



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 39 OF 2016

ISAIAH SHIKUKU BITULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case number 571 of 2012 in the Chief Magistrate's Court at Webuye – S. N. Abuya (PM) on 29/01/2016)

JUDGMENT

1. **Isaiah Shikuku Bitula** the Appellant herein was charged together with five others with the offence of attempted robbery with violence contrary to **section 279(2)** of the **Penal Code** in Count I. The particulars were that on the 14th day of July, 2012 at Webuye township within Bungoma East District in Bungoma County, he jointly with others not before court while armed with dangerous weapons namely one AK 47 rifle, one toy pistol, iron bars and a knife attempted to rob one Suresh Kumar Kerai of unknown amount of money and at or immediately before or immediately after the time of such robbery used actual violence on the said Suresh Kumar Kerai.
2. He was solely charged in count II with being in possession of a firearm and in count III for being in possession of ammunitions contrary to **section 34(1)** of the **Fire Arm Act Cap 114 Laws of Kenya**. The particulars of count II and III were that on the 16th day of July, 2012 at about 1000 hours at Naitiri area in Bungoma North District within Bungoma County, he was found in possession of a firearm make starter automatic pistol and two rounds of ammunition 8 mm caliber without a firearm certificate.
3. Following a full trial, the Appellant and his co-accused persons were acquitted on count I while the Appellant was convicted on counts II and III. He was sentenced to serve ten (10) years imprisonment in each of the two counts which sentences were to run concurrently.
4. The Appellant subsequently filed the present appeal against both conviction and sentence, advancing six (6) grounds of appeal in which he stated that the prosecution case was not proved beyond reasonable doubt: that there were material contradictions on the part of the prosecution witnesses; that his mitigation was not considered and that the conviction arrived at was harsh.
5. Learned state counsel Mrs. Njeru conceded the appeal on behalf of the state and submitted that the prosecution evidence was contradictory and inconsistent. She agreed with the Appellant's argument that the case against him was not proved to the required standard.
6. I have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the

trial court's findings and conclusions. An appellant on 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 courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. See - **Kiilu and Anor vs. Republic [2005] 1 KLR pg. 174**, a Court of Appeal decision of Tunoi, Waki and Onyango Otieno JJA.

7. Upon re-evaluation of the evidence on record, I am of the considered view that this appeal can be disposed of on the single question of the sufficiency of the evidence. In his written submissions filed in support of his appeal, the Appellant argued that the prosecution witnesses gave varying accounts of where and how he was arrested and of how and where the fire arm and two round of ammunitions were recovered. That they did not therefore prove the two counts against him. The evidence of the arrest of the Appellant and the recovery of both the fire arm and ammunitions came from the testimony of PW2, PW5, PW6 and PW8.

8. PW2 APC Thomas Kirwa Teight in his testimony in examination in chief stated that he, in the company of other officers namely Sergeant Joseph Rono, CPL Timothy Oyongo and APC Anderson Njeru, received a tip off from an informer that someone had been spotted with a pistol make automatic starter. They traced and arrested the Appellant at Naitiri hospital and escorted him to his house at Mitua village Sirakalu location central division Bungoma North where they recovered a pistol and two live ammunitions of 0.8 mm calibre. The record shows that during his cross-examination, the witness stated as follows:

"I have not seen the firearm which I recovered from the 2nd accused. I have not also seen the live ammunition which I recovered from the 2nd accused. I handed over to the D.C.I.O, my work was to arrest the suspect...I am not aware if the firearm had been used in the commission of offences. I recovered the pistol in the house of the 2nd suspect. I did not recover anything from his body. From Naitiri to the house of the 2nd accused is some distance. The firearm was removed from under his bed."

9. PW5 Senior Sergeant Fredrick Simba from Webuye Police Station on the other hand testified in his examination in chief that on 14th July, 2012 the Appellant was taken to the police station and said to have been within the scene of crime. He however did not investigate the offence since the investigations were conducted by the CID. On cross-examination by Counsel for the Appellant, he stated *inter alia* that:

"I interviewed accused 2. He told me he was not a suspect but a supervisor with the security firm. He had no weapon on him. I never mentioned him in my statement."

10. On his part PW6, APC Emmanuel testified that he together with three (3) other police officers being APC Koech, APC Teight and CPL Oyongo arrested the Appellant at Naitiri Health Centre on 16th July, 2012. He asserted that the Appellant did not have anything on him but upon being interrogated, he told them that "it" was at home. The relevant part of his testimony from the record is as follows:

"We were shown the person and we arrested him next to Naitiri Health Centre and on searching he did not have anything. We interrogated and he told us it was at home. We went to his home in his compound. It was between Mitoto and Nyenge Trading Centre. He showed us the house and he removed it from a dish in the cupboard. We took it - we got an automatic starter and rounds of ammunition - 0.8 mm - We took him to Naitiri station. The gun and ammunition is in court (positively identifying accused 2). This is the gun. Later we informed D.C.I.O who came and collected him and took him to Webuye Police Station."

On cross-examination, PW6 affirmed the position that the Appellant was arrested upon the information of a Police Informer. Further that no recovery was made during his arrest.

11. The testimony of PW8 IP Peter Momanyi as shown on the record gives yet another version of the events leading up to the Appellant's arrest. According to him, the Appellant was arrested at his home in

Webuye, two days after the incident. The relevant part of his testimony in examination in chief in this regard, as shown on the record is as follows:

“We went to accused 2 and found a gun and two bullets, it was after two days...We continued with interrogation he told us he ran away he took the gun to the police station but they declined. We preferred charges.”

On cross-examination however he stated as follows:

“2nd accused was arrested at his home at Webuye after 2 days. He was brought in by other officers. I did not go to his house. I was in company of Senior Sgt Simba...Informers led us to the 2nd accused. The 1st accused was not my informer. The 2nd accused told me he was with accused 1. I do not know his home. I cannot remember who recovered the pistol.”

The evidence of PW8 is therefore questionable since on one hand he says that he was among those who went to the Appellant’s house and recovered a gun and two bullets and on the other hand, he says that he does not know the Appellant’s home or remember who recovered the pistol.

12. From the evidence on record therefore it is impossible to tell if the Appellant was arrested on 14th July, 2012 or 16th July, 2012 and whether he was arrested at his home in Webuye or next to Naitiri Health Centre. Further PW2 and PW6, who were both allegedly present at the time of recovery of the fire arm and ammunitions gave varying accounts. PW2 stated that a firearm was recovered from under the Appellant’s bed at his home in Mitua village, while PW6 stated that the firearm and the two rounds of ammunition were found in a dish in a cupboard at the Appellant’s home which was between Mitoto and Nyenge Trading Centre.

13. The Appellant herein was charged in count II and III with being in possession of a firearm and being in possession of ammunitions respectively, contrary to **section 34(1)** of the **Penal Code**. The prosecution was therefore under a duty to prove possession of both the firearm and ammunitions against the Appellant.

14. Possession is defined under **section 2** of the **Firearms Act Cap 114** as follows:

“(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.”

15. A scrutiny of the evidence on record shows that the prosecution failed to discharge the burden placed on it to establish the fact that the Appellant was indeed found in possession of a firearm and two rounds of ammunition without a licence contrary to **section 34(1)** of the **Firearms Act** as alleged. The evidence tendered by the prosecution witnesses as to how the Appellant was arrested and where the firearm and ammunition were found is wanting. The court cannot with any degree of certainty establish where the Appellant was arrested nor connect the firearm and ammunition to him. The court finds that the evidence was marred with grave contradictions and inconsistencies which were not explained or clarified during the trial.

16. In **Eric Onyango Ondeng’ vs. Republic [2014] eKLR**, the Court of Appeal cited and applied the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001**, in which the Uganda Court of Appeal observed 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. The 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.”

17. After a careful scrutiny of the entire record, I have come to the conclusion that the discrepancies in the accounts of the material witnesses being PW2, PW5, PW6 and PW8 affected the main substance of the prosecution’s case. The prosecution evidence was marred with grave contradictions and inconsistencies which the prosecution did not attempt to explain before the trial court. Their evidence upon which the Appellant’s conviction was founded was therefore unreliable and as such the prosecution’s case was not proved to the required standard. The conviction cannot therefore stand.

18. In the premise, I find that a real doubt exists in the prosecution’s case whose benefit must be granted to the Appellant. The upshot is that this appeal must succeed and is therefore allowed. I quash the conviction and set aside the sentence imposed on the Appellant and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 17TH DAY OF JANUARY 2019.

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S. N. RIECHI

HIGH COURT JUDGE