REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 13 OF 2017

DOMINIC MWANZIA MWENDWA…….....APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 1799 of 2014 in the Resident Magistrate's court at Winam delivered by B.Kasavuli R.M. on 23.2.17).

JUDGMENT

The trial

The Appellant herein **Dominic Mwanzia Mwendwa** has filed this appeal against his conviction and sentence on a charge of being in possession of a homemade gun contrary to Section 34(1) of the Firearms Act Cap 114 Laws of Kenya. The particulars of the offence were that:-

> ***"On the 27th December 2014 at Kamrongo village in Kisumu East District within Kisumu County was found in possession of a homemade gun (pistol) without a firearm's certificate***

The prosecution called a total of four (4) witnesses in support of their case. The brief facts were that at 4.00 am on 27.12.14; PW1 Andrew Were, a chief accompanied police officers to arrest suspects. That the appellant and another were arrested from their houses and that while the witness was outside appellant's house, he heard the police officers who were in the house claim that they had recovered a homemade gun from under a briefcase. PW2 CPL Samuel Sang told court that he was in company of CPL Ikunda and 2 APs when a homemade gun was recovered from a house where the appellant and a wife were found. He said he prepared an inventory of the recovery but did not produce it as an exhibit. PW3 Sgt James Chepsui who was in company of PW1 and PW2 told court that it was PW2 that recovered the homemade gun from appellant's house. PW4 PC Peter Ooyi produced the homemade gun and a ballistic report which confirmed that it was capable of being fired.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He said he was arrested for smoking bhang but was charged with a totally different offence that he did not commit.

On *23.2.17,* the learned trial magistrate delivered his judgment in which he convicted the appellant and after listening to mitigation sentenced him to suffer 7 years imprisonment.

The appeal

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his

amended grounds of appeal filed on 14th March 2017, the appellant raised five (5) grounds to wit:-

> **1. THAT the trial court erroneously convicted him on alleged recoveries without considering that the inference of guilt could not hold water as the ownership of the alleged house where the exhibits were recovered was not substantiated**
>
> **2. THAT the trial court erred in law and in fact to convict him by relying on the alleged exhibit without evidence of corroboration by an independent witness**
>
> **3. THAT the trial court erred in its findings by convicting him by relying on the firearms examiner's report which was tainted with irregularities**
>
> **4. THAT the trial court erred in law and in fact while convicting by failing to find that the prosecution case was not proved beyond the required standard of proof**
>
> **5. THAT the defence statement was not given due consideration whereas the same was capable of awarding him an acquittal**

Ms. Wafula, learned counsel for the state opposed the appeal and submitted that the gun was recovered from the house where the appellant was arrested from.

Analysis

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC [1972] E.A.32***, where it held that:-

> ***"It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that. I have perused the written submissions of the appellant and I note that they reiterate the six (6) grounds of Appeal stated herein above.

I have carefully read the appellant's written submissions and considered oral submissions by the appellant and on behalf of the state.

In dealing with this appeal, I will separately consider the grounds of appeal.

a. Where was the appellant arrested from?

Evidence by PW1, PW2 and PW3 that the appellant was arrested from a house where he was with his wife and not on a public road is well corroborated.

b. Was any homemade gun recovered from that house?

PW1 saw the homemade gun after its recovery. PW2 CPL Samuel Sang told court that he was in company of CPL Ikunda and 2 APs when a homemade gun was recovered from a house where the appellant and a wife were found. Of interest to note however is that PW3 Sgt James Chepsui who according to PW2 was not at the scene claimed that it was PW2 that recovered the said gun. The evidence on record raises 2 questions.

> 1. Why PW2 did not specifically claim that he recovered the gun if he actually did?
>
> 2. Why did the prosecution call PW3 who was not at the scene of recovery as a witness instead of CPL Ikunda and 2 APs who allegedly witnessed the recovery?

Appellant has denied that any homemade gun was recovered from. The fact that none of the prosecution witnesses claimed to have specifically recovered the gun raises a reasonable doubt in the prosecution case. PW2's evidence of recovery of the homemade gun is not corroborated and failure by the prosecution to call CPL Ikunda and 2 APs who were the alleged the eye witnesses were not called as witnesses.

This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

In the case of ***Bukenya & Others V Uganda [1972] EA 549*** court addressed itself thus:-

> ***"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.***

In the case of ***JUMA NGODIA –Vs- REPUBLIC (1982-88)1 KAR 454***, the Court of Appeal held viz-

> ***"The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."***

Determination

Having considered the evidence in its totality, I find that failure by the prosecution to call eye witnesses to corroborate the evidence of recovery of the homemade gun from the appellant's house leaves the court wondering whether the prosecution was holding back some evidence that may have been adverse to its case. Similarly, the calling of PW3 as a witness while it is clear that he was not at the scene of recovery leaves the court in no doubt that an attempt was being made to strength an otherwise weak case. From the totality of the evidence, a doubt is raised in the prosecution case and I resolve it in favour of the appellant.

The conviction is unsafe and I hereby, allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 21st DAY OFSeptember 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - In person

For the State - Ms Wafula