



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
Criminal Appeal 76 of 2011

**JOHN WABWIRE OPESA .....1<sup>ST</sup> APPELLANT**

**JOHN OWUOR ONDAS.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Arising from the conviction and sentence of M.W. Njagi R.M. delivered on 14<sup>th</sup> July 2011 in Busia C.M.C.C.Case No.23 of 2011)**

**J U D G M E N T**

The appellants were charged with one count under the **Penal Code**. They were charged with **preparation to commit a felony** contrary to **Section 308(2)**. The particulars of the offence were that on 23<sup>rd</sup> October 2010 at Bumala Trading Centre in Busia County, the appellants, not being in their place of abode, were found with articles used in the course of robberies, namely imitations of AK47 rifle and pistol. Each appellant was further charged with being in **possession of an imitation of a firearm** contrary to **Section 34** of the **Firearms Act**. The particulars of the offence were that on 23<sup>rd</sup> October 2010, at Bumala Trading Centre, the appellants were found in possession of imitation firearms with intent to commit an offence of robbery. The 1<sup>st</sup> appellant was further charged with being in **possession of live ammunition** contrary to **Section 4(2)(a)** as read with **Section 4(3)(b)** of the **Firearms Act**. The particulars of the offence were that on 23<sup>rd</sup> October 2010 at Bumala Trading Centre, the 1<sup>st</sup> appellant was found in possession of four rounds of live ammunition without holding a firearm certificate. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the appellants were convicted on the 1<sup>st</sup> count of **preparation to commit a felony** and sentenced to serve five (5) years imprisonment. On the count of being in **possession of imitation firearm**, the appellants were sentenced to serve seven (7) years imprisonment. The 1<sup>st</sup> appellant was acquitted on the charge of being in possession of ammunition. The appellants were aggrieved by their conviction and sentence and duly filed their separate appeals to this court.

In their petitions of appeal, the appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of insufficient evidence adduced by prosecution

witnesses. In the case of the 1<sup>st</sup> appellant, he was aggrieved that he had been convicted after the trial magistrate had proceeded with the case in his absence. The 1<sup>st</sup> appellant took issue that he had been convicted before he had been given a chance to defend himself. On the part of the 2<sup>nd</sup> appellant, he was aggrieved that he had been convicted on the basis of an exhibit that was not found in his possession. The 1<sup>st</sup> appellant urged the court to order that he be re-tried while the 2<sup>nd</sup> appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that had been imposed on him.

At the hearing of the appeal, the two separate appeals that had been filed by the appellants, were consolidated and heard together as one. Both appellants made oral submission urging this court to allow their appeals on the ground that the prosecution had failed to adduce sufficient evidence to connect them with the crime. The 2<sup>nd</sup> appellant also presented to the court written submission in support of his appeal. On his part, Mr. Obiri for the State submitted that the prosecution had adduced sufficient evidence which proved the charges to the required standard of proof beyond any reasonable doubt. He urged the court to dismiss the appeals.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced by the prosecution witnesses so as to arrive at its own independent determination whether or not to uphold the conviction of the appellants. In doing so, the court must take into consideration the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any determination regarding to the demeanour of the witnesses(see **Njoroge vs. Republic [1987]KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution proved its case on the charges brought against the appellants to the required standard of proof beyond reasonable doubt.

What are the facts of this case? On 23<sup>rd</sup> October 2010 at about 7.00 a.m., while PW2 Corporal Joseph Ngaira was on duty at Bumala Police Patrol Base, he received information that there was a person who was carrying a sack with an item which appeared to be a gun. The informer gave the description of the person. He stated that the person was walking towards Busia direction accompanied by a woman. PW2 laid an ambush together with PW3 PC Evans Musioma and PC Koech. They managed to arrest the 1<sup>st</sup> appellant. At the time, the appellant was carrying a sack. The appellant and the woman accompanying him were escorted to Bumala Police Patrol Base where the sack was searched. Inside the sack, PW2 and PW3 found the following items: a homemade gun, 2 torches, a magazine of AK47 rifle, four live ammunition suitable for firing from an AK47, and a jungle jacket. The police interrogated the 1<sup>st</sup> appellant. According to PW2 and PW3, the 1<sup>st</sup> appellant told them that he had planned to carry out a robbery with the 2<sup>nd</sup> appellant. He then led PW2 and PW3 to the house of the 2<sup>nd</sup> appellant where an imitation pistol was allegedly recovered under a cushion of a seat. According to PW2 and PW3, they got the imitation pistol in the place that the 1<sup>st</sup> appellant indicated that they would find it. The 2<sup>nd</sup> appellant, who was found sleeping in the house, was arrested and taken to Busia police station where he was subsequently charged together with the 1<sup>st</sup> appellant.

The case was investigated by PW1 PC Michael Kipsang from Busia police station. He produced the items which were recovered as exhibits during trial. From the time the 1<sup>st</sup> appellant took plea, he declined to participate in the proceedings because he insisted that the woman he was arrested with should be brought to court. Each time the 1<sup>st</sup> appellant was brought to court during trial, he requested the court to excuse him from participating in the trial. The trial court granted his wish. It is therefore interesting that the 1<sup>st</sup> appellant is using the fact that the trial court allowed him to exercise his constitutional right not to be present during his trial as a ground of appeal.

When the 2<sup>nd</sup> appellant was put on his defence, he denied preparing to participate in any robbery. He also denied the evidence adduced by the prosecution witnesses to the effect that an imitation firearm was found in his possession.

This court has re-evaluated the facts of this case. It has also considered the submission made during the hearing of this appeal. The appellants were convicted of the charge of **preparing to commit a felony** contrary to **Section 308(2)** of the Penal Code. This Section provides as follows:

*“Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.”*

The appellants were charged with the offence of **preparation to commit a felony** which is an offence under **Section 308(1)** and not **Section 308(2)** of the Penal Code. The ingredients to establish an offence under **Section 308(1)** are not the same as the ingredients required to establish the offence under **Section 308(2)**. Under **Section 308(1)**, the prosecution is required to establish that the appellant was found with a dangerous or offensive weapon that indicate “that he was so armed with intent to commit any felony”. Under **Section 308(2)** the prosecution is required to establish that the appellant was found in possession of an article for use “in the course of or in connexion with any burglary, theft or cheating”.

In the considered opinion in this court, a charge under **Section 308(2)** is established if the prosecution establishes that the item found in possession of the accused, while outside his place of usual abode, is an article that is usually used in the course of or in connexion with the afore-mentioned crimes. An example of such an article maybe bolt cutters which may be used by burglars to cut padlocks or to cut burglar-proof grills. In the present appeal, it was clear that the prosecution confused the charge under **Section 308(1)** with the particulars of the charge under **Section 308(2)** of the **Penal Code**. The appellants were therefore convicted on a defective charge. This court asks itself if it could substitute the charge so as to accord with the correct particulars. But having carefully thought through the issue, it was clear that the appellants would be placed at a disadvantage because they would in effect have been convicted on a charge and particulars that they were not made aware of at the time they took plea. This would be in breach of their constitutional right to fair trial, and particularly the right to be informed of the charge with sufficient detail to answer it as provide under **Article 50(2)(b)** of the **Constitution**. In the premises therefore, the conviction of the appellants on a defective charge cannot stand. The appellants are thus acquitted of the charge that was brought against them purportedly under **Section 308(2)** of the **Penal Code**.

As regard the charges brought under **Section 34** of the **Firearms Act**, the said Section provides as follows:

*“(1)If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment for a term of a term not less than seven years but not exceeding fifteen years and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.*

*(2) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code.*

*(3) In this section, “imitation firearm” means anything which has the appearing of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not.”*

In the present appeal, the items which were referred to as an imitation AK47 rifle and imitation pistol were produced into evidence by the investigating officer. The said items were not examined by a ballistic expert to determine whether they qualified to be referred to as imitation firearms. The prosecution did not call a ballistic expert to establish that indeed the said articles found in possession of the appellants were imitation firearms. In the absence of the evidence of a ballistic expert to proof or establish that the articles found in possession of the appellants were indeed imitation firearms, the trial court erred in finding that the prosecution had established its case to the required standard of proof beyond any reasonable doubt.

That being the case, the prosecution failed to prove the charge that the appellants were found in possession of the imitation firearms to the required standard of proof. The prosecution did not discharge

the burden placed on it to establish the fact that indeed the appellants were found in possession of imitation firearms in accordance with the definition of the same as provided under **Section 34** of the **Firearms Act**.

The respective appeals filed by the appellants are therefore allowed. Their conviction by the trial court is quashed. The sentences imposed on them are set aside. The appellant are acquitted of the charges brought against them. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

**DATED AT BUSIA THIS 26<sup>TH</sup> DAY OF JULY 2012.**

**L. KIMARU**  
**J U D G E**