



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO.361 OF 2002

**(From original conviction and sentence of the Senior Resident Magistrate's Court at
Homa Bay in Criminal Case No.260 of 2001 – J. WANJALA – R.M)**

BENSON SAKUYE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Appellant was convicted on three counts by S.R.M Homa Bay. In the first count he was charged of preparation to commit a felony c/s 308(1) Penal Code in that on 11/2/2001 at Shauri yako Estate in Homa Bay town with others not before the court being in possession of a A.K. 47 rifle were found in circumstances to indicate they were armed with intent to commit the felony of robbery. He was jailed for 3 years.

Count 2 was that of unlawfully being in possession of a firearm c/s.8a(1) Penal Code. In Count 3 he was charged of being in possession of ammunition. In each count he was jailed for 2 years. The court ordered the sentence to run consecutively.

Appellant submitted that the trial magistrate erred in accepting the evidence of prosecution witness's evidence which was contradictory and full of discrepancies. He said that there was no identification parade held though PW2, 3 & 7 said they knew him. Further he submitted that the clothes found in a bag said to be his had no marks to show they were his.

Appellant further said the magistrate erred when she directed the sentence to run consecutively. Further he said counts 4 & 5 were not dealt with. They should have been dismissed.

Mr. Kemo the state counsel supported both the conviction and the sentence.

It is clear from the evidence of the witnesses that appellant was properly identified. The evidence was overwhelming. PW2 A.P.C. Tom Mboya Oyoo. PW3 APC JUSTUS OWINO told court how they had gone on patrol with the late P.C. Rukwaro. They met some people sitting under a tree and smelt bhang. When they approached them the man run away. They chased them. P.C. Rukwaro got hold of appellant who had a bag. They struggled and appellant removed his jacket which Rukwaro was holding. Rukwaro fell down and got injured. The other A.P.s were near there. Appellant removed an A.K. 47 rifle from the bag and started shooting at them. They retreated and went for reinforcement. They said they saw accused well. They knew him. The coat he had was identified by PW1 who said he used to see him with it. The rifle when recovered was identified by PIW1 & 2.

There was therefore no doubt that appellant had the rifle and the ammunition found inside. Inside the bag he had a magazine was found with other rounds of ammunition.

After reinforcement an armed police found the appellant and ordered him to stop but he ran away. He was shot at and that in probably when he was injured. He found the group of IP. Obel who arrested him. The gun was found hidden in a bush. The bag too was recovered and it was identified. The incident took place during the day and as such the appellant was properly identified. Identification Parade could not be held as those who had seen him saw him soon after he was arrested. I find there was no contradiction in the prosecution witness's evidence.

Appellant was properly seen with the gun and ammunition. The magistrate came to a proper finding in those three courts. I uphold the conviction.

As for counts 4 & 5 the court clearly said that they were duplication of counts two and three. Thus though the magistrate did not candidly say so she found those charges not proved.

As for the sentence the magistrate erred when she ordered the jail term to run consecutively and not concurrently. If the appellant had been fined and given a jail term in default then the sentence would run consecutively.

From the above therefore I dismiss the appeal and uphold the sentence save to order the jail terms to run concurrently.

It is so ordered.

Delivered on 6th October, 2004

KABURU BAUNI

JUDGE.