



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 398 & 448 of 2004

DAVID KIHARA NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 448 OF 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 691 of 2002of the Senior Resident Magistrate’s Court at Kikuyu (M.W. Murage -PM)

MICHAEL KINUTHIA MUHANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

DAVID KIHARA NYAGA, hereinafter referred to as the 1st Appellant and **MICHAEL KINUTHIA MUHANGO**, 2nd Appellant were together with two others convicted of **PREPARATION TO COMMIT A FELONY** contrary to **Section 308(1)** of the Penal Code. The 1st Appellant faced two counts alone of **BEING IN POSSESSION OF A FIREARM** contrary to **Section 4(1) (a)** of **Firearms Act** and **BEING IN POSSESSION OF AMMUNITION** contrary to **Section 4(1)(a)** of the same Act. The 2nd Appellant and the other two faced count 4 of **CONSORTING WITH A PERSON IN POSSESSION OF A FIREARM** contrary to **Section 89(2)** of the **Penal Code**. The 1st Appellant was convicted of counts 1, 2 and 3 and sentenced to 7 years imprisonment, 10 years imprisonment and 10 years imprisonment respectively with prison terms running concurrently. The 2nd Appellant was convicted of counts 1 and 4 and sentenced to 7 years imprisonment and 5 years imprisonment respectively with prison terms running concurrently.

The 1st Appellant has raised three grounds of appeal in his amended petition which are; one that no

tangible evidence was adduced by the prosecution to support the charges, two that his defence was not given due consideration and three that the sentence imposed against him was harsh and excessive.

The 2nd Appellant relied only on one ground of appeal in which he submitted orally, which was that the prosecution failed to prove the case against him beyond any reasonable doubt.

The facts of the prosecution case was that PW1 and PW2, acting on information, knocked at the door of a house at Riruta. The 1st Appellant opened for them. They immediately searched the 1st Appellant and recovered a tokalov pistol with five rounds of ammunition. They found three others inside the house including the 2nd Appellant. They searched them and recovered nothing. PW3 was the firearms examiner who tested the firearm and ammunition and found them to be firearms under the Firearm Act. The 1st Appellant in his sworn defence said that he was arrested while ferrying illicit brew (changaa) in a wheelbarrow. That he took the police to house of his co-accused who was also arrested together with the other co-accused. All their houses were also searched. That police demanded Kshs.20,000/- which he was unable to raise and so he was charged.

The 2nd Appellant in his sworn defence said that the 2nd accused in the case who was his cousin went to his house and requested him to sleep in his house and went in search of his wife. That two days later IP MUU, who had been with him in Police College, in company of other police officers, knocked at the 2nd accused's door. It was at night. He opened. He was questioned whether he dealt with changaa. He was led to his house which was also searched. That he, his co-accused and another person were taken to the police station. He denied the offence.

I have carefully analyzed and re-evaluated the entire evidence adduced before the trial court bearing in mind that I neither saw nor heard the witnesses and giving due allowance.

The appeal was opposed.

MRS. GAKOBO learned counsel for the State submitted that the State was supporting both the convictions and sentences in the case. Learned counsel submitted that the 1st Appellant, after opening the door to his house for PW1 and PW2, was searched and found to have a pistol inside his trouser waist band. That the 2nd Appellant and the co-accused gave no reasonable explanations as to why they were in that house and so they were all charged with preparing to commit a felony. Counsel submitted that the evidence of recovery adduced by PW1 and PW2 was direct and reliable.

On sentence, learned counsel supported that the sentences imposed against the two Appellants. Learned counsel however did not support the three years probation sentence imposed by the trial magistrate on the Appellant's co-accused terming the sentence illegal.

It is true that the basis of the convictions entered against the 1st Appellant was recovery of a firearm with five rounds of ammunition from the right side waist band of his trouser. The 1st Appellant in his oral submission challenged the conviction terming it based on hearsay on grounds that PW1 and PW2 said that they acted on information received from a person not called as a witness.

The information leading to PW1 and PW2 knocking on the door of a house where they found both Appellants with their co-accused was inadmissible evidence and ought not to have been recorded by the court. However, recording the said inadmissible evidence has not prejudiced the Appellants in any way since it was not the basis of the conviction. The evidence by PW1 and PW2 that a pistol was recovered from the person of the 1st Appellant was direct evidence and was therefore admissible. Upon recovery an inventory was made which both Appellants and the co-accused signed to acknowledge the recovery. The learned trial magistrate believed both witnesses that they were truthful and that their evidence that they recovered the gun with the ammunition from the 1st Appellant was true.

The 1st Appellant has denied being found with the pistol and ammunition. That is a bare denial and I find

that it neither shook nor dislodged the strong evidence adduced by the prosecution. The evidence was very clear. The 1st Appellant had the two exhibits in his possession. He had no firearms certificate allowing him to have such items. The conviction entered against the 1st Appellant in respect of counts 2 and 3 was proper and I uphold the same.

As for the first count of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**, the learned trial magistrate concluded that the charge was proved because the Appellants did not:

“...give any explanation of their presence in that house. Accused 1 was found with a loaded pistol. The only inference one can make is that they were up to something. The circumstances of their arrest indicate that they were out for a mission and given that accused one was found with a pistol, I am satisfied that they were preparing to commit a felony”.

Under **Section 308(1)** the crime of preparing to commit a felony is committed by being;

“found armed with any dangerous or offensive weapon in circumstances that indicate he was so armed with intent to commit any felony”

In the instant case, the evidence is clear that the Appellants and their co-accused were found inside a house. It is not clear what they were doing in that house since the police officer who found them did not say. However, it is clear that the house belonged to one of them. These were not circumstances that would lead to an inference that the Appellants were armed with intent to commit a felony. In any event, the 1st Appellant alone was the one found with the loaded pistol. The pistol was concealed. The prosecution did not adduce any evidence to prove that the 2nd Appellant and his co-accused were aware that the 1st Appellant had possession of the loaded pistol. See **MWAURA & OTHERS vs. REPUBLIC 1973 EA 373, MUTHIORI vs. REPUBLIC 1981 KLR 468.**

In respect of the **preparation to commit a felony** charge the same cannot be sustained. The convictions entered against both Appellants in respect of this count are quashed and the respective sentences set aside. On the charges of **possession of the Firearm and ammunition without a certificate**, the evidence is clear that the 1st Appellant was found in actual possession of the two items. He had no certificate to have them. The conviction entered in both counts 2 and 3 are safe and are upheld. On the sentence of 10 years, the 1st Appellant was a first offender. The 1st Appellant should have been given credit for that fact. The sentence of 10 years was rather harsh in the circumstances. I will set it aside and in substitution sentence, the 1st Appellant to seven years imprisonment in each of the two counts with prison terms running concurrently.

In the charge against the 2nd Appellant of **consorting with a person in possession of Firearm** contrary to **Section 89(2)** of the **Penal Code** the charge is committed where+ the accused is found in company of a person in possession of a firearm in circumstances which raise a reasonable presumption that he intends to act or has recently acted with such other person in a manner or for a purpose prejudicial to public order. The evidence is clear that both Appellants were in a house belonging to one of their co-accused. The circumstances in which they were found would not justify an inference that the 2nd Appellant intended to act or had recently acted with the 1st Appellant in a manner or a purpose prejudicial to public order. Such a presumption would not be reasonable in absence of any evidence that would lead to a conclusion that there was an intention to act against public order. The learned trial magistrate's finding was not based on any evidence but was only inference which I would say was unfounded. The conviction was unsafe and therefore I quash the same and set aside the sentence imposed against the 2nd Appellant.

The upshot of this appeal is that the 2nd Appellant's appeal against both conviction and sentence in counts 1 and 4 are allowed. He should be set free unless he is otherwise lawfully held.

The appeal by the 1st Appellant against conviction and sentence in count 1 is allowed and the conviction quashed and sentence set aside.

The appeal by 1st Appellant against conviction in counts 2 and 3 fails and is dismissed. The appeal against sentence in both counts is allowed in part, and the sentence reduced to 7 years imprisonment in each count to run concurrently.

Those are the orders of this court.

Dated at Nairobi this 22nd day of March 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mrs. Gakobo for the State

CC: Huka

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LESIIT, J.

JUDGE