



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 139 OF 2009

(Consolidated with Criminal Appeal No.140 of 2009)

1. AHMED RAMADHAN FUNDI
2.TOM MBOYA MUSYOKI.....APPELLANTS
-VS-
REPUBLIC.....STATE

JUDGEMENT

AHMED RAMADHAN FUNDI(1st appellant) and **TOM MBOYA MUSYOKI**(2nd appellant) were convicted on four counts which comprised the following;-

I. Preparation to commit a felony contrary to section 308 (1) Penal Code that on 29th day of May 2007 at Timboni trading Centre in Malindi District jointly with others not before the court, were found armed with a dangerous weapon, namely an AK 47 Rifle Serial Number 310029/03319 with a magazine loaded with 30 rounds of ammunition of calibre 7.62mm special, in circumstances that indicated they intended to commit a felony, namely ROBBERY WITH VIOLENCE.

II. Being in possession of Public Stores contrary to section 344(2) of the Penal Code, that on 28th day of May 2007 at Timboni in Watatmu Location, Malindi, jointly with others not before the court were found in possession of two light blue police shirts, three navy blue trousers, three black berets, one police head badge, 2 force coloured belts, 2 peated caps with white covers similar to those used by traffic police, two red lanyards with one whistle, two rain coats(dark blue) and one pair of handcuffs, the property of Kenya Police, reason being suspected to have been stolen or unlawfully obtained.

III. Being in possession of firearm without a certificate contrary to section 4 (2) as read with section 4 (30) of the Firearms Act(Cap 114) that on 28th day of May 2007 at Timboni in Watamu location, jointly with others not before the court, were found being in possession of an AK 47 Rifle Serial Number 310029/03319 without a firearm certificate.

IV. Being in possession of ammunition without a firearm certificate contrary to section 4 (2) as read with 4 (3) of the Firearms Act(Cap 114) that on 28th day of May 2007 at Timboni in Watamu, jointly with others not before court, were found in possession of 30(Thirty) rounds of 7.62mm special and five rounds of 7.62mm ammunition without a firearm certificate.

The appellants denied the charges, and prosecution called a total of seven witnesses to prove its case while appellants were the only defence witnesses.

The prosecution case was that on 28/05/07 at about 4.00Pm **PC JOHNSTONE THIKE**(Pw 4) was

informed by the OCS that there was a suspicious motor vehicle being driven within Watamu area – the registration number was given as KAX 562 B “L” Touring, white in colour. The OCS instructed three officers to take a firearm each, and proceeded to Gede-Watamu Road in a police land rover. When the officers got to **TIMBONI** stage, they spotted the said motor vehicle and tried to block it using the police motor vehicle(which they were in and which was being driven by **PC KYALO**) by driving past the said motor vehicle then stopping. The said motor vehicle also stopped. The Police Officers jumped out of their motor vehicle and the OCS ordered its occupants to surrender. There were four occupants – two at the front seat and two at the rear. The OCS arrested the two who were in the front seat while the ones at the rear took to their heels. Pw 4 conducted a quick search in the motor vehicle and found two travelling bags - one was green in colour and contained an AK 47 Rifles Serial Number 310029. The rifle had another number that is 03319. There was also the magazine attached to the rifle with 30 rounds of ammunition. Then there were five other rounds of ammunition in a polythene bag which also contained three navy blue trousers similar to the ones worn by police officers, two dark blue rain coats similar to the ones worn by police, three black berets, (with one having the original police head badge), two peat caps(similar to those worn by traffic police, two white belts, (similar to those worn by traffic police), two police force coloured belts, two lanyards similar to those issued to administration police officers, one lanyard which had a whistle attached to it, one pair of handcuffs(similar to the ones used by security guards) one spring file with stickers guard have different number and letters similar to the number used in motor vehicle number plates and can therefore be used to stick on the registration plate of a motor vehicle to read a different registration, one bottle of glue, one bottle of steering wheel transmission fluid, one insulating tape(black in colour), two pairs of black shoes, two pairs of slippers, two torches, two head caps, one cap similar to the type worn by Muslim faithfuls, one mat similar to the one used by Muslim faithfuls when praying, one white kikoi, one jungle green coloured bag. The prayer mat was inside the boot but not in the bag. The arrested persons were escorted to Watamu Police Station. Photographs of the recovered motor vehicle, were taken and were produced in court.

On cross-examination Pw 4 denied suggestions by 1st appellant that he called the latter from the roadside to come and see the exhibits in the boot because by the time he called the accuseds to the boot, the accuseds were already under arrest. The recovered vehicle Toyota Corolla L Touring registration KAX 562B was produced in court as exhibits – photographs taken of the same motor vehicle were also produced. Pw 6 **MATTHEW NGUYO** was among the officers who gave chase to the aforementioned motor vehicle, and his evidence corroborates that of Pw 4 regarding the arrest of the two appellants and how their colleagues fled. He also confirmed recovering of a green bag which contained the very items mentioned by Pw 4. He was able to identify the same motor vehicle as the one they found appellants, in giving its registration as KAX 562B. (**PC ROBINSON MAINA**(Pw 7) took photographs at the scene capturing the recovered motor vehicle as well as the items mentioned by Pw 4 and Pw 6 **PC PETER MWANGI**(Pw 5) who arrived at the scene after arrests had been made an inventory of the recovered goods – that record was produced in court as exhibits. The recovered firearm and thirty rounds of ammunition were forwarded to the firearms examiner.

JOHNSTONE MUSYOKI(Pw 3) whose report (exhibit 6) confirmed that the AK 47 Rifle was a Soviet copy assault rifle 7.62mm calibre Serial number 3120029 with a detachable magazine(which was also produced as exhibit). The Magazine had a capacity of 30 rounds of ammunition when fully loaded, it was in good working condition. The AK Rifle The assault rifle was in good mechanical condition, complete with all its component parts except the bullstock which was missing, it was capable of discharging ammunition.

The thirty rounds of military rifle of ammunition in calibre 7.62 X 39mm and are used in assault rifles like the one recovered and submitted for examination. Eight rounds were picked at random and successfully test fired from the said rifle.

The motor vehicle was identified by its owner, **RAEL OMBWORO** Pw 1 who produced documents of ownership. He had hired out the said motor vehicle to **JOHNSON KENGA** on 25/05/07 and produced an agreement to confirm that – it was hired for one day and was to be returned the next day. The witness also produced a copy of the hirer`s identity card and driving licence. The motor vehicle was not returned as per the agreement and when he rang **JOHNSON**, he said there would be a delay for one day. However it

was not returned and on 28/05/07, Pw 1 got a call from a friend who is also in the car hire business informing him that his motor vehicle was at the police station. He identified the motor vehicle in court and also from the photographs produced as the same one which police recovered from the appellants. Pw 1 never saw **JOHNSON KENGA** again, and only learnt that he had passed away.

SIMON MERIKI GONDI (Pw 2) is a taxi driver in Malindi, having been employed by Pw 1. He knew **JOHNSON KENGA** as a fellow taxi driver and he is the one who introduced **JOHNSON KENGA** (hereinafter referred to as **KENGA**) to his boss and **KENGA** became a regular customer who would hire the motorvehicle in question from his boss.

Appellant gave sworn testimony, 1st appellant`s (Ahmed) contention was that he was on his way to WATAMU and was just waiting for a matatu at GEDE junction. He had stepped by the roadside to speak on the phone when police officers approached and begun questioning him. They checked his phone to see what calls he had made, searched him, then telephoned two vehicles, after ten minutes. He was interrogated once more, then 2nd appellant was brought from one of the vehicles police had come in and he was questioned about 1st appellant but he denied that he knew him. He ended up being charged and maintains that police lied by claiming that they arrested him in TIMBONI TRADING CENTRE. Upon cross-examination 1st appellant maintained that he was framed up by police and that the DCIO tried to obtain a bribe from him, although he admitted that the DCIO was not present during his arrest and he had never met the DCIO before his arrest. All the police officers were described by 1st appellant as being untruthful and he did not have anything to do with the exhibits recovered at the scene.

2nd appellant`s (Tom) evidence is that he had left Watamu for Gongoni using motor vehicle KAE 390S, (semi-trailer) which was loaded with salt and was actually on his way back to Malindi when his motor vehicle developed gear box problem at Gede. He left the motor vehicle near a petrol station at Gede, and went to his residence in Gede. While waiting with a friend one **DAVID OPONDO**, just 40 metres to the tarmac road leading to Watamu, they were approached by a motor vehicle whose occupants asked them for directions. Police gave chase to that vehicle as they fired in the air while one police officer remained in the motor vehicle. This particular police officer begun interrogating 2nd appellant and his colleague, demanding that they identify the persons who had just fled. A crowd gathered and police requested him to assist them drive the abandoned motor vehicle to the police station. Upon getting to the police station, the DCIO arrested him, saying he resembled someone called **JOHN** whom he had previously arrested for killing a police officer. He was eventually charged in Criminal Case 864/07, Criminal 865/07, Criminal case 864/07 and the one involving this matter. He too denied being found with the recovered items. He insists this is a case of mistaken identity as his name is not **JOHN NDUNDA** which DCIO kept referring.

2nd appellant called **DAVID OPONDO** as his witness- the latter said he had been in company of 2nd appellant and that those who were in the abandoned motor vehicle all fled as police gave chase. Basically his evidence is that 2nd appellant was not found in the motor vehicle and that police asked him for his identification because he (2nd appellant) appeared to be the only stranger there. It was his testimony that police asked 2nd appellant to drive the abandoned motor vehicle to the police station. The defence witness maintained that no one was arrested at the scene in Timboni area, and that its police officers who arrived at the scene with the bag, a rifle and police stores. He also confirmed that he was serving a jail term for being in possession of stolen goods. On request by 2nd appellant, **PC DAVID KOROS** produced an OB from Watamu Police Station for 28th May 2007 entry no. 27 which related to this case the prisoners were booked in and one was a **KAMBA** male adult **JOHN MBOYA MUSYOKI**.

The Trial Magistrate noted that 1st appellant conceded during cross-examination that the **DCIO** was not present during arrest and there was no reasonable explanation as to why police would just pick him out from the blues as he walked along the road and charge him alongside 2nd appellant seemed rather farfetched. As regards the name of the police station appearing on the charge sheet as Malindi Police Station – the Trial Magistrate held that it was not a fatal defect. The Trial Magistrate in her judgement considered the issues raised by the appellants especially the 2nd appellants contention that police were

telling lies as all they did was to question him regarding the identity of the occupants of the fleeing motor vehicle and to drive it to the police station. The Trial Magistrate held that there was no reason why the police officers would request 2nd appellant to assist in driving the recovered motor vehicle to the police station then turn around to frame a charge against him.

Regarding 2nd appellant's identity, she observed that 2nd appellant is charged in court as **TOM MBOYA MUSYOKA** and the documents he produced as DEX 1-4, namely photocopies of the police abstract for loss of his driving licence, receipt for the Kshs.50/- for the same, application for duplicate driving licence and photo copy of road safety pass been the names TOM MBOYA MUSYOKA. As regards the OB extract produced in court by PC DAVID KOROS which booked 2nd appellant as **JOHN MBOYA MUSYOKA, PC PETER KETER** (Pw 5) explained that 2nd appellant was known by different names. The Trial Magistrate further observed that 2nd appellant was physically identified by the arresting officers and the issue of use of different names could not on its own lead to the conclusion of mistaken identity.

She noted that evidence of the police officers from the scene of arrest that is Pw 4 and Pw 6 identified the 2nd appellant as one of the people arrested from the motor vehicle in question and that the DCIO was not even present during the arrest and that 1st appellant confirmed this on cross-examination.

The issue regarding delay in police custody was also considered by the Trial Magistrate and she held that this was not raised at the preliminary stage so as to enable the court carry out an inquiry – it only came up as part of defence evidence. The credibility of the defence witness (**OPONDO**) was doubted as he gave an unlikely scenario of being in the company of 2nd appellant when the police officers appeared, yet police opted to only ask 2nd appellant about the identity of the occupants of the fleeing motor vehicle and not ask DW 1. The Trial Magistrate also noted this witness contradicted the evidence of 2nd appellant on whether the occupants of the motor vehicle had stopped to ask for directions because according to 2nd appellant, the motor vehicle occupants asked for directions whilst Dw 1 said they did not ask for directions.

Their defences were thus rejected and they were convicted as charged. They now contest both conviction and sentence on the following grounds which are considered together with the grounds filed by 2nd appellant.

- (a) The evidence of Pw 4, Pw 5, Pw 6 and Pw 7 was flared and contradicting as to exactly what happened at the scene of crime.
- (b) Upon arrest nothing linking him to the offence, so as to incriminate appellant was recovered.
- (c) No reason was given as to why the prepared inventory recovery report was not signed by appellants.
- (d) The recovered motor vehicle was not dusted for finger prints.
- (e) Their defences were improperly rejected.
- (f) Key prosecution witnesses were not summoned to testify and it was necessary to call an independent witness

Both appellants filed written submissions, 1st appellant wonders why out of five police officers who were in the chase car only two were called to testify. He argues that Pw 4 and Pw 6 gave contradictory evidence because whereas one said their car stopped 20 metres ahead of the police car, the other said the car stopped in the middle of the road and they urge court to be guided by section 163 (1) (c) of the

Evidence Act, in rejecting the evidence of the two police officers and resolving this purported contradiction in favour of the appellants. 1st appellant argues that the prosecution case was founded on lies and no investigations were carried out as the recovered items were not dusted to establish the link between the appellants and the items. They also wonder which place it was that they were preparing to commit the felony of robbery since no name was given. They argue that in any event the preparation to commit a felony was not even proved, as the items allegedly recovered from them have many uses including:-

1. Being transported for sale
2. To kill
3. To be thrown away

So all that the trial magistrate relied on to convict was mere suspicion. As far as appellants are concerned, possession means having in one's hand or person, and not just being in the presence of these items, and all the police officers confirmed that the exhibits were not found in them personally, when a body search was carried out. It is also argued that the Trial Magistrate erred in finding that the DCIO was not at the scene yet Pw 6 confirmed at page 48 that the DCIO arrived at the scene 15-20 minutes later after the appellants had been apprehended and the appellants were taken to the police station after the DCIO's arrival.

2nd appellant submitted that his rights, under the Constitution were violated because he was held in police custody for 13 days that is from 28th May 2007 and that this offended the provisions of section 72 (3) (b) of the Constitution of Kenya. He cited the case of **PAUL MWANGI MURINGA VR Criminal Appeal NO. 35 of 2006.**

He also submits that there was a fatal misdirection by the Trial Magistrate in holding that there was no mistake regarding his identity pointing out that whereas Pw 4's testimony was that PC **MWASUWA** arrested the driver of the motor vehicle, PW 6 (**MATTHEW NGUYO**) evidence is that he is the one who arrested the 2nd appellant. He wonders why the said **MWASIWA** was not called as a witness, and urges this court that in the face of such contradiction regarding who arrested him, the inference to be drawn is that he was not arrested at the scene. He also pokes holes at the Trial Magistrate's findings that there was no way in which the police could have requested him to drive the recovered car quoting from the statement of (Pw 4) PC **THIKE** (Dexhibit 1) where he states.

"I escorted one prisoner who gave me the names as TOM MBOYA MUSYO, and he was the one driving the car to Watamu Police Station....."

He further contends that even then Pw 4's evidence is based on pure lies regarding the person he booked because the OB abstract from Watamu Station the OB abstract for 28/05/07 shows the names entered as **JOHN MBOYA MUSYOKA**, which he says are very different from **TOM MBOYA MUSYOKI**. He argues that the trial court closed its eyes and ears to the truth and convicted him yet he was innocent. As far as he is concerned, his arrest was engineered by the **DCIO** and that is why he directed the police officers to record their statements in Malindi rather than Watamu and urges court to infer mala fides in that action.

The appeal is opposed, and **MR KEMO** submitted on behalf of the State that the court should consider the evidence of Pw 6 on cross-examination by 1st accused at page 15, the OCS said:-

"We separated you from accused 2 to enable us investigate. Accused was taken to Watamu".

And that Pw 6 confirmed in his evidence found at page 58 that 2nd appellant was escorted to Watamu Police whilst 1st appellant was escorted to Malindi Police Station so he could not have been booked at Watamu. He further points out that the evidence clearly shows that appellants were arrested with all the items produced by Pw 6, and that in the course of his investigations, Pw 4 found out that 2nd appellant was using different names, so he cannot claim that there is a mistake in his identity, and that police did not arrest a ghost, but a person who had the exhibits. **MR KEMO** argues that owing to the nature of the

recovery, the DCIO cannot be faulted with taking over investigations.

MR KEMO further argues that evidence was direct, the incident took place at 4.00Pm in broad daylight and if the appellant had a problem with the DCIO, then Pw 4 was a very independent witness who participated in surveillance, arrest and recovery and could not have framed up the appellants.

From the evidence, there is no doubt that the motor vehicle in question registration number KAX 562B belonged to **RAEL OMBWORO**, was hired by **JOHNSON KENGA**, was never returned on the due date, and ended up in a police chase recovered in Watamu where firearms and other police stores were recovered.

The issues raised by both appellants revolve around;-

(a) Arrest

(b) Recovering/Possession/taking of finger prints (c) Presence/absence of DCIO – contradiction in the evidence of Pw 4 and Pw 6 and the significance of the DCIO's role.

I confirm that Pw 4's evidence is that **PC MWARISWA** arrested the driver of the motor vehicle (who is 2nd appellant) and the OCS arrested the man at the front seat (that is the passenger seat). I think the issue regarding whether the appellants were arrested jointly or separately or why only one ended up at Watamu Police Station gets a clear explanation in the answer by the witness.

***“Yes I saw the motor vehicle you were in when your motor vehicle was ahead of us. Yes I escorted accused 2 to Watamu Police Station. I left you under the arrest of the OCS*”**

Pw 4 was also categorical that he did not call 2nd appellant from the roadside to come and see the exhibits in the boot, saying that by the time he called the 2nd appellant to the boot, he was already under arrest. Further that the person he (Pw 4) escorted to the police station in the police landrover, was the same person who had been driving the escaping car. The then OCS Watamu Police Station sergeant **MATTHEW NGUYO** (Pw 6) described how the group of police officers gave chase to the fleeing motor vehicle.

“The ones we arrested were still in process of getting out of the motor vehicle. I arrested the driver, who is the 2nd accused”

Much later in his evidence at page 58 he stated

“The 2nd accused was escorted to Watamu Police Station. The 1st accused was escorted to Malindi Police Station”

Of course there is a contradiction regarding who arrested 2nd appellant but that contradiction is not fatal because there were not any other two people who were arrested on that day except the two appellants and that the person who was driving the fleeing motor vehicle was the 2nd appellant and the reason why he alone ended up being booked at Watamu is not because they were arrested at different times, rather, it is because they were separated and booked at two different police stations and there is no contradiction regarding the physical identity of the person who was arrested and what his role was. There is no reason therefore to resolve that contradiction in favour of the appellants. Pw 6 denied that police requested the 2nd appellant to drive the motor to the police station.

The 2nd appellant is mixing up issues and Pw 4 evidence in cross-examination must be read in context, and begins from his identification of the recovered vehicle then he says;-

“The other one (i.e accused) and the motor vehicle were taken to the police station. The 1st accused (identified) is the suspect who was seated at the front passenger seat, The 2nd accused (identified) was the one driver the motor vehicle and the one/escorted to Watamu Police Station.....”

I have no doubt in my mind that this was in reference to the recovered motor vehicle and 2nd appellant's role during the chase and not as he was being escorted to the police station. My finding is that the appellants were arrested together in the motor vehicle, but taken to separate police stations which is why statements ended up being recorded at Malindi Police Station. **PW 5 PC MWINYI** evidence about 1st appellant being at the scene is because he arrived **AFTER** arrest and action taken and one suspect had been taken away already.

The other matter of concern to the appellants is the role of the **DCIO** – his presence or absence at the scene seems to hold great significance especially to 2nd appellant who says the **DCIO** mistook him for a man named **JOHN NDUNDA** who had earlier killed a police officer. This he says is why he was booked in at the Police Station as **JOHN MBOYA MUSYOKA** despite having all his documents in the names **TOM MBOYA MUSYOKI**. Pw 7 PC **PETER MWANGI** on cross-examination explains the entry in the OB regarding the names **JOHN MBOYA MUSYOKA** as referring to 2nd appellant, saying 2nd appellant uses different names but that they are made in reference to the same person that is 2nd appellant. I think whether the **DCIO** was to testify or not, one thing is clear, he was not in the team which gave chase to the fleeing motor vehicle, he arrived at the scene almost 15-20minutes after the appellants had been apprehended and the exhibits recovered.

He was not even involved in the arrest of either appellants, and whether he failed to testify or whether he referred to 2nd appellant as JOHN, does not alter the fact of 2nd appellant's physical identity and physical presence in the fleeing motor vehicle as consistently confirmed by PW 4 and PW 6.

Then there is the issue regarding recovery/possession/finger prints. The recovered motor vehicle was not dusted for finger prints – whether it was an omission by police or because it had been touched by too many people as to make it difficult to carry out any significant dusting, the truth is, the finger prints had not been dusted. All the prosecution witnesses were consistent that the police stores were found inside the said motor vehicle boot – the same motor vehicle which appellants were found in.

Certainly the items were not in their physical possession in the sense that they were not found holding those recovered items, nor were they on their bodies. But the items were under their control, in the very motor vehicle which was fleeing away from police – if the items were going to be sold or disposed off – then why the flight – that is why police concluded that the appellants had constructive possession of the items for purposes of preparing to commit a felony. I think finger prints would only have been significant if the motor vehicle had been abandoned without a soul – in this situation some of the occupants were captured right within the motor vehicle and failure to dust the fingerprints was not fatal. To buttress this, I refer to the definition of **POSSESSION** under chapter II of the PENAL CODE which addresses the issue of interpretation, at section 4 (a);-

“be in possession of or have in possession includes not only having in one`s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place(whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person”

(b) “If there are two or more persons and any one or more of them, with the knowledge and consent of the rest has or have anything in his or their custody or possession of each and all of them,

The situation in which the items were found in relation to both appellants fits in squarely with the definition referred to. The Trial Magistrate therefore made a safe conclusion regarding the charges: The appellants defences were duly considered and properly rejected as not making a dent in the evidence offered by prosecution.

There is the final issue regarding violation of the appellant's constitutional rights. This seems to be the appellant's trump card, even being played close to their chest. Just like they had done in the trial court, it did not form a ground in either the 1st appellant's amended grounds of appeal, or in the 2nd appellants

grounds of appeal. It was only introduced by appellants in the submissions. This offends section 350(2) of the Criminal Procedure Code which provides inter alia that an appellant shall not be permitted at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal. I think there is good reason for that provision, it is intended to avoid a situation where an appellant ambushes the prosecution – in this case for instance, if such an issue had formed one of the grounds of appeal, then it would have given prosecution a chance to respond and explain the reason for delay and probably require the investigating office to swear an affidavit to that effect. To use this ground as the last ace when it was not included in the ground is this improper.

But even if for the sake of supremacy of the Constitution, one were to consider the provisions of section 72 (3) (b) of the former constitution – then yes, 13 days would definitely be offending that provision, but the remedy does not lie in an acquittal – it lies in pursuing for compensation as against the State, under provision of section 72 (6) of the Constitution which was applicable at the time and appellants are at liberty to pursue that route.

The upshot is that I find no reason whatsoever to interfere with the findings of the trial court and my conclusion is that the convictions were safe and I uphold them. The sentences were within the legal provisions and I confirm them. The appeals are dismissed.

Delivered and dated this 6 day of July 2011 at Malindi

**H A OMONDI
JUDGE**