REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 16 OF 2018

1. ALEX MATHENGE GATHONI.....1ST APPELLANT

2. VANESSA WAMBUI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Nyeri Chief Magistrates Court

Criminal Case No. 826 of 2016(Hon. H. Adika, Senior Resident Magistrate) on 6 June 2018)

JUDGMENT

The appellants were charged in the magistrates' court with three counts of preparation to commit a felony contrary to section 308 (1) of the Penal Code, cap. 63.; being in possession of a fire arm contrary to section 89(1) of the Penal Code; and, being in possession of ammunitions contrary to section 89(1) of the Penal Code. The particulars of offence in the first count were to the effect that on the 11th day of August, 2016 at Nanyuki Matatu terminus in Nyeri township within Nyeri County, without reasonable excuse were found armed with a dangerous weapon namely ceska pistol serial number F5578 in circumstances that indicated that they were so armed with intent to commit a felony namely robbery. As for the second count, it was alleged that on the same date and place as in the first count, and without reasonable cause, the appellants had in their possession a ceska pistol serial number F5578 with five rounds of ammunition in circumstances that raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order. Again, in the third count, on the material date and place without reasonable excuse the appellants are alleged to have had in their joint possession five rounds of ammunitions of 9mm calibre in circumstances which raised reasonable presumption that the said ammunitions were intended to be used in a manner prejudicial to public order.

The 1st appellant faced a fourth count of consorting with a person in possession of a firearm contrary to section 89(2) of the Penal Code and here the particulars were that on the 11th day of August 2016 at Nanyuki Matatu terminus within Nyeri County in the company of Vanessa Wambui Ndichu a person who, without reasonable excuse had in possession of a firearm namely ceska pistol serial number F5578 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

The record shows that the charges were amended on 27 March 2018 the effect of which was that the charges contained in the second and third counts were withdrawn as against the 1st appellant; accordingly, only the 2nd appellant faced the first, second and third counts while the 1st appellant ended up being charged with the first and fourth counts.

In his judgment, the learned trial magistrate convicted the appellants on the first count; he convicted the 2nd appellant on the second and third counts while the 1st appellant was convicted further of the fourth count. For the first count, each of the appellants was sentenced to seven years imprisonment without the option of a fine; for the second count, the 2nd appellant was sentenced to 7 years imprisonment without the option of a fine; she was discharged on the third count under section 35(1) of the Penal Code. The 1st appellant was imprisoned for 5 years on the fourth count. The court ordered the prison terms to run consecutively.

The appellants filed separate appeals against both the conviction and sentence; in the memorandum of appeal filed by the 1st appellant, the latter impugned the judgment of the trial magistrate on the grounds that he erred both in law and in fact by convicting him on the basis of preparing to commit a felony without establishing whether the ingredients of the preparation were proved; that he erred in law and in fact by convicting the appellant on the basis of highly contradictory evidence of the prosecution witnesses; that he further erred in law and in fact by convicting the appellant on the basis of alleged consorting, a fact that was not proved to the required standard; and, the trial magistrate erred in law and in fact by rejecting his defence without cogent reasons contrary to section 169(1) of the Criminal Procedure Code, cap.75.

Like the 1st appellant, the 2nd appellant faulted the learned magistrate's judgment on the grounds that he erred both in law and in fact by convicting her on the basis of contradictory evidence of the prosecution witnesses and also rejecting her defence contrary to section 169(1) of the Criminal Procedure Code. She added that the trial magistrate erred both in law and in fact by convicting her for being in possession of a firearm without considering what she described as 'the doubtful exclusiveness of possession' required in section 2 of the Penal Code. She also faulted the learned trial magistrate for convicting her on the basis of being in possession of a firearm with the intention to commit a felony when neither the fact of possession nor the preparation to commit a felony was proved.

Since the appellants were tried, convicted and sentenced in the same trial, the two appeals were inevitably consolidated on 28 September 2018.

This being the first appeal, it is the task of this honourable court, in exercise of its appellate jurisdiction, to consider the evidence on record afresh and come to its own conclusions of fact; these conclusions may not necessarily be the same conclusions that the trial court arrived at but this court has to bear in mind that as much as it is entitled to deviate from the trial court's conclusions, the latter court had the advantage, which this court does not have, of seeing and hearing the witnesses and, for this reason, it was ideally placed to make factual conclusions based on such elements of evidence as the demeanour and disposition of the witnesses whenever it was necessary to do so. **(See Okeno versus Republic (1972) EA32)**

The record shows that the state called a total of eight witnesses four of whom were police officers; Of these officers, one was a ballistics expert. The rest of the witnesses were civilians.

The first witness to testify was Ambrose Mwai Wambugi (PW1) whose evidence was to the effect that on 11 August 2016 at about 10 AM he boarded a public service vehicle, registration No. KBX 295M to Nanyuki at a terminus in Nyeri. He found three other passengers in the vehicle; one woman and two men. He sat next to the driver. Other passengers entered the vehicle. Subsequently, a police officer came and enquired whether any of the passengers was travelling with the other or were travelling separately to their respective destinations. The passengers answered that they were travelling separately.

The appellants happened to have sat at the back of the vehicle; they came out of the vehicle; the 1st appellant came out first followed by the 2nd appellant. There was a green paper bag belonging to the 2nd appellant in the vehicle; it was handed over to the police by one of the passengers who was described as a school boy. In cross-examination, the witness testified that, in fact, the 2nd appellant came out of the vehicle carrying the paper bag. In it was another leather bag from which was found a firearm. The appellants were arrested, apparently in connection with this recovery, and taken to the police station. While the 1st appellant was being handcuffed, the 2nd appellant shouted that the police should not kill him because she was pregnant with his child. The rest of the passengers, including this witness, were also taken to the police station to record their statements.

Like the first witness, Patrick Mbarire Ndigiri (PW4) testified he was a passenger in the vehicle registration no. KBX 295 M, the same vehicle that the appellants had boarded. It was while he was seated in the vehicle that two police officers came and ordered the appellants out. The appellants got out with their items but left hand bag on the seat where they were sitting. A student, who was in the same vehicle, gave out the bag; he described it as black and 'leatherish'. The police officers opened it and found a gun in it.

The student alluded to was one Edward Muchiri Wagura (PW7) who confirmed that indeed he was travelling from school to his home in Naromoru on the material day. He boarded the same vehicle as the appellants; as a matter of fact, he sat with them on the same row of seats at the back of the vehicle. He was initially seated between them but they swopped places with the 2nd appellant so that the latter sat in the middle next to the 1st appellant. He ended up sitting on one of the two window seats on that row. It was his evidence that the 1st appellant was sitting on a bag with a leso; he was initially seated on the other window seat but he exchanged his seat with the 2nd appellant who now occupied the window seat while the 1st appellant sat on the middle seat.

As the vehicle was about to leave two men, who turned out to be police officers, appeared and asked the appellants to get out; one of them searched them. He then asked the witness whether the two had left anything in the vehicle. He told them that there was a bag which he gave to the officer. When the latter opened it, he found a gun in it.

The driver of the passenger vehicle was John Maina Mureithi (PW2) who testified that on 11 August 2016 he was at Nyeri bus stage when the appellants entered his vehicle. He recalled that the 2nd appellant was expectant. According to him, the 1st appellant sat on the seat at the back of the vehicle but did not sit together with the 2nd appellant. Apparently, he was in the vehicle when they boarded and vacated the back seat for the appellants when they entered the vehicle. As the 1st appellant was interviewed by a police officer, the 2nd appellant shouted from the vehicle 'do not kill him' because she was pregnant with his child. She came out of the vehicle carrying a yellow paper bag; in that bag was a leather bag from which the police removed a gun.

Police Constable Oscar Korir Kosgey (PW3) testified that on the material day at about 11 AM, he got a call from a member of the public alerting him that he had seen two people, a man and a woman, whom he suspected to be thugs. He asked the caller to track the suspects' movements as he made his way to the scene. He finally came to the bus stage together with his colleague, Robert Mugaka (PW5) and found that the suspects had boarded a passenger vehicle registration No. KBX 295 M heading to Nanyuki.

From the description he had been given he arrested the appellants; the 2nd appellant had a black bag from which he found a ceska pistol serial No. F5578; it had a magazine loaded with 5 rounds of 9mm calibre live ammunition. The 2nd appellant told him that the pistol belonged to the 1st appellant who was her husband. The two were then arrested.

It was his evidence that the appellants were seated next to each other at the back of the vehicle; apart from the appellants, there was also another passenger at the backseat. Other three passengers were on the next row of seats. There was one passenger near the door and, of

course, the driver. The 2nd appellant had a bag on her laps while the 1st appellant had another bag that contained clothes. According to his evidence, it was the 2nd appellant who revealed that the ceska pistol belonged to her husband, the 1st appellant. The 2nd appellant left the vehicle with her bag. Apart from the pistol, other items recovered in the bag were a tissue paper, a thermometer, two bottles of cosmetics and a body lotion, sanitary pads, toothbrush, an eye pencil and a pink underwear. The 2nd appellant is said to have signed an inventory of these items.

In the course of the investigations, the 2nd appellant led the witness to a house in Naromoru where the two are alleged to have lived; in that house, they found photographs of the appellants. It is from this photographs that he formed the opinion that the appellants were a married couple. He also got information from the owner of the house that he had leased it to the appellants.

The officer testified that he arrested the appellants on the basis of the description he had been given and that he found them seated next to each other.

His colleague police constable Robert Mogaka (PW5) testified that indeed he was with his colleague, constable Oscar Kosgei when they were informed of an armed couple. They proceeded to the matatu terminus where they found the appellants. He entered the vehicle in which the appellants were seated at the back; he got the 1st appellant out. The 2nd appellant was holding a bag but she left it in the vehicle when she came out. It was given to the police by another passenger who was in the vehicle. They searched the bag and found a gun serialised as No. F5578 loaded with 5 rounds of ammunition. Apart from the bag in which they found the pistol, there was another paper bag with clothes in it. It was his evidence that the 2nd appellant told the officers that the gun belonged to the 1st appellant and that the latter was her husband.

The ballistics expert Alex Mudindi Mwandawiro (PW6) presented a report of the findings upon examination of the firearm, the magazine and the rounds of ammunition. According to the report, the magazine was used in the firearm and could carry up to fifteen rounds of 9 x 19 mm ammunition; he established that the ammunitions found loaded in the magazine were of this size and could be fired from the firearm. As a matter of fact, he successfully fired three of the rounds using the firearm.

The investigations officer police constable Norah Muasi (PW8) stepped into the case after the appellants had been arrested. She reiterated in her testimony what the arresting officers had testified that the appellants had been arrested with two bags one which contained a pistol amongst other items. She recorded the appellants' statements. She took the 2nd appellant to hospital where she was advised that the 2nd appellant was pregnant. She went with the 1st appellant to his house and found nothing; together they then proceeded to a house in Naromoru where they found photographs and baby clothes. The photograph is said to have been in pieces and for this reason they did not carry it.

The officer established that the 1st appellant had been previously charged with robbery with violence in two other cases; however, she couldn't establish the outcome of those cases.

When the appellants were put on their defence at the close of the prosecution case they opted to give sworn evidence. The 1st appellant testified that he lived in Nanyuki where he operated a barber shop. He lived in the same shop. On 11 August 2016, he was on his way to Nanyuki when he was arrested in a public passenger vehicle at the bus terminus in Nyeri. When he boarded the vehicle, there were four other passengers; three women and one man. He sat on the seat next to the backseat. Soon thereafter police officers came and asked all the passengers to alight with their luggage. A search was conducted outside the vehicle and nothing was found on them.

One of the officers entered the vehicle and came out with a black handbag. He opened it and removed the pistol from there. He enquired from the passengers who the owner of the bag was but all the passengers disowned it. He, in particular, told the officer that all he had was a luggage of tiles in the boot of the vehicle. All the passengers were then taken to the police station where the appellant was informed that he had another criminal case and therefore he must have known something about the pistol.

The 1st appellant testified further that the prosecution witnesses contradicted themselves; in particular, the 1st prosecution witness testified that the 1st appellant entered the vehicle with a green paper bag and that he alighted with it when the police officers ordered them to get out of the vehicle yet at the same time he said that the officers were given the bag by one of the passengers. The 2nd prosecution witness on his part, stated that he found the accused being beaten by police officers and that he saw a black bag being removed from a yellow and not a green bag. He denied knowing the 2nd appellant.

On her part, the 2nd appellant testified that she lived in Kamakwa and that on 11 August 2016 her husband had chased her away; she was on her way to her aunt's place in Nanyuki when she was arrested at the bus terminus in Nyeri. She also testified that she was seated behind the driver and as passengers streamed in two men came and asked everybody to alight from the vehicle with their belongings. They were searched outside the vehicle but nothing was found on them. One of the men entered the vehicle and came out with a black bag. He removed a pistol from the bag. Nobody claimed the bag. He checked for any form of identification from the bag but he could not find any.

It was her evidence that none of the prosecution witnesses knew where the bag was from; according to her, the first prosecution witness said that a hand bag was removed from a green paper bag but the second prosecution witness said that it was removed from her legs. Yet the third prosecution witness said it was removed from the vehicle. She denied owning the pistol.

On cross-examination she admitted that she had a yellow paper bag with cloths in it. She also admitted that she was seated next to a man. She, however, denied seeing the 1st appellant.

At the hearing of the appeal, the appellants relied entirely on their own written submissions which they filed in person.

Mr. Magoma, the learned counsel for the state conceded that the appellants were improperly convicted on the first count; he urged that there was no evidence to support the particulars of the offence in this count.

The 2nd appellant, as earlier noted, was discharged on the third count; considering that the state did not raise any issue with the discharge, it follows that this honourable court is left with the second and fourth counts to grapple with in this appeal.

The second count is that of being in possession of a fire arm contrary to section 89(1) of the Penal Code. This section defines both the offence and the penalty of possession of a firearm; to the extent that it is relevant, it is necessary that I reproduce here the entire section 89 of the Code; it reads as follows:

> ***89. Possession of firearms, etc.***
>
> ***(1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.***
>
> ***(2) Any person who consorts with, or is found in the company of, another person who, in contravention of subsection (1), is carrying or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that he intends to act or has recently acted with such other person in a manner or for a purpose prejudicial to public order, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.***
>
> ***(3) In any prosecution for an offence under this section, it shall be presumed, until the contrary is proved, that a weapon having the appearance of a firearm is a firearm.***
>
> ***(4) In this section—***
>
> ***"ammunition" has the meaning assigned to it by the Firearms Act (Cap. 114);***
>
> ***"explosive" means any explosive within the meaning of the Explosives Act (Cap. 115);***
>
> ***"firearm" has the meaning assigned to it by the Firearms Act;***
>
> ***"incendiary material" means any material capable of being used for causing damage to property by fire and intended by the person having it in his possession or under his control for such use;***
>
> ***"offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use.***

Looking at the evidence on record, it is not in dispute that a firearm was recovered from what has been described as a black bag found in a public service vehicle registered as No. KBX 295 M at a bus terminus in Nyeri town on 11 August 2016. The evidence that the firearm was loaded with live ammunition is also not in doubt; to be precise, it is a fact that was proved by the prosecution to the required standard. According to Alex Muindi Mwandawiro (PW6) an Assistant Superintendent of Police attached to the ballistics laboratory at the Directorate of Criminal Investigations, the firearm was tested and found to fire; indeed, of the five rounds of ammunition with which it was loaded, it fired three of them. With these tests, the ballistics expert came to the conclusion that the gun and the bullets were respectively a firearm and ammunition as understood under the Firearms Act, cap. 114.

The major point of contention in the prosecution case was in whose possession this firearm was found. According to section 89 (1) the act of 'possession' is an essential ingredient in the offence created under this provision of the law and being that essential it falls upon the prosecution to prove beyond reasonable doubt that the accused was in possession of the firearm in question as alleged.

The term 'possession' is not left to speculation; perhaps because of the importance attached to it in definition of offences such as the one in section 89(1), it is specifically defined in section 4 which is the interpretations section of the Penal Code; that section reads as follows:

> ***"possession"—***
>
> ***(a) "be in possession of" 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 not) for the use or benefit of oneself or of any other person;***
>
> ***(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;***

More pertinent to the present circumstances is part (a) of this section; I understand it to say that possession may be actual or constructive; it is actual when one is in active control or custody of a thing but it is constructive when though not in actual or active possession or custody of a person, the thing is either in the custody or possession of another person or at a particular place but, somehow, subject to the control of the accused.

When I consider the evidence on record in its entirety, I am left with no doubt that the 2nd appellant was in actual custody, control or possession of the bag in which the firearm was found.

I do not have any reason to doubt the police officers' (PW3's and PW5's) evidence that their attention was drawn to the motor vehicle in which the appellants had boarded by an informer who tracked the appellants' movements to the vehicle; the informer's interest in tracking down the appellants was informed by the fact that he had alerted the police officers that the appellants were armed and one of them (PW3) had asked him to track them as they made their way to the scene. It would, of course have been important to hear from the informer on how he came to learn that the appellants were armed but I am convinced that failure to call an informer to testify particularly in such a case where there is both direct and corroborative evidence is not fatal to the prosecution case.

It was the officers' evidence that they picked the appellants out from the vehicle because of the description they had been given and this again need not have been difficult because according to constable Kosgey (PW3) the first appellant was wearing a t-shirt and gumboots; it was not suggested that there was any other passenger in the vehicle with the same outfit. The 2nd appellant, on the other hand, was pregnant and wore a leso but which she had put in a bag at the time of the arrest. She was described as a short and brown lady.

Based on the information they had been given they conducted a search on the appellants outside the vehicle but they could not find anything on their persons. My assessment of the police officers' actions is that they could not have picked out the appellants and searched them if they did not have reliable information that they were armed.

It is true that nothing was found on the persons of the appellants, and in particular the 2nd appellant but there is evidence that she carried a paper bag in which there was another bag that contained the firearm, amongst its other contents. According to Mureithi (PW2) the 2nd appellant had a yellow paper bag; in it was a leather bag and it is from this bag that the police removed a gun. The 2nd appellant herself admitted that she was in possession of a yellow paper bag.

According to Wambugu (PW1) the 2nd appellant was called out by the police but her bag was handed over to the police by a school boy (PW7) who testified that the 2nd appellant had been in possession of this bag all along. The school boy himself testified that both the appellants sat on a bag in turns. They left it in the vehicle when they were told to get out by the police; he gave the bag to the police and the police found a gun in it. Ndigiri (PW4) also testified that a student gave out the bag to the police and it is in this bag that a firearm was found. Police constable Kosgey testified the 2nd appellant had the bag on her laps except that she told the police that the gun in it belonged to the 1st appellant.

In my humble view, the prosecution evidence that the 2nd appellant was found in possession of the bag in which the firearm was found was neither shaken nor controverted and I find no reason on record not believe this part of the evidence. In fact, in my assessment, there was sufficient evidence to charge and convict both the appellants, and not just the 2nd appellant alone, with the offence of possession of a firearm under section 89(1) of the Penal Code. The axe may have fallen on the 2nd appellant alone because she was the one who was found in active custody of the offensive bag which contained the firearm.

I agree with the 2nd appellant that there was some inconsistency in the evidence of some of the prosecution witnesses on the colour of the bag and the point at which it was taken out of the vehicle; however, this inconsistency does not displace the fact that she was in possession of the offensive bag, irrespective of its colour and the time it was taken out of the vehicle. In my view, these inconsistencies are immaterial and have little or no bearing at all on the fact that the 2nd appellant was found in possession of the bag. In any event, it has been noted, she admitted having had a yellow paper bag.

Turning to the 1st appellant, he was convicted under section 89(2) of the Penal Code; according to that section, if one either consorts or is found in the company of another person who is in contravention of section 89(1) he is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

The evidence of the school boy, Edward Muchiri Wagura (PW7) would suggest that the appellants were together and it also corroborates the evidence of the driver of the vehicle John Maina (PW2) that he saw the appellants enter the vehicle together. As a matter of fact, he gave up a seat for them at the back of the vehicle where he had been sitting when they entered. It was also his evidence that he heard the 2nd appellant shout, apparently to the police, that they should not kill the 1st appellant because she was pregnant with his child. His evidence corroborates that of police constable Kosgey (PW3) who testified that he was informed that the two appellants had been seen together. Indeed, when he arrived at the vehicle, he found them seated together at the back. Wambugu (PW1) also testified that the appellants were seated together at the back of the vehicle. Testimony along the same lines was given by Ndigiri (PW4) who testified that the two appellants were seated at the back.

According to police constable Kosgey (PW3), the 2nd appellant told him that the 1st appellant was not only her husband but also that he was the owner of the firearm.

Based on the evidence on record, I am satisfied that that the 1st appellant was consorting with the 2nd appellant or, at any rate, was in the company of the 2nd appellant; either way, an offence under section 89(2) was proved beyond reasonable doubt and the 2nd appellant was properly convicted of it.

In the ultimate, the appellants' appeal against conviction fails.

As far as their sentences are concerned, the learned magistrate erred in law when he ordered that the sentences to run consecutively rather than concurrently; the various offences having been committed in the same transaction and at the same time, the appropriate order should

have been to have the sentences run concurrently rather than consecutively. But this question is now moot because as things stand, each of the appellants is convicted of one count only and therefore the question whether sentences should run concurrently or consecutively shouldn't arise.

For avoidance of doubt, save for their appeal against conviction on first count which the state conceded and the third count for which the 2nd appellant was discharged, the appellants shall serve their respective sentences on the second and forth counts as meted out by the trial court. It is so ordered.

Signed, dated and delivered in open court this 17th day of January, 2020

Ngaah Jairus

JUDGE