



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**MISC. CRIMINAL APPEAL NO. 8 OF 2009.**

**TOM KIMUNYI SIKUKU.....APPLICANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

**(Being an appeal against the conviction and sentence by Mrs. W A Juma Chief Magistrate Kitale  
Criminal case no.528 of 2006 )**

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

1. This is an appeal against the conviction and sentence of the 1<sup>st</sup> and 2<sup>nd</sup> appellant by Mrs. W. A. Juma - Chief Magistrate on 8<sup>th</sup> May, 2008. The appellants were charged with three offences to wit; attempted robbery with violence contrary to sections 257 (2) of the Penal Code, the second count was being in possession of a firearm without a firearm certificate, contrary to section 4 (2) of the firearm Act and count three was being in possession of ammunition without a firearm certificate contrary to sections 4 (2) (2) (a) of the firearm Act. After a full trial both the appellant was found guilty of the 2<sup>nd</sup> and 3<sup>rd</sup> count, they were convicted and sentenced to serve seven (7) years for each of the offences and the sentences were to run concurrently.
2. Being aggrieved by the conviction and sentence, the appellant, **Tom Kimunyi Shikuku** has appealed. In the petition of appeal which is further supported by the appellant's written submissions, he has faulted the decision by the learned trial magistrate on the grounds that the evidence by the prosecution witnesses was full of material contradictions. Those contradictions should have been resolved in his favor. Further the appellant contended that the court relied on evidence of a young girl who was not called as a witness. The young girl was said to have shown the Police Officers where the firearm was hidden on the ceiling of her father's house. The court assumed what the young girl would have told the court which was prejudicial to the appellant.
3. Moreover, the serial number on the firearm had been erased on the report that was produced by another witness who was not the firearm examiner. **PW1** could not explain why the report that was produced in court contained an error that was purportedly erased, and why the copy of report that was furnished to the defence counsel was not erased. The decision by the trial court was further challenged because the firearm that was produced did not have a serial number at all. It was not recovered from the appellant and the no evidence was adduced to prove to court that the house from which the firearm was

recovered belonged to the appellant.

4. This appeal was opposed; by the Learned State Counsel Miss. **Bartoo**, submitted that the appellant was convicted based on sound evidence of recovery of a firearm from a house in his compound. The firearm was tested and according to the ballistic report that was produced by PW1, the cartridges that were found at the scene of attempted robbery were fired from the firearm. It was also certified that the firearm that was recovered from the possession of the appellant was a riffle, it was ammunition as described in the Firearm Act and the appellant was not a licensed holder.

5. This being a first appeal, this court is mandated by law to re-evaluate the entire evidence and judgment by the trial court and arrive at its own independent determination on whether to uphold the conviction or to allow the appeal. The evidence that led to the conviction of the appellant was given by a total of nine (9) prosecution witnesses. Briefly stated, on the night of 24<sup>th</sup> and 25<sup>th</sup> January, 2006, at about 2.00 a.m. **Fredrick Nyongesa, PW1**, testified that while he was sleeping, he was ordered to open his house, he hesitated but within no time the assailants broke the door of his house and it opened. He was ordered to light a lamp which he did. He was then ordered to sit down and produce money. He told the attackers that he had no money and at that moment his brother came in response to the distress call and the assailants ran away.

6. As PW2 and his brother stood there pondering at what to do, the assailants returned and fired three shots, they burnt PW1'S bicycle but when neighbors came, they assailants run away. PW2 said he was able to recognize the 1<sup>st</sup> appellant and he later identified him at an identification parade. According to PW1, the 1<sup>st</sup> appellant named the co-accused. **Edward Juma Makokha PW3** also testified that he was attacked by the same assailants in the same manner as PW2. PW3 testified after he was attacked and ordered to produce money, PW2 came and the assailants ran away and as they were left discussing the attack, the assailant came back and fired two shots. According to PW3, it was his house that was attacked and not that of PW2. Although I will revisit this issue later, in the analysis of the evidence, I find the trial court did not resolve this contradiction on whose house was attacked and where the spent cartridges were found.

7. Further evidence was given by **Lindsey Kipkemoi, PW2** who was attached to the Forensic laboratory, CID Headquarters Nairobi, on behalf of his colleague who examined the firearm. During cross-examination it was apparent that there was an alteration on the report that he produced. PW1 could not offer an explanation why the report that was furnished to the defence was not altered. Moreover, he confirmed that the riffle that he produced in court did not have a serial number as it had rubbed off due to rust.

8. This issue was raised by the defence, in the submissions and in my view the trial court did not seem to have resolved it satisfactorily. The other set of evidence was by the **Zebedayo Shikuku, PW4** who is also Police Reservist. He testified that he met with the 1<sup>st</sup> appellant and they walked together to the chief's office. That is where the 1<sup>st</sup> appellant was interrogated and he led the police to his home where they recovered an AK 47 riffle. They recovered the ammunition from the roof of a house and one person who was inside the house attempted to run away but he was arrested. He is the 2<sup>nd</sup> appellant. During cross-examination, he told the trial court that they were shown the gun by a young girl; he recorded the serial number 31666 which is also different from the serial number which was indicated in the report by PW1.

9. The evidence by **PC Nicholas Kibet, PW7** is probably what led the trial magistrate arrive at the conclusion that the appellant was guilty of the two counts. He testified how they went to the home of the

appellant and they were shown by a small girl a grass thatched house where they recovered from the roof an AK 47 riffle. According to PW7, they also took the young girl to the police station where she recorded a statement although she did not give evidence in court. During cross-examination, PW7 said that the appellant told the police that the house where the firearm was recovered belonged to his son who was not charged with the offence. The evidence by **PW8 IP David Kipter** is of no evidential value because the complainants said they recognized the appellant who was a neighbour.

**10.** I agree with the trial court that since the complainants knew and recognized the assailants, an identification parade was of no use. After evaluating the above evidence, the learned trial magistrate found there was no evidence to support the first count of attempted robbery with violence but found the appellant guilty of the 2<sup>nd</sup> and 3<sup>rd</sup> count. I have gone through the evidence and the judgment by the trial court, I find there were fundamental flaws in the evidence by the prosecution witness. There were contradictions which were not resolved by the trial court. Most importantly there is a gap in the evidence on the identification of the firearm. The description by PW1's report and the evidence of PW3 were at variance. Equally important, was the gap left by the prosecution witnesses who said the house where the gun was recovered belonged to the appellant while during cross-examination PW7 said the house belonged to the appellant's son who was not charged in court.

**11.** Finally crucial evidence by the girl who led the police to recover the firearm was not available to the court. In the upshot I find the conviction unsafe, the gaps in evidence and the contradictions should have been resolved in favor of the appellant. I allow the appeal and set aside the conviction and sentence. This finding should apply also to **Francis Situma Kakai** who was similarly convicted and sentenced. I also order that his sentence and conviction be set aside unless the appellant and **Francis Situma Kakai** are otherwise lawfully held, they are to be released from lawful custody forthwith.

**Judgment read, signed and delivered on 11<sup>th</sup> January, 2011.**

**M. K. KOOME.**

**JUDGE.**