



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 261 OF 2014**

**REDEMPTA KERUBO MUGAKA.....APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

*(Appeal from the Sentence of the Senior Principal Magistrate's Court at Molo Hon. H. M Nyaga – Senior Principal Magistrate delivered on the 22<sup>nd</sup> September, 2014 in CMCR Case No. 896 of 2013)*

**JUDGEMENT**

The appellant **REDEMPTA KERUBO MUGAKA** has filed this appeal challenging her conviction and sentence by the learned Senior Principal Magistrate sitting in Molo.

The appellant had been charged with three (3) other accused persons on three (3) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The appellant faced an alternative charge of **BEING IN POSSESSION OF SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 322(2) PENAL CODE**

In addition the appellant was charged on a 4<sup>th</sup> Count of **BEING IN POSSESSION OF AN IMITATION FIREARM CONTRARY TO SECTION 34(3) OF THE FIREARM ACT, CAP 114, LAWS OF KENYA**.

The particulars of the charge were that

***“On the 29<sup>th</sup> day of May, 2013 at Tayari Estate Molo within Nakuru County was found being in possession of imitation Firearm”***

The learned trial magistrate after hearing the evidence convicted the appellant of this offence and thereafter sentenced her to seven (7) years imprisonment.

The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of {eight (8)} witnesses in support of their case. The case arose from a Robbery incident which occurred on the night of 28/4/2013. **PW3 JOSEPH KAMAU KIBE** told the court that on that material day he was driving a bus Registration No. KAZ 867B belonging to the Eldoret Express Bus Company. The bus left Kakamega heading to Nairobi. At about 1.00am they got to Kamara along the Eldoret/Nakuru road and came across a road block manned by about five (5) people dressed in police uniform. The **‘police men’** flagged down the bus. **PW4** stopped. One of them who was armed came to his door and forced it open and entered. He ordered **PW1**

to get out. **PW4** complied. The other ‘**policemen**’ (who turned out to be thugs) entered the bus.

**PW4** was ordered to drive off the road into the bushes. He complied. The robbers then ordered everyone to surrender their cash, mobile phones and other valuables. After robbing then genuine police who had been alerted of the incident arrived. The robbers fled with loot.

Later as police were investigating the incident they tracked one of the stolen mobile phones to one ‘**Elizabeth Mbaire**’ (who was the 3<sup>rd</sup> accused in the case). Elizabeth told police that her husband ‘**Paul Kamau Njuguna**’ (the 2<sup>nd</sup> accused) had bought her the phone. The said Paul led police to the appellant whom he claimed had sold him the phone.

Police went to the house of appellant where they searched. They recovered two mobile phones suspected to have been stolen and under the mattress found a toy (Imitation) firearm. All four suspects were arrested and charged.

The learned trial magistrate delivered his judgment. On 22/9/2014. He acquitted the appellant on all three (3) counts of Robbery with Violence, and acquitted her also on the alternative charge of Handling Suspected Stolen Property. However, the appellant was convicted on the 4<sup>th</sup> count of possession of an Imitation Firearm and sentenced to serve seven (7) years imprisonment. Being aggrieved by both her conviction and sentence the appellant filed this appeal.

The State represented by **MS OUNDO** learned Senior Assistant DPP opposed the appeal.

Being a court of first appeal this court is obliged to re-examine and re-evaluate all the prosecution and draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004] KLR 82**).

Neither **PW4** nor any of the witnesses, who were passengers in the bus at the time the robbery occurred, identified the appellant as one of the robbers. Indeed none of them stated that a woman was involved in the actual robbery. I therefore agree with the decision of the trial magistrate to acquit the appellant on the 3 counts of Robbery with Violence.

**PW2 CORPORAL HUSSEIN DUBA** of Molo CID told the court that after the robbery he was tasked to track and recover a mobile phone which had been stolen from one of the passengers. He tracked the phone to the 3<sup>rd</sup> accused Elizabeth. She told him that her husband Njuguna (Accused 2) had brought the phone to her. Accused 2 when arrested told police that he had purchased the phone from the appellant.

Both accused 2 and accused 3 led police to the house of the appellant. **PW2** said they arrived and found the appellant resting inside the house. Police searched and recovered a toy pistol hidden under the mattress.

The evidence of **PW2** regarding the recovery of the toy pistol is corroborated by **PW4 PC ROBERT CHEPKWONY** and **PW5 PC KENNEDY NYAGWA**. They all testify as to how they removed a toy pistol hidden under the mattress in that house.

In her defence the appellant readily concedes she was arrested inside the house in question and she does not deny that the toy pistol was recovered there from. However the appellant denies that the house was hers and denies all knowledge of the presence of the toy pistol under the mattress. The appellant in her defence stated that the house belonged to her boyfriend one ‘**Peter Ngeno**’ who died in prison. She stated that she had only gone there to wash clothes when police came and arrested her.

The first point of concern here is that the police were led to the appellant by two of her co-accused. There could be every possibility that in trying to get themselves off the hook. Accused 2 and accused 3 conveniently decided to lay blame on the appellant.

There is no proof tendered by accused 2 that it was the appellant who sold him this stolen phone. The 2<sup>nd</sup>

accused did not say when he purchased the phone or for how much. No witness was there when the appellant sold him this phone as alleged. No sale agreement was exhibited in court.

The appellant denied that the house in question was hers. The police made no attempt to determine the true owner of that house. The landlord was never called to testify. No neighbour was called to confirm that the house actually belonged to the appellant. No ownership documents were produced and no rental receipts to prove who owned or paid rent for the house.

The defence raised by the appellant is in my view quite plausible and cannot be dismissed as out of hand. The toy pistol was found hidden under the mattress. If as appellant claims the house was not hers, that she had only gone there to wash clothes, then she could not be expected to know what was hidden under the mattress. The question of the ownership of that house was not conclusively determined by the prosecution.

The defence raised by the appellant is as I have stated plausible and places a doubt on the prosecution case. The benefit of such doubt must be settled in favour of the appellant. As such I find that the Charge of Possession of the Imitation Firearm was not proved beyond reasonable doubt. The appellant's conviction was questionable and I quash that conviction. The seven (7) year term of imprisonment imposed is also set aside. This appeal therefore succeeds. The appellant is to be set at liberty forthwith unless she is otherwise lawfully held.

**Dated in Nakuru this 9<sup>th</sup> day of December, 2016**

Read in open court

Appellant in court

**Maureen A. Odero**

**Judge**