



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 38 OF 2014
SALIM CHAGAWA KARISAAPPELLANT
VERSUS
REPUBLICRESPONDENT

(An appeal from the conviction and sentence of the Honourable Resident magistrate A. K. Gachie on the 7th February, 2014 at Mombasa law courts in criminal case No 327 of 2012).

J U D G M E N T

The appellant, SALIM CHANGAWA KARISA also known as ISSA charged with four (4) counts.

In count 1, the appellant was charged with preparation to commit a felony contrary to section 308 (1) of the penal code.

The particulars are that;

“On the 15th day of November, 2012 at Mtwapa within Kilifi County, the appellant jointly with others not before court was found in possession of dangerous weapon namely GLOCK 19 pistol with obliterated serial number and 15 rounds of ammunition in circumstances that indicate he was so armed with the intent to commit a felony namely murder”.

In count 2, the appellant was charged with being in possession of a firearm without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) of the Firearm Act.

The particulars of the charge are:

“On the 15th day of November 2012 at Mtwapa within Kilifi /county, the appellant was found in possession of one pistol make GLOCK 19 serial number not visible without a Firearm certificate”.

In count III, the appellant was charged with being in possession of ammunition without a firearm certificate contrary to section 4(2) (a) as read with section 4 (3) of the firearm Act.

Particulars being that;

“On the 15th day of November,2012 at Mtwapa within Kilifi County, the appellant was found in possession of 15 rounds of ammunition of 9 mm calibre without firearm certificate”.

In count IV, the appellant was charged with concealing of serial number contrary to section 11A (h) of the

Firearm Act, cap 114 Laws of Kenya.

The facts are that;

“On the 15th day of November,2012 at Mtwapa within Kilifi County, the appellant was found without reasonable excuse, in possession of one firearm make GLOCK 19 the serial number of which has been obliterated”.

The appellant pleaded NOT GUILTY to all the counts. He was tried, convicted and sentenced to serve seven (7) years imprisonment for counts 2,3, and 4, which sentences were ordered to run concurrently. He was acquitted of the charge in count 1.

The appellant being aggrieved by the said conviction and sentences, preferred the appeal and filed four (4) grounds of appeal, being that the learned trial magistrate erred in law and fact:

1. by shifting the onus on the appellant to prove his innocence;
2. in finding that the prosecution proved its case beyond reasonable doubt.
3. by purely relying on circumstantial and contradictory evidence;
4. by adopting and allowing hearsay evidence to influence his decision, hence prejudicing the applicant.

As the first appellate court, I have a duty and obligation to re-evaluate and re-analyse the evidence that was adduced at the lower court to enable me reach my conclusion. In doing so I have borne in my mind that I never had the opportunity to hear or observe the manner and demeanor of the witnesses. These principles were set down in the case of OKENO Vrs REPUBLIC (1973) E.A 32, in the following terms;

“An appellant on the first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vrs Republic (1957) E.A 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala Vrs Republic (1957) E A 570). It is not the function of the first appellate court merely to scrutinize evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see Peters v Sunday Post (1958) E., 424”).

The prosecution adduced evidence of six (6) witnesses.

Pw1, HALIMA SULEIMAN MWAKA , a waiter at a hotel called Bagras cafe testified that on 15.11.2012 at 10 00am, she was at work when a customer, who she later identified as the appellant herein, came in and asked for tea and chapatti. That after about 10 minutes other customers came in, sat behind the appellant and asked for tea and pilau. One of them got out to speak on phone. He came back in and jumped on the appellant while shouting “he is the one !”The accused tried to fight as the cashier asked what it was. These customers said they were police officers doing their job. Pw1 went on to state that the appellant resisted handcuffs and others came, searched him and got a gun. She said that the gun was black in colour 9x9 mm calibre and made in Austria. The appellant was knocked on his knees as Pw1 and others were shown the gun and asked to get out. According to Pw1, the appellant used to come there often and she knew him because he was commonly with one Rashid, their supervisor who ran away and has never been seen again.

When cross-examined , Pw1 admitted that she recorded her statement with the police on 9.12.2012 but did not indicate

- the date of the incident;
- what the officers said in the hotel;
- what the customers ordered;

She also said that she saw police recover and hold the gun in their hands but did not say from where it was removed or see where it was removed. She said that she had never seen the appellant with a gun as he always went there and could sometimes cater for the customers.

Pw2, FATUMA WANJIKU ABDUL told court that she was working as a cashier at the Bafra Hotel at Mtwapa. She said that on 15.11.2012 she was doing her work at the hotel at around 10 am to 11.0am when one she identified as Issa, who is the appellant, and a friend to her uncle by the name Rashid came in. She said that after ten minutes, two men came and sat. That one got out and then returned. He then attacked the appellant as two others joined. That the appellant tried to resist arrest thought the commotion Pw2 said that she asked them who they were and they identified themselves as police officers. They then removed a black item from the appellant which looked like a pistol. They asked the members who had gathered around to disperse as they arrested the appellant. Like Pw1, Pw2 also said that the appellant used to frequent the café. That he was a friend of Rashid who escaped and has never been found. Pw2 said her aunt Leira, who is the owner of the cafe was contacted by the police and she went to Mtwapa police station.

Upon being cross examined, Pw1 said that two people came as she went out to talk on phone and did not hear the conversation. Pw2 said that more people came in and they wrestled with appellant for about 5 minutes then heard one say. "He has a weapon!" She saw a gun raised and Issa, the appellant was now down. She said that she did not say that the police had placed a gun on the appellant and she was not threatened by anyone.

Pw3, NO. 89405 PC ELIJAH KALAN MBURWA told court that he works with anti terrorism unit in Mombasa and that on 15.11.2012, they were called by an informer who told them that there was a person who was suspected to be a terrorist and had been found at Bagras cafe. He said that together with PC Kenga, proceeded to the said cafe where they found the person and identified themselves. They also told the person, who he identified as the applicant herein that they wanted to arrest him. That the appellant got up and wanted to run away but they were close. He said that the appellant tried to resist arrest but they wrestled him, in the course of which Pw3 touched something and he shouted that he had a gun in his right hip. They wrestled him down and handcuffed him. They searched and found him with a pistol. Pw3 removed the pistol and arrested the appellant. He identified the pistol as GLOCK, black 9x19 mm calibre and said it had a magazine which was loaded with 15 bullets. He escorted the appellant to Makupa police station where he handed him over to the investigating officer. He also said that the serial number on the pistol had been tampered with.

When cross examined, Pw3 said that he received information while at Nyali from an informer at around 10.20 am. He said that it took them about 24 minutes to get to Mtwapa. He said that the information was about a suspected terrorist and he was given a description of his clothes. He however told court that he did not include this information in his statement with the police. Again, it was Pw1's evidence during cross examination that he did not put in his statement the description of the gun, or that the appellant tried to resist, or that the gun was on the right side of his waist. He also did not indicate in his statement that he snatched the gun from the appellant. He said he could not remember any of them walking in and out of the café. He then said that they did not find anything incriminating when they searched the appellant's residence, although they believed that he had more weapons in his residence.

Pw4, No 230 245 S.P LAWRENCE THUO LEMA introduced himself as a Ballistic Expert in the Ballistic unit at the CID Headquarters. He also said that he had worked as such for 12 years. His evidence was that on 27.11.2012, officer no. 72637 Corporal Raphael Minis from Anti-Terrorism took him;

2 a magazine – M2

3.3 -1XV

He examined them following the request in the exhibit memo form.

He established the pistol – M1 was a black pistol model 19 made in Aishian a with 9 x19 mm bullets. He also found that the serial number had been scrapped/ rubbed off. He tried fair restoration and established that the pistol was in good condition and can be used. He also established that the magazine from a bluch of 15 bullets 9x19 mm and was in good conditions. The bullets were also examined randomly and found to be in good condition. Pw4 concluded that they were pistol and bullets within the meaning of Firearms Act, prepared a report dated 27.11.2012 which he signed. He produced it as exhibit p5 together with the exhibit memo form.

In cross examination, it was Pw4's evidence that they do not dwell on who was in possession of the weapon. He confirmed that the serial number had been rubbed but said he did not know when this was done. He said that the pistol was from Austria Grey Company but did not make attempts to reach out to this company.

Pw5, No 72637, Sergeant Raphael Mimis, also attached to the Anti Terrorism Unit in Mombasa told court that on 15.11.2012 he was in the office when he was sent to Makupa police station where there was a suspect arrested in Mtwapa with a pistol block 19 and 15 ammunitions 9x19mm. He found PC Kenga and PC Elijah who gave him a pistol and the ammunition. He also got the appellant and took him to their offices. He interviewed him on whether he had a license and he told him that he did not have one. He then visited the scene of crime which was a hotel and recorded witness statements. He prepared a exhibit memo form which he used to escort the exhibits to the Ballistic expert in Nairobi. The exhibits were examined and the ballistic expert confirmed that the pistol and bullets were in good condition and prepared a report. He then charged the appellant with four (4) counts. He produced the block pistol as exhibit P1, the 15 rounds f ammunition as exhibit P2, the magazine as exhibit P3, the exhibit memo form as exhibit P4.

In cross- examination, pw5 told court that he was not present during the arrest of the appellant. He said that he was instructed to investigate the case by his senior (IP Kilonzo). He also said that there were no OB entries. That he went to Uganda hence the delay in recording his statement. He said that Halima and Fatuma recorded their statements in December as he was looking for witnesses. He denied having delayed statements due to mischief, Pw5 said that the gun was handed over to him at Makupa police by Elijah and Kenga but it had not been booked as an exhibit and neither was there a handing over report. He then said that Halima said in her statement that she did not see where the gun was removed but saw the pistol. That even Elijah and Kenga did not indicate where the pistol was recovered in their statements. No finger printing or dusting was done. He further said that the appellant resisted arrest and he was armed. He however said that the arresting officers did not introduce themselves.

Pw6, No 78349 PC A GAMALIEHI KE,YA of Ant- Terrorism Unit, gave evidence that on 15.11.2012, being in the arresting squad, was following up on a person suspected to be a terrorist with information that he was armed. He said they were told the suspect was at Bagras Hotel at Mtwapa and given a description of his clothes. Pw6 said that they were in plain clothes and when they entered the said hotel, where he saw the suspect taking tea, they introduced themselves. He also said that the suspect was surprised and they advised him to comply but he refused. They handcuffed and over powered him. N a quick search, they found a pistol on the left side of his waist. He then secured the gun from which he removed the magazine which had on bullet ready for use. Pw6 also said that the appellant took them to his house at Kisauni where they found nothing. They then escorted him to Makupa police station.

Upon being cross examined, Pw6 told court that the wrote his statement and it was typed for him. He admitted that he had not signed it and said the written one was not there. He said that he received information about the case on 14.11.2012 though he did not indicate this in his statement. They were then kept on standby pending operations. That they were at Shanzu centre at 10.00am when they

received information about the suspect from his seniors. He said that the informer beckoned at the hotel which they were in the vehicle but did not point out the suspect specifically. The description they were given was that he was wearing a saggy trouser with side pockets, a creamish –whitish T- shirt with a big W on the chest and a purplish boshori head dress. Pw6 said that he did not capture this in his statement and neither did he indicate any other time or that the appellant was armed. He did not describe the scene in his statement. He did the introductions as Elijah remained silent. He also said that he did not indicate who recovered the pistol but said that they recovered block 19 pistol. He further said that the appellant was injured and so were they.

The prosecution closed its case, and the trial magistrate, upon going through the submissions by both the defence and prosecution, found that the prosecution had established a prima facie case against the appellant and placed him on defence.

The appellant, SALIM CHANGAWA KARISA opted to give a sworn statement in defence and called no witnesses. He told court that he used to work at Bagra's Hotel in Mtwapa but lived in Kisauni. He denied all the charges against him and went on to state that on 15.11.2012, he arrived at his place of work which he found was okay at 11.00am. He said that there were about three (3) people in the kitchen and two in the main hotel with 2 more customers and 3 were reading news paper. He then asked for tea and chapati as he washed his eyes. According to the accused, he had started taking tea when three people came, jumped and fell on him. He started to defend himself for he did not know who they were. His fellow workers screamed and a crowd came there. And as he was facing him, he heard a voice saying that they had found him with a gun. He did not see the gun. These people commanded the crowd to go out and they did not introduce themselves. The accused said that he was taken to a vehicle where he was shown a gun. He was blind-folded and assaulted but he did not know who did this as there were other people in the vehicle. At one point they opened his eyes and asked him to say his last prayer because they were killing him. He was taken around until 5.00pm when they asked him to take them to his house where they broke the door, entered and searched. They found nothing and took him back to the car where he was further beaten. He screamed and put a cloth in his mouth. He was taken to the station and then the Coast General Hospital. He then met a woman who beat him while telling him that he was a terrorist. The appellant said that he has never gone to Somalia and neither is he an Al Shabaab.

In cross examination, the appellant told court that he is a resident of Kilifi and has a family of a wife and two children. He said that he had been employed at this hotel by one Ali Rashid, as an Assistant for Ksh 200-250 per day and did not hear Pw1 and 2 say he was a customer. He said Ali Rashid left and he had not seen him until he saw him at Shimo la Tewa. The appellant said that he did not know the people as they were in civilian clothes and they overpowered him. He said he was shown a gun while in the vehicle and denied that he had it. He said he did not know that he was required to show where Rashid lived and did not have a license as he did not have a gun.

In his judgment at the last paragraph of page 4 to the first paragraph of page 5, the trial magistrate noted;

“From the evidence on record it is abundantly clear that Pw1 and w2 were present at Bagra's Hotel, Mtwapa when accused person while taking tea and chapati was accosted by Pw3 and pw6. Pw1 and Pw2 said Pw3 and Pw6 wrestle with the accused person and also saw a pistol black in colour recovered from him. Pw4, the ballistic expert confirmed that the pistol was in good working condition and that its serial numbers had been obliterated. The evidence of the accused person that he was accosted while taking tea and chapati and that he did not have a gun does not dislodge the evidence tendered by the prosecution. What is doubtful is whether he was so armed with the intent to commit a felony namely murder”

He went on to state;

“ I find that the prosecution has been able to prove the charges in count 2, count 3 and count 4 against the accused person to the standards required by law which is beyond any reasonable doubt..... As regards count 1, the prosecution has failed to prove beyond reasonable doubt the charges therein”

During the hearing of the appeal, Mr Chacha, the appellant's counsel tendered written submissions in which he indicated that they were to rely on every breadth of. He highlighted the said submissions by stating that counts 2 and 3 which the appellant was charged with and convicted for, both have to do with possession "of a firearm" without a certificate...." and.....of ammunition without a certificate....." respectively, so that if they are found unproven, count 4, in which the appellant is charged with ".....concealing of a serial number" becomes irrelevant and automatically fails. In the written submissions, the appellant's counsel submitted that there were screaming contradictions in the evidence of pw1, Pw2, Pw3 Pw5 and Pw6 some of whom were at the scene of the alleged recovery of the said firearm and ammunitions, on where they were recovered. He submitted that the contradictions and inconsistencies in the evidence of Pw1 and Pw2 as to where they saw the gun /pistol recovered by the police is a clear indication that they were under duress from the officers to allege it was recovered from the appellant. He further submitted that there was noted contradiction and confusion in the evidence of Pw3 and Pw6 who were two critical witnesses for the prosecution as they were the police officers attached to the Anti-terrorism police unit and were involved in the recovery of the said firearms and ammunition and arrest of the appellant. He highlighted the inconsistencies and contradictions in the evidence of the prosecution together with other extraneous factors which render the said evidence worthless.

The appeal was opposed by M/s Ocholla, counsel for the state who also filed written submissions which M/s Mutua, also counsel for the state, indicated were to be relied on in their entirety together with the cited authorities and filed in the case. She submitted that the prosecution had proved its case against the appellant beyond reasonable doubt as Pw1 and 2, who were present at the scene on the material date confirmed that the gun was retrieved from the appellant by police officers. She also submitted that the contradictions pointed out by the appellant in the evidence of Pw3 and Pw6 were immaterial as they did not weaken the probative value of the evidence. She submitted that Pw4, the Ballistic expert confirmed that he had examined the pistol and ammunitions and found that they were properly working.

In my own analysis of the four grounds of appeal, they can be consolidated into one ground, being;

Whether, the prosecution's evidence proved the case against the appellant beyond reasonable doubt, and whether, the defence evidence cast doubt, which would be given to the appellant.

In considering this appeal, I have read through the evidence of both the prosecution and defence which was adduced before the lower court, the submissions by both counsel and the cited authorities filed herein.

I wish to point out that it is trite law that in criminal trials, the burden of proof is always on the prosecution, and it never shifts to the defence.

Section 107 (2) of the Evidence Act provides;

"when a person is bound to prove the existence of any fact it is said that the burden of proof is on that person".

In this case, it is the prosecution which is charged with the burden of proving that the appellant in this case was found in possession of firearm and ammunition as charged vide counts 2 and 3 and concealed serial number as charged vide count 4 in the instant case.

This is a position which is followed in all criminal cases.

In the case of Woolmington Vs D.P.P (1935) D.C. 462, it was held;

"It is the duty of the prosecution to prove the prisoner's guilty. If at the end of the whole case there appears any reasonable doubt created by the evidence brought forward by the prosecution, the prosecution has not proved its case and the prisoner is entitled to an acquittal".

And even where one is charged with a criminal offence and the prosecution fails to advance any evidence or call any witness the person will be entitled to a discharge or acquittal.

The appellant in this case appealed against, is alleged to have been found in possession of a firearm, namely a pistol make GLOCK 19 without a firearm licence in count 2.

He is also alleged of having been found with 15 rounds of ammunitions of 9 mm calibre without a firearm licence in count 3.

All this is alleged to have happened on 15th November, 2015.

In the 4th count, the appellant is alleged to have concealed a serial number on the said pistol, which count 1 will consider if it is established that the evidence against the appellant in respect of the 2nd and 3rd counts was proved beyond reasonable doubt.

To prove their case against the appellant in respect of counts 2 and 3, the prosecution adduced evidence of six (6) witnesses.

What is required to have been proved by the prosecution's witnesses is;

- a. that the appellant was found in possession of the firearm and ammunition referred to in counts 2 and 3; and if so,
- b. whether the appellant was licenced to possess the said firearm or ammunition.

Pw1 HALIMA SULEIMAN MWAKA, in her evidence in chief at page 10 lines 10—stated;

“One got outside and spoke on phone. He again got in and bumped on him shouting “he is the one” The accused tried fighting. Our cashier came and asked “what is it “ . Then said we are police officers doing our job. He resisted handcuffs, others came there , searched him and got a gun. The gun was black colour.....they knocked him on the ankles. We were shown the gun and told to get out”

In cross examination, Pw1 said at page 16 lines 13 to 15.

“The police removed it and held it by their hands. I did not say where it was removed from. I do not know why Fatuma said they had placed a gun on accused. I do not know from where it was removed...

At lines 10-18, she said;

“I have never seen him with a gun.”

From the evidence in chief, Pw 1 told court that the appellant was searched during his confrontation with the officers and a gun was gotten. She did not say where it was gotten and she confirmed in her evidence during cross examination that she did not know where it was removed from. In fact it is worth noting that she admitted that she did not record this in her statement with the police.

Pw2, FATUMA WANJIKU ABDUL, testified at page 11 line 16 to 17 of the record of appeal, that;

“They removed a black item from him looking like a pistol”.

When cross examined, Pw2 said at page 20 lines 11 to 13 of the record;

“We heard one say he has a weapon. We saw a gun raised”. It was removed and Issa was

down.....”

In re examination on the same page at lines 19 to 20 of the record of appeal, Pw2 stated;

“One said he had a gun. I saw it as they were wrestling. They removed it from the accused. Accused had it.”

From her evidence, in chief, cross-examination and re- examination, Pw2, who also said was at the scene from where the appellant was arrested, said that she saw a gun/pistol being removed but could not give a specific part of appellant’s body where it was removed.

Pw3, who is one of the arresting officers testified at page 21- lines 4 stated that;

“ We wrestled him. I touched and felt something. I shouted that he has a gun on his hip (right) we wrestled him down and handcuffed him. I searched and found a pistol.....I removed and arrested him. It was loaded with I magazine of 15 bullets.....”

When cross examined, Pw3 on page 22 lines 12

“I shouted the accused had a gun. I indicated it in my statement. He stood up and tried to resist. It was on the right side of his wrist. It is not in any statement. The statement is self recorded on 17.11.2012.i snatched the gun from the accused. I did not put in the statement”.

What I found interesting in Pw3’s statement in his evidence in chief is that while wrestling with the appellant, he touched and felt something causing him to shout “ he has a gun on his hip (right)”

Then he goes onto say that he searched and found a pistol. One is bound to wonder why Pw3 had to search the appellant when he had already touched and felt something that he knew was a gun on his right hip. After feeling it, I doubt he had to try to find it by looking for it carefully or thoroughly. It even gets more interesting in cross- examination when Pw3 says that “ Is snatched the gun from the accused”. And yet there is no indication or evidence that the appellant was holding on to it.

Pw6, GAMALIELHI KEYA , also an arresting officer, in his evidence in chief said on page 35 lines 20-22.

“He was hand cuffed and on quick search we found a pistol on the left waist side. I secured the gun and removed the magazine and found it had a bullet ready for use”

Upon being cross examined,Pw6 on page 37 lines 3 of the record said;

“I have not indicated who recovered the pistol.....at line 7 and 8,he goes onto state;

“I have not described in my statement the exact place of these recoveries”.

According to Pw6, they searched the appellant, found the pistol on left side of his waist, which he secured, removed the magazine from where he found the bullet ready for use.

Pw6 contradicted the evidence of Pw3 to the extent that the following questions came to mind.

Who between Pw3 and Pw6 recovered the pistol or gun from the appellant?

Where, on the appellant’s body was the pistol/gun recovered? How many bullets or ammunitions were found in the magazine that was in the said pistol or gun?

According to Pw3, he is the one who touched and felt the pistol, searched and found it in the appellants right hip. But in his evidence Pw6 said that they found the pistol on the left waist side and he secured it.

Also, Pw3 said that the pistol was loaded with 1 magazine with 15 bullets. Pw6 on the other hand said that he found the magazine with a bullet which was ready for use.

An analysis of the evidence of Pw1 and Pw2 clearly reveals that they could not tell where the gun/pistol was removed from when the appellant was confronted by the officers.

Pw3 and Pw6 contradicted each other to the extent the defence counsel in their submissions commented that it was like they were looking for credit for the recovery of the firearms and arrest of the appellant.

In the submissions by the Respondent's counsel, it was stated that it was immaterial that the prosecution's evidence failed to state exactly where the gun was removed from on the body of the appellant. The case of John Kahonga Mwangi Vs republic (2014) e KLR was cited as where the court of appeal affirmed the decision of the High court that despite the arresting officer contradicting himself by saying on one had that the exhibit (phone) was removed from the appellant's a jacket and later claiming that it was removed from the pocket, this case is distinguished from this case where the evidence was by two different officers who were in the same operation at the same time with each claiming they were the ones who had made the recovery.

I associate myself with the findings of my sister Justice Mutuku in High Court Criminal Appeal No. 92 of 2012, Buye Salim Bajila v Republic at Garissa, where faced with a case with a similar situation said;

“Contradictions is in respect of who among the two officers (Pw1) and (Pw2) recovered the exhibit creates doubts as to whether the ammunitions were recovered from the house of the appellant. When this contradictory evidence is weighed in addition to the appellants claim that the ammunitions were planted on him, the doubts increase. Although I find no evidence but there existed a grudge between the two witnesses as any of them and the appellant, I agree with him that there are material contradictions which to my mind vitiate the conviction”

In his sworn defence, that appellant denied that he was found with a gun and said that he only saw it when it was shown to him in the vehicle. He was then assaulted and taken to his house and then police station.

In his judgment. I find the Honourable trial magistrate, although he indicated that there was need to prove that the appellant had been found in possession of the dangerous weapon, he only considered the fact that the accused was accosted by Pw3 and pw6 and pw1 and pw2 witnessing them wresting with the accused and a pistol recovered from him. I find that the trial magistrate did not analyse the evidence of these witnesses to be able to determine what each had to say about how the said pistol /gun was recovered from the appellant. He summarized the witness' evidence but did not analyse the same to highlight the consistence, corroborations or otherwise.

For this, I in my own analysis of the evidence of Pw1, Pw2 and Pw6 that was tendered before the trial court, find that the same was riddled with inconsistencies and contradictions to the extent that it was incredible.

I also noted that during cross examination of Pw1, Pw2 and Pw3 and Pw6, it came out that most of the evidence they gave to court on that day, confirmed, it was not indicated in their statements with the police. This raises questions as to the credibility of these witnesses, especially Pw3 and Pw6 who confirmed that their statements were self recorded.

Further, an analysis of the evidence of pw5, the investigating officer leaves a lot to be desired. Reading through it, one is left wondering how serious the said officer was in investigating the matter as there is a lot of laxity with regard to when the statements were recorded and how the exhibits were handled.

And when he was cross examined, he raised more doubt on the evidence of Pw1 ,Pw3 and Pw6, when he said;

“I have Halima’s statement. She said she did not see exactly where the gun was removed but saw the pistol. He resisted arrest also with Fatuma. The arresting officers said they got the gun from his hip. The statement of Elijah and Kanga does not indicate where the pistol was removed.....”

Pw4’s evidence was only a confirmation that he was sent a gun to examine and he found it was in good working condition and serial numbers obliterated. His evidence had nothing to do with where or how the gun was found.

I find that the persecution’s evidence against the appellant, with all the contradictions, anomalies and inconsistencies only managed to raise doubts as to whether the appellant was found in possession of the alleged gun or pistol, and he must benefit from this.

Having found that the prosecution failed to prove that the appellant was found in possession of a gun/pistol, it is my contention that he would not have been expected to have a licence of what he did not have.

It then follows, that if it has not been proved that he was found in possession of the gun or pistol in question, then he cannot be said to have concealed its serial number.

From my analysis of the evidence and judgment of the trial court, this appeal has merit. And in the result, I allow the same, quash the conviction and set aside the sentences imposed against the appellant.

The appellant to be released forthwith and be set at liberty unless lawfully held. It is so ordered.

Judgment delivered, signed and dated this 22nd day of November, 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua for the state

Mr Nabwana holding brief for Mr Chacha for the Appellant

C/clerk- Kiarie