



REPUBLIC OF KENYA



**Erodo v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 2412 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E011 OF 2023
RB NGETICH, J
MARCH 7, 2024**

BETWEEN

LUTUPET ERODO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence from the Judgment of Honourable V. O Amboko (SRM) delivered at Kabarnet Magistrate's Court Criminal case No. E081 of 2022 on the 18th day of January, 2023)

JUDGMENT

1. The Appellant Lotupet Erodo was charged with two counts of offences. Count 1 is the offence of being in possession of an illegal firearm contrary to section 4a 1(a) of the *Firearms Act*. The particulars were that the accused on the 23rd day of June, 2022 at Chepilat village in Tiaty East Sub- County Baringo County without lawful authority was found in possession of an illegal firearm namely AK 47 serial No. A07032.
2. Count 2 is the offence of possession of Ammunitions contrary to section 4(1) as read with section 4(3) (b) of the *Firearms Act* Cap 114 Laws of Kenya. The particulars were that the accused on the 23rd day of June, 2022 at Chepilat village in Tiaty East Sub- County, Baringo County without lawful authority was found in possession of 28 rounds of 7.62mm x 39 ammunitions.
3. The appellant denied the charges and the matter proceeded for hearing with the prosecution calling a total of 4 witnesses and closed its case. The accused was placed on his defence and he gave sworn statement and called 3 witnesses.



4. By judgment delivered on the 18th January, 2023 the trial court found the appellant guilty on both counts and convicted him; and on the 28th day of February, 2023 the appellant was sentenced to ten (10) years imprisonment to run from the date of his arrest.
5. The Appellant being aggrieved and dissatisfied with the conviction and sentence, lodged this appeal on the 14th day of March, 2023 on the following grounds: -
 - i. That the Appellant pleaded not guilty to the charges.
 - ii. That the lower court never considered both the defence and the mitigation made by the Appellant and it is clear from the record.
 - iii. That the prosecution witnesses gave conflicting and contradictory evidence in their statements.
 - iv. That the learned trial magistrate erred by failing to make a finding that the prosecution failed to prove the case to the required standards.

Submissions

6. The Appeal was canvassed by way of both written submissions by appellant and oral submissions by the state counsel. The appellant identifies the issues for determination: -
 - i. Whether the appellant was arrested in possession of alleged firearm.
 - ii. Whether the prosecution's case was proven beyond reasonable doubt.
 - iii. Whether the trial court disregarded the Appellants defence without giving due consideration.
 - iv. Whether the trial court shifted the burden of proof to the Appellant.
7. On the first issue, the appellant submits that he was arrested without a gun while on private business within the shopping Centre. He submits that as per the evidence of PW 1 and PW2 it is very clear that he was arrested without a gun and from their evidence, the arrest and recoveries were two different activities and considering their evidence on record that they were acting on a tip off from an informer, there is no evidence in court in support of their allegations that the Appellant led the police to where the alleged gun was recovered.
8. The appellant further submit that the prosecution failed to adduce evidence to establish a clear nexus between the appellant and the firearm in question. That the procedures on the recoveries of exhibits requires that an inventory of recovery of any item to be used as exhibits in a case must be prepared and signed by the officers involved in the recovery as well as the suspect and since crucial evidence of recovery was not tendered in court to authenticate the alleged recovery, there is no integrity in the recovery process as the informers could not be called to adduce evidence and there is therefore is no independent witnesses to prove that the alleged recovered firearm belonged to the to the Appellant; that all prosecution witnesses were police officers; that from the summary of the evidence of PW 3 based on his solid findings and his evidence adduced in court, the ballistic report produced in court as exhibit 4 by PW3 were of no probative value for failure to establish nexus between the Appellant and the firearm in question.
9. The appellant further submits that from evidence of PW4 the investigations officer, the Appellant was arrested on 23rd June,2022 and arraigned in court for plea taking on 27th June,2022 a period of 5 days after arrest which is in violation of the appellants constitutional rights as guaranteed under Article 47, 48 and 49. That the investigations officer did not explain the said delay.



10. Further that the evidence of PW4 contradicted that of PW1 and PW2 who both testified in court to have arrested the Appellant and recovered the alleged firearm while PW4 said he was informed by P.C Otieno and CPL Maina concerning arrest of the appellant and the recovery of the firearm; that the appellant led them to recovery of the firearm thus raising question as to who recovered the firearm and this leaves gaps in the case which ought to be resolved in favor of the appellant.
11. On whether the appellant's defence was considered, the appellant submits that he gave sworn testimony and called 3 witnesses who testified on arrest. He submits that all the 3 witnesses were present at Chepilat Centre at the time the Appellant was arrested and their evidence was corroborative that the Appellant was arrested within the Centre without the firearm but the court rejected his defence without analyzing and weighing it against the prosecution evidence on record and instead shifted the burden of proof to the Appellant and arrived at erroneous judgement. He relied on the case of [*Joseph Ocharo v Republic* \[2015\] eKLR](#).

Oral Response By State

12. The state counsel Ms Ratemo submits that the Appellant was charged with the offence of being in possession of illegal firearms and the prosecution was to prove whether the Appellant was in possession of the firearm and whether he had a permit. She submits that the 4 prosecution witnesses testified. That PW1 testified that he got a tip off and together with other officers on patrol at Chepilat area apprehended the Appellant who fled into a thicket where they recovered AK 47 S/N A07032 with 28 rounds of Ammunition and the Appellant was arrested and taken to Loruk Police station. That PW2 corroborated the evidence of PW1 and PW3 who was the firearm examiner who examined the firearm and found that it was firearm capable of being fired and the ammunitions found were in good condition and the same was firearm and ammunition respectively. PW4 produced the firearm together with the ammunition.
13. She further submitted that the Appellant led police to the recovery of the firearm. That the evidence of the 4 prosecution witnesses was not shaken by the Appellant's witnesses and the appellant did not produce any evidence to show he was licensed to carry firearm. Further that the area where the appellant was found and arrested is an area which has high tension being Tiaty Pokot East Sub- County. She submitted that during sentence, the court took into consideration the fact the offence attracts up to a maximum sentence of life imprisonment but by virtue of the fact that the area is high tension area, the court was lenient by imposing 10 years imprisonment. She further submitted that the court also considered time spent in remand in the sentence and ordered that the sentence run from the date of his arrest she submitted that this appeal lacks merit and should be dismissed in its entirety.

Analysis And Determination

14. This being the first Appellate Court, I am obligated to re-evaluate the evidence adduced before the trial court and arrive at an independent determination. This I do while aware of the fact that unlike the trial court, I never got an opportunity to take evidence first hand and observe the demeanor of witnesses. For this I give due allowance. The duty of the 1st Appellate Court was explained by the Court of Appeal in the case of *Kariuki Karanja v Republic* [1986] KLR 190 where the court stated as follows:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."



15. In view of the above, I have perused and considered evidence on record and wish to consider the following:
 - i. Whether the prosecution proved the charge against the appellant beyond reasonable doubt.
 - ii. Whether sentence imposed by the trial court was harsh and excessive.

i. Whether the prosecution proved the charge against the appellant beyond reasonable doubt

16. Record show that PW1 PC James Omondi testified that on the 23/6/2022 he was on patrol with other officers at Chepilat area when they got a tip off that accused had a firearm. He said the accused led them to a thicket where they found a rifle AK 47 rifle Serial number A07032 with 28 rounds of ammunition. He said they escorted the accused person to Loruk police station. He further stated that the arrest created tension in the area as the area residents said accused was a good person who looked after goats while armed with a gun.
17. PW2 Benard Mukole confirmed that he was on patrol within Chepilat shopping center following a tip off from an informer that he had a gun. He said the appellant led them to a thicket where they found a gun with 28 rounds of ammunition. The firearm and ammunition recovered were confirmed to be firearm and ammunitions respectively by PW3 a firearm arm examiner. He produced ballistics report in court as exhibit. PW4 the investigating officer produced AK 47 rifle, 25 rounds of ammunition and 3 rounds of ammunition in court as exhibits.
18. In his defence, the appellant maintained that he was arrested at the center where he was taken to loruk police station and later Kabarnet police station. He denied being found in possession of the gun and said the gun was brought to court after one month.
19. DW2 Joseph Akeno testified that he was with the accused person at Chepilat area outside a shop when Police officers arrived in 2 vehicles and arrested the appellant and left with him. He said together with other people, they boarded 3 motorbikes to Loruk Police station where the OCS informed them that the accused person had been arrested by RDU officers and were asked to go back to the police station the next day. On cross examination, he said he did not know whether the appellant led police to where the gun was recovered as they followed police after 30 minutes.
20. DW3 Stephen Kapurai Siareng also said he saw police officers arrest the appellant at chepilat and the following day, he heard a gun was taken from the chief. He said the gun belonged to the assistant chief John Longete. On cross examination he stated that he did not follow the police vehicle and he was not sure whether the gun belonged to the chief and added that the chief had differences with the accused person.
21. DW4 Lomeriaman Larar Lobong also said the appellant was arrested at Chepilat area, and taken to Loruk police station. He stated that he later heard that the gun was from Joseph Longete. He said Joseph's gun had skin and a rope and the gun was known in Chepilat area as it helps them in the area. On cross examination he stated that he did not follow the officers after appellant's arrest and he did not know whether the appellant took police to where the gun was.
22. I have considered evidence adduced by the 4 prosecution witnessed and the evidence adduced by the appellant and his 3 witnesses as captured above. All defence witnesses confirm that appellant was arrested by police. The 3 defence witnesses say they saw police arrest the appellant. They however confirmed that they did not follow him immediately upon arrest. They said they followed after 30 minutes and they learnt from OCS Loruk that the appellant had been arrested by RDU. From evidence adduced, none of the defence witnesses was present when the firearm was recovered. They admitted



that they did not follow police and accused immediately. It is therefore evident that they did not know how the firearm was recovered. On the other hand, the evidence adduced by PW1 to PW3 was consistent and corroborative. From the forgoing, the defence did not shake prosecution evidence. In view of the above, I see no reason to interfere with finding on conviction by the trial court.

23. In respect to consistency in evidence, I am guided by the case of *Philip Nzaka Watu v. Republic* [2016] e KLR, where the Court Appeal stated hereunder:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.

Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

24. Guided by the above decision, I find that minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that it may affect credibility of witnesses and create some doubt in the mind of the trial court that an accused is entitled to benefit there from. In the instant case, issues raised are trivial and did not substantially or fundamentally affect the prosecution case. From the foregoing, I find that the prosecution proved charges against the appellant beyond reasonable doubt.

(ii) Whether sentence imposed was harsh and excessive.

25. Section 4(3)(a) of the *firearms Act* provide for a maximum sentence of fifteen (15) years and a minimum of seven (7) years. The trial Court sentenced the appellant to ten years imprisonment which was within the law. I take judicial notice of the fact that insecurity has persisted in the area where appellant was arrested as a result of conflict between two communities and in view of the above, I find that sentence of 10 years imposed was appropriate in the circumstances and I will not interfere.

26. Final orders: -

Appeal on both conviction and sentence is hereby dismissed.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 7TH DAY OF MARCH 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Appellant present.

Ms Ratemo for state.

Elvis, Court Assistant.

