



**Korosian v Republic (Criminal Appeal 165 of 2023)
[2024] KEHC 4711 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 165 OF 2023**

DR KAVEDZA, J

MAY 7, 2024

BETWEEN

FRANCIS MECHUKI KOROSIAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against original conviction and sentence imposed by the Court Martial sitting at Kahawa Garrison delivered on 8th September 2023 in Court Martial case no. 16 of 2022 Republic vs Francis Mechuki Korosian)

JUDGMENT

1. The appellant was charged with after a full trial before the Court Martial convicted for the offence of committing a civil offence contrary to section 133 (1) (b) of the [Kenya Defence Forces Act](#) of 2012, that is to say, Conspiring to acquire a firearm without holding a firearm certificate in force contrary to section 4 (2) (a) as read together with section 4 (3) (b) of the [Firearms Act](#), Cap 114 of the Laws of Kenya. He was sentenced to serve five (5) years imprisonment.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal and grounds of appeal on record, he challenged the totality of the prosecution’s evidence against which he was convicted. He argued that the prosecution failed to prove its case beyond reasonable doubt. He also contended that the confession evidence relied on by the trial court was inadmissible. He maintained that the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).



4. The prosecution called seven (7) witnesses in support of their case. PW1 Dickson Mathenge, Head of Security at Nation Media Group, testified recounting events from February 25, 2022. He told the court that he received a call from his colleague, Ibrahim Palapala, a security officer at the Nation Centre building, informing him that Diana Langat, another staff member, had attempted to enter the building with a firearm which had been detected at the scanning point. PW1 rushed to the scene, seized Diana's black 'Jansport' bag, and upon inspection, discovered a black metallic cartridge box housing a pistol with 7 rounds of 9mm caliber, concealed within a hoodie. He detained Diana for questioning, during which she claimed the bag belonged to her cousin, Frankline Kibet, the appellant herein who was allegedly at Cooperative Bank near Nation Centre. He contacted Chief Inspector Moses Shikuku of Central Police, handing over Diana, the bag, and its contents. Exhibits later presented included the black bag, metallic cartridge box, hoodie, pistol, handwritten and typed inventories.
5. PW2 SSpt. Florence Karimi, a firearms examiner, responded to a request from Cpl Hassan Jilani of the Military Police Headquarters to examine exhibits related to a case of illegal firearm possession. She confirmed that the firearm was a Chinese-made Tokarev pistol, manufactured in 1962 and chambered in 9mm caliber, was operational and matched the recovered ammunition. The examination also revealed that the ammunition box was designed for storage of such ammunition. A successful firing test was conducted, and a comparative analysis of spent cartridges and test bullets was performed, showing no match to typical criminal ammunition. PW2 submitted various items as exhibits, including the firearm, magazine, test cartridges and bullets, and a Ballistics report, providing crucial evidence for the investigation.
6. PW3 Faith Kerubo Nyagaka, an employee of Ismax Security Ltd responsible for security at the Nation building, testified to events on February 25th, 2022. She was alerted by her colleague, Zephania Shivilai, that he had detected a pistol in Diana Langat's bag during the screening process. Langat was accompanied by a male friend. Despite PW3 order for Langat to open her bag, she refused. She reported the incident to her her supervisor, who arrived with Mr. Ibrahim Palapala. Palapala took possession of the bag and its contents, as well as Langat. Upon opening the bag, she glimpsed a pair of military uniform items, a shirt and trousers, and a metallic box, which she later identified in court.
7. PW4 Chief Inspector Moses Mutayi Shikuku, head of Central Police Station in Nairobi, responded to a call from Mr. Mathenge regarding urgent items recovered at Nation building on February 25th, 2022. Upon arrival, they found Diana Langat in possession of a bag containing a Tokarev pistol and ammunition. Langat claimed the bag belonged to her cousin, the appellant, who was subsequently brought in for questioning. The appellant admitted to being from Somalia and purchasing the firearm for a colleague. Military Police took custody of the appellant due to his military status. PW4 provided documentation of the investigation process, including inventory reports from Nation building and the handover to Military Police, as evidence in court.
8. PW5 Police Constable Geoffrey Mbai, stationed at Central Police Station, responded to a call from the Officer in Charge about an incident at Nation Building on February 25th, 2022. Upon arrival, they found Diana Langat in possession of a bag containing a suspected firearm and other items. Langat claimed the bag belonged to her cousin, the appellant who arrived and confirmed ownership.
9. PW5 conducted inventories of the recovered items and escorted Langat and the appellant to Central Police Station. Further inventory was done and the appellant was handed over to the Military Police. During interrogation, the appellant confessed he was from Somalia and had been sent money to purchase a firearm on behalf of a colleague, providing significant information for the investigation.
10. PW6 Major Anthony Njoroge, a KDF officer stationed at the Military Police Corp, Special Investigation Unit, testified about an incident on March 3rd, 2022. Corporal Jilani, the Investigating



Officer, informed him that the appellant who had been arrested wished to make a confession. He testified that he explained to the appellant He explained to the legal requirements for recording a confession under section 170 of the *Kenya Defence Forces Act* and section 80 of the *Evidence Act*. The appellant called Corporal Joseph Makari, his friend, to witness the confession.

11. He testified that the appellant voluntarily confessed that he was in Doblely between February 2020 and February 2021, where he befriended Corporal Kibet, also stationed in Somalia at the time. He admitted to giving Corporal Kibet 60,000 Kenyan Shillings to procure a firearm, which Corporal Kibet allegedly failed to deliver while the appellant was still in Somalia. However, after leaving the mission, the appellant received a message from Corporal Kibet stating that he had obtained the firearm. PW5 Major Njoroge produced the confession statement as a prosecution exhibit.
12. PW7 Corporal Hassan Jilani, a Military Police investigator, detailed his investigation into the appellant's involvement in illegally acquiring a firearm. He corroborated evidence linking the appellant and Spte Frankline Kibet to their time in Somalia through the AMISOM Exit Nominal Roll. Their acquaintance with a civilian named David, who sold guns, further solidified their connection to the firearm acquisition.
13. PW7 submitted the firearm for Ballistics Examination, confirming its involvement in the case. Financial investigations revealed that the appellant had sent money to Kibet for the firearm purchase, supported by the appellant's Mpesa statement presented in court. In addition, he testified that the appellant confessed to the conspiracy, which was recorded by PW6.
14. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn evidence and did not call any witness. It was his testimony that During his sworn testimony, the appellant, refuted the charges against him. He described being brought to the Special Investigation Unit without clear explanations regarding the purpose of the statements he was asked to provide. He clarified that the statements were related to Spte Kibet's case, of which he had limited understanding.
15. He recounted that in July 2020 he had lent Kshs. 70,000 to Spte Kibet while both were in Somalia with an expected repayment in early 2021. However, when they reconnected in August 2022 during Kibet's trial, the appellant interpreted their exchange as Kibet having repaid the loan. He adamantly denied any involvement in procuring a firearm with Kibet or engaging in any illicit activities.
16. However, before I delve into the analysis of the evidence on record, I would like to address my mind to the issue raised by counsel for the appellant with respect to whether the charge sheet was defective. From the record, I note that the appellant was charged in the main charge with the offence of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act* of 2012, that is to say, conspiring to acquire a firearm without holding a firearm certificate in force contrary to section 4 (2) (a) as read together with section 4 (3) (b) of the *Firearms Act*, Cap 114 of the Laws of Kenya. The particulars of the offence are as follows: that he (the accused) on diverse dates between 27th June 2020 and 24th July 2020 conspired with 150736 SPTE Frankline Kibet to acquire Quantity One (1) Chinese Tokarev Pistol S/No. 7583171 without holding a firearm certificate in force.
17. The specific provision of the law under the *Firearms Act* reads thus:
 4. Penalty for purchasing, etc., firearms or ammunition without firearm certificate
 - (1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.
 - (2) If any person—



- (a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or
 - (b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to this Act, be guilty of an offence.
- (3) Any person who is convicted of an offence under subsection (2) shall—
- (a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or
 - (b) if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years:

18. From the record, the appellant was charged with the offence of conspiracy. Having reproduced the provisions of the law against which the appellant was charged, the question for determination is whether the charge conformed with the provisions of section 137 (a) (ii) of the Criminal Procedure which provides that the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.
19. Section 4 of the *Firearms Act* under which the appellant was charged does not provide for the offence conspiracy to acquire a firearm without holding a firearm certificate. It is therefore clear that the charge preferred against the appellant did not conform to Section 137(a)(ii) Criminal Procedure Code in that, the offence was not properly described as the law provides.
20. Article 159 (2) (d) of *the Constitution* of Kenya abhors procedural technicalities and puts emphasis on substantive justice. The question is whether this error in drafting the charge sheet is a technical error hence curable under section 382 of the Criminal Procedure Code that provides thus:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

21. In this case, the charge preferred against the appellant is not provided under the *Firearms Act* as reproduced in paragraph 17 above, and therefore, no amount of explanation to the appellant on the date of plea could have cured the defect. The Court of Appeal in the case of Sigilai and Another vs Republic (2004) 2 eKLR 480 found that the principle law governing charge sheets is that an accused should be charged with an offence known in law and that where one is charged of a non-existent offence, the charge should be declared defective and the applicant should not take plea. However, in



- this case, plea was taken and the appellant taken through the trial process on a defective charge. The trial process is not therefore a mere procedural technicality can be cured at this juncture.
22. That being the case, the appellant was not only charged for an offence that did not exist in law, but, the particulars of the offence did not also disclose an offence known in law.
 23. For argument's sake, let us assume that the charge is proper. The evidence on record, shows that the appellant is alleged to have conspired with SPTE Frankline Kibet to acquire a Quantity One (1) Chinese Tokarev Pistol S.No. 7583171 without holding a firearm certificate in force. From the record is that one Daina Langat was found in possession of the firearm with rounds of ammunition at Nation Media House. Upon interrogation, she informed police officers from Central Police Station that the bag belonged to her cousin Frankline Kibet. Indeed, she called Frankline who was arrested. It is instructive to note that the said SPTE Frankline Kibet was not jointly charged with the appellant, but the appellant herein was actually a witness against the said Frankline arising from the same incident in a different case.
 24. The question that begs for an answer is, the prosecution having conducted investigations and established that this was a case of conspiracy, why they opted to charge the two separately. Given that conspiracy is an offence whose commission involves more than one person, and for a single individual to be charged and convicted, there must be overwhelming evidence that that person was part of the agreement to commit the offence planned. It was held in the case of *R v Anthony* [1965] 2 QB 189 (Lord Parker CJ, Marshall & Widgery JJA) and *Ongodia and Erima v Uganda* [1967] EA 137 (Bennett, Sheridan JJA & Russell AgJ), that an accused person may be convicted even where the co-conspirators are unknown.
 25. However, the appellant's alleged co-conspirator is known and the prosecution opted to charge him separately. In addition, the appellant was a prosecution witness in the case. Consequently, the evidence on record did not establish the appellant to be at heart of the commission of the alleged offence of conspiracy.
 26. Having already found that the appellant's main count was defective, I will now consider the alternative count. From the record, the particulars to the alternative charge are worded in the same language as the particulars in the main charge: That he (the accused) on diverse dates between 27 June 2020 and 24th July 2020 conspired with 150736 SPTE Frankline Kibet to acquire Quantity One (1) Chinese Tokarev Pistol S.No. 7583171 without holding a firearm certificate in force.
 27. Having found that the offence of conspiracy to acquire a firearm without holding a firearm certificate does not exist in law, it therefore follows that, the particulars to the alternative charge do not support the alternative offence, that is, Prejudice of good order and service discipline contrary to Section 121 of the *Kenya Defence Forces Act*.
 28. Although the evidence on record disqualified the charges, the question is whether a crime was indeed committed by the appellant. Indeed, the evidence on record points to the commission of a crime being the illegal possession of a firearm and ammunition.
 29. The evidence presented indicates that Diana Langat attempted to enter a building with a firearm, which was detected during a security screening. The firearm was found to be a Chinese-made Tokarev pistol with ammunition, concealed in her bag. Further investigations revealed connections between Diana Langat and Frankline Kibet on the one hand, and, Frankline Kibet and the appellant herein on the other hand. Furthermore, in a confession taken before PW5. In the confession, the appellant admitted Frankline money to purchase to the firearm in question. Importantly, the confession was not retracted and there was no trial within a trial. That evidence remains unchallenged.



30. I therefore find that the charge proved against the appellant is possession of a firearm and ammunition without a firearms certificate contrary to section 4 (2) (a) of the *Firearms Act*. I hasten to state that the firearm was found in physical possession of Diana Langat and not the appellant herein. However, the evidence on record proves constructive possession against the appellant as demonstrated hereunder.
31. Frankline and the appellant agreed on the purchase of the firearm while based in Somalia. Financial statements produced in evidence shows exchange of money from the appellant to Frankline. The confession produced as an exhibit confirms that the appellant instructed Frankline to procure the firearm on his behalf.
32. The upshot of the foregoing is that the prosecution proved a case of being in possession of a firearm without holding a firearm certificate in force contrary to section 4 (2) (a) as read together with section 4 (3) (b) of the *Firearms Act*. Having so found, I proceed to quash the conviction and set aside the sentence against the appellant for the offence of conspiracy to acquire firearm without holding a firearm certificate.
33. Consequently, I invoke the provisions of section 179 of the Criminal Procedure Code and find the appellant guilty for the offence of possession of a firearm without holding a firearm certificate contrary to section 4 (2) (a) as read together with section 4 (3) (b) of the *Firearms Act*. I accordingly sentence the appellant to serve two (2) years imprisonment.
34. I note that the appellant has already served more than two years imprisonment. He has therefore served his sentence and he should be released forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Musyoki for the Appellant

Ms. Ndombi h/b for Mr. Mulama for the Respondent

Joy Court Assistant

