Mamo & 2 others v Republic (Criminal Appeal E010 of 2023)
[2023] KEHC 23101 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E010 OF 2023

JN NJAGI, J

SEPTEMBER 20, 2023

BETWEEN

BORU GUYO MAMO ..... 1ST APPELLANT

GUYO HALKANO GALGALO ..... 2ND APPELLANT

ABUDO TUKI BORU ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C. Wekesa, Senior Principal Magistrate, in Marsabit PM`s Court Criminal Case No.E060 of 2022 delivered on 17/5/2023)

JUDGMENT

1. The 1st Appellant was convicted in count 1 for the offence of being in possession of a firearm without a firearms certificate contrary to section 4A (1) (a) of the *Firearms Act* 2014. The particulars of the offence were that on the 30th March 2022 at Manyatta Adhi Huqa in Jirime location within Marsabit County without reasonable excuse he was found in possession of a firearm namely AK47 bolt No. 4xxxx, without a firearms certificate in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

2. The 1st Appellant was in addition convicted in count 2 for the offence of being in possession of ammunition without holding a firearms certificate contrary to section 4(1) 2(a) as read with section 3 (a) of the *Firearms Act*, 2014. The particulars of the offence were that on the same day, time and place as in count 1, without reasonable excuse he was found in possession of 33 rounds of ammunition of 7.62 x 39mm special without a firearm certificate. The appellant was sentenced in count 1 to serve 12 years imprisonment and in count 2 to serve 7 years imprisonment.

3. In the same case the 2nd and 3rd appellants were convicted in count 3 for the offence of being in possession of government stores contrary to section 324 (2) as read with section 36 of the *Penal Code*. The particulars of the offence were that on the same day, time and place as in count 1 the Appellants were found in possession of public stores namely, 2 smoke jackets, 2 jungle trousers, one jungle sweater, 3 jungle shirts, 2 jungle belts, one lanyard with whistle and unspecified amount of gun oil of the disciplined service such property being reasonably suspected having been unlawfully obtained. Each of the 2nd and 3rd Appellants was sentenced to serve 3 years imprisonment.

4. The three Appellants were aggrieved by the convictions and the sentences and filed the instant appeal. The grounds of appeal are: -

    1. That the learned trial magistrate erred in matters of law and fact by failing to note that the charges were a frame up due to tribalism.

    2. That the learned trial magistrate erred in matters of law and fact by failing to note the incident took place at night at 7 pm thus the light used to identify the appellant was not proved beyond reasonable doubt.

    3. That the learned trial magistrate erred in law and fact by failing to give the appellant an option of a fine.

    4. That the learned trial magistrate erred in law and fact by not observing that the evidence adduced by PW1, PW2 and PW3 was un-collaborative and contradictory.

    5. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.

    6. That the learned trial magistrate erred in law and fact by failing to note that the sentence imposed on the Appellants was harsh, excessive and contrary to law.

    7. That the learned trial magistrate erred in matters of law and fact by failing to note that the alleged exhibit adduced by the prosecution was not found in the possession of the Appellant.

    8. That the learned trial magistrate erred in law and fact by rejecting the Appellants` defences without giving any cogent reason.

Submissions

5. The appeal was canvassed by way of written submissions. The appellants submitted that the entire trial was conducted in a language that they did not understand. That in the premises they were not accorded a fair trial and as such their right as to fair trial was violated.

6. It was submitted that the arresting officer PW2 stated in his evidence that the magazine of the AK 47 rifle was loaded with 33 rounds of ammunition while the ballistic expert testified that the maximum capacity for the magazine was 30 rounds.

7. The Appellants submitted that PW2 stated in his evidence that the rifle PEXh 1 has no serial number but only a volt No. 4xxx. That to the contrary the ballistics expert PW1 stated that the rifle has a serial number 4xxxx. That this was a material contradiction in the case.

8. It was submitted that there were no government marks on the items alleged to be public stores. That the said items were not found in the hands of the 2nd and 3rd Appellants. That there was no report from the government chemist that the alleged oil that was before court was gun oil.

9. It was submitted that a medical report ordered by the trial court revealed that the 2nd appellant had a history of mental illness and was on treatment. That the court did no employ the provisions of section 162 (1) of the *Criminal Procedure Code* in the trial of the 2nd appellant. Therefore, that the 2nd Appellant underwent an unprocedural trial and his rights under article 50 (2) (b) and (d) of *the constitution* were violated.

10. It was submitted that the maximum sentence for the offence under section 324 (3) as read with section 36 of the *Penal Code* is 2 years imprisonment. Therefore, the trial court imposed an illegal sentence of 3 years imprisonment on the 2nd and 3rd Appellants.

11. It was submitted that the trial court dismissed the defences by the Appellants without giving cogent reasons. The Appellants urged the court to quash the convictions and set them at liberty.

12. The state through the Senior Principal Prosecution Counsel Mr. Otieno, submitted that the charges against the 1st Appellant were sufficiently proved. That the police witnesses PW2 and PW3 arrested him while in possession of the AK47 rifle which was loaded with ammunition. That the ballistics expert PW1 confirmed that the rifle and the ammunition were firearm and ammunition respectively. The Appellant did not at any time produce a firearm certificate.

13. The state submitted that there was no contradiction between the evidence of the ballistics expert PW1 and the arresting officer PW2 on the number of rounds the magazine could hold. That the fact that PW1 said that the magazine was capable of holding 30 rounds of ammunition and not 33 rounds as stated by PW2 is not a material contradiction as PW1 is the expert.

14. It was further submitted that the contention that the Appellants did not follow the proceedings due to language barrier is not tenable because they actively participated in the whole trial by cross-examining witnesses called by the prosecution, gave their defence and called their own witnesses.

15. As regards the charge against the 2nd and 3rd Appellants, the state conceded their conviction in count 3 because it was not established in evidence what markings pursuant to section 324(1) of the *Penal Code* identified the exhibits as government stores. That there was no evidence adduced to confirm that the oil was gun oil and that it was the property of the government. Therefore, the conviction of the 2nd and 3rd Appellants on the said charge was not safe.

16. Further that the sentence of 3 years imposed on them was not legal as section 36 of the *Penal Code* provides for a maximum of 2 years imprisonment.

17. The court was urged to dismiss the appeal by the 1st Appellant but uphold the appeal by the 2nd and 3rd Appellants.

Analysis and Determination

18. This being a first appeal the duty of the court is as was stated by the Court of Appeal in the case of *Kiilu & Another -vs- Republic (2005)*1 KLR 174 that:

> " An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's

findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. The court is therefore duty bound to re-consider the entire evidence as adduced at the lower court and draw its own independent conclusions.

20. The 1st Appellant challenged his conviction on the grounds that the evidence adduced against him was not sufficient to sustain the charge, that the evidence was un collaborative and contradictory; that he was not found with the exhibits; that his identification was not proved; that the charges were framed up and that the trial court dismissed his defence without giving any cogent reason. The Appellant further challenged the sentence on the ground that it was harsh and excessive.

21. It was the evidence of PC Simiyu PW2 that he was on operation patrol at Manyatta Jillo with police officers from other multi agency teams. That at around 7pm while at Kibuka area they spotted a certain man dressed in a navy-blue jacket and a green trouser. He was armed with a rifle. The person saw their vehicle and ran away. They gave chase and he arrested the person about 300 meters away. He disarmed him and took the rifle from him. He found it was an AK 47 without a serial number but had a volt No. 4xxx. He found it loaded with a magazine containing 33 rounds of ammunition. He and his colleagues escorted him to where their vehicle was.

22. It was further evidence of PC Simiyu that after the arrest of the 1st Appellant they went to a nearby house where they found the 2nd and the 3rd Appellants. They conducted a search in the house and found items that they considered to be government stores - as recorded in the charge sheet. PC Nderitu PW3 prepared an inventory of the items. He, PC Simiyu, signed it. They escorted the three Appellants to Marsabit police station. They were charged with the offences.

23. PC Nderitu PW3 on his part testified that on the material day he was in a multi- agency team patrol. That at 7pm while at manyatta Adhihuka they spotted a man wearing a navy-blue jacket. The person was armed with a rifle. That on seeing the police officers he ran away. He was chased and ordered to stop. He stopped and surrendered. He was disarmed by PC Simiyu, PW1. The rifle he was carrying was found to be a AK47 with no serial number but with a volt No. 4xxxx. It had a magazine loaded with 33 rounds of ammunition. They searched one of the nearby houses and recovered government stores – items as stated in the charge sheet. He, PC Nderitu, prepared an inventory of the items. They escorted the Appellants to the police station. They were charged. The rifle and the ammunition were forwarded to the Ballistics Department for examination. During the hearing he produced the rifle, the ammunition, the magazine and the exhibit memo as exhibits, Pexh. 1-4 respectively. He also produced the alleged public stores and inventory as exhibits, P.exh 6-16.

24. It was the evidence of the forensic Examiner, CI Kenneth Chomba PW1 of DCI Headquarters, Forensic Department, Ballistics Section that he examined the rifle and found it to be a German AK 47 assault rifle designed to chamber rounds of ammunition in calibre 7.62 x 39mm. That it was successfully test fired with 3 rounds of ammunition picked at random from those presented to him for examination.

25. The witness further examined the 33 rounds of ammunition and found them to be in calibre 7.62 x 39mm. He test-fired 3 of them with the AK47 rifle. He also examined the magazine and found it to be a AK47 detachable with a carrying capacity of 30 rounds of ammunition. From the examination he formed the opinion that the rifle and the ammunition were capable of being fired and that they were firearm and ammunition respectively as defined under the *Firearms Act*, 2013. He prepared a report to that effect. During the hearing he produced the report in court as exhibit, P.exh.5.

26. When placed to their defence the Appellants gave sworn statements. The 1st Appellant stated that he was working with China Road Construction Company. That on the 30/3/2022 he left work and went to a manyatta to visit his family. He was arrested and beaten up. He was then charged in court with being in possession of a firearm. He denied that he was found with such a thing.

27. The 2nd Appellant stated that GSU officers found him standing outside a house. They asked him why people were running away. He was arrested, beaten up and taken to the police station.

28. The 3rd Appellant stated that he was arrested and beaten up. That there was a dirty uniform that the people had gotten from one Timothy. He was then charged. He denied that he committed the offence charged.

29. Each of the Appellants called one witness. The witness for the 1st Appellant, DW4, testified that he is a village elder. That the 1st Appellant was working with China Road Construction Company. That on the material day at 7-7:30 am they heard noise from the home of the appellant. They rushed there to check and they found him having been arrested and taken away. They went after him but they were denied access.

30. The witness for the 2nd Appellant, DW5, testified that the 2nd appellant is his neighbor. That he is of unsound mind. That on the morning of 30th the 2nd Appellant woke up and went to graze his livestock. That later they heard noise and he learnt that the 2nd appellant had been arrested. They sought to find out the reason for his arrest and they were told that he was found with items belonging to the police. He did not witness him being arrested.

31. The witness for the 3rd Appellant, DW6, testified that he is from manyatta Adhi Huka and a village elder. That policemen invaded their village and started to beat up people. He heard noise and people being chased. That by the time he arrived at the scene the 3rd Appellant had been taken away. He did not see him being arrested.

32. The Appellants in their written submissions contended that they did not understand the language in which the proceedings were conducted. That the trial court failed to give them interpreters as required by Article 50(2) (m) of *the Constitution* that accords an accused person the right to be provided with an interpreter where he cannot understand the language used at the trial.

33. I have noted that the issue that the Appellants did not understand the language the proceedings were conducted in is not among the grounds raised in their memorandum of appeal. I however consider the issue to be a crucial one that requires some consideration.

34. Section 198(1) of the *Criminal Procedure Code* provides thus:-

> "Whenever any evidence is given in a language not understood by the accused, and he is present in person, it should be interpreted to him in open Court in a language which he understands."

35. I have perused the court record. The plea was taken on 1/4/2022. The record indicates that the appellants answered to the charge in Borana language. Subsequent to that the language indicated in the coram part of the proceedings was English/Kiswahili. The trial magistrate however did not indicate the specific language the witnesses testified in – whether it was English or Kiswahili. I have however noted that the Appellants cross-examined witnesses, gave their defences and called witnesses.

36. In the case of *David Kariuki Kibuku v Republic* [2017] eKLR where the language of the court was indicated as English/Kiswahili/Kikuyu, the Court of Appeal held that:

8. Was the appellant's right to interpretation of the proceedings violated? We have perused the entire record and cannot help but note that the entire trial was conducted in three languages, that is, English, Kiswahili and Kikuyu.....

9. The omission by the trial court to specifically state the language which the appellant understood during the plea taking, in our view, did not vitiate the veracity of the trial.

The appellant pleaded not guilty, he cross-examined the witnesses, he has not demonstrated that he suffered any prejudice and none can be seen from the record of proceedings. We are satisfied that the appellant understood the proceedings as evidenced by his cross examination of the prosecution witnesses as well as by the defence he advanced at the trial court. In *Mugo & 2 Others -vs- R* [2008] KLR 19 it was held,

"On the face of the record, it cannot be said that the appellants did not follow the proceedings. Each of the appellants is shown to have cross examined all witnesses and ask questions which were relevant to the charges."

37. In the instant matter I am satisfied that the Appellants followed the proceedings. The fact that they did not raise the issue of interpretation in their memorandum of appeal connotes that the issue was an afterthought.

38. In her judgment the trial magistrate held that the evidence of the arresting officers PW2 and PW3 that they found the 1st Appellant with the AK 47 rifle to be consistent and credible. That she believed their evidence that he ran away when he saw the policemen but he was chased and he surrendered. She found that the gun and the ammunition were found in his possession.

39. The Appellants submitted that the discrepancy in the evidence of forensic expert PW1 and the police officers PW2 and 3 as to the capacity of the magazine found on the rifle puts into question the credibility of the police officers as to whether they found the 1st Appellant with the rifle.

40. The manner of addressing contradictions in a case was stated by the Court of Appeal in the case of *Jackson Mwanzia vs Republic* [2017] eKLR cited with approval the Ugandan case of *Twahangane Alfred vs Uganda* (Criminal "Appeal No. 139 of 2000 (UGCA) thus:

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. This 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's case."

41. Similarly, the same court in the case of *Richard Munene vs Republic* [2018] eKLR stated that;

> "It is a well settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial that an accused person will be entitled to benefit from it."

42. In my considered view, the discrepancy between the evidence of the forensic officer and the police witnesses PW2 and PW3 was not a minor contradiction. The forensic expert was categorical that the magazine could only hold 30 rounds of ammunition. The police witnesses said that the magazine was carrying 33 rounds of ammunition when they arrested the 1st Appellant. The question is where the

extra 3 rounds of ammunition were housed if the magazine could only carry 30 rounds? Were the policemen credible witnesses? The trial magistrate did not address the issue in her judgment.

43. The Court of Appeal in the case of *Ndungu Kimani v Republic* [1979] KLR 282 said the following on the credibility of witnesses:

> " The witness in a criminal case upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept evidence."

44. In this case the prosecution witnesses did not explain the discrepancy on the evidence of the extra 3 rounds of ammunition that was said to have been in the magazine when it could only carry 30 rounds of ammunition. The contradiction creates doubt whether the 1st Appellant was found with the rifle and the magazine. It is either that the witnesses were lying or that the magazine and the gun are not the ones recovered.

45. PC Simiyu PW2 said that he chased the 1st Appellant for a distance of about 300 meters before he arrested him. It was not clear from his evidence whether other police officers were with him when he caught up with the Appellant or they joined him later after he had arrested him. PC Nderitu PW3 did not say whether he joined in the chase or not. All that he said is that a chase ensued and the Appellant was arrested by PC Simiyu after he surrendered. Considering that it was at night how did PC Nderitu know that the Appellant surrendered to PC Simiyu when he did not say that he was in the chase? In my evaluation of the evidence I do not find sufficient evidence that the 1st Appellant was found with the AK 47 rifle and the rounds of ammunition.

46. The state conceded the appeal on the conviction of the 2nd and 3rd Appellants in count 3 where the Appellants were charged with being in possession of government stores. Section 324 (1) of the *Penal Code* requires for government stores to be marked. The section provides as follows:

> 324. Marking and possession of public stores
>
> (1) The Minister may, by notice in the Gazette, give directions as to the marks which may be applied in or on any stores under the control of any branch or department of, and being the property of, the Government of Kenya or the Kenya Railways Corporation and the Kenya Ports Authority.

47. In this case, no evidence was adduced that there were government markings on the items alleged to have been found with the 2nd and 3rd Appellants. The trial court did not address the issue in its judgment. I find no evidence that the exhibits were government stores. The trial court wrongly convicted the Appellants of the offence. The state rightly conceded to the appeal on the count.

48. The upshot is that the appeal is upheld on the three counts. Consequently, I do hereby quash the convictions and set aside the sentences imposed on the Appellants. I order the Appellants to be set at liberty forthwith unless lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20TH SEPTEMBER 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellants – present in persons

14 days R/A.