



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 45 OF 2020**  
**RAMA LENJARU.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(Being an appeal against the original conviction and sentence by Hon. E. Ngigi PM in Isiolo CR. No. 257 of 2017 on 05/03/2020)**

**JUDGMENT**

1. **Rama Lenjaru ('the appellant')** was charged with the offence of burglary contrary to **section 304 (2)** and **Stealing** contrary to **section 279(b) of the Penal Code**. It was alleged that on 20/05/2015 at around 10.00pm at Samburu Lodge in Samburu County within Rift Valley Region, he broke and entered the dwelling house of No. 2013057944 APC FIDELIS OMWERI MACHONI with intent to steal therein and did steal from therein a firearm make G3 A3-POF-06 J19674 loaded with a magazine of 20 rounds of ammunition of 7.62 MM caliber together with a mobile phone make ALCATEL TAB S/NO 3439021904244 all valued at Ksh.110,000 the property of the said No. 2013057944 APC FIDELIS OMWERI MACHONI.

2. He faced a second count of possession of a specified firearm without a firearm certificate contrary to **section 4A of the firearms Act**. The particulars were that on the 21/05/2015 at around 11.00am at Loruko Village in Isiolo County, without reasonable excuse he had in his possession a firearm make G3 A3-POF-06 J19674 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

3. He also faced a third count of possession of ammunition without a firearm certificate contrary to section 4 of the firearm Act. The particulars were that on 21/05/2015 at around 11 am at Loruko village in Isiolo County without reasonable excuse he had in his possession 18 rounds of ammunitions of 7.62MM in circumstances which raised reasonable presumption that the said ammunitions were intended to be used in a manner prejudicial to public order.

4. There was an alternative charge of handling stolen goods contrary to **section 322 (1) (2) of the Penal Code** for which it was alleged that on 21/5/2015 at around 11.00 am at Loruko Village in Isiolo County, otherwise in the course of stealing, he dishonestly received or retained a firearm make G3 A3-POF-06 J19674 loaded with a magazine of 18 rounds of ammunitions of 7.62MM, a mobile phone, make ALCATEL S/NO3439021904244, knowing or having reason to believe them to be stolen goods.

5. He denied the charges but after trial, he was convicted and was sentenced to serve 5 years for the 1<sup>st</sup> limb of count 1, one year for the 2<sup>nd</sup> limb of count 1, 10 years for count 2 and 7 years for count 3. The sentences were to run concurrently.

6. Aggrieved by the said conviction and sentence, the appellant lodged this appeal raising 6 grounds which I have condensed into 4 as follows-;

- a. The trial court erred in law and fact by failing to note that the charge sheet was defective.
- b. The trial court erred in law and fact by convicting the appellant on contradicting, inconsistent and paradox evidence which was not enough to secure a conviction yet he was not found with the alleged exhibit
- c. The trial court erred in law and fact by rejecting the appellant's defence without any articulate reason.
- d. The trial court erred in law and fact by failing to order that the sentence starts from the date of arrest according to section 333(2) of the CPC since the appellant was in custody during trial.

7. The prosecution's case, advanced on the footing of eight witnesses was to the effect that on the material day, 20.05.2015, **P.C Fidelis Omweri Machen (PW1)**, then attached wamba camp at Samburu Lodge, left his house at around 2200hrs to go and take a shower. Before he left his brick house, thatched with makuti, he securely locked it with a padlock to safeguard his personal items and his government used firearm. On returning from showering, he found the right window open and the light on and on entry into the house, he found his items scattered all over and upon close look, he discovered that his firearm as well as his tablet were missing. He called his colleague, one Juma Omar, and both found that the house had been broken into. They informed the company management as well as the security team and thereafter called the sergeant at Archers post. The OCS came with officers an hour later and found some finger prints on the window but since it was at night, they opted to sleep and pursue the matter the next day. In the early morning of 21/5/2015, the Archers post team accompanied by sniffer dogs mounted a search which led them to Loruko village then towards the wilderness where, after tracing the footsteps, they saw the appellant who was not in uniform but carrying a firearm. The appellant surrendered when two officers fired at him and he was arrested. They recovered the firearm, the phone and the tablet then took him to the scene of crime and later forwarded him to Archers police station where they recorded their statements.

8. During cross examination, the witness stated that the firearm was taken for ballistic testing and that at the time of arresting the appellant, the police officers recovered 18 rounds of ammunitions, and the alcatel, touch screen tablet. He denied ever giving the appellant his firearm and insisted that the same had been stolen from his quarters together with his phone and that he was the one who had informed his superior about the theft of his firearm. During re-examination, he stated that the appellant was arrested four or five kilometres from Loruko village where he lived.

9. **PW2 Gabriel Lepana**, a ranger with the Samburu National reserve, a warden and in charge of security, said that he was in his house on the material day at around 2230 hours when he was called on phone by APC Edward, who told him that his house had been broken into and his firearm stolen. He mobilized PW3, PW4, PW5, PW6 & PW8, went to the scene and confirmed PW1's house had been broken into. On 21/5/2015, they followed the foot prints towards Loruko and found a young man namely Rama within the village with the firearm. When the appellant saw them and attempted to flee, they fired three shots in the air and he surrounded after which they apprehended him and recovered the loaded firearm and the alcatel phone. PW1 identified the rifle and the phone after the appellant had been arrested. While identifying the appellant in court, he added that he knew him and his father.

10. **PW3, Daniel Jairinon Leparakichu**, was also a warden, attached to Samburu National reserve, stated that he was part of the Archers post team that visited the scene and thereafter, with his superiors apprehended the appellant with the firearm.

11. **PW4, Charles Sam Lesamali**, of Samburu National reserve, told court he did not live with PW1 but the riffle and the phone were recovered from the appellant who had broken into the house of PW1.

12. On his part, **PW5, Joseph Erotis**, another warden attached to Lewa Wildlife Conservancy, stated having part of the Archer's post team in the operation denied either knowing what the appellant was doing with the gun or what he had used to break the wooden window with. He confirmed that the appellant had been arrested with the riffle and the tablet.

13. **PW6, CI George Naibei**, the Base Commander Malindi as at the date of testifying, but the OCS Archer's post at the time of the incident, confirmed having visited the scene and detected that there was a break in of the officer's window when he went to shower then admitted that neither the broken window nor any photographs of the same taken and brought to court as an exhibit. He further admitted that even though all the witnesses were police officers, there were civilians as well as the local chief around that area, but no photographs of the foot prints that led to where the appellant was were ever taken. In re-examination, he stated that the team followed the footprints and arrested the appellant with the gun before court.

14. The 7<sup>th</sup> witness was, IP Kenneth Chomba, the Forensic examiner, who produced the forensic report on behalf of his colleague Mr. Alex Chirchir, who was involved in another case in Nyeri and could not attend court. He produced the report whose gist was that the firearm and ammunitions were subjected to examination and confirmed to be a firearm and ammunitions as defined under the Firearms Act. Nothing of substance emerged from the cross-examination.

15. **PW8, P.C John Musili**, the investigating officer, told court that that they just followed the footprints which led them to where the appellant was sleeping. The entry point of the house was the window which they did not see the need of bringing to court. They found the gun as well as the bullets intact and that after they shot in the air, the appellant surrendered.

16. In his defence, the appellant gave sworn testimony to the effect that on the material day, he came from grazing and slept and was asleep in his house the next day when officers broke the door and asked him to give them PW1's gun that he had stolen. He was then arrested and taken to the police station. He pointed out that there were discrepancies in the evidence tendered on the serial numbers of the gun as well as the number of ammunitions as narrated by the witnesses. He added that Juma Omar testified that the contingent followed the footprints of an animal and that PW8 said they did not find the appellant's finger prints on the gun therefore he was not involved in the theft. During cross examination, he stated that he was arrested in 2017 and that he was in form two at Kipsing Secondary School although he did not have any document in support thereof. That he had seen one of the officers (Juma Omar) who came to arrest him before. He alleged having been framed by the 15 officers who came to arrest him even though there was no grudge between him and PW1. He denied ever being arrested on 2/5/2015 and absconding.

17. The parties filed their respective submissions on 8/2/2021 and 30/3/2021. On his part, the appellant submitted that the charge sheet was defective as there was a discrepancy in the serialization of the gun indicated in the charge sheet and the one actually produced as exhibit in court. He further submitted that merging of burglary and stealing in one count contravened section 134 of the CPC as it amounted to duplicity. He contended that the absence of evidence that the weapon was dusted for fingerprints and the contradicting testimonies of the prosecution witnesses ought to have created a doubt in the trial court's mind. He faulted the trial court for its failure to factor in the period he had already spent in custody and order the sentence to run from the date of his arrest in line with the provisions of section 333(2) of the CPC. He further faulted the trial court for rejecting his defence and concluded that the prosecution had not proved their case beyond reasonable doubt. The court is urged to quash the conviction and set aside the sentence against the appellant and set him at liberty. He relied on the decisions in **JOO v R (2015) eKLR, John Barasa v R (2005) eKLR, Elijah Wainaina Kihuyu v R (2006) eKLR, Ahamad Abolfathi**

**Mohammed & anor v R (2018) eKLR and Bethwel Wilson Kibor v R (2009) eKLR** in support of his appeal.

18. For the prosecution, it was submitted that the trial court had dealt satisfactorily and sufficiently with the assertion that the charge sheet was defective. According to the prosecution, the said error apparent on the record was curable as it did not occasion a miscarriage of justice as is outlined under section 382 of the CPC. It was contended that there was no duplicity in charges as both offences could be subsumed into each other and the particulars as laid out in the charge sheet were sufficiently corroborated by the witnesses as well as the exhibits adduced. It was concluded that the sentence meted out to the appellant was fair and lenient as the appellant was a convict serving a lawful sentence at the time of the current sentencing therefore the time he spent in custody during his trial was a non-issue. The prosecution relied on **John Irungu v R (2016) eKLR, Reuben Nyakango v R (2013) eKLR, Richard Munene v R (2018) eKLR, Julia Wangeci Githua v Commissioner General of Prisons & 2 others (2020) eKLR and Francis Karioko Muruatetu & anor v R (2015) eKLR** in support of their submissions.

19. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See **Okeno v. Republic [1972] EA 32**. In executing that mandate, the must determine is whether the complaint that the charge sheet was bad for duplicity is merited; whether the prosecution proved their case beyond reasonable doubt and if there was material discrepancy in the evidence as to negate the findings leading to conviction.

20. I have carefully perused the record in totality and noted that the testimony of PW1 was sufficiently and consistently corroborated by that of PW2, PW3, PW4, PW5, PW6 & PW8 and to that extent, I find the same was reliable and credible. The global import of that corpus of evidence point irresistibly that a contingent of police officer, using a sniffer dog, traced the foot prints of a person who broke into the quarters of PW1 and stole the firearm and telecommunication gadgets to the appellant and recovered from him the stolen items.

21. The appellant's defence when viewed against the entire evidence on record had no impact at all in controverting or just casting doubt in the prosecution's case and cannot hold together. All the prosecution witnesses were categorical that the rifle and the phone were recovered from the appellant after his arrest. I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt, that the highlighted discrepancies in the evidence never and cannot negate the substance thereof. I would for that reason alone dismiss the appeal.

22. However, it would be important to look at the grounds of appeal singularly and determine what each faults the judgment for and if such fault is merited. The first is the allegation that the charge sheet was defective for having amalgamated the offences of burglary and stealing in the same count. Court of Appeal, (Chunga, CJ., Omolo & O'Kubasu, JJA. ) in **Njoka v. R (2001) KLR 175** held as follows:

“ Section 304 (2) of the penal Code, cap. 63, was the main section under which the appellant was charged. **The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry ne mens rea. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house.**

23. More recently the same court in **Reuben Nyakango Mose vs Rep (2013)eklr** reiterated the same position and said; -

**“It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge.”**

24. I am bound by this decision of the Court of Appeal and find nothing wrong with the two offences of burglary and stealing being charged as one. Consequently, I find the charge to have been proper and not defective. In any event the dictates of sections 134 and 135 of the Criminal Procedure Code is that offences may be charged together provided that the particulars there of are well set out as to fully inform the accused of the accusations facing him. A charge sheet can only be determined defective when it fails the thresholds of section 135 aforesaid and leads to a miscarriage of justice. Here I have discerned no prejudice occasioned to the appellant at trial.

25. On the sufficiency of the evidence against the accused, which speaks the grounds 2, 3, 4, and 5 of the Amended supplementary ground of appeal, I totally agree with the trial court that there was possibly no way that all the prosecution witnesses would have framed the appellant yet some did not have prior knowledge of him. Since the stolen items were found in the appellant's possession and he could not explain how they came into his possession, the direct and only possible inference is that he is the one who broke into PW1's house on the material day and stole them. In **David Kanyoro & Another vs R Cr. Appeal No.265/2005** (unreported), the Court of appeal stated as follows:

**“The position in law is that a person found in recent possession of property reported as stolen is presumed to be the thief of it unless he gives a reasonable explanation as to how he came to be in possession thereof. This is a presumption of fact arising under section 119 of the Evidence Act Cap 80 Laws of Kenya and is rebuttable [see Jethwa v. R. 1969 E.A. 459.”**

26. I now turn to the two offences of possession of firearms and ammunition without a certificate. I apply my findings on the sufficiency of the evidence and hold that the possession of the items charged was properly proved and I find no justification to fault the trial court. It might only be necessary to comment on what constitute possession in law. Section 4 of the Penal Code (cap. 63) defines possession as follows:

**“Possession”**

**(a) be in possession or have in possession 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 of any other person.**

27. The defence by the appellant when confronted with otherwise very watertight evidence was that he had been framed by the 15 officers who came to arrest him yet he had no grudge with any of them. Likewise, he could also not account for the possession of firearms and ammunition. In his defence, he stated that since PW7 did not find his finger prints on the gun, he was not involved in its theft. The appellant did not furnish any firearms certificate or authority to show that he had authority to possess the firearms, magazine and ammunition. It has also been conceded that he was not a police officer therefore unauthorized to have in his possession a firearm.

28. The last ground of the appeal contends that the sentence meted out ought to have been ordered to commence on the date of his arrest. In holding such position, section 333(2) of the Code and the decision by the Court of Appeal in **Ahamad Abolfathi Mohammed vs Republic (2018) eKLR** have been relied upon. I have read the judgment of the trial court in light of the binding decision of the court of appeal and it is indubitable that the period the appellant had taken in custody was never taken into account. That was an error that goes against the duty of the court to comply with the provisions of the law. For that reason alone, and while I have dismissed the appeal on conviction and upheld the sentence, I order that the sentence shall run from the 21/05 /2015, being the date the appellant was arrested.

29. The upshot from the foregoing is that the appeal dismissed on both conviction and sentence save for the commencement date of the sentence.

**DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY, BY MS TEAMS, THIS 3RD DAY OF MAY, 2021.**

**PATRICK J O OTIENO**

**JUDGE**