



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E006 OF 2020

BETWEEN

DENNIS MUNENE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Criminal Case Number 1617 of 2017 by Hon. G.Sogomo (PM) on 07th November, 2019)

JUDGMENT

Background

- 1) **DENNIS MUNENE** (*Appellant*) was charged for being in possession of a firearm without a certificate contrary to section 4(1)(a) as read with section 4(3)(a) of the Firearms Act Cap 114 Laws of Kenya (*the Act*).
- 2) Appellant was by a judgment dated on 31st October, 2019 found guilty and was on 07th November, 2019 sentenced to serve 10 years' imprisonment.

Appeal

3) Aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal on 22.09.2020 in which he raised the following issues for determination. **THAT**

- 1) Appellant was not supplied with witness statements
- 2) Appellant was denied a chance to tender his defence
- 3) Prosecution case was not proved beyond any reasonable doubt

SUBMISSION BY THE PARTIES

4) The court directed that the appeal be argued by way of written submissions but only the Respondent complied.

Respondent's submissions

5) Respondent argues the Appellant did not complain to the trial court that he had not been supplied with statements. Respondent contends that evidence of recovery of a G3 rifle from the Appellant by PW1 was well corroborated by PW4 and that the Appellant who did not have a license and was correctly convicted and sentenced.

Analysis and determination

6) The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

"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."

7) The prosecution case as stated by PW1 John Kaimenyi Muketha was that the persons that were in possession of firearms were one Murigi and one Kithare. It was his evidence that upon being shot, Murigi threw his firearm at the Appellant who was subsequently arrested together with Murigi who later died from gunshot wounds. PW2 MulaM'Nkuraru and PW3 David Chokera stated that they heard gunshots prior to Appellant's arrest whereas PW4 stated that he arrived at the scene long after Appellant and another were arrested and a firearm recovered.

8) In his sworn defence, Appellant denied having been in possession of a firearm. He explained he met two men who asked to light their cigarette and as he did so, the men told him to hide from approaching gunmen. That he hid as instructed and thereafter heard gunshots and was later arrested after he surrendered.

9) I have perused the record of the trial court and I proceed to address the issues for determination as hereunder.

1. Appellant was not supplied with witness statements

10) The court record discloses that on 30.10.18, the trial court made an order that the Appellant be supplied with witness statements by the close of that day. When the case came up for hearing on 04.04.2019, Appellant did not raise the issue of non-availability of statements if indeed they had not been supplied as directed by the court. Had that issue been raised; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to Appellants' right under Article 50 (2) (j) of the Constitution. I therefore find no merit in this ground of appeal.

2. Appellant was denied a chance to tender his defence

11) **Article 50 (k)** stipulates that every accused has the right to adduce and challenge evidence. There is evidence that the trial court complied with Constitution and afforded the Appellant an opportunity to tender his defence.

3. Prosecution case was not proved beyond any reasonable doubt

12) Section 2 of *the Act* defines possession in the following terms:

(a) includes 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". (Emphasis added)

13) After evaluating the prosecution case, the trial court indeed accepted the prosecution evidence that Appellant was not in actual possession of the firearm and that it was thrown to him by one Murigi after he was shot and the ingredients of possession reiterated in the case of **Joseph Nalima Domokwang v Republic [2018] eKLR** do therefore not apply to this case.

14) Having so found, the trial court's duty and which it failed to consider was whether the prosecution had proved that Appellant had knowledge that Murigi was in possession of a firearm and whether Murigi had the firearm with the consent of the Appellant.

15) That Murigi threw the firearm at Appellant is with respect no evidence concerning Appellant's involvement in the gun violence complained of as was erroneously held by the trial court.

16) There being no evidence that Appellant had knowledge that Murigi was in possession of a firearm and or Murigi had the firearm with the Appellant's consent, the prosecution case was not proved as required by law. The Appellant's explanation that he had just met the said Murigi and another before gunshots were fired after which he was subsequently arrested is in my considered view reasonable and ought not to have been dismissed as "*futile red herring*" as was described by the trial court.

17) Accordingly, and for the reasons set out hereinabove, I find that the prosecution did not prove its case beyond any reasonable doubt. The conviction and sentence are against the weight of evidence. This appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DELIVERED AT MERU THIS 13TH DAY OF MAY 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mbithe