



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 22 OF 2013

(CONSOLIDATED WITH CRIMINAL APPEAL NO.24 OF 2013)

PETER KINYUA IRERI1ST APPELLANT

JOHN MUCHAGI NJIRU2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 478 of 2011 at the Chief Magistrate's Court Embu by R.O. OIGARA - SRM on 29TH MAY 2013

J U D G M E N T

1. **PETER KINYUA IRERI & JOHN MUCHANGI NJIRU** the 1st and 2nd Appellants and another were charged with the following offences;

Count 1

Preparation to commit a felony contrary to section 308(1) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

***“On the 7th day of March 2011 at Mukangu trading centre within Embu Municipality of Embu County, jointly with others, were found in possession of a dangerous/offensive weapon namely rifle of make GECADO MOD 25D, made in Germany serial number not visible in circumstances that indicated that they were so armed with the intent to commit a felony.*”**

2. **Count 2**

Being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(3) of the firearm Act (Cap.114 Laws of Kenya);

“On the 7th day of March 2011 at Mukangu trading centre within Embu Municipality of Embu County, were found in possession of a rifle of make GECADO MOD 25D, made in Germany serial number not visible without firearm certificate.

3. The case was heard and they were convicted on both counts and sentenced to seven (7) years imprisonment on each count. The sentences are to run concurrently. Their co-accused was acquitted under section 210 Criminal Procedure Code.
4. They filed this appeal against both conviction and sentence. They raised the following common grounds;
 - i. **The learned trial Magistrate erred in law and facts when he convicted them relying on evidence which was inconsistent and uncorroborated.**
 - ii. **The learned trial Magistrate erred in law and facts when he failed to place the 3rd accused on his defence yet he had admitted owning the firearm.**
 - iii. **The learned trial Magistrate erred in law and facts by convicting them on the 1st Count yet the Ballistic expert confirmed that the Firearm was not capable of being fired.**
 - iv. **Their defences were not considered by the learned trial Magistrate.**
5. The Prosecution case was that PW1 – PW4 who are members of Community Policing in Kathangari Sub-location were on patrol on 7/3/2011 morning when they met both Appellants.
6. The 2nd Appellant was carrying a sack. PW2 (Rose Jairose Wambeti Njabi) who is the Assistant Chief Mukangu sub-location asked to inspect the sack. They found an old gun (EXB1) inside the sack.
7. They were arrested and Criminal Investigations Department Embu informed. PW5 and others arrested the Appellants.
8. The gun (EXB1) was sent to the ballistic expert for examination. PW6 produced the report on behalf of Alex Mwandimo who was away on other duties. The report produced as EXB2 confirmed that EXB1 was a Rifle and in good mechanical condition complete in its components and was capable of being fired.
9. When placed on their defence both Appellants made unsworn defences. Each told the Court that the fireman belonged to their co-accused who had been acquitted (3rd accused).
10. This is a first appeal and this Court is enjoined to evaluate the evidence on record together with the grounds of appeal and arrive at its own conclusion.
11. The Court of Appeal in the case of **PATRICK & ANOTHER –V- REPUBLIC [2005]2 KLR 162** stated thus;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. It is not the function of first appellate Court merely to scrutinize the 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”.

12. Being so guided by the above case I have considered the submissions by the Appellant and the State together with the grounds of appeal. I have equally considered the evidence on record.
13. The issues for determination are;
 - i. Whether the Appellants were found in possession of the firearm (EXB1).
 - ii. If yes, were they in lawful possession?.
 - iii. Why were they in possession?

14. From the evidence of the Prosecution and the defence of the Appellants they were in possession. The 2nd Appellant was the one carrying the sack with the rifle. When asked about it the 2nd Appellant said it was the 1st Appellant who knew about it. The 1st Appellant did not deny what the 2nd Appellant had said. This clearly confirmed that they both knew about the firearm. Further the 1st Appellant led to the arrest of their co-accused who he said co-owned the gun with

- him.
15. There was no evidence to show that they were in lawful possession. They did not produce any certificate allowing them to keep the firearm. The possession was therefore unlawful.
 16. The ballistic experts report (EXB2) confirmed that the rifle (EXB1) found with the Appellants was capable of being fired and it was a firearm in terms of the Firearms Act Cap. 114 Laws of Kenya.
 17. My finding is that both Appellants were properly convicted on Count 2.
 18. The charge in Count 1 is **“preparing to commit a felony contrary to section 308(1) of the Penal Code.”** The particulars were that they were found with a firearm **“in circumstances that indicated that they were so armed with the intent to commit a felony”**.
 19. It was the duty of the Prosecution to clearly show what these circumstances were. It was the submission of Mr. Wanyonyi State Counsel that possession of the gun meant that the Appellants were to do something unlawful.
 20. He relied on the case of **NDIRANGU –V- REPUBLIC CRA NO. 72/87 COURT OF APPEAL NAIROBI**. With due respect I differ with the learned State Counsel. The facts of **NDIRANGU’S CASE (supra)** were that he was found in the fenced house compound of the manager of Kigwe Estate at about 2.00am on 6/8/1985 armed with dangerous weapons (a simi and iron bar).
 21. In that case the Prosecution proved the circumstances very well. To be found armed on another person’s compound at hours when people are asleep is criminal and no other explanation would be given to it. That was **NDIRANGU’S CASE (Supra)**.
 22. In the present case the Appellants were found on the road in broad daylight with their luggage. There was nothing proved to the Court to confirm that they were planning or were about to commit a felony. Mere possession cannot be equated to preparation to commit a felony as submitted by learned State Counsel and as stated by the learned trial Magistrate at page 58 line 20- page 59 lines 1-6 where he stated;

“In any case two persons to carry one gun (rifle) in a sack? The two ought to have known or were part of a plan and no good plan could be out of such other than preparation to commit a felony. I shall dismiss a defence that the rifle was properly of any other person but even if the Court was to establish that it was for another person as Accused 3, the two having been found with the gun (rifle) had no other lawful excuse other than plan to commit a felony. I shall proceed to convict both in count one as charged.”

23. The Appellants have complained about the sentence of seven (7) years imprisonment. The record shows they were 1st offenders. I take cognizance of the fact that cases of possession of illegal firearms in this County are on the rise, and must be discouraged. Considering that the Appellants were 1st offenders I will reduce the sentence of seven (7) years to five (5) years imprisonment on Count 2 from date of conviction.
24. The result is that the appeal on Count 1 succeeds. The conviction is quashed and sentence set aside.
25. The appeal on Count 2 only succeeds on sentence to the extent stated above (paragraph 23).

1st Appellant’s bond is cancelled.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF MAY 2014

H.I. ONG'UDI

J U D G E

In the presence of;

Wanyonyi for State

Appellant

C/c - Njue