No.177

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.125 OF 2011

PHILIP KENNEDY OTIENO …….APPELLANT

VERSUS

STATE ……..……...…… RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Migori, Hon. Kibet Sambu on 9th November, 2010, SPM, CR. Case No.451 of 2010)

JUDGMENT

1. The appellant herein, **Philip Kennedy Otieno** was charged jointly with Edwin Ouma Owidi and Jane Wafari Munga(hereinafter referred to only as "**co-accused**") with the offence of attempted robbery with violence contrary to section297(2)of the Penal Code (first count)and an alternative charge of, preparation to commit a felony contrary to section 308(1) of the Penal Code. The appellant also faced another charge of, possession of a fire arm without a firearm certificate in force contrary to section 4(2) (a) as read with subsection (3) (a) of the Firearms Act, Cap. 114 Laws of Kenya (second count). The particulars of the charge on the first count were that, on 30thMay 2010 at Migori township in Migori district within Nyanza province, the appellant and his co-accused jointly with others not before the court being armed with dangerous and offensive weapons namely, a homemade pistol and a knife, attempted to rob Mohammed Abdi.
2. The particulars of the alternative chargeunder which the appellant was also charged jointly with his co-accused were that, on the 30th day of May 2010 at Migori township in Migori district within Nyanza province, the appellant and his co-accused jointly with others not before court were found with a dangerous weapon namely a homemade pistol in circumstances that indicated that they were so armed with the intent to commit a felony namely robbery with violence.
3. The particulars of the charge under the second count in which the appellant was charged alone, were that, on the 30th May 2010 at Migori township in Migori district within Nyanza province, the appellant was found in possession of a firearm namely a homemade pistol in contravention of the Firearms Act. The appellant and his co-accused denied all the charges.
4. The prosecution called four witnesses. PW1 was **No.68778 Corporal Njeru Elijah** who was attached to Migori Police Station as criminal investigations officer. He told the trial court that on 30thMay 2010, he received instruction from the District Criminal Investigation Officer (DCIO), Migori to detail some criminal investigation department officers (CID officers) for a raid on some suspects who were about to commit robbery at Five Star petrol station. This was followed by a briefing by the said DCIO to his colleagues, one, PC Mohammed, PC Muli and himself that the

suspected robbers had already boarded a motor vehicle from Kisumu heading to Migori town. They proceeded to the scene and laid ambush at a distance from the Five Star petrol station. By this time, it was around 3p.m. Immediately after laying ambush, they saw the suspected robbers entering a hotel known as Ambassador. They were able to identify them as they were told they were in the company of a lady and they conversed for a while before they divided themselves into two groups.He (PW1) concentrated on the group that had a lady while his colleague PC Mohammed kept watch on the other group. The group he was keeping watch over was composed the co-accused. PW1's colleague, one, PC Aneke confronted this group and on interrogation, they were unable to identify themselves and they arrested them. By this time, PC Mohammed had already arrested the 1st appellant. PC Mohammed had carried out a search on the appellant and recovered an imitation firearm that was stacked under his waist and a knife with sharp parts also stacked inside his waist. PW1 identified the imitation firearm in court as MF1-1 and Swiss knife as MF1.2.After making the said recoveries they escorted the suspects to Migori police station where charges were preferred against them.

5. The prosecution's second witness (PW2) was **No.88677 PC Mohammed Abdulahi** who was attached to Migori police station as criminal investigations officer. He told the court that on 30th May 2010 at 2p.m. he was called by his colleague PW1 that he was required to join a group of other police officers under the DCIO's command. He corroborated PW1'stestimony concerning the briefing by the DCIO and the venue of the planned robbery. On arrival at venue where the suspects had planned to carry out the robbery, they divided themselves into 2 groups. Thereafter, four of the suspected robbers came out of Ambassador Bar while two remained inside. Those who remained inside included a lady and a tall man. The four who came out walked along the verandah, three ahead and one behind. They (PW2 and his colleagues) had also been informed that one of the suspects who had a firearm was among the four persons who had come out of the bar aforesaid. PW2 together with PC Muli, followed the four and managed to arrest one of them. Three members of the group escaped. The person who was arrested was the appellant. Upon searching the appellant, PW2 recovered a homemade pistol hoisted near his navel between the belt and his trouser. He handcuffed him upon arrestand took possession of the recovered homemade pistol. He identified the homemade gun as PMF1-1. Later, while conducting a thorough search on the appellant, at the DCIO's office, they recovered a knife stacked on the right side of his body. He also confirmed to the trial court that Ambassador hotel (pub) was located opposite the Five Star petrol station. PW2 then preferred charges against the appellant and the co-accused and prepared an exhibit memo form requesting confirmation on whether the homemade pistol was a firearm for the purposes of the Firearms Act. He identified the exhibit memo which was marked PMF1-4. The knife, firearm and exhibit memo form were produced as exhibits 1, 2 and 3. On cross examination by the appellant, PW2 stated that the exhibits were taken to Nairobi for examination by a ballistic expert on 9th June 2010 and he collected the same on 18th July 2010.
6. The prosecution's third witness (PW3) was, **Emmanuel Lagat** a firearm examiner based at, ballistic section, CID headquarters, Nairobi. He told the court that his duties included examining firearms, ammunition components, parts and other exhibits related to firearms and ammunition. He confirmed that on 1stJune 2010No.2173303 Chief Inspector Joseph Nzioka, a CID officer at Migori submitted to him a homemade pistol marked P. Exhibit 1 with a request for him to ascertain whether the same could be classified as a firearm and whether it was capable of shooting and to ascertain its caliber. He proceeded to examine the exhibit which was a homemade gun measuring 29cm made up of a metallic body pistol grip, a chamber, a firing pin, corking assembly and a trigger mechanism with a fastening device used to retain rounds of ammunition in the chamber. He observed that the exhibit could chamber a wide range of ammunition ranging from 9mm to 15mm and a large length not less than 20mm.He successfully tested the exhibit using a 45inch round of ammunition from his laboratories and he formed the opinion that the exhibit (P. Exhibit 1) was capable of firing and that it was a firearm in accordance with the **Firearms Act Cap. 144** Laws of Kenya. He then produced his report dated 5th July 2010 as P. Exhibit 4 and the tested caliber ammunition as P. Exhibit 5.
7. The prosecution's last witness (PW4) was **Japhet Mateche** who was the DCIO, Migori. He told the court that on 27thApril 2010, he received information that there was an intended robbery which was to take place at Five Star petrol station within Migori town and that, the suspects were

planning the robbery fromKisumu townwhich robbery was to take place either on 29th or 30thMay 2010. The intended robbery was to be carried out by six suspects one of which was a lady. He sent his informer to do surveillance from Kisumu on the suspects' movements. On 30thMay 2010, he was updated by the said informer that the six suspects had left Kisumu in two groups using public means. He then arranged for an ambush to be laid at Five Star petrol station Migori and later in the day he was informed by the officers he had sent to lay ambush that they had arrested some suspects and in the process recovered a toy pistol and a pen knife. He proceeded to the scene of arrest and found the appellant and the co-accused. He interrogated them but none of the three was able to give an account of what they were upto in Migori town. In the process of interrogating the suspects, he established that one of the arrested persons was a passerby and he accordingly released him. He took possession of the toy pistol and pen knife. The appellant claimed to have come from Yala in Kisumu and the co- accused claimed to have come from Rachuonyo district and Nakuru district respectively. PW4 took the toy pistol and caused the same to be taken to the ballistic experts for forensic examination (P. Exhibit 1). He received a report from PW3 after which he preferred the charges against the appellant and his co- accused.

8. That marked the end of the prosecution case. The trial court after evaluating the above evidence found that there was insufficient evidence to place the co-accused persons on their defences. They were accordingly acquitted under section 210 of the Criminal Procedure Code. However, the trial court ruled that there was sufficient evidence to place the appellant on his defence on the second count namely, being in possession of a firearm without a firearms certificate in force contrary to section 4(2) (a) as read with subsection 3(a) of the Firearms Act Cap. 114 Laws of Kenya.The charge under this count in my view should have read, being in possession of a firearm without a firearm certificate in force contrary to section 4(2)(a) as read with (3)(**b**), and not (3)(**a**) of the Firearms Act, Cap. 114, Laws of Kenya since the firearm that was found in possession of the appellant according to the report that was produced by the Firearms Examiner (P. Exhibit 4) was not in my view a prohibited weapon of a type specified in paragraph (b) of the definition of the term in section 2 of the Firearms Act, Cap. 114, Laws of Kenya. I will revert to this issue at the end of this judgment. In his defence, the appellant chose to give a sworn statement. He denied having knowledge of the charges facing him and his co-accused and the fact that he was found in possession of a firearm as alleged by the prosecution witnesses. He also contended that the police officers did not dust any fingerprints at the time of the alleged recovery of a homemade gun, neither did they make any inventory on its recovery nor call in the scene of crime officers. The appellant contended that he was an acrobat from Kisumu and was in Migori town outside a hotel verandah setting up a place to perform his acrobatic shows before he was arrested by police. After evaluating the above evidence, the trial court found the appellant guilty on count II, convicted him and sentenced him to serve 5 years imprisonment.
9. The appellant being dissatisfied with the above conviction and sentence preferred an appeal to this court. In his petition of appeal filed in court on 4th July 2011 the appellant has appealed against his conviction and sentence on the following grounds:

1. **"That the weight of the alleged offence was not water tight to warrant a conviction and such a sentence".**
2. **"That I am an orphan who was taking care my three siblings and such a sentence is meant to make them suffer".**
3. **"That I live the matter before your Lordship in order to review the same and come up with a better option".**

10. When the matter came before me on 17th October 2013, the appellant appeared in person while the state was represented by Mr. Shabola. The appellant submitted that he was charged with the offence of attempted robbery, but he was convicted with the offence of being in possession of a firearm. He submitted therefore that his conviction was illegal as he was not charged with the offence of which he was convicted. Secondly, he submitted that the sentence of 5 years imposed upon him was very harsh and he prayed that the sentence be reduced. In conclusion, he submitted that he had reformed while in prison and if he is released he would be able to fit well in the community.
11. The appeal was opposed by **Mr. Shabola** learned counsel for the state. He submitted that although

the appellant was acquitted of the charge of attempted robbery with violence, he was convicted of the charge of being in possession of a firearm and sentenced to 5 years imprisonment. He submitted that, the appellant was found in possession of a homemade firearm according to the evidence of PW1which was corroborated by PW2. The said firearm was examined and tested by PW3 who certified that it was capable of firing bullets. Mr. Shabola submitted that, in his defence, the appellant had denied that he was found in possession of a firearm and claimed that he was not aware of the charges. Mr. Shabola submitted that the prosecution had proved its case against the appellant beyond reasonable doubt and as such the conviction and the sentence that was imposed against the appellant was proper. Mr. Shabola submitted in conclusion that the appeal herein lacks merit and should be dismissed.

12. This being a first appeal, I must reconsider and evaluate the evidence on record afresh. In exercise of this duty, I am guided by decisions in such cases as, **Pandya vs. Republic (19570 E.A336**, **Okeno vs Republic (1972) E.A 32** and **Abdul Hammed Saif vs. Ali Mohammed Sholan (1955) 22 E.A.C.A 270.**In evaluating the evidence afresh I am mindful however of the fact that unlike the trial court, I have neither seen nor heard the witnesses to be able to benefit from observing their demeanor. I am satisfied from the evidence on record that the appellant was arrested and found in possession of a homemade firearm. This fact is clear from the testimonies of PW1and PW2. The said homemade gun was taken for examination and testing on instruction of PW4 and was tested by PW3 who confirmed that the same could indeed be used to fire bullets. The issue of whether the appellant was found in possession of a homemade gun was proved in the affirmative beyond reasonable doubt by the prosecution. In the circumstances, it is my finding that the trial court was right in convicting the appellant on count II.
13. On the issue of sentence, the appellant had contended that the sentence that was imposed against him was too harsh. Section 4(2)(a) and (3)(a) under which the appellant was convicted provides for a sentence of not less than 7 years but not exceeding 15 years imprisonment. As I have pointed out herein earlier, the appellant should have been charged and convicted under section 4(2) (a) and (3) (b) of the Firearms Act, Cap. 114, Laws of Kenya. Under section 4(3) (b) of the Firearms Act, Cap. 114, Laws of Kenya, the appellant should have been sentenced to serve a term not less than 5 years but not exceeding 10 years imprisonment. In the circumstances, the sentence of 5 years imprisonment imposed upon the appellant was the minimum provided for under the law. In the case of **Shaddrack Kipkoech Kego vs. Republic** Criminal Appeal No**.253 of 2003 (**unreported) it was held:-

> ‘‘**A sentence is essentially an exercise of discretion of the trial court and for this court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred’’.**

The same sentiments were echoed in the case of **Omuse vs. Republic (2009) KLR 214** where O’kubasu, Waki and Onyango Otieno JJA after reviewing decided cases said:-

In **Macharia vs Republic (2003) EA 559** it was held;

> *‘‘This principle upon which this court will act in exercising its jurisdiction to review or alter a sentence imposed by the court have been firmly settled as far back as 1951, in the case of Ogola s/o Owuor(1954) E.A.C.A 270 wherein the predecessor of this court stated;*
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> > ‘‘**The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial judge, unless as was said in James vs. Republic (1950) 18E.A.C.A 147, it is evidence that the Judge acted upon some wrong principles or overlooked some material factors. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case Republic vs. Sherxhawsky(1912) C.C.A 28 LR 263. Further, the law is that sentence imposed on**

> **an accused person must be commensurate to the moral blame worthlessness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence''.**

As I have already stated above, the trial court gave the appellant the minimum sentence provided in law. The discretion that the trial court had was restricted in that it could only impose a sentence of between 5 years and 10 years imprisonment. Having imposed the minimum sentence, I am not persuaded that the trial court exercised his discretion wrongly. In the circumstances, the appellant's contention that the sentence imposed against was excessive has no basis. The upshot of the foregoing is that the appellant's appeal fails in its entirety and the same is hereby dismissed.

Delivered, Dated and Signed at KISII this 18th day of December 2013

S.OKONG'O

JUDGE

In the presence of:

Appellant present in person

Mr. Shabola for the State

Mobisa Court clerk

S.OKONG'O

JUDGE