



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 67 OF 2012

Appeal from original conviction and sentence of Principal Magistrate (J.N. Onyiego, PM) in the then
Principal Magistrate's Court Criminal Case No. 1612 of 2011.

HASSAN FAROW ABDULLAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Hassan Farow Abdullahi, the appellant, was charged with three counts. Count 1 was robbery with violence under section 296 (6) of the Penal Code. It was alleged in the particulars that on 26th August 2011 at Ifo Refugee Camp in Lagdera District within Garissa County, jointly with another not before the court while armed with dangerous weapon namely AK 47 rifle robbed Mahat Elmoge Mohamud one pair of trousers, one pair of shoes and cash Kshs 100,000 (one hundred thousand Kenya shillings) all valued at Kshs 101,500 and at or immediately before or immediately after such time of the said robbery used personal violence against the said Mahat Elmoge Mohamud.

In Count 2 the appellant was charged with being in possession of ammunition without a certificate contrary to section 4(2)(a) of the Firearms Act in that on the 27th day of August 2011 at Hagadera Refugee Camp in Fafi District within Garissa County he was found being in possession of thirty eight (38) rounds of 7.62 mm by 39mm without a valid firearm certificate.

In Count 3 the appellant was charged with being in possession of a firearm accessory contrary to section 26 (1) (e) as read with section 26 (2)(b) of the Firearms Act. The particulars are that on the same date and place as in Count two above he was found being in possession of firearm accessories namely two AK 47 rifle magazines without a valid firearm certificate.

He pleaded not guilty to the three counts and the case proceeded to a full trial. The complainant in Count 1 did not turn up to testify in support of that count. The appellant was acquitted on Count 1 and found guilty in respect of Counts 2 and 3 and sentenced to 10 years in each count to run concurrently. He was

not satisfied with that judgement and has now come before this court on appeal.

Petition of appeal

The appellant has filed initial petition of appeal on 12 June 2012 but with leave of this court he amended his petition of appeal containing seven grounds of appeal. This was filed on 21st May 2013. On 30th October 2013 he informed the court that he would abandon the initial grounds of appeal and rely on the amended grounds of appeal and submissions filed on 21st May 2013. The grounds of appeal are summarized as follows:

- i. **The prosecution failed to prove its case beyond reasonable doubt.**
- ii. **There was no proof that the exhibits were recovered from him.**
- iii. **The ballistic expert who examined the exhibits did not testify.**
- iv. **There were contradictions in the prosecution case.**
- v. **Dusting was not done to prove allegations that the appellant was the person found in possession of the gun and magazines.**
- vi. **The mode of arrest was improper.**
- vii. **The sentence was executed against the law and in violation of Article 25 (a) of the Constitution.**

Submissions by appellant

In his submissions, the appellant has raised six issues for determination: whether the prosecution has proved the time, date and place of arrest where the exhibits are alleged to have been found; whether he was the real owner of the alleged paper bag; whether he was in possession of the alleged exhibits or they were planted on me; whether there is any possibility of any other person being in possession of alleged exhibit; whether the search and recovery was done on the spot; and whether dusting was done to prove allegations.

The appellant submitted that the case was not proved beyond reasonable doubt and that the prosecution bears the burden of proving a case beyond reasonable doubt and the burden never shifts to the accused.

He submitted that the complainant who is alleged to have led police to arrest the appellant and who is alleged to have identified him for purposes of arresting did not testify; that save for PW3 who said the arrest was carried out at 11am, PW2 and PW3 did not mention the time; that the date the offence is alleged to have been committed is 27th August 2011 at Hagadera bus stage yet the exhibit memo shows the date of offence is 26th August 2011 at Ifo Refugee Camp Market.

He submitted that the prosecution failed to call the ballistic expert who examined the exhibits and called a different one in order to conceal the truth.

He submitted that his defence all along was that the complainant who is alleged to have led police to arrest him had a grudge with him and this evidence was not considered by the trial magistrate.

He submitted that the person who had the paper bag containing the exhibits was not established; that evidence shows that when the police arrived at the scene of arrest there were other two people in company of the appellant who ran away on seeing police; that at the stage there were many people and that paper bag could have belonged to anyone; that the search was not conducted at the scene of arrest but at the police station and it was possible for the police to fabricate the case and plant the exhibits on the appellant and that no dusting for fingers prints was done to ascertain whether the appellant was the one who had the alleged exhibits.

Submissions by respondent

The appeal was opposed by the respondent. The learned state counsel submitted that there was ample

evidence from the prosecution witnesses save for Count 1 on which he was acquitted after the complainant in that count failed to attend court to testify.

Counsel submitted that the evidence of PW1, PW2, PW3 and PW4 showed that the appellant was found in possession of an AK 47 rifle and ammunition without a firearm certificate; that there were no contradictions in prosecution evidence; that the ballistic report was produced by a ballistic expert and in accordance with the law and that the report corroborated the prosecution evidence.

Counsel submitted that the appellant was sentenced to ten years imprisonment which was within the law; that the sentence did not violate the law as alleged; that the appellant has no valid grounds of appeal.

Facts

Let me state the facts to put the case into context. One Mahat Elmoge reported on 27th August 2011 at 11.00am to No. 93320 Acting Inspector of Police Edwin Mugeria, PW3, that he had been robbed of two pairs of shoes and Kshs 100,000 by two men at gunpoint on 26th August 2011 and that he had followed them to the Hagadera Refugee Camp. Mahat Elmoge reported that he had spotted the assailant at the Hagadera bus stage. PW3 informed No. 69464 Police Constable Benjamin Bore, PW2, and No. 75698 Police Constable Mark Otundo to accompany him to the bust stage to make an arrest of the suspect.

The appellant was arrested and a plastic bag recovered from him. He was taken to Hagadera Patrol Base where a search was conducted on the bag. Inside was found two magazines one black with 8 rounds of ammunition and a brown one with 30 rounds of ammunition, a military jungle long trouser, ninja veil, shirt, disk player and 8 CDs. The appellant was charged and the rifle magazine and the ammunitions were taken to the firearm examiner for an expert report. They were confirmed to be live ammunition of 7.62mm by 39mm.

Determination

The duty of this court while sitting on first appeal is in my mind as I begin to examine and evaluate all the evidence adduced in the lower court. When a court is sitting on first appeal, it is given allowance that it did not have the opportunity to observe the witnesses as they testified to form its own opinion on their demeanor.

The trial court seemed impressed by the police witnesses as can be seen in the judgement of that court. The relevant section of that judgement reads as follows:

“PW1, PW2 and PW3 all police officers consistently corroborated each other how they recovered the said accessories and bullets from the accused after a robbery victim (sic) reported to them that he had spotted his assailant at the bus stage.

What reason did the officers have to fabricate this case? They did not know the accused person. They arrested him during the day while carrying a paper bag and immediately took him to the station. Upon opening the bag, they recovered the bullets. Why would they look for those 38 bullets and magazines to plant on a person they did not know?

From my assessment of the general demeanour of PW1, PW2 and PW3, they all appeared honest, truthful and reliable and I have no doubt in their testimony.....”

The appellant was acquitted on the charge of robbery with violence which was the first count. I will therefore not waste time on it except perhaps as far as the relevance of the absent complainant is concerned in respect to count two and three and more particularly on the manner in which the appellant was arrested.

To my mind the appellant’s grounds of appeal can be summarized into three, namely, issue surrounding the proof of the case beyond reasonable doubt and recovery of the exhibits; identification of the appellant

as the person who had the exhibits and the issue of the sentence offending the provisions of Article 25 (a) and (c) of the Constitution 2010.

Starting with violation of the Constitution, I fail to understand the issue raised on appeal. Article 25 is on fundamental rights and freedoms that may not be limited. Article 25 (a) is the freedom from torture and cruel, inhuman or degrading treatment or punishment and 25 (c) is the right to fair trial.

The appellant was convicted after a full trial and sentenced in accordance with the penalty prescribed for the offences described in count 2 and 3 and there is nothing illegal in those sentences. In both counts the sentence is given as not less than seven years and not more than fifteen years. He was sentenced to ten years in each count the sentences to run concurrently. The sentence is within the law and therefore this ground has no merit.

Likewise the complaint that a different ballistic expert other than the one who examined the exhibits testified and this was calculated to conceal the truth has no basis. The record of the lower court shows that on 23rd January 2012 the prosecutor applied to call Mr. Chirchir to testify and produce the ballistic expert report on behalf of Mr. Hassan Manungo who was not available. The appellant has no objection so he cannot turn around and blame the prosecution. Besides, this was done within the law and I therefore find that this claim has no basis.

On the issue of inconsistent evidence, differences start to emerge when one closely scrutinizes the evidence. I know it is not humanly possible for two people to give exactly the same account of the sequence of events as though those events had been recorded and replayed. But there are some facts that ought to tally. PW1 told the trial court that he was on escort in company of PW2 when PW3 called them and told them of a robbery report and to proceed to arrest the suspect seen at Hagadera bus stage. According to PW2, he was on duty preparing to go for escort duties in company of PW1. Let me capture their respective sections of the evidence on that issue.

PW1 testified as follows:

“I do recall on 27th August 2011. On that day I was on escort coming to Dadaab from Hagadera. While on escort, our OCPP IP Mugera called us. He said that he had received a robbery report from Ifo and that the suspect was at Hagadera bus stage. I and PC Otundo proceeded to Hagadera bus stage. We were in company of the complainant who was in the station. The complainant led us to the bus stage. He had alleged that the suspect had robbed him cash. We arrested accused and took him to the station. At the stage he had a black paper bag. PC Otieno took possession of his paper bag.....”

PW2 testified as follows:

“I am attached at Hagadera Patrol Base performing general duties. On 27th August 2011 I was on duty preparing to go for escort duties. While there in company of PC Benjamin Bore, our boss IP Mugera came. He informed us that somebody had reported the offence of robbery by two suspects. IP Mugera said the complainant has spotted one of them at Hagadera bus stage. He requested us to go and arrest him. IP Mugera and the complainant went ahead of us. We followed them to the bus stage. The complainant identified the suspect. IP Mugera got hold of the suspect. We also joined.”

PW3 said he directed PW1 and PW2 to go and arrest the suspect and that at the bus stage they arrested the suspect after identification by the complainant. He did not confirm whether he is the one who arrested the suspect.

That evidence gives different scenarios and even without repeating myself it is not consistent. It does not tell the court how the appellant was identified and without the evidence of the complainant the court will not benefit from that evidence.

I do not agree with the trial magistrate where he stated in the judgement that failure for the complainant to testify in respect of count 1 is not prejudicial. My view is that one cannot separate the fact that the appellant was arrested after the alleged identification by one Mahat Elmoge. The facts of this case would have been different had the appellant been arrested under different circumstances other than from an alleged robbery where the victim of such alleged robbery identifies the suspect. In my view, the evidence of the complainant becomes very crucial to the prosecution case.

In my view the court required evidence of the complainant to ascertain the identification of the alleged robbers at the time of the robbery. This would have laid to rest doubts regarding the identification of the appellant later on as one of the alleged robber. The lower court record shows that on 23rd September 2011 the prosecutor told the court that the complainant had been very elusive to the police and could not be traced. Indeed he was never summoned to testify and at the end of the hearing the prosecutor closed the case without addressing the issue of the availability to testify of the complainant. The lower court too did not seem to mind his absence because no steps were taken and no explanation was offered on the efforts the police had taken to ensure the complainant was summoned to attend court to testify. Robbery with violence is a serious offence carrying penalty of death upon conviction and to for the prosecution to casually handle the importance of the evidence of the complainant is to say the least unusual.

Exhibit 12, the exhibit memo form, gives the information on the offence as having been committed on 27th August 2011 at around 11.00am at Hagadera Refugee Camp bus terminus. The time, date and place the offence was committed is given as 26th August 2011 at Hagadera Refugee Camp. Time, date and place exhibits were found and by whom is given as 26th August 2011 at about 11.00am at Ifo Refugee Camp market by PC Mark Otundo. PC Mark Otundo is PW2. PW2 is one of the officers who testified that they found the suspect at the bus stage at Hagadera bus stage! PW2 did not talk of recovering the exhibits at Ifo Refugee Camp on 26th August 2011. Ifo and Hagadera Refugee Camps are in two different districts and the prosecution failed to address this discrepancy.

This contradiction in evidence leads this court to more doubts about the circumstances surrounding this case.

I have taken into account all the evidence adduced in the lower court. I find the allegations that the lower court did not consider appellant's defence untrue. The court did take into account his defence and mitigation. I also note that the appellant told the court in mitigation that he would not repeat it. In my view it is farfetched for this court to assume that the appellant was admitting the offence by so stating.

I am alive the offence is a serious one given the insecurity of the North Eastern Province and Garissa County in particular and the Country generally. I am also alive to the commendable work being done by security officers in this country to secure the citizens against harm caused by terrorism and general insecurity. However, it would be going against all that is expected of this court if I were to uphold conviction of the lower court in situations where doubts exist like in this case.

It is my considered view that the inconsistencies I have highlighted in this judgement creates doubts in my mind and these doubts make it unsafe for this court to uphold the conviction of the lower court.

In conclusion therefore, I will and do hereby allow this appeal. I quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless for any other reason he is being held in custody. The appellant being a refugee shall be escorted and handed over to UNHCR at the Refugee Camp he used to live in before his arrest and arraignment in court. The UNHCR shall deal with him in accordance with the law relating to Refugees. It is so ordered.

Dated, signed and delivered this 16th day of December 2013.

S.N.MUTUKU

JUDGE