REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
APPELLATE SIDE
CRIMINAL APPEAL NO. 13 OF 2002
(Being an appeal against the Judgment of L.W. Gitari (Mrs), Principal Magistrate, delivered on 20th February 2002 in Eldoret Chief Magistrate's Criminal Case No. 793 of 1999.)

PAUL KAROGO KARANJA

Alias Paul Mwiru Kanina…….
……..APPELLANT

VERSUS

REPUBLIC…….
…….RESPONDENT

JUDGMENT

On 8.2.1999, at about 4.00a.m, while on patrol at Muskoma in Bungoma, the police saw a Mazda vehicle registration number KRG 551. They identified it as a taxi and ordered the driver to stop the vehicle, which he did. Two people disembarked and disappeared in the bush. Three people remained in the car. The police became suspicious and one of them, an Inspector (PW1) decided to search the vehicle. He recovered one AK 47 gun, which was in bag. It had 16 rounds of ammunition. They then took the three people to the police station and thereafter conducted a thorough search in the vehicle from where they recovered one pistol make Ceska, which was loaded with six rounds of ammunition, one grenade, and two detonators. Expect for the loaded AK 47, all the other items were found in the dashboard of the vehicle.

The three people were later arraigned in court, and Paul Karogo Karanja was charged with two others and convicted of one count of preparation to commit a felony, contrary to section 308 (1) of the Penal Code, and six counts of being in possession of a prohibited weapon contrary to section 4(3) (a) of the Firearms Act, Cap 114 of the Laws of Kenya.

Karanja was the 3rd accused. The 2nd accused died during the trial. The two accuseds were then sentenced to serve 10 years imprisonment with hard labour and 6 strokes of the cane for the 1st count, 6 years imprisonment for the 2nd to 6th counts and 5 years imprisonment for the 7th count. The terms were to run concurrently.

Karanja, who I shall hereinafter refer to as the 'appellant' has now preferred this appeal against the convictions and sentences, his grounds being that, it was never established that he was found in possession of the guns or ammunition, nor was it ever proven that he was actually armed with the intention to commit a felony.

It is also his ground that the learned trial Magistrate erred in relying on a retracted statement, and on the prosecution case, which he feels, was not proven beyond reasonable doubt. He also takes issue with the sentence, which in his opinion was manifestly excessive.

As is expected of me, I have had to re-evaluate all the evidence on record and the resultant judgment, with a view to establishing whether or not, this appeal is meritorious.

Several issues arose from the evidence by the prosecution, namely, whether the appellant was actually a passenger in the said vehicle, whether the firearms and ammunition were found in his possession and whether he was actually preparing to commit a felony.

It was imperative in the circumstances that sufficient proof be availed to prove he prosecution case.

PW1 narrated how this appellant and his co-accused were found in the vehicle when it was stopped at Muskoma. He acknowledged the fact that it was a taxi and that he did not recover anything from their persons when he conducted a search on them, nor did he enquire from the driver about the ownership of the bag in which the loaded AK 47 was found. PW1 conceded that none of his colleagues gave chase to the two who disappeared in the bush when the vehicle stopped.

According to PW2, one of the other arresting officers, both the hand grenade and the Ceska pistol were recovered from under the seat of the taxi. The Investigating officer PW7 had recovered only the hand grenade from under the driver's seat.

I find that the evidence of PW2 contradicted that of PW1 in that, while the former testified that the grenade was found under the seat, according to PW1, it was in the dashboard. Further the fact that PW2 testified that the three accused persons had been stopped as they attempted to run away from the taxi also contradicted the evidence of PW1 who testified that the three had remained in the taxi.

The evidence on the recovery of the pistol, was also contradictory, in that PW1 testified that it had been recovered from the vehicle after the appellant had been taken to the Police Station, yet PW2 stated that the same was recovered in the presence of the appellant and his colleagues. Even then, according to PW2, the bag containing the AK 47 was on the rear seat, yet according to PW3 the bag was kept down in the vehicle, while according to PW5, it was in the front on the passenger's side under the seat, and according to PW1, it was under the front seat. PW5 was later to concede during cross-examination that the bag, which was recovered from the taxi, had nothing, yet again; PW7 testified that the firearms and ammunition were recovered from one big bag.

Of equal importance, is the fact that though PW4 had claimed to see the vehicle on the night of 6.2.1999 and that one of its occupants had shot at him, he testified that the Mazda vehicle was yellow in colour, the Investigating Officer (PW7) testified that the vehicle was white in colour.

In my view the prosecution case, could only have been proved beyond reasonable doubt if supported by an experts report, following the examination of fingerprints found on both the vehicle, the guns and ammunition, yet by his own admission, PW1 conceded there was so much interference with the gun and ammunition that no report could be availed. He had also conceded, that the vehicle was never dusted for fingerprints.

I do note that a flying squad officer (PW8) produced two exhibits namely Exhibits 11 and 12, which were reports of the examining officers, which were dated 10/12/1999 and 10/2/1999 respectively, and though the accused persons intimated that they had no objection to the prosecutor producing the same, it was incumbent upon for the trial Magistrate to ensure that it was done in compliance with the requirements of section 72 of the Evidence Act which stipulates that "*Where evidence is required of a document which is required by law to be attested, and none of the at testing witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attestin g witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.*"

No sufficient reasons were advanced for failure by the specific officer to attend court to produce the documents neither did PW8 prove that he was familiar with the signatures on forms or that they were

those of the attesting officers. The learned trial Magistrate therefore failed to ensure compliance with the above provisions of the law.

In any event, and even if the correct procedure had been adhered to, the learned trial Magistrate should have taken cognizance of the fact that whereas the recoveries were made on 8.2.1999, the guns and ammunition were not released for examination until 5.11.1999 which was 9 months after the appellant was charged in court. But of even greater interest is that though the grenade was found in the vehicle on the same night (8.2.1999) the examiners report indicates that, it had been sent for examination on 21.1.1999, which was at least 3 weeks before its recovery. As if that was not enough, the one which was recovered from the taxi was described as Type PL 36 while the one that was examined and its details produced in count was Type F1.The experts report further indicated that the grenade pin was still in place, contrary to the evidence of PW7, the officer who had allegedly recovered it from the vehicle, whose testimony it was, that the pin had already been removed at the time of its recovery.

With such serious omissions, and contradictions, I can only but conclude that the prosecution did not prove its case beyond reasonable doubt.

I do in the circumstance allow this appeal, quash the convictions and set aside the sentences. The appellant should be released forthwith unless he is otherwise held in lawful custody.

Dated and delivered at Eldoret this 28th day of April 2004.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:-