REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 523 OF 2013

1. **JOHN MBURU NDEGWA**
2. **CYRUS KIBUNJA NDUNGU .... APPELLANTS**

VERSUS

REPUBLIC …………………………….................... RESPONDENT

(From the original conviction and sentence in Criminal Case No.453 of 2013 of the Chief Magistrate's Court at Murang'a by Hon. T. Nzyoki – Ag. Senior Resident Magistrate)

JUDGMENT

JOHN MBURU NDEGWA the first appellant was convicted and sentenced for the offence of possession of a firearm contrary to section 89(2) of the Penal Code whereas **CYRUS KIBUNJA NDUNGU**, the second appellant, was convicted and sentenced for the offence of consorting with a person in possession of firearm contrary to section 89(2) of the Penal Code.

The particulars of the offence were that on 11th July 2013 at Ma-Joice area within Mukuyu in Murang'a County, the two were found under a mango tree taking some alcohol. The first appellant was found in possession of a pistol. The second appellant was charged for consorting with him.

Each appellant was sentenced to 7 years imprisonment.

They have appealed against both conviction and sentence.

Both appellants were in person. They raised some grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the first appellant was implicated falsely due to a land issue.

2. That the learned trial magistrate erred in law and in fact in convicting the appellants when there was no sufficient evidence to show that he was aware that the first appellant had a firearm.

The state opposed the appeals through Ms. Keya, the learned counsel.

Briefly the facts of the prosecution case are as follows:

While some APs were on foot patrol they bumped into the two appellants who were under a tree and were drinking alcohol. After arresting them, the first appellant was found to be in possession of a firearm. They were both charged.

In his defence the first appellant denied any involvement in the offence. He contended that Senior Superintendent Munyapala framed him up for he wanted him out of the way so as he may be able to purchase the land of one Elias.

The second appellant contended that he was not aware that his co accused had a firearm.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VS. REPUBLIC 1972 EA 32.**

For easier flow of the arguments, I will address the appeal by the second appellant first. He was convicted under section 89 (2) of the Penal Code that provide as follows:

> **(2) Any person who consorts with, or is found in the company of, another person who, in contravention of subsection (1), is carrying or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that he intends to act or has recently acted with such other person in a manner or for a purpose prejudicial to public order, is guilty of an offence and is liable to imprisonment for a term not exceeding five years**. (*emphasis is mine*)

The first thing we note is that the sentence on the second appellant was illegal. He ought to have been imprisoned for a term not exceeding 5 years. Secondly, this offence is not absolute. The prosecution was required to adduce evidence to show that he was aware the person he was with had a firearm and thirdly, evidence was required to show that in the circumstances the first appellant was found, there was an intention to act or he has recently acted in manner or for a purpose prejudicial to public order. This must be demonstrated through evidence. In the instant case it was not done. The conviction of the second appellant therefore was not based on any evidence.

The first appellant raised the issue of being framed up by Senior Superintendent Munyapala. This was when he was cross examining the first prosecution witness. The investigating officer ought to have called him as a witness so as to give the appellant a chance to cross examine him. This was not done and no explanation was given. This failure was prejudicial to the first appellant.

After the arrest of the appellants, they were escorted to the office of the County Commissioner where according to the evidence of **APC Harrison Kathenya (PW1)** they were to be interviewed. This is very curious. I would have expected the appellants to be taken to the police station for further action and not for a press interview.

The two appellants were arrested at about 4.20 pm on 11th July 2013. However, the charge sheet indicate the police Occurrence Book was number 3 of 12th July 2013. This anomaly raises suspicion as to why they were taken to the police station on 12th July. In view of the defence raised by the first appellant, the trial magistrate ought to have interrogated this issue further. Failure to do so was prejudicial to the appellant. He had a consistent line of defence and which required the prosecution to address.

From the analysis of the evidence on record, I find that the conviction of both appellants was unsafe. The conviction against each appellant is quashed and the sentence set aside. Each is set at liberty unless if otherwise lawfully held.

DATED at MURANG'A this 19th day of July 2016

KIARIE WAWERU KIARIE

JUDGE