

The appellant was aggrieved by the conviction and sentence and preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 14th November, 2011.

At the hearing of the appeal, the appellant presented and relied on written submissions. The learned prosecution counsel, **M/s. Bartoo**, appeared for the respondent and conceded the appeal on grounds that the prosecution case was full of contradictions and that PW1 did not say how and what form of light was used to identify the appellant. Further, PW3 did not identify the firearm that was allegedly stolen, neither did he make a report that the firearm was stolen.

Having considered the submissions by the appellant and those by the respondent, this court was called upon to revisit the evidence and arrive at its own conclusion bearing in mind that the trial court had advantage of seeing and hearing the witnesses.

In summary, the prosecution case was that on the night of the 3rd/4th March, 2010, **Khadija Rajab Lodomo (PW1)**, was at her home when she heard a gunshot and proceeded outside the house. She stood outside the house and then returned therein. On the following day, she went to her shop and found it broken. Part of the stock therein was stolen but some items were later recovered near a bush.

Khadija and others attempted to track the culprit by following foot prints but all in vain. She said that she saw the appellant while armed with a gun. She previously knew him as a stock thief and his father is a neighbor.

On the same material night, **Seremoi Javan (PW2)**, a teacher at Lokichar also heard a gunshot and on the following day learnt that Khadija's shop was broken into and property stolen from therein. A person called Lokedi told him and others that the appellant was seen with a gun on the previous night.

Lokedi Lodwangle (PW3), a police reservist lost his firearm and later heard people saying that there was a gunshot. He had already reported the loss of his firearm to the area chief and when a firearm was found with the appellant, he identified it as that belonging to him.

P.C. Benson Mongayo (PW4) of Kacheliba Police Station proceeded to Orolwa on 5th march, 2010 after being informed that a thief had been found with a gun. The appellant was handed over to him by the area chief. A gun and some beans were also handed to him and in the course of investigations took the firearm for ballistic examination. Later, he preferred the present charges against the appellant.

In his defence, the appellant denied the offences and contended that he was only told that he stole and had a gun. The learned trial magistrate considered the evidence against the appellant and concluded that the two alternative counts had been proved beyond reasonable doubt.

This court's consideration of the evidence reveals that although a gunshot was fired on the material night and on the following day the shop belonging to Khadija (PW1) was found broken and items stolen from therein, there was insufficient evidence to show and establish that the appellant was responsible for firing the gunshot and/or breaking and stealing from inside Khadija's shop.

It was apparent that Khadija knew the appellant in a negative manner. She alleged that he was a known stock thief. However, there was nothing to show that the appellant had previously been convicted of offences related to stock theft. It was quite obvious that the appellant was mentioned by Khadija because she had already formed a negative and biased opinion against him.

With regard to the alternative counts, there was insufficient and sketchy unreliable evidence to prove that the appellant was found in possession of a firearm and some kilograms of beans. The recovery of the said items from the appellant was also not proved. It was not known how the appellant was arrested. The chief who seemed to have effected the arrest and the elders to whom the appellant allegedly admitted the offences, were not called to testify and shed light on exactly why the appellant was arrested and charged.

In sum, the prosecution case against the appellant was not proved as required by law. Therefore, his

conviction by the learned trial magistrate was not proper and sound.

In any event, he was convicted on the alternative counts which were defective for duplicity (see, **Selimia Mbeu Owour & Another vs. Republic CR. APP. NO. 68/99 NBI**). This appeal is merited and is hereby allowed with the result that the appellant's conviction by the learned trial magistrate is hereby quashed and the sentence of four (4) years imprisonment on each of the alternative count is set aside. The appellant be released forthwith unless otherwise lawfully held.

[Delivered and signed this 24th day of May, 2012.]

**J.R. KARANJA.
JUDGE.**