



**Lesian v Republic (Criminal Appeal E084 of 2021)  
[2023] KEHC 18552 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E084 OF 2021  
EM MURIITHI, J  
JUNE 15, 2023**

**BETWEEN**

**MUREPU LESIAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence  
by Hon. E. Ngigi PM in Isiolo CR. No. 49 of 2019 on 2/7/2020)*

**JUDGMENT**

1. Murepu Lesian, the appellant herein was charged with the offence of being in possession of ammunitions without a firearm certificate contrary to section 4 of the *Firearm Act*. The particulars were that on 3/4/2019 at around 1330 hrs at Archers Police Station in Samburu East Sub-County within Samburu County without reasonable excuse had in possession of 3 rounds of ammunitions of 7.62 × 51mm without firearm certificate
2. He denied the charges but upon full trial, he was convicted and was sentenced to 7 years imprisonment.

**The Appeal**

3. On appeal, he raised 5 amended grounds of appeal as follows:
  1. The learned trial magistrate erred in law and fact by not noticing that the prosecution did not prove their case beyond any shadow of doubt.
  2. The learned trial magistrate erred in law and fact by not observing the mandatory provisions in Article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*.
  3. The learned trial magistrate erred in law and fact by relying on fabricated, contradictory and speculative evidence which was marred with a lot of falsehood.



4. The learned trial magistrate erred in law and fact by failing to note that vital witnesses (CI Simon Gitau, Sgt Muthomi, PC Oteri, sister Magdalene and the two officers at the reporting office) were not availed/or called before court to clear doubts.
5. The learned trial magistrate erred in law and fact by disregarding the facts raised in the appellant's defence of alibi.

### **Duty of the Court**

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* (1972) EA 32).

### **Evidence**

5. PW1 Inspector Kennedy Chomba, attached under the forensic department Ballistic section at DCI Nairobi testified that, "My core duties in the section relates to examination and identification of firearms and components. Serial number restoration and thirdly scene incident reconstruction incases where firearms have been involved. On 25/4/2019 we received the following exhibits in our laboratory. There were three rounds of ammunitions. The three rounds were under escort of 233446 CI Simon Gitau. They were accompanied by duly filled memo form. The officer wanted to ascertain whether the three rounds are ammunition which can be fired from a known rifle. I examined the exhibits which are before court. On 25/4/2019 I was able to come up with the following report. Exhibit A, B and C are three rounds of ammunitions in caliber 762 × 51 mm. Each of the exhibit is designed to be chambered in firearm such as G3, FN among other rifles I picked two rounds and test fired using a G3 rifle in our laboratory. I obtained these two spent cartridges. From the examination I formed the opinion that exhibit A, B and C are capable of being fired and an ammunition as defined under *Firearms Act*. I prepared the report. I wish to produce the report (produces PEX 1). I produce the one round of ammunition and two spent cartridges (PEX 2a & b) spent cartridges, bullet heads 3a & b, on rounds of ammunition PEX 4).
6. The witness was not cross examined.
7. PW2 James Isanda Oteti, of Archers police station, testified that, "On 3/4/2019 at 1.00 pm I was in the office doing my work when I was told by sergeant Murdani of a call from mission hospital of a person who had been treated and refused to pay bill. I and PC Rukwaru went to hospital and we found sister Magdalene. We found him on the hospital bed and brought him to Archer's police station. Before booking him, I searched him and found he had three rounds of ammunition. We then booked him in the cells. I then reported to the sergeant. He was healed by the time we brought him. This are the three rounds of ammunition (refers to PMFI 2 & 3). The person we arrested with the ammunition is the accused in court."
8. On cross examination, he stated that, "From the call we received is that he refused to pay the bill and the nurses feared the accused may turn violent and so she wanted him to be out of her custody and in our hands. When we arrested you, we did not do a thorough search on you at the hospital. I am the one who we found the ammunition inside the sheet that you are wearing now. We did not take pictures of the accused and the ammunition."
9. PW3 PC Josephat Rukwaru from Archers Post Police station and the investigating officer herein testified that, "On 3/2/2019 at 1.00 pm I was at the station when sergeant Muthomi came and told me that he had received a call from sister Magdalene that there was a person who had been brought to the



hospital with a snake bite and after treatment refused to pay. We went with PC Oteri and we found the patient. Sister Magdalene handed over the patient to us. Before we could take him, he was given his personal belonging, upon arrival at the station we did a search to him before booking him in. When searching him with PC Oteri we found along the waistline he had three ammunition folded inside a sheet he was covering. I prepared an exhibit memo and forwarded the exhibit to the Ballistic expert. The ammunition was confirmed and ammunitions. We then charged the accused with this offence. He had no permit to possess the ammunition. He told me that he collected the ammunition where he used to live. The person we arrested is the accused in court. These are the three ammunitions. I wish to produce them (produced as PEX 2 and 3).”

10. On cross examination, he stated that, “You had a bill at the hospital but when we brought you to the station, we found the accused had three ammunitions. We normally search a suspect at the station before booking you in. We do need the face pictures at the station. Ours was merely the search.”
11. DW1 Murepu Lesian, the appellant herein gave sworn testimony that, “I reside I live at Laichenamu in Archers Post. On 1/4/2019 I had been bitten by a snake and I came to hospital with the snake that bit me. I was given hospital clothes to wear. I slept at the hospital. A nurse there called police officers who came and arrested me accusing me of having found me with ammunition. I was then brought to court. I do not know where they got the ammunitions. I was framed up by the officers.”
12. On cross examination, he stated that, “I was not having any problems with the arresting officers. I was arrested for failure to pay the bills. I had no grudge with the police officers. When we arrived at the police station they recorded my name in the book and said if I do not pay the bill they would frame me up with ammunitions. I am surprised as I already knew of the bill.”

### Submissions

13. The appellant faulted the prosecution for failing to prove their case beyond reasonable doubt as required by law, and cited *Philip Muiruri Ndaruga v Republic* (2016) eKLR. He submitted that his rights under Article 50 (2) (g) (h) were violated because the trial court failed to inform him of his right to legal representation, and cited *Jared Onguti Nyantika v Republic* (2019) eKLR and *Daniel Mpayo Ngiyaya v Republic* (2018) eKLR. He submitted that there were material contradictions in the evidence adduced by the prosecution witnesses that goes to question their credibility, and cited *Rankrishan Panoya v Republic* (1957) 339. He faulted the prosecution for failing to call vital witnesses to shed more light in their case, and cited *Bukenya v Uganda* (1972) EA 549 and *John Kenga v Republic* (Criminal Appeal No. 118 of 1984). He urged that his defence was not shaken by the prosecution, and faulted the trial court for rejecting it.
14. The respondent refuted the claims by the appellant that he was framed and urged that the testimonies of PW2 and PW3 were properly found by the trial court to be truthful and free of ill will. It urged that the trial court considered section 333 (2) of the *Criminal Procedure Code*, in sentencing the appellant to 7 years imprisonment. It prayed for the dismissal of the appeal and the conviction and the sentence to be upheld.

### Analysis and Determination

15. The issues for determination are whether the prosecution proved its case beyond reasonable doubt by water tight evidence; whether Article 50 (2) (g) (h) was violated; whether vital witnesses were called; and whether the appellant’s defence was considered.



## Proof of the offence

16. Ammunition is defined under section 2 of the [Firearms Act](#) to mean, “any cartridge, whether a blank, tracer, explosive, incendiary, gas-diffusing, signalling or any other cartridge of any other kind capable of being discharged from or used with a firearm and includes— (a) any grenade, bomb or other missile whether explosive or not and whether or not capable of or intended for use with a firearm; (b) any mine whether for use on land or at sea, depth-charge or other explosive charge; (c) any other container or thing designed or adapted for use in or as weapon for the discharge of any noxious liquid, gas or other substance; (d) any projectile, powder or other charge, primer, fuse or bursting charge forming part of any cartridge or any component part thereof; and (e) any ammunition or pellets for use in an airgun, air rifle or air pistol.”
17. Possession is defined under that section to, “(a) include not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person and the expressions “be in possession” or “have in possession” shall be construed accordingly; and (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”
18. Section 4 of the [Firearms Act](#) provides that, “(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. (1A) No person shall manufacture, assemble, purchase, acquire or have in his possession an armoured vehicle unless he holds a certificate of approval issued under this Act. (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, 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.”
19. PW2 testified that, “Before booking him, I searched him and found he had three rounds of ammunition.” That evidence was corroborated by PW3 who testified that, “When searching him with PC Oteri we found along the waistline he had three ammunition folded inside a sheet he was covering.” Uncertain whether the same were ammunition, they were forwarded to PW1 for examination. PW1 was able to confirm that indeed the 3 rounds of ammunition were ammunition as defined under section 2 of the [Firearms Act](#) and capable of being fired from any known rifle.
20. In his defence, the appellant admitted being arrested on the material day, but insisted that he had been framed by the officers. On cross examination however, he stated that he had no grudge with the officers.
21. This court finds that the prosecution proved beyond reasonable doubt that the appellant was found in possession of 3 rounds of ammunition without a firearm certificate.

## Right to legal representation

22. The appellant alleges a breach of his right to representation under Article 50(2) (g) (h) of the [Constitution](#) and the [Legal Aid Act](#). That Article provides that, “(2) Every accused person has the right to a fair trial, which includes the right— (g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State



and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

23. The appellant pleaded guilty to the offence, but the reading of the facts was deferred to a later date for the ballistic report to be availed. The matter eventually proceeded to full hearing when all the prosecution witnesses testified and they were cross examined.
24. In *N. M. T alias Aunty v R* (2019) eKLR, the court (A.C Mrima J) stated as follows:- “That being the record, the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the *Constitution*. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one’s choice as embodied in Article 50(2)(g) of the *Constitution* therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation. The right under Article 50(2)(g) of the *Constitution* must be distinguished from the right under Article 50(2)(h) of the *Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of the *Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of the *Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the *Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the *Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the *Constitution* is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the *Constitution*.”
25. This court finds that, although the appellant was not informed of his right to legal representation, that failure did not vitiate the whole trial, as it has not been established that any prejudice or miscarriage of justice was occasioned to him.

#### **Failure to call vital witnesses**

26. According to the appellant, the prosecution ought to have called vital witnesses like CI Simon Gitau, Sgt Muthomi, PC Oreri, sister Magdalene and the 2 officers at the reporting office, to shed more light on how the offence was committed. Section 143 of the *Evidence Act* provides that, no particular number of witnesses shall, in the absence of any provisions of the law to the contrary, be required for proof of any fact. Besides, whether a witness should be called by the prosecution is a matter within their discretion and an appellate court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive (see *Oloro s/o Daitayi & others v R*. (1950) 23 EACA 493). Moreover, it would be an act in futility for the prosecution to call every superfluous witness just because they have been mentioned by prosecution witnesses called to testify.
27. This court finds that the 3 witnesses called by the prosecution were sufficient to prove the offence beyond reasonable doubt. PC Oreri indeed testified as PW2.

#### **Appellant’s Defence**

28. It is undoubtedly clear that the trial court considered the appellant’s defence and observed as follows, “The accused person in his defence also says that the officers had framed him with this offence for



having failed to pay the medical bill. On this it is noted that the hospital had in fact abandoned the pursuit of their bill and all they wanted was the accused taken out of their premises after the accused had become confrontational. The court has also paid regard to the accused defence and the same is a mere denial which could not be relied to counter the will collaborated evidence of the prosecution witnesses.”

29. The trial court duly considered the pre trial detention of 1 year during sentencing, in accordance with the provisions of section 333 (2) of the [Criminal Procedure Code](#).

### **Orders**

30. Accordingly, for the reasons set out above, the Court finds that the appellant’s appeal has no merit and it is dismissed.

Order accordingly.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Appellant in Person.

Ms. Nandwa for the DPP.

