



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.2 OF 2020

BONAYA TARI GUYOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and Sentence of Hon. E.K. TOO Principal Magistrate Moyale in Cr. Case No.320 of 2017)

J U D G M E N T

The appellant was charged with two counts under the Firearms Act Cap 114 Laws of Kenya. In the first count the appellant was charged with the offence of being in possession of firearm Contrary to section 4(2)(a) as read with section 4(3)(a) of the said Act. The particulars of the offence are that the appellant on the 5th day of August, 2017 at about 11.00 hours at Uran location, Sololo sub county within Marsabit county was found in possession of an AK rifle serial No.1569 without a firearm certificate. In the 2nd count the appellant was charged with the offence of being in possession of ammunition contrary to section 4 (2)(a) as read with section 3(a) of the same Act. The particulars of the offence are that the appellant on the 5th day of August, 2017 at about 11.00hours at Uran location, Sololo sub county within Marsabit County was found in possession of two (2) rounds of ammunition of calibre 7.62x39mm without a firearm certificate.

The trial Court convicted the appellant on both counts and sentenced him to serve seven (7) years imprisonment for the 1st count and 5 years imprisonment for the 2nd count. The sentence is running concurrently. The grounds of appeal are: -

- 1. That the appellant pleaded not guilty to the charges.**
- 2. That the lower court never considered both the defence and the mitigation made by the appellant and it is clear from the record.**
- 3. That the lower court erred when it failed to avail vital witnesses. One Halkano Guyo never appeared before Court. The same Halkano Guyo is the one who was found in possession of illegal arms.**
- 4. That from the defence on record and throughout the proceedings Halkano Guyo who was mentioned on several occasion has to be the key person in this instant case and appellant was only forced, beaten up only to take them where Halkano Guyo was.**
- 5. That the prosecution witnesses gave conflicting and contradictory evidence in their statements. Records is clear, vide Page 19 that PW3 (Wako Galma) in his statements when cross examined by the appellant, never recovered the gun, didn't know about the gun and he just arrested the appellant on a motor bike only due to compliant with investigations whether appellant could be linked.**
- 6. That the prosecution witnesses framed the appellant due to existing grudge between them over land.**
- 7. That the learned trial Magistrate erred by failing to make a finding that the prosecution failed to prove the case to the required standards.**

The appellant submitted that he was not found in possession of ammunition as alledged. PW4 Halkano Wako contradicted the evidence of PW3 Wako Galma to the effect that the appellant was not found with the alledged gun. There is variance between the particulars of the charge and evidence adduced. There was no photographs taken showing the appellant in possession of the rifle. The prosecution evidence made reference to one Halkano Guyo who was not called to testify. The prosecution evidence also shows that it is the said Halkano Guyo

who was found in possession of the rifle. The trial Court did not consider the existing grudge over land involving the appellant. The investigating officer PW5 testified that he found the appellant tied with a rope with the rifle placed beside him. That clearly shows that the appellant was being forced to accept that he was in possession of the rifle. The prosecution did not prove its case to the required standard. It was alleged that the appellant had used the rifle to threaten his family members but none of them were called to testify. PW3 was a pathological liar who intentionally cheated the lower court. He contradicts himself when cross examined by the appellant and said "nobody assaulted the appellant" again when further cross-examined he did that to the appellant because he wanted gun.

The state opposed the appeal. Mr. Ochieng, learned prosecution counsel, submitted that the evidence proved beyond reasonable doubt that the appellant committed the offence. PW1 to PW4 gave the same evidence. The appellant led witnesses to where the rifle was hidden. The prosecution evidence was not shaken on cross examination. A ballistic report confirmed that what was recovered was a gun and ammunition. The appellant had no permit to own the gun. Even though one Halkano Guyo was found with another bullet, that does not disprove the prosecution case. The place where the gun was hidden was pointed out by the appellant to the chief after interrogation.

This is a first appeal and the Court has to evaluate the evidence afresh before drawing its own conclusion. **PW1 Golo Wario** is a Kenya Police Reservist (KPR) from Uran. On the 5.8.2017 at 3.00pm he was called by the Chief and informed that the person they were looking for had been arrested. He went there and interrogated the appellant who initially declined but later accepted to take them to where the gun was. The appellant took them to a place and produced the gun. PW1 was with the chief and other Kenya Police Reservists. The chief called the Police from Sololo Police station who arrested the appellant. The gun had two bullets. The appellant was arrested at Lataka and is the one who directed them to where the gun was. Nobody assaulted the appellant. He only saw the two rounds of ammunition and the gun but is not aware of the other two rounds of ammunition.

PW2 Galgalo Rob Duba is the assistant chief Lataka sub location. On the 5.8.2017 he was at home with chief Wako. They had looked for the appellant for three days as they had been informed that the appellant had threatened his relatives with a gun during his brother's wedding. They found the appellant on the 5th August 2017 on a motor bike. They talked to him and he accepted to hand over the gun. The appellant took them to some bush where he had hidden the gun and removed it. The gun had two rounds of ammunition. The appellant later alleged that the gun belonged to his uncle. Police from sololo Police station were informed. They went to his uncles' place and a search revealed one bullet that was found in his pocket. He had not differed with the appellant. No one assaulted the appellant.

PW3 Wako Galma is also a Kenya Police Reservist. On 1.8.2017 he was informed by the chief that someone was disturbing members of the public. They were informed that the appellant was disturbing people using a gun at a ceremony. They looked for the appellant for about four days and arrested him. He did not witness the arrest and did not see the recovery of the gun. The appellant was arrested by the chief. He had not differed with the appellant.

PW4 Wako Halkano Wako is the chief of Uran location. On 1.8.2017 he was in Lataka and was informed by PW2 that the appellant had threatened his family members with a firearm. He wanted to stop his brother's wedding. They looked for the appellant for four days and arrested him. They talked to him and he later informed them where the gun was. The gun was recovered with two bullets. It is the appellant who showed them where the gun was. The appellant's brother refused to testify.

PW5 Cpl. Sammy Yaa was based at the Sololo Police Station. They were informed about the recovery of the gun on 5th of August, 2017. They found the appellant tied with a rope with an AK47 rifle loaded with two rounds of ammunition beside him. There were two police reservists, PW2 and PW4 were also present. They re-arrested the appellant and caused him to be charged with the offence. He prepared an exhibit memo and took the rifle for examination by the firearm examiner. He produced the report from the firearm examiner. The appellant alleged that the rifle belonged to his uncle Halkano. PW5 arrested Halkano and found him with two rounds of ammunition in his jacket. Halkano told him that he picked those rounds of ammunition at the wedding where the appellant was firing shots disturbing people at the ceremony.

The appellant tendered unsworn defence. On 4th August, 2017 at 5.30pm the assistant chief, the chief and two Kenya Police Reservists went to where he was working. They told him that there was a gun that was with him. He was pushed to the bush at Lataka where they found Halkano Guyo and another KPR. They came up with a gun and the chief told him that the gun belonged to him. He declined. They started to assault him from 5.30pm until 11.00 am the following day. At 11.00am he accepted and the chief called the Police. He told the Police that the gun did not belong to him but to Halkano. He took the Police to his uncle's place where they searched him and found bullets in his clothes. They were all arrested and taken to Sololo Police station. He was just framed as the gun belongs to Halkano Guyo.

The issue for determination is whether indeed the appellant was found in possession of the firearm and ammunition. The appellant contends that the allegation that he had threatened his family members with a gun are not true as none of those family members testified. The prosecution evidence does prove that one Simonov rifle and two rounds of ammunition of calibre 7.62X39mm were recovered. These items were forwarded to the firearm examiners as per the exhibit memo form dated 5th August, 2017. The exhibits were received by the Firearm examiners' offices on 13th September, 2017 and were duly examined. A report dated with 14th September, 2017 does confirm that the firearm was capable of firing and was in good mechanical condition. It is therefore proved that a firearm was recovered with two rounds of ammunition.

The prosecution evidence is that the firearm was in possession of the appellant. The evidence of PW1, PW2 and PW4 is that it is the appellant who took them to where the firearm was. The prosecution evidence further point to some disturbance at a wedding on 1st August, 2017. The wedding was for the appellant's brother by the name Dadacha Tari as per the evidence of PW2. The appellant's defence does not deny that there was a wedding on 1.8.2017.

According to the prosecution's evidence the chief, assistant chief and the Kenya Police Reservist started looking for the appellant from 1st August, 2017 and they found him on a motorbike on 4th August, 2017. PW4 does confirm that they found the appellant on 4th August, 2017. This evidence is in line with the defence evidence. The appellant's defence does not explain his whereabouts between 1st to 3rd August, 2017. This confirms the prosecution evidence that PW1, PW2, PW3 and PW4 were looking for the appellant and managed to arrest

him on 4.8.2017.

It is clear that a rifle and two rounds of ammunition were recovered. The appellant in his defence contends that he was pushed to the bush at Lataka where he found Halkano Guyo and a Kenya Police Reservist. It is the appellant's defence that the rifle belonged to Halkano Guyo. He took the chief and the Kenya Police Reservist together with the Police to Halkano Guyo's house where the Police conducted a search and recovered bullets in Halkano Guyo's clothes. It is the evidence of PW5 that Halkano Guyo told them that the recovered bullets were the spent cartridges he had collected at the wedding where the appellant was threatening his family.

Even if we go by the appellant's defence that Halkano Guyo was found with some ammunition, that does not explain the recovery of the rifle and the two live rounds of ammunition. The appellant's contention that the rifle belonged to his uncle, Halkano Guyo is not proved. Even if the two were arrested, Halkano Guyo managed to explain how he came into possession of the cartridges. There is the original contention by PW4 that he was informed that the appellant had threatened his family members with a gun on 1.8.2017. There was no allegation that it was Halkano Guyo who had threatened people with a gun. The chief was given the appellant's name as the one who made the threats and for three days they were looking for him. I find no contradictions in the prosecution evidence.

The concise **Oxford English Dictionary (12th edition)** define the word possession as:-

The state of possessing something; visible power or control, as distinct from lawful ownership.

The offence of being in possession of a firearm is committed where the person found in possession of the firearm does not have a firearm certificate. The appellant was arrested and the evidence does prove that he took PW1, PW3 and PW4 to where the firearm was hidden. In effect therefore he was in possession of the firearm as he had the power and control over the weapon. He could go to his hiding place and retrieve the weapon and use it by threatening his family members. He could then hide it and no one knew where the weapon was apart from the appellant.

I am satisfied that the prosecution did prove its case beyond reasonable doubt. The defence evidence does not raise any doubt on the prosecution case. The appellant's contention that the firearm belonged to one Halkano Guyo is not established. I do find that the evidence on record did prove both counts. The conviction is proper. The issue of a grudge over land is an afterthought.

The appellant contend that his mitigation was not considered. In mitigation the appellant informed the trial Court that he prayed for forgiveness and that he had been in remand for nine (9) months. He is also a first offender.

Section 4(3)(a) of the firearms Act provide for a maximum sentence of fifteen (15) years and a minimum of seven (7) years.

The trial Court sentenced the appellant to seven years imprisonment on the first count and five years on the second count. Given the fact that the appellant is a first offender I do set aside the sentence and replace it with four (4) years for the first count and three (3) years imprisonment for the second count. The sentence to run concurrently. The Court's discretion to impose what it deems to be appropriate sentence should not be eroded. In line with section 333(2) of the Criminal Procedure Code, the sentence shall include the period spent in remand custody. The appellant was arrested on 7.8.2017 and remained in custody until he was sentenced on 3.5.2018. The sentence shall run from 7.8.2017.

The upshot is that the appeal on conviction lacks merit and is hereby disallowed. The sentence imposed by the trial Court is set aside and is replaced with four (4) years imprisonment for count one (1) and three (3) years imprisonment for count II. The sentence shall run concurrently with effect from 7.8.2017.

Dated, Signed and Delivered at Marsabit this 15th of July 2020

S. CHITEMBWE

JUDGE