aside the sentence that had been imposed upon him and order that he be set at liberty unless otherwise lawfully held.”**

32. Similarly, it is my view that the conviction of the appellant was unsafe. In the premises this appeal succeeds, the conviction of the appellant is hereby set aside, his sentence quashed and it is hereby directed that he be set at liberty forthwith unless otherwise lawfully held.

33. It is so ordered.

34. Right of appeal 14 days.

**Judgement read, signed and delivered in open court at Mombasa this 20<sup>th</sup> day of December, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Thiatha for the Appellant**

**Miss Ogweno for the Respondent**

**CA Lavender**