



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL NO.25 OF 2000
(From Senior Principal Magistrate's Criminal Case
No.2784/99 at KERICHO)

GILBERT AURA WASONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant Gilbert Aura Wasonga was convicted on a total of 5 counts.

Count.1

he was convicted of preparing to commit a felony contrary to Section 308(1) of the Penal Code;

Count.2,

he was convicted of being in possession of a fire-arm without certificate contrary to

Section 4(1)(2)(a) as read with Sub-Section (3)(a) of the Fire-arms Act Cap 114 Laws of Kenya;

Count 3,

he was convicted of being in possession of ammunition without a fire-arm certificate Contrary to Section 4(1)(2)(a) as read with Sub-Section of the Fire Arms Act Cap 114 Laws of Kenya;

Count 4

he was convicted of being in possession of instruments of house breaking contrary to Section 308(2) as read with Sub-section 4 of the Penal Code.

Count 5

he was convicted of being in possession of public stores contrary to Section 324(2) of the Penal Code.

On the first Count, he was sentenced to serve 7 years imprisonment and ordered to receive 2 strokes of the cane. On the second and third counts he was sentenced to serve 5 years imprisonment on each while for the fourth and fifth counts he was sentenced to serve 3 years and 3 months respectively.

He appeals against both conviction and sentence.

On 19th March, 1999, PW3, Mr. Walter Kibet Kenduiywa who was a security guard with African Highland Produce Co. Ltd was on duty. He met two people. The two people were strangers in the area. One of the two people greeted him. As he patrolled the estate farm he noticed a motor-vehicle which had registration Number KAB 627H. According to him it was a small vehicle and two people were seated inside. He talked to one who was at the steering. The person told him that they were going for a funeral but they had missed the way.

PW3 told them that there was no funeral in any of the company's estates. PW3 suspected that these people were out for no good and reported to the assistant manager of the company. On coming back PW3 found that there were 6 people in all. He said that the appellant herein was among the 6 people.

Three of the six people left. He followed them and they boarded a matatu which was heading to Kericho town. After a vehicle from the company came 2 of the remaining 3 people escaped. One was arrested. He was taken together with the vehicle to company's head office. When the police arrived they followed the two with a dog.

It is thereafter that PW3 saw the appellant alighting from a matatu and heading to where their vehicle was. On seeing the Police he stood. PW3 told the police that the appellant was one of the suspects. He was chased and apprehended. Other prosecution witnesses supported PW3's evidence.

I have perused the record and evaluated the same on my own.

The first question to be answered is whether the appellant herein had any connection with motor-vehicle Registration No.KAB 672H(it does not matter that it bore false registration numbers).

PW3 insisted that the appellant was among the 6 people who had the said motor-vehicle. This was denied by the appellant. In my view this identification by PW3 taken in isolation would not have been sufficient evidence to support the charge. But the identification coupled with the appellant's conduct and behaviour could be good and sufficient evidence to support the charges against the appellant.

Section 8(2) of the Evidence Act makes such conduct admissible and relevant.

The evidence on record which was accepted by the learned trial magistrate show that the appellant ran away from the police even when he was being fired at. The learned magistrate made the following finding:-

“The other issue which arises is whether accused is connected to the offence. Accused was seen with other persons already convicted. He was seen heading to the scene and he refused to stop even after being fired(sic). The fact of heading to the scene and trying to escape on seeing the police land rover clearly links accused to the offence.”

I agree with the conclusions reached by the learned trial magistrate.

The question is whether each of the offences the appellant was charged with was proved.

The particulars of the charge in Count 1, read as follows:-

“On the 19 th day of March, 1999 at Changama Tea Factory Estate in Kericho District of the Rift Valley Province jointly with others already convicted were found armed with dangerous weapons namely one AK 47 Assault Rifle with 20 rounds of ammunition, one Revolver loaded with 6 rounds of communication in circumstances that indicate they were so armed with intent to commit robbery.

No report of a ballistics Expert was produced to show the status of the fire-arms and ammunition. The same were produced in court but the prosecution needed to go further and prove what they had alleged

and pleaded in the particulars of the offence.

I will reluctantly find that Count 1, was not proved on the required standard. The same goes for Count .II and Count.III.

As to Count 4, I would only say that the articles said to b for house breaking purpose, a driller, pliers and two bunches of keys are implements for other lawful uses. While the appellant was arrested under suspicious circumstances it cannot be said with certainty that the instruments were meant for house breaking.

However , my view is that Count.V, was proved. The appellant did not explain how he had come to be in possession of public stores.

The upshot is that the appeal succeeds and the convictions quashed in respect of Counts 1,2,3 and 4. The sentences meted on the appellant on those Counts are set aside.

The appeal against conviction and sentence in respect of Count V fails. Orders accordingly.

Dated and delivered at Kericho this 26th day of February, 2001.

D. M. RIMITA

JUDGE

26.1.2001