Ameju v Republic (Criminal Appeal 15 of 2022)
[2023] KEHC 4121 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL 15 OF 2022

RN NYAKUNDI, J

MAY 2, 2023

BETWEEN

PHILIP NAKULEU AMEJU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. D. Orimba in Lodwar law court Cr. Case No. 748 of 2018)

JUDGMENT

1. The appellant Philip Nakuleu Ameju was charged in the magistrate's court at Lodwar with four counts. Count 1 was for being in possession of specified firearms without a firearm certificate contrary to section 4A and (1)(a) of the *Firearms Act* No. 6 of 2010 (Cap 114 Laws of Kenya). The particulars of the offence were that on 23rd November 2018 at Kalobeyei area, in Turkana West Sub-County, within Turkana County, the appellant jointly with others not before the court was found in possession of specified firearms namely 6 (six) AK 47 rifles body No's. 16xxx, 56590xxx, 19xxAXxxx, 19xxBMxxx, 07xxx, and 0xxx without firearms certificates.

2. Count 2 was for being in possession of ammunition without firearms certificate contrary to section 4(2)(a) as read with section 4 (3)(b) of the *Firearms Act* No. 6 of 2010 (cap 114 Laws of Kenya). The particulars of the offence were that on the 26th day of November 2018 at Kanam IDP Camp area, in Lodwar township within Turkana County, the appellant together with another were jointly found in possession of Ten (10) rounds of 7.62mm*39 special caliber ammunition and one (1) round of 0.38 Caliber without a firearms certificate.

3. Count 3 was for being in possession of AK47 rifle magazines without a firearms certificate contrary to section 4(2)(a) as read with section 4 (3)(b) of the *Firearms Act* No. 6 of 2010 (cap 114 Laws of Kenya). The particulars of the offence were that on the 26th day of November 2018 at Kanam IDP Camp area,

in Lodwar township within Turkana County, the appellant together with another were jointly found in possession of sixteen (16) AK47 empty magazines of 7.62mm*39 special caliber without a firearms certificate.

4. Count 4 was for preparation to commit a felony contrary to section 308(1) of the *Penal Code*. The particulars of the offence were that on the 23rd day of November 2018 at Kalobeyei area, in Turkana West sub-county, within Turkana County, the appellant jointly with others not before the court was found in possession of specified firearms namely 6 (six) AK 47 rifles body No's. 16xxx, 565906xxx, 19xxAXxxx, 19xxBMxxx, 07xxx, and 03xxx in a manner likely to suggest that they were armed with the intent to commit a felony namely robbery with violence contrary to section 296(2) of the *Penal Code*.

5. He pleaded not guilty to all four counts. After a full trial, he was convicted of all four counts. He was sentenced to serve 30 years imprisonment in count 1, 3 years imprisonment in count 2, 3 years imprisonment in count 3, and 5 years imprisonment in count 4. The four sentences were ordered to run concurrently.

6. Dissatisfied with the decision of the trial court, the appellant has appealed on the following couched grounds: -

    1. The trial Court erred in law and in fact by failing to find that the charges against the appellant were not proved beyond reasonable doubt.

    2. The trial court erred in law and fact by sentencing the appellant to serve 41 years in jail on all counts.

7. The appellant also filed written submissions which I have considered. He cited a number of decisions and submitted that nothing connected him to the scene of crime, an identification parade was not conducted and the charge sheet was defective. He stated that exclusive possession of the alleged items was not proved by the prosecution evidence.

8. The Director of Public Prosecution through Assistant Director of Public Prosecution Mr. Edward Kakoi also filed written submissions to the appeal. He submitted that there was enough evidence for the court to convict the appellant in counts 1 through 3. On count 4 he submitted that it was not fully proved since there was no clear evidence that indeed the appellant and his co-accused were planning to commit the offence of robbery with violence at the time they were arrested. He submitted that the appellant be acquitted on this count.

Resolution

9. This is a first appeal. As a first appellate, court I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact. See the case of *Okeno v Republic* [1972] EA 32.

10. I have re-evaluated the evidence on record. I have considered the submissions on both sides as well as the authorities cited to me. I have also perused the judgment of the trial court.

11. The appellant submitted that the offences were not proved beyond reasonable doubt. He stated that possession of the alleged items was not proved.

12. Indeed, from all the witnesses it was clear that the circumstantial evidence of an NSSF card recovered at the scene of crime showed that the appellant was at the scene of crime. All the witnesses were police officers who took part in laying ambush on the suspected assailants. They all stated that the following morning, by tracking footsteps from the scene to the direction the two assailants had fled

to, they recovered 3 more guns 2 magazines, a pair of handcuffs, a pair of jungle socks, an NSSF card belonging to the appellant, a phone and three guns and upon recovery, they called the directorate of criminal investigation who took up the matter. In the case of *Minniti v R*. [2006]159 Crim R394/408 it is settled law that a circumstantial prosecution case is a kind which presents "the links in a chain metaphor. The second is the "strands in a cable metaphor." It appears to be now settled that a circumstantial crown case which is properly to be treated as a "link in a chain" type of case will require jury directions about so-called intermediate facts which are indispensable links in the jury's chain of reasoning towards and inference of guilt, to borrow from the court judgement (Wood CJ at CL, James and Adams JJ) in *P v Merritt* [1999] NSWCCA 29 at (70). Such directions must identify facts having that potential significance, and the jury must be instructed that if the jury sees any such fact as constituting reasonable doubt before it can be utilized as part of the chain of reasoning to and inference of guilt as charged."

13. In *Sawe v Republic* and *R vs Kipkering Arap Kosgei and Another 16* EACA 135 the cases emphasize the necessity for a court to consider all the circumstances collectively and not piecemeal. That is "in order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely may be fully established.

14. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of conclusive nature and tendency.

15. The appellant on his part denied the offence and said he was implicated wrongly by the police. The court did not have any reason to doubt the truthfulness and credibility of the four witnesses. In any event, the court was not given any reason as to why the police would have framed the appellant.

16. Having perused the evidence on record, I find that the evidence of the four police witnesses who went to the scene to track the footsteps of the assailants was consistent and corroborative. The details differ a little, but that is expected of evidence from truthful witnesses. The difference in details was not the same as the contradictions. In my view, the circumstantial evidence clearly shows that the appellant was at the scene of crime. In *Twehangane Alfred vs Uganda* it is not every contradiction that warrant rejection of evidence. It subtly stated

> "With regard to contradictions in the prosecution's case that law as set out in numerous authorities is the grace contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

17. Apparently the inconstancies complained by the appellant did not affect the veracity of the prosecution case to establish his guilt beyond reasonable doubt. From the record the testimonies of PW1, PW2, PW3, PW4 PW5 and PW6 satisfactorily explained and addressed all the concerns raised by the appellant in so far as proving the ingredients of the offence. I find no tactical rebuttal evidence against the prosecution case to render the charge a mere suspicion.

18. In the instance case the appellant was charged with multiple counts mainly on being in possession of firearms and ammunitions without a valid certificate of possession. A recap of the prosecution evidence clearly shows proof of possession beyond reasonable doubt. To prove personal possession, the prosecution must proof that the appellant had knowledge of the nature of the item and physical control

of the item at the relevant time. In the present case the prosecution witnesses (PW1-PW6) established that the appellant had possession of the firearms with his knowledge and consent and that he had some measure of control over them. He cannot therefore escape criminal liability for those offences.

19. With respect to the charge of preparation to commit a felony it was not clearly proven. There was no probative evidence that indeed the appellant and his co-accused were preparing to commit the offence of robbery with violence at the time they were arrested. I entirely agree with the respondent on this count. I will thus quash the conviction for preparation to commit a felony, as the charge was not fully proved beyond reasonable doubt.

20. The sentences were determined by the trial court after considering the mitigation of the appellant. Sentencing is a discretion of a trial court. In the case of *R v Scoot* [2005] NSWCCA 152 Howie, Groove and Barr JJ stated;

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect tht objective seriousness of the offence committed and there must be a circumstances of the crime committed. One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."

21. Similarly, the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR addressed the issue of judicial discretion by an appellate court to exercise jurisdiction to properly interfere with the sentencing verdict of a trial court

> " That is now settled law, following several authorities by this court and by the high court, that sentence is s matter that rests in the discretion of the trial court. similarly, sentence must depend on the facts of each case. on appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matter already states is shown to exist."

22. The sentences were made to run concurrently. The sentence for preparation to commit the offence of robbery with violence has to be set aside, as the conviction was quashed. It is of note that the region is an area that is prone to acts of violence using ammunition. It is common knowledge that guns and other ammunition have been used against defenseless civilians repeatedly. As such in my view, the sentences being deterrent are justified in the matter.

23. I am satisfied that the prosecution proved its case beyond a reasonable doubt on count 1,2, and 3 as the defense evidence did not raise any doubt about the prosecution case. The appellant's contention that he was being framed is not established. I do find that the evidence on record did prove all the three counts squarely within the ambit of section 107(1), 108 and 109 of the *Evidence Act*.

24. In sum, I dismiss the appeal on counts 1,2, and 3 on both conviction and sentence. However, in so far as count 4 is concerned no convincing evidence on record to implicate the appellant. It was a wrong conviction based on evidence below the threshold of beyond reasonable doubt. The best I can do is to set it aside and free the appellant of any encumbrances attached to it.

25. Accordingly, the appeal partially succeeds as herein discussed in this judgement.

DATED AND SIGNED AT ELDORET THIS 2ND DAY OF MAY, 2023

.....

R. NYAKUNDI

JUDGE

In the presence:

Mr. Edward Kakoi for the State

Appellant present in person