



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Appeal 63 of 2006

PAUL OTIENO OLOO APPELLANT

VERSUS

REPUBLIC PROSECUTOR

JUDGEMENT

This is an appeal against the judgement of the Eldoret Chief Magistrate Mrs. F. N. Muchemi in Eld. CMCC Criminal Case No. 8802 of 2002 delivered on 1st August, 2006. The Appeal is against both conviction and sentence.

The Appellant was charged in the Chief Magistrate's Court on 15th October, 2002 together with 3 others, namely Moses Thuo, Renson Mwangi and Joseph Juma with two Counts. The Counts in the Charge Sheet dated 14th October, 2002 were:-

1. Stealing from a locked motor vehicle contrary to Section 279 (G) of the Penal Code.
2. Being in possession of prohibited weapons contrary to Section 4 (3) of the Firearms Act, Chapter 114, Laws of Kenya

The four accused persons, pleaded not guilty to both charges. The case came for hearing from time to time until 4th March, 2003. On the said date the Prosecution applied to substitute the Charge Sheet with a view of introducing a third Count. Counsel for the Third Accused did not object. The other accused person were not represented on the said date. The Appellant was Accused No.1. The Court allowed the substitution. As a result of the substitution there were now three Counts as follows:

1. Stealing from a locked motor vehicle contrary to Section 279 (G) of the Penal Code.
2. Preparation to commit a felony contrary to Section 308 of the Penal Code.
3. Being in possession of prohibited weapons contrary to Section 4 (3) (a) of the Firearms Act, Chapter 114, Laws of Kenya.

The 2nd Accused Moses Thuo Karanja jumped bail during the trial and before the close of prosecution case. The 3rd and 4th Accused persons were acquitted under the provisions of Section 210 of the Criminal Procedure Code on 16th June, 2006. The 1st Accused who is the present Appellant was put on his defence and he was found guilty and convicted. He was sentenced to four (4) years imprisonment on 1st August,

2006.

The aforesaid 1st Accused in the case in the Court below being aggrieved lodged this Appeal on 21st August, 2006 through the firm of B. I. Otieno & Company, Advocates. He raised the following grounds in Memorandum of Appeal:-

1. That the Learned Chief Magistrate erred in law and in fact by convicting the appellant on a wrong Charge Sheet in disregard to the substituted Charge Sheet.
2. That the Learned Chief Magistrate erred in law and in fact by relying on an untested sworn evidence of PW 3 in total disregard to the provisions of the Criminal Procedure Code.
3. That the Learned Chief Magistrate erred in law and in fact by convicting the Appellant on uncorroborated evidence of PW 4.
4. That the Learned Chief Magistrate erred in law and in fact by disregarding the evidence of the Appellant DW 2 and submissions of Counsel.
5. That the Learned Chief Magistrate erred in law and in fact by meting harsh sentence on the Appellant.

Before the hearing of the Appeal, the Appellant declared that he would prosecute the Appeal personally hence without legal representation. He filed written submissions which I must say was well thought out and written. The Republic was represented by Senior State Counsel Ms. Mary Oundo. The State opposed the Appeal. In the written submissions the Appellant purportedly included what he referred to as Amended Grounds of Appeal. There was no application for amendment of the Memorandum of Appeal and therefore no leave obtained. I have disregarded the same.

In the first ground of Appeal in the Memorandum of Appeal the Appellant contended that the Learned Chief Magistrate erred in law and in fact by convicting the Appellant on a wrong Charge Sheet in disregard to the substituted Charge Sheet.

In her Judgement, the Learned Chief Magistrate had these to say regarding Count 1 which was that of stealing from a locked motor vehicle contrary to Section 279 (G) of the Penal Code:-

“

In respect to Count 1 of stealing from a locked motor vehicle, the prosecution required to prove the act of stealing itself against the Accused. In this case there is no evidence of stealing from the locked motor vehicle. Recent possession of the stolen gun does not apply since the Accused was found with the gun four (4) months later. For this charge therefore, I find that the same has not been proved as required against the accused Paul Otieno Oloo.

Taking all into consideration including the defence, I acquit the Accused of this Count under Section 210 CPC

The Appellant was therefore acquitted of Count 1 of the Charge Sheet. Count 2 of the substituted Charge Sheet and which substitution took place on 4th March, 2003 was the charge of preparation to commit a felony contrary to Section 308 (1) of the Penal Code. However, it is clear from the Judgement that the Learned Chief Magistrate proceeded with the trial and delivered her Judgement on the basis that Count 2 was in respect of being in possession of prohibited weapons contrary to Section 4 (3) (a) of the Firearms Act Chapter 114, Laws of Kenya. She had this to say at J3:-

“

On the charge of being in possession of a firearm, the Court has evidence of PW 3 Enock Muindi and PW4 P.C. James Tinego who were Eldoret Flying Squad Officers in the year 2002

I therefore find that the prosecution have proved Count II against the accused beyond any reasonable doubt. I find the accused Paul Otieno of being in possession of a Firearm and convict him accordingly under Section 215 of the Penal Code. Right of Appeal.”

In the substituted Charge Sheet and which was now the only valid, proper and relevant Charge Sheet before the Court, Count 2 was not in respect of possession of prohibited weapons contrary to Section 4 (3) of the Firearms Act, Laws of Kenya. This Count was in fact Count No. 3 of the substituted Charge Sheet and not Count 2.

This Court would have deemed that the Learned Chief Magistrate had merely made an inadvertent error in respect of the numbering of the Counts in the Charge Sheet. And this would have been the case had she considered, dealt with and made a finding on the “3rd Count” – the true Count No. 2 in respect of preparation to commit a felony contrary to Section 308 (1) of the Penal Code.

The Learned Chief Magistrate did not make any reference to the true Count No. 2 aforesaid and she did not make any finding and/or determination in respect thereof. As a result, I do hereby find that indeed the Learned Chief Magistrate convicted the Appellant on a wrong Charge Sheet, namely, the earlier Charge Sheet which was substituted on 4th March, 2003.

I therefore do hereby hold that the Appellant was convicted on the wrong Charge Sheet and one which had been abandoned by the prosecution and with leave of the Court substituted. The said former Charge Sheet was invalid and could not be proceeded upon in the trial. The Appellant could also not be convicted on such incompetent and invalid Charge Sheet.

The effect of the foregoing was that the trial was flawed resulting into a mistrial. The conviction of the Appellant and subsequent sentence are illegal, null and void. The Appellant had pleaded not guilty to the three Counts in the substituted Charge Sheet yet he was convicted on an abandoned and replaced one. In the light of the foregoing, there is no need for this Court to delve into and/or consider the other four grounds of appeal.

At this Court’s own instance and in exercise of the Court’s jurisdiction, power and discretion under Section 354 of the Criminal Procedure Code, I considered whether this is an appropriate case for re-trial. The Appellant was arraigned in Court on 15th October, 2002 which is over 4½ years ago. If there is an order for retrial, there is no guarantee that re-trial will take a shorter period. In my view a re-trial in the circumstances of this case would violate the Appellant’s right to a fair and speedy trial as provided by the Constitution. The error was by the trial Court and the Appellant had no hand in it. I see no reason why he should undergo another long period of anxiety and burden in all ways. He dutifully submitted himself to the lawful process of meeting the charges against him and it would be unfair, unjust and unconscionable to suffer the rigours of a new trial for reasons not attributable to him.

I have also considered that the Appellant has been illegally incarcerated and denied his liberty for the last 10 months.

I therefore do hereby allow the Appeal herein, quash the conviction and set aside the sentence. The Appellant shall be released forthwith from prison custody unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE