



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO.59B OF 2010

LESIIT, J

RAPHEL LOKINYATI.....APPELLENT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment and conviction of M. Maundu, Principle Magistrate at Isiolo

in the Criminal Case No. 970 of 2009)

JUDGEMENT

1. The appellant was charged jointly with another Ltamingoi Lesingirah. The case against the co-accused was withdrawn under section 87(a) of the Criminal Procedure Code. The Appellant faced three counts, the offence of robbery with violence contrary to section 296(2) of the Penal Code. The second and third counts were under the Firearms Act, hereinafter the Act, of being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Act; and of being in possession of ammunition without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Act. The Appellant was acquitted for count 1 of robbery with violence. The Appellant was found guilty in counts 2 and 3 and was sentenced to ten (10) years imprisonment in each count and both sentences ordered to run concurrently.

2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. The Appellant abandoned his earlier grounds of appeal and relied on supplementary grounds namely:

1. That the learned trial magistrate erred in law and facts when he failed to consider the facts that there was no recovery form to confirm that Appellant was the one who led the police to recover the said riffle.

2. That the learned trial magistrate erred in both law and facts when he failed to note and consider that there was a contradiction of statements by PW1 and PW4.

3. That the learned trial magistrate erred in law and facts when he failed to note and consider the fact that the gun recovered from him by PW1 and PW4 had the same serial number 4825789.

4. Contradiction of evidence of the defence witness and that of prosecution witnesses.

3. The Appellant represented himself in person while Mr. Mungai Prosecution Counsel represented the state. The Appellant relied entirely on his written submissions. I have considered them. Mr. Mungai stated that he was not opposing the appeal because the charge was defective. Counsel did not elaborate what he meant with the charge was defective.

4. The facts of the prosecution case relevant to this appeal are as follows. There was a robbery committed against tourists within Samburu Lodge on the 14th September, 2009. Investigation commenced immediately and the Appellant and another were arrested. It is the prosecution's case that the Appellant led a group of Police Officers, KWS and Rangers to a river where they recovered a firearm, magazines, ammunition and other items. The firearm and ammunition were examined by a Ballistic Expert who confirmed the firearm and ammunition were firearm and ammunition within the meaning of the Act. He found that the firearm was in a fair condition and capable of firing. He test fired the ammunition and found them capable of being fired. His report was an exhibit in the case.

5. The Appellant in his short evidence stated that on the date that is alleged he committed the offence he was at home when police officers came and put him in their vehicle and took him to Samburu Lodge. At the lodge, the Appellant claimed that he was beaten demanding to know whether he is the one who attacked the tourist. He stated that he was taken to Archers Police Post where he was given a gun and photographed holding it. He said he was not aware whether there were visitors who were robbed.

6. I am a first appellate court and as such, I have carefully considered this appeal and I have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation. I have drawn my own conclusions while bearing in mind I neither saw nor heard any of the witnesses and therefore cannot comment on their demeanor. I am guided by the principles set out in the case of **Okeno vs. Republic 1972 EA 32** where the Court of Appeal set the duties of a first appellate court as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and 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. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 vs Sunday Post [1958] E.A 424”

7. The Appellant was charged with being in possession of a firearm and ammunition without a firearm certification contrary to section 4(1) as read with section 4(3) of the Firearms Act. The section stipulates as follows:

“4(1) subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.”

4(3) any person who is convicted of an offence under subsection (2) shall

a. If the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term not less than seven years and not more than fifteen years.”

8. The Appellant in his petition has urged that the evidence of the prosecution was full of contradictions in the evidence of PW1 and 4, that there appears to have been two recoveries and that the prosecution did not record them in an Inventory. The evidence of PW1, PW2, and PW4 was to the effect the Appellant took them to a river where he retrieved a firearm and ammunition. I have analyzed the evidence of PW1 and 4. PW1 testified that after interrogating the Appellant he agreed to take the team of KWS, Police

Officers and Rangers to a place near MugaNanyori river where he retrieved a firearm under a stone. PW2 who was also present said that the firearm was under two stones. PW4 who was also present testified that the firearm was inside a cave in a dry river gully. There is a clear variation in the evidence of each of these three witnesses in regard to where the firearm was recovered.

9. The list of recovered exhibits according to the same officers seems to differ as well. PW1 testified that they recovered a rifle serial number 4825789, exhibit 1 a magazine with 31 rounds of ammunition exh. 2, 3A and 3B respectively. He stated that nothing else was recovered.

10. PW2 testified that in addition to exhibits 1, 2, 3A and 3B, they also recovered a green trouser exh. 4A, a military trouser 4B, green pullover exh. 5, two jungle military police hats exh. 6A and 6B, and a black police beret exh 7; cleaning kit and oil exh. 8A and 8B, a G3 pin rifle and an empty magazine exh. 10.

11. PW4 evidence was to the effect of adding to the list of the exhibits the officers recovered on the material day. In addition to those recovered as per PW1 and 2's list PW4 added the following exhibits. PW4 testified that they also recovered two jungle coats exh. 12A and 12B, a jungle trouser and a green police trouser exh. 13A and 13B and one green forest guard sweater exh. 14.

12. PW1, 2 and 4 were in the same group at the same time when the exhibits were recovered. It is therefore baffling that PW1 could be very confident that only exhibit 1, 2, 3A and 3B were recovered. Then PW2 who was also very confident that the only exhibits recovered were exhibits 1 to 10. And lastly PW4 who swore that they recovered exhibits 1 to 14. The variations in the evidence of PW1, 2 and 4 were so glaring that they cannot be explained away or ignored. Secondly they go to the very root of the prosecution case.

13. It is the duty of a trial court to resolve any inconsistencies in the evidence adduced before it. I have perused the judgment of the learned trial magistrate. Nowhere does he mention any inconsistency or variation in the evidence of the prosecution. That is a serious non direction on his part.

14. I did try to resolve the inconsistencies in the prosecution case. I find that the same cannot be resolved. There is no explanation for the variation how each of the three recovery officers could differ in their evidence regarding the exhibits they recovered. This is serious because the three officers were present at the place and time of recovery. They should have been consistent in their evidence on this issue. Had the variation been of one or two items, one may ignore the same. However in this case we are dealing with so much between 7 items in the case of PW1 and 2; and 13 items in the case of PW4's evidence. The inconsistency in the evidence in regard to the recovered items is material and goes to the very root of the prosecution case.

15. The Appellant raised issue with the absence of a record of the recovered items. An inventory could have resolved the problem as it could have been a documentary record of the recovered items. In the circumstances of this case, in view of the contradictions in the number of items recovered I find that the lack of an inventory proves to be fatal to the prosecution case.

16. The Appellant suggested that due to the contradictions in evidence of the recoveries made, there were in fact two different recoveries made, one by PW1 and the other by PW4. My view is that there may not have been any recoveries made otherwise there can be no other explanation of the glaring contradictions in the prosecution evidence.

17. I find that the learned trial magistrate failed to address his mind to important issues in this case. He failed to take note of the obvious contradictions in the prosecution evidence. Had he done so he could have come to a different conclusion of this case.

18. I find that the conviction entered against the Appellant in this case was unsafe and could not sustain a conviction of this very serious offence. Consequently the conviction cannot be allowed to stand. I will end by stating that once a case against an accused person is withdrawn, that person ceases to be on trial. His name should not be retained in the charge, and neither should his name appear in the judgment of the

court as an accused person. The proper thing to do is to substitute the charge sheet in order to remove him/her from the charge. That is not what happened in this case. I do hope the trial courts take a note of that.

19. In conclusion, I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JUNE, 2014

LESIT, J.

JUDGE