



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 540 of 2003

(From original conviction and sentence in Criminal Case No. 20046 of 2001 of the Chief Magistrate's Court at Makadara - Miss B. Oyaró)

IRUNGU CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

IRUNGU CHEGE, the Appellant herein was charged in the lower court with the following three offences:

- (i) Preparation to commit a felony, contrary to Section 308(1) of the penal Code.***
- (ii) Being in possession of firearm without firearm certificate contrary to Section 4(2) (b) of the Firearms act and***
- (iii). Being in possession of ammunition without Firearms Certificate contrary to Section 4(2) (b) of the Firearms Act.***

The Appellant was convicted on all the counts and sentenced as follows:

Count 1 – Appellant to serve three (3) years imprisonment and receive two (2) strokes of the cane.

Count II - Fined Kshs.20,000/- in default to serve two (2) years imprisonment.

Count III - Fined Kshs.20,000/- in default to serve two (2) years imprisonment.

The aforesaid sentences were ordered to run concurrently. Being dissatisfied with the conviction and sentence the Appellant lodged this appeal.

The court gave notice to the Appellant that should the court find that the conviction was proper, it would interfere with the sentence as regards Counts II and III and enhance it to at least the minimum required under the law of seven (7)years. Having understood the caution, the Appellant nonetheless opted to pursue the appeal.

In brief, the facts of the prosecution case were that on 5/10/01 at around 6.40p.m. P.W. 1, P.W. 2 and P.W. 4, all Police Officers from Shauri Moyo police Station were on the beat when they spotted three suspicious characters whom they approached and challenged them to stop. When they attempted to escape, they were stopped at gun point and ordered to lie down. On conducting a thorough search on them, the said Police officers recovered a U.s. Army Revolver – Exhibit 1 and 6 rounds of ammunition – Exhibit 2. According to the said Police officers, the said exhibits were recovered from the Appellant. The appellant could not produce any valid firearms and ammunition certificate. The three were then arrested and taken to Shauri Moyo Police Station and later, the Appellant alone was charged with the aforesaid offences. The said witnesses could not say or explain what happened to the other suspects. P.W. 3, Firearms Examiner confirmed that Exhibit 1 was a firearm as defined in the Firearms Act and that Exhibit 2 were live ammunition.

The Appellant denied committing the offences for which he had been charged. He stated in his defence that on the day in question he was walking past “Burma Market” when he saw four people ahead of him and three others approaching from the opposite direction. The three then drew out their guns and told the four to surrender. Out of the four people, two of them managed to escape, while two were arrested. One of the three people stopped the Appellant and claimed that he was together with the other suspects. When one of them alleged that he looked like a thief – the accused introduced himself as a “**matatu conductor**” On conducting a search on him they took away his Kshs.730/-.

The three people later identified themselves as Police Officers and later recovered a gun from one of the suspects. Though they were taken to Shauri Moyo Police Station, the Appellant never saw the other two suspects.

In his petition of appeal, the Appellant faults his conviction on prosecution case that was not proved beyond reasonable doubt and that his defence was not given due consideration by the trial Magistrate. In support of this grounds of appeal, the Appellant tendered written submissions that I have duly considered.

Mrs.Kagiri, learned counsel for the state opposed the appeal. She submitted that the evidence on record is strong. P.W. 1, P.W. 2 and P.W 4 testified that a firearm was recovered on the person of the Appellant on the material day.

That the evidence of these witnesses was consistent and detailed. The defence advanced by the Appellant did not shake the prosecution case. Finally counsel submitted that the sentence imposed on firearm related charges was illegal. The law requires that upon conviction of a firearms related offence, the offender should be sentenced to a minimum of Seven (7) years imprisonment. In the instant case, the Appellant was sentenced to a fine of Kshs.20,000/- in default 2 years imprisonment which was clearly illegal. Learned State counsel therefore urged me to substitute the sentence imposed with the legal sentence should I find that the conviction was proper.

I have carefully re-evaluated the evidence adduced before the lower court bearing in mind that I neither saw nor heard the witnesses as they testified and giving due allowance. See **OKENO – VS- REPUBLIC (1972) E.A. 32.**

The Appellant does not dispute that on the day in question P.W. 1, P.W. 2 & P.W. 4 stopped and searched some people from whom they recovered a pistol and six rounds of ammunition. However, it is the case of the Appellant that at the time of his arrest at the scene, he was not in the company of suspicious characters whom the police conducted a search on. Neither were the exhibits recovered from him. Though the learned trial magistrate relied heavily on the evidence of these three police witnesses and concluded that their evidence was consistent and corroborated, there are certain aspects of their evidence that casts some doubts as to their credibility. First and foremost, it is in evidence that the three police officers spotted three suspicious characters whom they confronted, ordered them to stop and upon searching them recovered the exhibits tendered in court and later on escorted them to Shauri Moyo Police Station. Indeed it is on the basis of the circumstances of the appellant’s purported arrest as aforesaid that a joint charge of preparation to commit a felony was preferred. The question that arises is what happened to the other suspects that were arrested alongside the Appellant? In his testimony on this issue P.W. 1 states:

“ I don’t know what has happened to the other suspects.....”

As for P.W. 2 he merely testified as follows:-

“.....Thereafter we escorted them to Shauri Moyo police Station where the accused was charged for the present offence....”

It is noteworthy that P.W. 2 made no reference at all as to what happened to the other suspects allegedly arrested with the Appellant.

As for P.W. 4 he testified thus,

“.....accused was later taken to Shauri Moyo Police Station where he was later charged for the present offence....”

P.W. 4 too does not make any reference as to what happened to the other two suspects and why they were not charged alongside the Appellant. In his defence the Appellant testified to the circumstances of his arrest, the fact that he witnessed the recovery of the alleged gun being removed from one of the two suspects and though after being jointly detained in the police cells, the two were mysteriously released. It is also noteworthy that the Appellant having been arrested on 5th October, 2001 it was not until 11th October, 2001 that he was arraigned in court. All these facts put together raises some suspicion. The learned trial magistrate should have sought for an explanation as to why the other two weren’t charged with the Appellant if it was true that the Appellant was in the team of the three suspicious characters. Is it not plausible that the Police Officers framed the Appellant with the case having taken his Kshs.730/- as a means of shutting him up. That possibility looms large. Why should the charge sheet read

“.....jointly with others not before court....”

Yet the police had the “others” in their custody whom they mysteriously led go. In my view the court should have sought for explanation and not just conclude that:

“the court finds as a fact that the accused was found with a revolver, 6 rounds of ammunition which he and his friends hand wanted to use to commit a felony.....”

In my view a reasonable tribunal directing its mind properly on this particular aspect of the matter should have demanded to know as to what happened to the other two suspects arrested together with the Appellant (as alleged) and referred to by the Trial magistrate as the Appellant’s friend.

With regard to the firearms related offences, P.W. 1, P.W. 2 and P.W. 4 maintained in their testimonies that the pistol and 6 rounds of ammunition was found on the person of the Appellant. However the Appellant maintains that the said items were recovered from another person who had no connection whatsoever with the Appellant. It is on record that the Appellant demanded for the production of the Occurrence Book from Shauri Moyo Police Station in respect of entries for 5th October 2001. The Occurrence Book was duly produced. However, and surprisingly, the record does not indicate the contents of the said Occurrence Book as it relates to the Appellant. The Appellant sought the production of the Occurrence Book to ostensibly show whether when booked in the Police Cells, he was suspected of being in possession of the pistol and the six rounds of ammunition. The learned trial magistrate, in my view, ought to have made a note as to what was contained in the Occurrence Book as it related to the Appellant and the incident. Failure by the trial magistrate to make such note as regards the contents of Occurrence Book or failure to make any reference to the same in his judgment was unfortunate. At this stage I am unable to tell whether the contents were favourable to the Appellant or not. Thus, there is doubt raised. As in every criminal case, any doubt raised must be necessity be resolved in favour of the accused. The Appellant herein will have that benefit.

It is also poignant that according to the evidence tendered there were members of the public at the scene where the Appellant was arrested. Indeed P.W. 4 testified as follows on the issue:

“.....There were many members of public that were present.....”

Yet none of the members of the public was summoned to testify. In the absence of such evidence, the evidence of P.W. 1, P.W. 2 and P.W. 4 who were all Police Officers remained uncorroborated and self-serving. The learned trial magistrate ought not to have held the evidence as corroborated in the absence of any independent witness such as a member of the public. It is not beyond the realm of possibility that these witnesses could have ganged up to frame the Appellant fearing that he may expose them for having taken his Kshs.730/-. Further, I note contradictions in the evidence of the said witnesses as regards where the pistol was allegedly recovered on the person of the Appellant. Whereas P.W. 1 stated

“.....The revolver was on the right hip of the accused.....”

P.W. 2 on his part testified:

“.....we recovered the revolver Exhibit 1 on the trouser of the accused.....”

He did not elaborate on which part of the trouser. However P.W. 4 stated:-

.....The revolver was at your right side of your trouser.....”

Had the Police bothered to call members of the public, as witnesses, perhaps these contradictions would have been resolved and provided the necessary corroboration. As stated in the case of **RAMSON AHMED – VS – REX (1955) EACA VOL. 22 AT PAGE 395**

“.....It is the burden of the prosecution to avail all material evidence to the court to enable the court to arrive at a just decision. The prosecution must summon all material witnesses or present the court with all facts even those whose evidence may have been unfavourable for it.....”

See also **BUKENYA – VS- UGANDA (1956) E.A. 549**. It is possible that the members of the public if called to testify would have given evidence that would have been adverse to the prosecution case? The learned trial magistrate should have been alive to such possibility.

Having carefully analysed the evidence tendered vis-à-vis the grounds of appeal filed herein and the submissions in support and in opposition to the appeal, I am satisfied that the conviction of the Appellant was not safe. It cannot be allowed to stand. Consequently I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be set free forthwith unless he is otherwise lawfully held;

Dated this 16th day of January, 2006

MAKHANDIA

JUDGE