



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal 20 of 2011

CHACHA DANIEL CHACHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kehancha,

Hon. J.R. Ndururi in Criminal Case No. 729 of 2010 dated 2<sup>nd</sup> February, 2011)

The appellant, **Chacha Daniel Chacha** was charged with the offence of being in possession of ammunitions contrary to section 89 (i) of the **Penal Code** (Cap 63) Laws of Kenya. He is said to have committed the offence on 22<sup>nd</sup> May 2010 at Nyabikongori location in Kuria West District of the Nyanza Province. The appellant also faced a second count of being in possession of narcotic drugs contrary to section 3 (2) (a) as read with Section 2 (i) of the **Narcotic Drugs and Psychotropic Substances Act 1994**. He pleaded guilty to this second count and was convicted and sentenced on 28<sup>th</sup> May, 2010 to serve one year imprisonment by the SRM's court Kehancha.

The appellant pleaded not guilty to the first charge and was tried and convicted on 2<sup>nd</sup> February, 2011, he was sentenced to 5 years imprisonment. The appellant was dissatisfied with the conviction and sentence hence the present appeal.

The appeal sets out six grounds as follows:-

- 1. The learned magistrate erred in fact and in law in finding that the evidence of PW2 was sufficient to convict the appellant without any collaborating evidence.*
- 2. The learned magistrate erred in law and fact in failing to take into account the evidence of the appellant to the effect that PW2 was related to the appellant and that they had domestic differences which would have affected the reliability of the evidence tendered by PW2.*
- 3. The learned magistrate erred in law and fact in failing to take into account that the prosecution failed to call the police officers who are alleged to have recovered the ammunition so as to collaborate the evidence of PW2 who the appellant testified had family differences with.*
- 4. The learned magistrate erred in accepting PW1 to produce evidence which ought to have been produced by the expert who examined the ammunition and give the accused an opportunity to cross-*

*examine him and thus denied the appellant the right to a fair trial.*

*5. The learned magistrate misdirected himself when he concluded that the evidence of PW2 was sufficient to prove that the ammunition were recovered from the appellant despite the fact that the said PW2 testified that he was in the company of police officers from the provincial administration and who were never called to collaborate this evidence.*

*6. The learned magistrate erred in law and fact in not seeking an explanation from the prosecution as to why the right of the accused/appellant to be produced in court within 24 hours as stipulated by the law, had been breached having been arrested on 22<sup>nd</sup> May 2010 and brought to court on 28<sup>th</sup> May 2010 and thus denied him his right to a fair trial.*

The appeal came for hearing before me on 8<sup>th</sup> November, 2011. **Mr. Osoro** for the appellant argued the following four grounds: that the evidence of PW2 was not corroborated; that the police officers who recovered the ammunition were not called to testify; that the ballistic expert's report was not properly produced in court; and, that the court ignored the sour familial relationship between the PW2 and the appellant which could have led to a frame up of the appellant. **Mr. Osoro** abandoned the 6<sup>th</sup> ground of appeal, namely that the appellant was held beyond the statutory period.

The appeal was opposed by the state through learned counsel **Mr. Mutai**. He urged the court to uphold the conviction as it was based on sound evidence. He discounted the need for corroboration stating that it was not necessary once the court was convinced that the evidence of a single witness was credible.

This is a first appeal. As such the court is under duty to re-evaluate the evidence afresh and come to an independent conclusion. This duty was explained in the case of **Okeno –vs- Republic (1972) E.A 32** and has subsequently been restated in numerous authorities.

The case before the trial court was brief. The appellant was arrested on suspicion of being in possession of a firearm and ammunition on a tip off by a member of the public who had earlier been robbed. A search was conducted by the assistant chief who later testified as PW2 and two administrative police officers from Kebaroti chief's camp **APC Fred Marwa** and **APC Nyaga**. They recovered 500 grams of cannabis and 15 rounds of 7.62 ammunition. The appellant was arrested and later charged. The ammunition was sent to the Government ballistics examiner in Nairobi who examined them and filed a report confirming that the same was ammunition within the definition in the **Fire Arms Act**.

The conviction of the appellant was secured through the evidence tendered by PW2, the assistant chief of Nyabikongori sub-location. He told the court that on 19<sup>th</sup> May 2010 he received information that a robbery had occurred at the kiosk of one **Chacha Mogendi**. He reported to the OCS, Kehancha Police Station and the DC Kuria East who sent police officers to the scene. No arrests were made on that day but on 21<sup>st</sup> May 2010 the chief received information that the appellant was one of the robbers.

On 22<sup>nd</sup> May 2010, PW2 in the company of administration police officers, went to the appellant's home where they found him searched the house and recovered cannabis and the ammunition. It is this testimony that the court found credible. On the other hand, the appellant denied being found with the ammunition. He told the court that it was a frame up. He further told the court that there existed bad blood between him and PW2. PW2 had married the appellant's sister and the marriage failed. They had disagreed over dowry which PW2 collected. PW2 in cross-examination admitted that the appellant was his brother-in-law but denied that there was any earlier disagreement between them over dowry.

In submissions before this court, **Mr. Osoro** for the appellant insisted that PW2's testimony was not corroborated by any other witness. **Mr. Mutai** for the respondent submitted that corroboration was not necessary as the court could, and did rightly convict on uncorroborated evidence if the single witness was found to be credible.

From my analysis of the proceedings before the trial court on the 5<sup>th</sup> January 2011, it is evident that PW2

testified at length and narrated to the court the events leading to the arrest of the appellant. He detailed the search in the appellant's house and the recovery of the ammunition. He stated that he was in the company of **APC Fred Mango** and **APC Nyaga**. He also testified that he knew the appellant both as his subject and as his brother-in-law. The appellant raised the issue of their relationship and a prior quarrel in cross-examination. He also raised it in his defence. The court in analyzing the evidence however did not consider the issue of the sour relations and alleged frame up. The court stated *"On the other hand, the accused person alleged that he had prior quarrel with PW2 and PW2 had threatened to fix him"*. In the final analysis the court found that *"PW2 was very consistent in his narration of the events that led to the recovery of the ammunition. On the other hand, the accused person's testimony was unsworn and uncorroborated. It had very little probative value, and must be rejected"*.

It is evident that the court summarily rejected the appellant's testimony, found PW2's testimony to be credible and convicted on the basis of that testimony. I find that to the extent that the appellant had raised an issue which would affect the credibility of PW2's testimony, the court ought not to have convicted on that testimony alone in the absence of corroboration.

The prosecution had indicted to the trial court that it would call two other witnesses, the police officers who along with PW2 arrested the appellant. It failed to do so. It gave a reason that *"PC Lijodi had left service while APC Nyaga was transferred to North Eastern Province and efforts to trace him for bonding have been fruitless"*. It cannot be true that a police officer in service cannot be traced and bonded to aid in the administration of justice. The court ought to have rejected such an excuse. The upshot of what I have stated is that conviction of the appellant on the basis of the single witness account was not safe. In the circumstances of this case, and owing to the testimony of the defence as to the sour relationship between the appellant and PW2, that evidence required corroboration.

For the foregoing reasons, I find that the conviction of the appellant on the basis of the uncorroborated evidence was not safe. Accordingly I quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**

**JUDGE**

**In the presence of:**

Chacha Daniel Chacha :appellant – (present/absent)

..... :for respondent – (present/absent)

Edwin Mongare :court clerk

**R. LAGAT-KORIR**

**JUDGE**