



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 133 OF 2012
NACHURI LEMUNAAPPELLANT
V E R S U S
REPUBLICRESPONDENT

(Appeal from conviction and sentence of the Principal Magistrate's Court at Maralal (Hon. A.K. Ithuku) dated the 26th April, 2012 in Criminal Case No.170 of 2011)

JUDGMENT

1. The Appellant, **Nachuri Lemuna**, was charged with the offence of being in possession of firearm contrary to **Section 89 (1)** of the **Penal Code**. The Appellant was also charged with another count of being in possession of six rounds of 303inches ammunition and one cartridge contrary to **Section 89 (1)** of the **Penal Code**.
2. The Particulars of the first charge are that on 7th March, 2011 at Ngaruni Location in Samburu East District within Rift Valley province, without reasonable excuse had in her possession a firearm namely MK-IV S/No. 95L5600 in circumstances which raised reasonable presumption that the said firearm had recently been used in a manner prejudicial to public order. The particulars of the second charge are that the Appellant on the above mentioned date and place, without reasonable excuse had in her possession six rounds of 303 inches ammunition and one cartridge of 7.62 x 51 mm in circumstances which raised reasonable presumption that the ammunition was intended to be used in a manner prejudicial to public order.
3. Judgment was delivered was delivered on 24th April 2012 by A.K. Ithuku, Principal Magistrate. He convicted the Appellant on both counts and sentenced her to serve for four years on each count. The sentences were to run concurrently.
4. The Appellant being aggrieved by the decision of the Principal Magistrate preferred this appeal. She raised fifteen grounds of appeal in her Amended Petition of Appeal which can be summarized as follows;

a)That the learned trial magistrate erred in law and fact in finding that the Appellant was in possession of the rifle and rounds of ammunition and yet the prosecution had not proved beyond all reasonable doubt the element of “possession”.

b) That the learned magistrate erred in law and in fact in treating the offense of possession of a firearm and ammunition as an offence of strict liability;

c)That the learned magistrate erred in law and in fact in convicting the Appellant without the evidence of the Investigating Officer;

d) That the learned magistrate erred in law and fact in finding that the firearm and ammunition had been used in a manner prejudicial to public yet no evidence to that effect had been placed before him;

f) The learned magistrate erred in law and fact in finding that the prosecution proved its case beyond all reasonable doubt.

g) The learned magistrate erred in law and in fact in failing to consider the Appellant's mitigation and thus passing a harsh and excessive sentence in the circumstances

5. The facts before the lower court were that Sgt. Ljiise Lelerapu (**PW1**) and Lempisi Lempata (**PW2**) who work with the Kenya Wildlife Services and stationed at Namyak Conservancy received information from an informer of a person being in possession of a rifle at Lokoyen area. They reported the matter at Wamba Police Station where the two officers in the company of PC Polycarp Odhiambo (**PW3**) and a Sgt Kathurima were led to the Appellant's house by the local chief. In the house belonging to the Appellant, they found a mark 4 rifle which was loaded with six rounds of ammunition. They also found a cartridge. The Appellant was arrested and taken to Wamba Police station. **PW3** sent the recovered items to a ballistic expert for further testing. Alex Mundidi Mwadawiro (**PW4**), a firearm expert examined the fire arm and was of the opinion that it was in fair condition and was capable of being fired. He also examined the ammunition and formed the opinion that they were live rounds of ammunition.
6. The Appellant in her defence gave an unsworn statement and did not call any witness. She testified that prior to her arrest she was house wife residing at Wamba Town. She denied having any knowledge of the rifle in her Manyatta and claimed the same was brought there.
7. The appeal was canvassed before this court on 24th March 2013. The Learned Prosecuting Counsel **Mr. Chebii** appeared for the State and **Mr. Arusei** was present for the Appellant.
8. **Mr. Arusei**, the Learned Counsel for the Appellant submitted on the following three grounds; that the trial magistrate erred in finding that the Appellant was found in possession of the rifle and rounds of ammunition; that there was no evidence that the firearm had been used to prejudice public order; that the Investigating Officer in the case was never called to testify.
9. On the first ground it was the submission by Counsel that the manyatta did not have a door and hence access was unrestricted. He further submitted that the Manyatta was a family house and the Appellant was married with children. Possession therefore ought to have been proved beyond reasonable doubt.
10. **Mr. Arusei** further argued that the evidence adduced was never sufficient to warrant a conviction. He submitted that crucial evidence by the Investigating Officer was not adduced before the court as to how the investigations were conducted and the mode of arrest. According to Counsel the rifle could have been placed at the scene by other persons. Further it was found under a sleeping skin whose ownership was not established. He therefore urged the court to find that the conviction to be unsafe.
11. On the last ground of his submission, Counsel argued that the prosecution ought to have shown that the appellant used the firearm and ammunition to breach public order. The prosecution did not prove that the appellant was capable of using a firearm. Further, **PW1** and **PW2** who alleged there was poaching did not testify that the Appellant was involved in poaching.
12. **Mr. Chebii** the Learned Prosecuting Counsel for the State, in opposing the appeal supported the Appellant's conviction and sentence. He submitted that the issue of possession was not raised in the trial court. It was not in dispute that the Appellant is the owner of the Manyatta. Moreover no other person is shown to have been resident at the premises. He further submitted that the informer should be treated as a protected witness due to the nature of the offence. He submitted that the issues raised as to whether the manyatta was restricted or not, whether the firearm had been recently used in breach of public order and ownership of the sleeping skin are an afterthought. These issues were never raised by the appellant in the trial court.
13. In a brief rejoinder, **Mr. Arusei** stated in criminal trial the accused has a right to remain silent. However the burden of proof is always upon the prosecution to prove its case beyond reasonable doubt. He submitted that in this instant case the burden was not discharged by the prosecution. Counsel urged the court to allow the appeal by quashing the conviction and setting aside the

sentence.

ISSUES FOR DETERMINATION

14. Whether the prosecution proved beyond reasonable doubt that the Appellant was in exclusive possession of the rifle and the rounds of ammunition?
15. Whether by not calling crucial witnesses the prosecution therefore failed to prove its case beyond all reasonable doubt?
16. Whether the sentences passed were harsh and excessive in the circumstances?

ANALYSIS

17. This being the first appellate court it is incumbent upon this court to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno V. Republic (1972) EA 32.**
18. On the issue of possession, the evidence of (PW1) and Lempisi Lempata (PW2) was that the information of the Appellant having a firearm was given to them by an informer. After making a report at Wamba Police Station, they proceeded in the company of local chief and two police officers to the Appellant's manyatta. and he states in evidence that he found a lady outside the manyatta.
19. Sergeant Ljiise Lelerapu (PW1) in his evidence makes no mention as to where they found the Appellant when they went to the manyatta. He only states that they found the Appellant, introduced themselves and proceeded to search her house.
20. In his evidence PC Polycarp Odhiambo (PW3) one of the police officers who accompanied PW1 and PW2, and in his testimony he stated that;

“...Myself, Sgt Kathurima and KWS officers went to Lemuna's manyatta. We were led by the local chief. We search (sic) houses in the manyatta. In the house belonging to the accused we found a mark 4 rifle. It was loaded with six rounds of ammunition...”

21. This witness makes no mention of the presence of the Appellant when they went to the manyatta and proceeded to conduct the search the Appellant's house. What emerges from the evidence of all the three aforementioned prosecution witnesses is that the Appellant was not found in actual or physical possession of the firearm nor in possession of the rounds of ammunition at the time of arrest.
22. Their evidence points to the fact that the firearm and ammunition were all found inside the house that belonged to the Appellant. PW1 testified that the firearm and ammunition were found hidden under a skin used for sleeping.
23. Also from the evidence adduced by PW2 and PW3 the court's understanding of a manyatta is that it was a compound consisting of several houses. The evidence of PW2 reads as follows:

“.....We searched houses in the manyatta. We found a rifle in the house belonging to the Accused herein.....”

24. Corroborating the above evidence PW3 stated and this court reiterates;

“.....We search (sic) houses in the Manyatta. In the house belonging to the Accused we found a mark 4 rifle.....”

25. The evidence goes to show that there were other houses in the manyatta/ compound. There is no evidence adduced by any of the prosecution witnesses to prove that apart from the Appellant there were no other persons in occupation of the other neighbouring houses.
26. Learned Counsel for the Appellant submitted and this court concurs with the submission and also has judicial notice of the fact that such houses do not have doors at all.
27. This court opines that it was incumbent upon the prosecution to have shown that there were no other persons around and to have demonstrated that the Appellant had exclusive access to her

- house and exclusive possession of the rifle and the ammunition.
28. Failure by the prosecution to demonstrate that the Appellant had exclusive access leaves a presumption that other persons from the other houses could have had access to the Appellant's house. There is doubt on this element of access and possession and it is trite law that where any doubt arises, the benefit of doubt will be in favour of the accused and in this instant the Appellant.
29. The second issue is that the Investigating Officer was not summoned by the prosecution to testify. Usually the prosecution is at liberty to call the witnesses it so chooses to call to testify on its behalf. But in this case this court upon perusal of the court record finds no evidence to support the fact that the Appellant had demonstrated or knew how the rifle worked or was capable of using a firearm.
30. The latter sections of the two Counts are therefore found to be unproven as the Investigating Officer is found to be a crucial witness and ought to have been summoned by the prosecution to testify on the investigations carried out to show that the Appellant was capable of using a firearm and to show the manner in which the firearm had been used that was prejudicial to the public.
31. This court finds no need to belabor itself on the last issue of the sentence being harsh and excessive in the circumstances.

FINDINGS

32. For the reasons set out above this court makes the following findings;

- a) This court is satisfied and finds that the prosecution failed to prove beyond reasonable doubt the element of possession in particular that the Appellant had exclusive possession of the rifle and rounds of ammunition.
- b) This court finds that the Investigating Officer was a crucial witness on the use of the rifle and ammunition and by failing to summon him to testify as a witness the prosecution failed to prove its case beyond reasonable doubt.
- c) On both Counts I and II this court finds that the prosecution failed to prove its case beyond reasonable doubt and the conviction is found to be unsafe.

CONCLUSION

32. The appeal is found to have merit and is hereby allowed.
33. The conviction is hereby quashed and sentence set aside. The Appellant to be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day of June, 2014.

A. MSHILA

JUDGE