



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 43 OF 2009

LOPEY AKURUKITARAPPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An Appeal from original conviction and sentence in Criminal Case No.2520 of 2009 by T. Nzyoki – SRM

delivered on 28th July, 2009 at Lodwar)

J U D G M E N T.

1. The appellant **Lopey Akurikitar** was charged with two other persons with the offence of being in possession of firearms without a certificate in force, contrary to section 4(2) (a) as read with section 4 (3) (a) of the Firearms Act (Cap 114) of the Laws of Kenya. The appellant was tried before the Senior Resident Magistrate, Lodwar. The appellant and his co accused persons were all convicted and sentenced to serve a term of seven (7) years imprisonment in respect of the 1st count. The appellant and his co accused persons were discharged under section 35 (a) of the Penal Code in respect of the 2nd count.
2. Being aggrieved by the conviction and sentence, the appellant has appealed on the grounds that the two firearms which were produced as exhibits were recovered from a house belonging to a woman, the 3rd co accused person and not from the appellant. Secondly, there was no dusting of the fingerprints that was carried out on the firearms so as to connect the ownership or handling with the appellant. The appellant further challenged the conviction on the grounds that no proper investigations were carried out to establish that the appellant had anything to do with the recovered firearms. Moreover, it is not possible for 4 people to sleep in a single manyatta which is traditionally a reserve for women and children at night. Lastly, in the defence by appellant that he was arrested while on the way to the hospital was not taken into consideration.
3. This appeal was opposed by the state; the learned state counsel **Ms. Bartoo** submitted that the conviction was based on the evidence of two Assistant chiefs, the Deputy OCS Lokichoggio who arrested the appellant with his two co-accused persons and APC Kosgei Kimeli who accompanied the assistant chiefs during an operation when the appellant and co-accused persons were arrested and two firearms were found in the same manyatta where the four were sleeping. The firearms which were recovered in the same manyatta where the appellant and co-accused persons were sleeping were examined by a ballistic expert and were confirmed they were firearms. The appellant and the co-accused persons had no certificates. The learned trial magistrate considered the defence by appellant and found it lacking in credibility in the face of prosecution's evidence. The

state counsel urged the court to sustain the conviction and sentence.

4. This being a first appeal, I have the duty to re-evaluate the evidence before the trial court and arrive at my own independent determination on whether or not to allow the appeal. I hereby summarize the evidence albeit briefly. The prosecution's case was supported by the evidence of six (6) witnesses; Stephano Lotabu, PW2, who was also the assistant chief of Lokorin sub location in Sangot Location testified that there was a spate of highway robberies between the 5th April, 2009 to 11th April, 2009 along the Kakuma – Lokichoggio highway. PW2 also received some information that some two men were found armed with firearms and they were staying in the house of the 3rd accused person.

5. On the morning of 14th April, 2009, PW2 in the company of Meshack Lokare PW3, who was also the assistant chief Songot sub location, Lokichoggio location with the help of APC William Sangaire, PW5, they raided a manyatta at Lomidat village. The manyatta belonging to the 3rd accused person. They arrested the appellant alongside the 2nd and the 3rd accused person. A 4th person who was sleeping alongside the appellant and the other two accused persons managed to escape. PW2, PW3 and PW5 searched the manyatta and found 2 firearms AK 47 rifle, FM rifle, 8 rounds of ammunitions and two magazines.

6. The firearms and ammunitions were submitted for examination and **inspector Alex Mudindi Mwandawilo**, (PW1), examined the firearms and ammunitions. He produced a report and according to that report, the AK47 rifle and FM rifle were firearms within the definition of the Firearms Act (Cap 114) of the Laws of Kenya. The other evidence which connected the appellant with the offence was by Acting Inspector **Michael Donga**, PW4, the Deputy OCS, Lokichoggio police station. He testified that on 14th April, 2009 at about 5.20 a.m. he received a call that highway robbers were arrested at Lomidat village by AP officers who needed reinforcement. PW2 also informed inspector Donga that they had discovered 2 rifles. He took possessions of the rifles and ammunition, prepared the memo form and forwarded them for ballistic examination. He also charged the appellant and co-accused persons with the offence of being in illegal possession of firearms.

7. The appellant and the co-accused persons were put on their defence. The appellant gave unsworn statement of defence and did not call any witness. The appellant told the court that he was arrested on his way to the hospital and nothing was recovered from him. In his arguments in support of this appeal, the appellant maintained that he had slept at somebody's home on the way to hospital. The chief of the area carried out a swop and he was arrested for a crime he had nothing to do with. The learned trial magistrate evaluated the prosecution's evidence alongside the appellant's defence and found it lacking credibility and thus convicted the appellant.

8. I have re-evaluated the above evidence, I have noted that PW2 testified that he was informed about 2 armed Highway robbers who were terrorizing motorist near Lomidat area along Kakuma-Lokichoggio highway. PW2 was also informed that the two robbers were selling donkey meat to residents of Lomidat and they were staying in the house of the 3rd accused person. The evidence of PW3 also confirmed that the report he received was to the effect that there were 2 strangers seen at Lomidat area and they were armed with firearms. It is also noteworthy that during the arrest one assailant escaped. The appellant gave a defence that he was arrested while on the way to the hospital.

9. Taking his defence into account and considering that the robbers who were sighted were 2 in number. Moreover, the defence offered by the other 2 co-accused persons is diametrically different from the appellant's defence. PW2 knew the 3rd accused person as the owner of the house in which all the witnesses said they found 3 men sleeping and the 3rd suspect managed to escape during the time of the arrest. For this reason, I entertain doubts in my mind whether the appellant was arrested with the firearms or whether he was an innocent passerby who spent a night in that manyatta while on his way to hospital. In my humble opinion, the two strangers who were seen in the area could have been the appellant or the assailant who escaped.

10. Due to this doubt, the prosecution should have dusted the firearms for fingerprints in order to nail the appellant with their possession. It is also evident that the firearms were not dusted for fingerprinting. One of the assailants escaped. This reinforces the doubts in my mind as to whether it is the appellant or the assailant who escaped who was party to the firearms that were discovered in the house of the 3rd accused person. For the above reasons, I find merit in this appeal, which I allow and quash the conviction and set aside the sentence of 7 years imprisonment imposed on the appellant. Unless the appellant is otherwise lawfully held, he is set at liberty.

Judgment read and signed this 20th day of May, 2011.

M. KOOME.

JUDGE.