REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 88 OF 2015

(From original conviction and sentence in criminal case No. 157 of 2014 of the Principal Magistrate's Court at Wajir L. Kassan -PM).

NUR DEKA MAALIM ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged in the magistrate's court at Wajir with three others with four counts. He was the first accused at the trial. Count 1 was for possession of explosive materials contrary to Section 29 of the Explosives Act Cap 115 Laws of Kenya. The particulars of the offence were that on the 4th May 2014 at around 2050 hours were found jointly with explosives materials (hand grenade) at their residence in Wagberi location within Wajir Township by ATPU officers who conducted a search at the said residence. Count 2 was for possession of ammunitions contrary to Section 4 (2) (a) as read with Section 4 (3)(b) of the Firearms Act Cap 114 Laws of Kenya. The particulars of the offence were that on the same day and time were jointly found in possession of seven AK47 and ammunitions at their residence in Wagberi Location within Wajir Township after ATPU officers conducted a search at the said residence. Count 3 was for preparation to commit a felony contrary to Section 308 (1) of the Penal Code. The particulars of the offence were that on the same day and time at Wagberi Location in Wajir Township were jointly found to have prepared to commit a felony by gathering explosive materials (hand grenade) and ammunitions (AK47 special) in their residence within Wagberi. Count 4 was for being members of a terrorist group namely Al-shabaab Contrary to Section 24 of the Prevention of Terrorism Act 2012. The particulars of the offence were that on the 3rd May 2014 at around 1815 hours at Orahey area within Wajir Township were jointly found and suspected to be members of a terrorist group namely Al-shabaab after police officers received information that they were from the military group training in Somalia following sustained surveillance from Mandera and the possession of the F1 grenade commonly used by Al-shabaab.

After a full trial, all the other three accused persons were acquitted of all the offences. The appellant was acquitted of count 1 for possession of explosive materials and count 4 for being members of a terrorist group namely Al-shabaab. He was however found guilty of count 2 for being in possession of ammunitions and count 3 for preparation to commit a felony. The appellant was thus convicted and sentenced to serve 5 years imprisonment on count 2 and 7 years imprisonment on count 3 and the sentences were ordered to run concurrently which meant that he will serve 7 years imprisonment in total.

Aggrieved by the decision of the trial court, the appellant came to this court through this appeal. His initial grounds of appeal was amended by his lawyer M/s. Odiya & Associates who filed an amended petition of appeal under the following grounds:-

1. The learned trial magistrate erred in law and in facts in failing to find that the prosecution had not proved its case beyond reasonable doubt, thereby occasioning a miscarriage of justice to the detriment of the appellant.

2. The learned trial magistrate erred in law and in fact in rejecting the defence case without giving cogent reason for doing so.

3. Considering all the evidence on record and the circumstance of the case, this was not a proper case for conviction and the trial magistrate erred in law by refusing to resolve the doubt in favour of the appellant.

4. The evidence given at the trial did not establish the guilt of the appellant to the required standard of proof.

During the hearing of the appeal counsel for the appellant Mr. Kinaro made oral submissions. Counsel submitted that the burden of proof in criminal cases was always on the prosecution and that the accused assumed no burden to prove his innocence.

Counsel submitted that PWI, PW2, PW4, PW5 said in evidence that on 4th May 2014 the appellant who had already been arrested took the police to a compound pointed to a house and PW4 entered and under the mattress found ammunition and a grenade. However during cross examination, it came out that there were women in the compound who confirmed that they knew the appellant but none was called to testify. The area Chief was also not called to testify. Counsel submitted therefore that the inference to be drawn by the court is that this crucial witnesses would have given evidence which did not support the prosecution evidence.

Counsel also submitted that the trial court failed to consider the defence of the appellant, and that the magistrate appeared in the judgment to be the defence counsel for the 4th accused who was acquitted. Counsel emphasized that the door of the house was open when the police arrived and the time of search was one day after the arrest and at night. This meant the appellant was not found with ammunition as alleged.

Counsel also submitted that even assuming that ammunition was found, there was no evidence that the appellant was preparing to commit a felony. Counsel relied on a case of ***Dominic Mutie Willy -vs- Republic (2013) eKLR*** as well as the case of ***Paul Ng'ang'a and 3 others -vs- Republic (2006) eKLR.*** Counsel emphasized that the appellant was not found with any weapon when he was arrested.

Mr. Okemwa for the Director of Public Prosecutions opposed the appeal. Counsel submitted that the other 3 accused persons were acquitted by the trial court on a technicality as the ballistic expert did not appear in court to testify. Counsel emphasized that the items found were dangerous and could cause death. Counsel submitted that the said items were found in the appellants house.

Counsel said the women found near the house were not called to testify because they were hostile, and a reason was also given for not calling the Chief to testify. Counsel submitted that it was in evidence that at the time of arrest and recovery of the items, there was hostility between the Degodia and the Garre clans. It was thus obvious that the appellant and the others were acting as a group and the two offences for which the appellant was convicted were proved.

In brief the facts are that on the 3rd of May 2014, the ATPU police in Wajir received intelligence information that some people had just come from Al-shabaab training in Somalia. The information was initially from the area County Commissioner.

The police then proceeded to the place where it was alleged the people were and arrested the appellant and the 3 others in the night. None of those arrested was found with any offensive weapon though their mobile phones and identity card were taken by the police for further investigations. Those arrested were then taken to the police station.

In the early hours of the night of the 4th May 2014, which was the next day, the ATPU police took the appellant to a place where they said his house was located. They found a cluster of about 3 grass thatched houses without door shutters but with temporary door covers. There were 3 women outside those houses one of whom said that the appellant was her brother.

The appellant then pointed at his house and the police proceeded in the house, searched the bags and found nothing but under the mattress they found a hand grenade and AK47 ammunition which they took to the police station with the appellant. The appellant was charged with the 3 others with the 4 offences mentioned above. The ballistic examiner did not come in court to testify regarding the hand grenade.

The learned magistrate, after considering the evidence on record, acquitted the other 3 accused persons on all the counts. The magistrate also acquitted the appellant on count 1 and 4 but convicted him on count 2 and 3 and sentenced him. Therefrom arose the present appeal.

This being a first appellate court, I am required to re-examine all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of ***Okeno -vs- Republic (1972) EA 32***.

The appellant was convicted by the trial court for being in possession of ammunitions, and for preparation to commit a felony.

The burden is always on the prosecution to prove a criminal case against an accused person beyond reasonable doubt. The accused does not have a burden to prove his innocence. He can only create doubts in the prosecution case. See the case of ***Woolimngton -vs- Director of Public Prosecution(1932) ALLER.***

The most important aspect of this case is the proof of possession of the ammunition. This relates to count 2 on which the appellant was convicted. The people who gave intelligence information about the appellant leading to his arrest were not called to court to testify. When he was arrested, he was not found in possession of any weapons or ammunition. There is no evidence on record that the police officers arrested him because they were looking for certain ammunition.

The evidence on record is that the appellant and the others were arrested on allegation that they had undergone Al-shabaab training. The appellant and the others were taken to Wajir police station and stayed there overnight from 3rd May 2014 to 4th May 2014. There is no evidence on record that the appellant stated at the police station that he had ammunition and had offered to go and show the said ammunition to the police. The police appear to have been acting on their own private or confidential information to take the appellant at night to a place where his grass thatched house was. That house did not have a lockable door. The appellant did not open any door.

The police entered the house and said they recovered the offensive items. Even assuming that those offensive items were found in the house, was the appellant in possession of the same? In my view possession was not proved because the appellant did not have exclusive access and control to that house. The items could have been put there by anybody, including the women who were found outside the house. It is not as if the appellant was arrested in that house and that on a quick search, the items were found so that one could say that he was aware and in control of the items in the house.

In my view count 2 was not proved beyond reasonable doubt. The items might have been planted by the police. They might also have been put there by somebody else. As such the prosecution did not prove beyond reasonable doubt that the appellant was guilty of count 2.

Count 3 on preparation to commit a felony was dependent on possession of the dangerous weapons. I agree with the reasoning in the case of ***Dominic Mutie Willy -vs- Republic (2014) eKLR*** in which the learned Judge cited with approval what was stated in the court of appeal in the case of ***Manuel Legasiani and Others -vs- Republic Criminal Appeal No. 59 of 2000*** where the Court of Appeal stated as follows:-

"To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a firearm not coupled with such an overt is not an offence, under Section 308(1) of the Penal Code."

Since I have found that the appellant was not in possession of the ammunition, he could not commit the offence of preparation to commit a felony as charged. Even if he had been found in possession of the ammunition, the prosecution was duty bound to prove that that ammunition was in his possession in preparation to commit a felony. A mere allegation that there was animosity between Garre and Ndegodia clan at that time was not adequate. In any event no civilian witness from either clan testified in court that there was such animosity.

To conclude, I find merits in the appeal. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 22nd day of November 2016.

GEORGE DULU

JUDGE