



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 340 , 341 & 342 of 2002

(From original conviction and sentence of the Chief Magistrate’s Court at Nakuru in

Criminal Case No. 245 of 2001 – S. Muketi [S.R.M.]

SAMUEL NDUNGU GITAU.....1<sup>ST</sup> APPELLANT

WYCLIFFE MUNGA NJOROGE.....2<sup>ND</sup> APPELLANT

JOHN WANYOIKE KAMAU.....3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants Samuel Ndungu Gitau (*hereinafter referred to as the 1<sup>st</sup> appellant*), Wycliffe Munga Njoroge (*hereinafter referred to as the 2<sup>nd</sup> appellant*) and John Wanyoike Kamau (*hereinafter referred to as the 3<sup>rd</sup> appellant*) were charged with two others who were however acquitted with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. They were also charged with two counts of being found in possession of firearms and ammunitions without firearm certificates contrary to **Section 4(2)(a) as read with Section 4(3)(a) of the Firearm Act**. The particulars of the offence were that on the 12<sup>th</sup> of January 2001 near Wakarega Hotel along Nakuru-Nairobi Highway, the appellants were jointly found in possession of two homemade guns and six rounds of 7.62mm ammunition without a firearm certificate. The appellants were also charged with preparation to commit a felony contrary to **Section 308(1)(a) of the Penal Code**. The particulars of the offence were that on the 12<sup>th</sup> of January 2001 near Wakarega Hotel along Nakuru-Nairobi Highway, the appellants were jointly found armed with dangerous weapons namely two homemade guns, six rounds of ammunition, two Somali swords, three torches, two caps, a pair of black gloves, a yellow paper bag and a small green bag with intent to commit a felony namely robbery with violence along Nakuru-Nairobi Highway. The appellants pleaded not guilty to the charges and after a full trial they were found guilty of the two counts of being found in possession of Firearms and ammunition without firearm certificates and the one count of preparation to commit a felony. The appellants were however acquitted on the two counts of robbery with violence. They were each sentenced to serve seven years imprisonment on the count of being found with the two homemade guns and each sentenced to serve three years imprisonment on the charge of preparation to commit a felony. The sentences were ordered to run consecutively. The appellants were aggrieved by their conviction and sentence and each filed a separate appeal to this court. The three separate appeals were consolidated and heard as one by this court.

The appellants presented more or less similar grounds of appeal challenging the decision of the trial magistrate in convicting them. They were aggrieved that they had been convicted by the trial magistrate based on insufficient and contradictory evidence of the prosecution witnesses. The appellants were particularly aggrieved that the trial magistrate had relied on the evidence of PW3, PW9 and PW12 to convict them, the evidence of which they were of the view was full of contradiction. They were further aggrieved that evidence was adduced by the prosecution that some of the weapons were allegedly recovered in the house of the 1<sup>st</sup> appellant yet no inventory was presented to court to prove that the house of the said appellant had been searched and the said weapons recovered. The appellants were aggrieved that the trial magistrate had not considered the defence which they had offered before arriving at the said decision convicting them.

At the hearing of the appeals, the 1<sup>st</sup> and 2<sup>nd</sup> appellant with the leave of the court presented to this court written submissions in support of their appeal. They urged this court to allow their appeals. The 3<sup>rd</sup> appellant made oral submissions urging this court to allow his appeal. Mr Koech, learned state counsel made submissions supporting both the conviction and the sentences imposed upon the appellants. He submitted that there was overwhelming evidence to support the charges that were brought against the appellants. He urged this court to dismiss the appeals.

Before addressing the issues raised on this appeal it is imperative that the facts of this case be set out, albeit briefly. On the 12<sup>th</sup> of January 2001 at about 9.00 a.m. PW3 James Kariuki Mwaura a taxi driver was at his place of work. PW3 usually parked his motor vehicle registration number KJY 892 at a place called Yorkstar. He testified that three men came and asked him if they could hire him to ferry them to a place called Nyama Choma. PW3 agreed to take the three men to Nyama Choma at an agreed price of Kshs 1,500/=. PW3 testified that the 3<sup>rd</sup> appellant was carrying a yellow paper bag, while the 2<sup>nd</sup> appellant was carrying a green bag. While on the way, they were stopped by the police and ordered to lie down. PW3 testified that when the police searched the paper bag and the green bag they found guns inside them. He was arrested and taken to the police station where he was detained for four days and later released.

PW9 Police Constable Ibrahim Nzwire and PW12 Police Constable Morris Otieno testified that they were on patrol on the 12<sup>th</sup> of January 2001 near the Stem Hotel when they saw a motor vehicle which was carrying more passengers than is provided by the law. It was about 5.00p.m. They stopped the motor vehicle and ordered the occupants who were six in number to come out of the motor vehicle. PW9 and PW12 searched the motor vehicle and recovered two homemade guns, a pair of black gloves, two hats and a sock inside of which they found six 7.62 mm caliber bullets. These items were found inside the two bags which were in possession of the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants.

PW9 and PW12 arrested all the occupants of the motor vehicle who included all the appellants in this case. PW11 Donald Mboyo examined the two homemade guns, test fired them and confirmed that they were firearms within the meaning of the **Firearm Act**. He testified that the two homemade guns were able to fire the ammunition that were found in possession of the appellants. When the appellants were put on their defence, all the appellants admitted that they were in the taxi belonging to PW3 when they were arrested by the police, but they denied that the items which were found in the motor vehicle which included the two homemade guns and ammunition belonged to them.

This being a first appeal, this court is mandated to reconsider and to reexamine the evidence adduced before the trial magistrate's court and to reach its own independent determination whether or not to uphold the conviction of the appellants. In reaching its decision, this court is required to put in mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comments as to the demeanour of the witnesses (*See Okeno -vs- Republic [1972] E.A. 32*). The issue for determination by this court is whether the prosecution proved its case against the appellants to the required standard of proof beyond reasonable doubt. I have re-evaluated the evidence that was adduced before the trial magistrate's court and considered the submissions that were made before me by the appellants and by the State.

The evidence that the prosecution relied on to secure the conviction of the appellants is basically that of PW3, the taxi driver. He testified that he had been hired by the appellants to ferry them from Yorkstar along Kanu Street to a place known as Nyama Choma (*Kikopey*) which is along Nakuru-Nairobi Highway near Gilgil. PW3 negotiated the fare with the appellants after which the appellants entered the motor vehicle. According to PW3 the appellants were carrying with them two bags. PW3 recalled that it was the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants who were carrying the two bags; one was a yellow paper bag and the other was a green bag.

From the evidence adduced by PW9 and PW12 it is apparent that PW3 carried other passengers other than the appellants. This is because when PW9 and PW12 stopped PW3's motor vehicle, there were two other passengers other than the appellants and PW3. PW3 testified that he stopped twice on the road; first at the petrol station where he fueled the motor vehicle for a sum of Kshs 500/= and secondly when he was instructed by one of the passengers to stop on the way as the said passenger had thought that he had identified a person who was walking by the road side. During this time, nothing in form of luggage was either removed or loaded onto the vehicle.

When the vehicle was therefore stopped by PW9 and PW12, it is only the six persons who were in the motor vehicle who could have explained who was possessed of the two bags. PW3 testified that it is the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, accompanied by the 1<sup>st</sup> appellant, who were possessed of the said two bags which when searched by PW9 and PW12, two homemade guns were recovered and six round of ammunition, among other items. The appellants cross-examined PW3 comprehensively but his evidence was not shaken. Similarly, although the appellants suggested in their cross examination that the said guns were planted on them by PW9 and PW12, the trial magistrate did not believe them. When the appellants were put on their defence, they skirted the issue and avoided addressing whether or not the two bags were found in their possession.

Having carefully re-evaluated the evidence and considered the submissions that were made by the appellants, it is clear that the prosecution proved its case against the appellants to the required standard of proof beyond reasonable doubt that they were indeed found in possession of the two homemade guns and six ammunition without licences contrary to the **Firearm Act**. The appellants defence did not dent the otherwise overwhelming evidence adduced by the prosecution that proved that they were in possession of the two homemade guns and the six ammunition.

However upon further re-evaluation of the evidence adduced, I am not persuaded that the prosecution proved that the appellants were carrying the said firearms with a view of committing a felony, namely robbery with violence. The prosecution failed to adduce any evidence to show that the appellants had done an overt act that would suggest that they intended to commit the offence of robbery with violence. In the absence of such evidence, the conviction of the appellants on the charge of preparation to commit a felony contrary to **Section 308(1) of the Penal Code** cannot stand. Whereas the prosecution were entitled to assume that the appellants were so armed with a view of committing a felony, they were required to adduce evidence to support their presumption that the appellants intended to commit a felony. For that reason the conviction of the appellants on the charge of preparation to commit a felony is unsafe and is hereby quashed. The sentence of three years imprisonment which was imposed upon them is consequently set aside.

The upshot of the above is that the appellants have partially succeeded their appeals. However the appeals against conviction and sentence of seven years imprisonment on the charge of being found in possession of the two firearms without firearm certificates fails. It is consequently dismissed. The appellants shall therefore serve seven years imprisonment with effect from the 13<sup>th</sup> of November 2002 when they convicted by the trial magistrate. It is so ordered.

**DATED at NAKURU this 11<sup>th</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**