



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 131 OF 2011

LESIIT, J

PAUL MURITHI.....1ST APPELLANT

JULIUS KINYUA KIRIMI.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(An appeal from the Judgment and sentence in Meru Principal Magistrate's Court Criminal Case Number 68 of 2011)

JUDGMENT

1. The Appellant **PAUL MURITHI MUTWIRI** herein after the 1st Appellant and **JULIUS KINYUA KIRIMI**, the 2nd Appellant were charged separately with one count each of being in possession of ammunition contrary to section 89(1) of the Penal Code. The 1st Appellant was charged in count 1 while 2nd Appellant faced count 2. They were convicted for the offence they were charged with and each sentenced to 8 years imprisonment.
2. Being aggrieved by the conviction and sentence each Appellant filed their respective appeals. I have consolidated their appeals as they arose out of the same trial in the lower court.
3. The 1st Appellant raises five grounds of appeal in his Added Grounds which he relied upon his appeal namely:
 - i. **That the learned trial magistrate erred in both law and facts when he failed to consider the fact that the investigation and arresting officers did not call the owner of Star Bar to come and give evidence in court hence making this appeal.**
 - ii. **That the learned trial magistrate erred in law and facts when he failed to consider the fact that no eye witness saw Paul Muriithi being served by the KWS personnel and bullets removed from his pockets and the counterman at the bar was not bonded to court and give evidence.**
 - iii. **The learned trial magistrate erred in both law and facts and misdirected himself when he failed to take into account that ballistic expert due to specify that the ammunition taken to him were of which caliber. It is my humble submission that the learned trial magistrate imposed a custodial sentence without evaluating the caliber of the ammunition.**

- iv. **The learned trial magistrate erred both in law and facts and misdirected himself when he failed to consider the fact that the dusting of ammunition was not done to establish the truth the appellant ever touched the said ammunition.**
4. The 2nd Appellant raises seven grounds in his Appellant raises seven grounds in his Added Grounds upon which he relied in his appeal namely.
- i. **That the learned trial magistrate erred in both in law and fact and did not take into account the owner of the bar was not called to give evidence in court or his employee in support of prosecution hence making this appeal.**
 - ii. **That the learned trial magistrate erred in both law and fact in misdirecting himself when he failed to take into account that no dusting of the ammunitions was done to find out if the appellant ever torched the said ammunition. It is my humble submission that despite that fact that the question is of the ammunition PW1 answered loudly and yet the appellant was speaking of ammunitions.**
 - iii. **That the learned trial magistrate erred in both law and facts when he failed to consider that the prosecution failed entirely and carried no investigations in respect of the case before court as he did not investigate and question the owner of the bar to find out what happened in his bar, yet he was the one who could give a truthful evidence. It is my humble submission that why did the Investigation Officer omit the owner of the bar where the appellant was drinking.**
 - iv. **That the learned trial magistrate erred in both law and fact and misdirected him self when he failed to considere the fact that all the prosecution witnesses omitted key civilian witnesses giving no reasons to omit them.**
 - v. **That the learned trial magistrate erred in both law and facts when he failed to take into consideration the fact that accused person were both his friends DW Mr. George Mbae Muguna and in his sworn testimony he said that the accused was arrested with nothing like ammunition.**
 - vi. **That the learned magistrate erred when he failed to consider the fact those ballistic experts did not come to give their report. It was given by PW3 and they are the ones who are fabricating this case to the appellant hence making this appeal.**
 - vii. **That the learned magistrate erred in both law and fact when he failed to consider the fact where PW3 said that the ammunitions were touched by other people so they can not have the Appellants finger prints. So I wonder why he said they tampered with the exhibit and he is trained on how to handle exhibits hence making this appeal.**
5. The appeal was opposed. Mr. Edwin Mulochi prosecution counsel represented the state and opposed the appeal. Counsel submitted that the prosecution through the evidence of PW1 and PW2 adduced consistent evidence which tallied and which was sufficient to sustain a conviction. Regarding the Appellants defences Mr. Mulochi urged that the defense was contradictory and fell short of casting doubt on the prosecution case.
6. Mr. Mulochi urged that regarding the sentence, the sentence imposed against the Appellants of 8 years imprisonment was proportionate to the offence.
7. I have considered the Appellants appeal and being a first Appellate court I have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation and have drawn my own conclusions. I have taken into account the fact I neither saw nor heard any of the witnesses and have given due allowance.
8. I have been guided by the court of Appeal case of OKENO V. REPUBLIC [1972] EA 32. the role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be

submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to 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 v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)"

9. The Appellants challenge the convictions on the basis of lack of independent witnesses, failure to call the owner of Star Bar where they were when the two were arrested for the offences in issue and failure to dust the alleged ammunition recovered from them to establish they touched any of them.
10. The Arresting Officers were Kenya Wildlife Service Officers PW1 and 2 who after receiving information of the presence of persons who kill animals in the forest and carry away the carcasses they decided to investigate. They found both Appellants at the Star Bar taking beer. PW1 searched 1st Appellant and recovered 7 rounds of ammunition while PW 2 searched 2nd Appellant and recovered 3 rounds of ammunition. The 2 Appellants were handed over to Meru Police Station where PW3 was assigned the case to investigate.
11. The 1st Appellant denied the offence. He admitted being arrested by the KWS officials. He said they were looking for ivory but after failing to get it, they arrested him anyway.
12. The 2nd Appellant on his part said 1st Appellant led KWS Officers to him pretending they needed transportation from him only to arrest him. The 2nd Appellant called first and 3rd witnesses to say they inquired why the 2nd Appellant been arrested, and the second witness who was his mother. The point 2nd appellant was making was that no one accused him of having ammunition in his possession until much later.
13. The learned trial magistrate, after analyzing the prosecution and defence evidence concluded that the prosecution had proved its case and convicted both Appellants.
14. I have carefully considered entire evidence. The prosecution evidence was that both Appellants were inside Star Bar enjoying drinks when they were arrested by PW1, 2 and other officers. The search was conducted on their persons by PW1. They were each found with ammunition in their pockets, which were wrapped in nylon paper and newspapers respectively.
15. The Appellants view was that the prosecution should have called independent witnesses. The independent witnesses were not called. However in **BUKENYA & OTHERS** 1972 EA 549 LUTTA Ag. VICE PRESIDENT held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

16. It is trite law that a fact can be proved by a single witness. It is not necessary to call all those who witnessed a fact in order to establish the fact. The duty of the prosecution is to call evidence that is sufficient to establish a fact. Secondly there is no requirement limiting the number of witness(es) that are required in order to establish a fact.
17. PW1 and 2 were KWS officers who acted on information they received from persons not called as witnesses their evidence was consistent and corroborative.
18. The Appellants despite the initial stages of their defences in which they denied that they were found at Star Bar changed. Eventually they each changed their story and admitted they were inside Star Bar at the time of the arrest.
19. The learned trial magistrate found PW1 and 2 truthful witnesses. I find no reason to depart from

- the trial courts finding of fact regarding credibility of the two witnesses. The learned trial magistrate had the opportunity to see and examine the demeanour of PW1 and 2, an opportunity i did not have. I will accept her assessment of the two witnesses and agree with the trial court.
- 20.The ammunition was proved to be live and capable of being fired. The firearms report on the results of the examination of the ammunition found on the persons of the appellants were that each ammunition was ammunition as defined under the Firearms Act.
- 21.PW3 the Investigation Officers produced the report. I am satisfied same was admissible under section 77(1) of the Evidence Act which provides

77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

22. There was no need to have other evidence to support that of PW1 and 2. There was no need for dusting of the rounds of ammunition in order to prove that the Appellants had possession of them. Failure to dust the ammunition was not fatal to the prosecution case.
- 23.I find that the learned trial magistrate carefully weighed the evidence adduced before her and came to the right conclusion accordingly I find the conviction entered against the Appellants was safe.
- 24.As for the sentence, the minimum sentence for the offence is 7 years. They were given a sentence of 8 years imprisonment on grounds that a deterrent sentence was required.
- 25.That argument is untenable. The Appellants were first offenders. They had ammunition only in a bar and therefore not with a projectile which could be used to fire them.
- 26.I think the minimum sentence was in all circumstances of the case the more appropriate sentence. I allow Appellants appeal against sentence by setting aside the sentence of 8 years imprisonment in substitution reduce the sentence to 7 years imprisonment from date of sentence in the lower court.
- 27.In the result the appeal against conviction has no merit and is dismissed. The appeal against sentence is allowed and sentence reduced from 8 years imprisonment to 7 years imprisonment from date of sentence in the lower court.
- 28.To that extent the Appellant appeal succeed.

DATED SIGNED AND DELIVERED THIS 24TH DAY OF JULY, 2014

LESIIT J.

JUDGE.