



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 6 OF 2018

SIMON KIKWAI NYAMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Hon. E.M. Kagoni, Senior Resident Magistrate delivered on 30th January, 2018 in Mombasa Chief Magistrate's Court Criminal Case No. 935 of 2017)

JUDGMENT

1. The appellant was charged with two counts in the lower court. The charge in the first count was for preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the charge were that on the 9th day of June, 2017 at about 4:00a.m. at Maji ya Chumvi Police road block Mariakani within Kilifi County was found with dangerous weapons namely ten (10) rounds of .38sp ammunition with intent to commit a felony.

2. The second count was that of being in possession of ammunition contrary to Section 89(1) of the Penal Code. The particulars of the charge were that on 9th June, 2017 at about 4:00 a.m. at Maji ya Chumvi police road block Mariakani within Kilifi County while aboard motor vehicle registration No. KCH 821B Simba Coach bus was found in possession of ten (10) rounds of .38sp ammunition which raised a reasonable presumption that the ammunition was for a purpose prejudicial to public order.

3. The appellant was found guilty of the second charge of being in possession of ammunition and was sentenced to serve 11 years imprisonment. He was dissatisfied with the said decision as a result of which he appealed against the conviction and sentence. He filed the following grounds of appeal:-

(i) That the Learned Hon. Trial Magistrate erred in law and fact in failing to see that the prosecution violated the appellant's constitutional rights as provided under Article 49(1)(f) of the Constitution by keeping him in their custody for eleven days extra days, in addition to the 24 hours mandated by the Constitution, without giving any reason for the delay;

(ii) That the Learned Hon. Trial Magistrate erred in law and fact in convicting him for the charge of being in possession of ammunition without a proper finding that he was not found with the same exhibited ammunition as PW2 told the court that it was PW3 who gave the Police the polythene bag which contained the same but PW3 also said it was PW2 who gave to the Police the same, thus contravening Section 163(1) of the Evidence Act;

(iii) That the Learned Trial Magistrate erred in law and fact by failing to see that the police informer who told the Police that the appellant had ammunition was not called as a witness to tell the court how he/she knew that he had the same, thus contravening Section 150 of the Criminal Procedure Code; and

(iv) That the Learned Trial Magistrate erred in law and fact in failing to see that the entire police case was poorly investigated.

4. The appellant filed his written submissions on 9th November, 2018. He submitted that his Constitutional rights were infringed as he was kept in custody for 11 days instead of the 24 hours prescribed by the Constitution. He urged the court to set him free so that he could go back to his family. He cited the case of **Albanus Mwasia Mutua vs Republic** [2006] eKLR where the Court of Appeal set the appellant free after he was kept in custody beyond the time provided under the previous Constitution of Kenya.

5. On the issue of the recovery of the ammunition in issue, the appellant submitted that the manner in which it was recovered went against the provisions of Section 163(1)(c) of the Evidence Act. He stated that it was the Driver who gave the luggage to the Police and not him. He indicated that there were 2 Drivers in the bus who incriminated him for the offence, yet they gave contradictory evidence.

6. The appellant discredited the lower court for not summoning the informer who tipped off the police about him being in possession of ammunition as the court has powers under Section 150 of the Criminal Procedure Code to summon a witness. He referred to the case of **Kigecha vs Republic** [1965] CA 773.

7. The appeal was opposed through written submissions filed on 27th November, 2018 by Ms, Ogwen, Prosecution Counsel. She submitted that the Police received a tip off about a man by the name of Simon Nyamu who was in Nairobi who was to travel to Mombasa using a Simba Coach bus and that he had in his possession some bullets. A road block was erected at Mariakani. At about 4:00a.m., a Simba Coach bus registration No. KCH 821B from Nairobi approached the said road block and it was stopped. Passengers were asked to produce their identity cards. The Prosecution Counsel stated that the names on the appellant's identity card matched with the name they had been given of the suspect. The appellant was taken out of the bus for further interrogation.

8. Ms Ogwen further submitted that the Police ordered passengers to alight with their luggage but the appellant left his luggage in the bus which was handed over by PW3 to PW1, who in turn gave it to the Police.

9. In the said paper bag a driving licence, identity card, NHIF card, NTSA documents, brown wallet, police abstract and ammunition were recovered. The bullets were test fired by a firearm examiner, PW6, who established that they were capable of being fired.

10. On the allegation that the appellant was kept in police custody for 11 days, Counsel cited the case of **Mwalimu vs Republic** [2008] KLR where the court held that such a complaint should be raised at the earliest opportunity.

11. On the failure to call the informer the Prosecution Counsel submitted that there was sufficient evidence on record to warrant the appellant's conviction.

12. In reply to the above submissions, the appellant asserted that an independent witness should have been picked from the bus to testify. He also submitted that offence under the provisions of Section 89(1) of the Penal Code carries a maximum sentence of 5 years. He prayed for the appeal to be allowed.

ANALYSIS AND DETERMINATION

13. The duty of the 1st appellate court is to analyze and re-evaluate the evidence tendered before the lower court bearing in mind that it has neither seen nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR the Court of Appeal reiterated this duty as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

The evidence adduced before the lower court

14. PW1, No. 236130 Inspector Peter Muthee, received a tip off from an informer that a man by the name Simon Nyamu who was in Nairobi would travel to Mombasa aboard a Simba Coach bus. The informer also reported that the said man had travelled to Nairobi to buy bullets. PW1 organized 10 Officers from the flying squad unit who laid ambush at Mariakani police road block. The uniformed Police Officers who man the road block were informed of the mission. It was the evidence of PW1 that at about 4:00a.m., a Simba Coach bus registration No. KCH 821B approached from Nairobi. The bus was stopped and the Driver was ordered to park it by the road side.

15. PW1 testified that he, Corporal Songola and PC Siele entered the bus. PW1 ordered all the male passengers to identify themselves using their identity cards. PW1 further stated that upon PC Siele picking the appellant's identity card, he called him to where he was. They escorted the appellant outside the bus where other Officers were. Nothing was found on the person of the appellant. He said his luggage was in the bus. The Driver and the Conductor also told the Police that the appellant's luggage was inside the bus.

16. PW1 asked the Driver to get the said luggage which was a nylon paper bag containing tomatoes and onions and a black bag which was in between the onions and tomatoes. The Driver handed over the luggage to PW1 who opened it. It was his evidence that the black bag contained what he suspected to be bullets. The appellant confirmed the luggage was his. They then left with the appellant who took them to his house in Bamburi. A search in the said house yielded nothing of interest. They took him to DCI headquarters where an inventory was prepared and signed by the Police and the appellant. They handed him over to DCI Mtwapa which needed him. PW1 indicated that the ammunition recovered was 10 rounds of 38 which is used in a revolver pistol. PW1 further stated that the appellant was unable to explain why he had the bullets. PW1 testified that photographs were taken of the onions and tomatoes which were not preserved as exhibits. PW1 further testified that among the personal items recovered in the bag were the identity card of Simon Kakwai, a driving licence, police abstract and a wallet, NHIF card, certified NTSA documents and a brown wallet.

17. PW2, David Ndereva a Driver with Simba Coach Company gave evidence that on 8th June, 2017 he reported on duty at Mito Andei and took over the vehicle from his colleague Godfrey Marangi who had left Nairobi at 8:00 p.m., for Malindi. He recounted that at Mariakani road block they were stopped and he was ordered by a Police Officer to park the vehicle for inspection. A Police Officer entered the bus and told him to tell all the passengers to remove and hold their identity cards. He told his colleague to relay the instructions. 3 Officers then got into the bus and started inspecting the bus and passengers. After a short while, the Police alighted with the appellant.

18. It was the evidence of the PW2 that he knew the appellant as Simon and that he was his colleague at Simba Bus Company who was on

interdiction. PW2 further testified that PW2 boarded the bus at the Nairobi booking office and had a small piece of luggage. He did not pay fare. He identified in court the luggage the appellant had on the day he was arrested. It was PW2's evidence that when the appellant boarded the bus he sat on the bonnet and would occasionally converse with PW3. PW2 sat on the staff seat from Nairobi. At Emali, the appellant bought some tomatoes and onions. PW2 further testified that at Mtito Andei, they stopped briefly. While at the said place, the appellant boarded the motor vehicle with a yellow paper bag in which he put the tomatoes and onions plus his bag and placed them on the dashboard. He then went and sat behind in one of the unoccupied passenger's seat.

19. PW 2 further said that at Mariakani all the passengers were asked to alight with their luggage and the only luggage that remained was the yellow paper bag on the dashboard which had a small bag that the appellant was carrying when he boarded the bus. The small bag had his clothes and wallet. When the yellow bag was opened by one of the Officers, he found a small black polythene bag. They opened it and said it had bullets. PW2 indicated that an inventory was made, which he signed.

20. PW3, Gilbert Mariukio Mwangi gave evidence that on 9th June, 2017 he was driving a Simba Coach bus registration No. KCH 821B from Nairobi to Malindi. It had passengers and crew on board. The appellant boarded the bus in Nairobi. At Maji ya Chumvi, they were stopped by Police Officers who asked all men to show their identify cards. The Police Officers got inside the bus and alighted with the appellant and asked PW3 for the appellant's bag. They checked the small bag but found nothing. On checking the bag which had onion and tomatoes they found something wrapped in black polythene. PW3 further testified that the Police said that they had found what they were looking for. They detained the appellant as PW3 and the others proceeded on with their journey.

21. PW4, No. 85560 Corporal Samson Kiprotich was the Investigating Officer. His evidence corroborated that of PW1 in all material particulars. He testified that he got inside the bus and asked male passengers to stand up with their identity cards. He further stated that they had the name of the suspect they were looking for, who was Simon Nyamu Kakwai, whose identity card was No. 21080271. PW4 testified that the appellant was the 4th passenger he inspected. He arrested him and removed him from the bus.

22. PW4 further gave evidence that the appellant was asked for his luggage which he indicated was on the dashboard. They recovered his personal effects in it. One of the Drivers told the Police that the appellant had a polythene bag containing tomatoes and onions. The Driver handed it over to them. In the said paper bag they found a black polythene bag tucked between the tomatoes and oranges (sic). On opening it, they recovered 10 rounds of ammunition. The suspect was arrested and the ammunition was sent for ballistic examination, through an exhibit memo dated 15th July, 2017. PW4 stated that an inventory was prepared by PC Mbore on 10th July, 2017 and the appellant signed the same. PW4 produced the personal items that were recovered from the appellant, as exhibits, save for the bullets.

23. PW5, No. 235210 Chief Inspector Kolicho Kin testified that on 20th June, 2017 he was requested by PC Siele of Flying Squad Mombasa to take photographs of a yellow bag which was in their offices. He also took photographs of a black paper bag and its contents. He produced the photographs and the certificate thereof as well as the scenes of crime report.

24. PW6 was No. 235225, Inspector Kenneth Chomba of DCI Forensic department, ballistic section. He testified that his duties include among others, examination of firearms and ammunition. He stated that on 15th June, 2017 he received 10 rounds of ammunition with an exhibit memo made by PC Siele. He examined the exhibits and concluded that they were bullets of 38 inches in length which could be used on a Taurus revolver and Smith and Wesson rifles. PW6 testified that he test fired 3 of the bullets and found that they were ammunition capable of being fired. He produced the 10 bullets and the ballistic examination report in evidence.

25. The appellant was put on his defence. He indicated that he was arrested from a Simba Coach bus on 9th June, 2017 which he had boarded in Nairobi. He was asked for his bag which he gave out to the Police. They searched it and recovered nothing. He was then arrested. He denied having committed the offence he was charged with.

26. The issues for determination are:-

- (i) If the appellant's constitutional rights were violated by not being taken to court within 24 hours of arrest;
- (ii) If the prosecution's evidence was contradictory;
- (iii) If the failure to call the informer was fatal to the prosecution's case; and
- (iv) If the appellant was found in possession of ammunition.

Appellant's constitutional rights

27. On the first ground of appeal, the appellant raised a pertinent issue of not having been taken to court within 24 hours of his arrest. He submitted that failure to take him to court within the required time contravened the provisions of Article 49(1)(f) of the Constitution of Kenya. He contended that he was kept in police custody for 11 more days after the elapse of the 24 hours provided by the Constitution. He also stated that he underwent unspeakable suffering in the hands of the Police. He thus submitted that failure on the part of the Prosecution to take him to court within 24 hours was fatal to the prosecution's case.

28. The matter that this court is adjudicating on is a criminal appeal and not a constitutional petition. This court cannot determine issues of violation of the appellant's rights in a criminal matter. There is an elaborate way provided under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, commonly known as the **Mutunga rules** on how such matters should be brought to court. Furthermore, where there is an allegation of violation of any constitutional right, it must be raised at the earliest opportunity possible. In **Mwalimu vs Republic** [2008] KLR 111, the Court of Appeal, when considering the application of the provisions of Sections 72 (3) and 84 of the previous constitution in an issue similar to the present one, stated as follows:-

"Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity."

29. The appellant's Advocate raised the issue of the appellant having been kept in custody for 11 days before being charged. As stated before, at appeal stage, the court cannot address the said issue as an explanation as to why the appellant was kept in police custody for the said number of days should have been given by the Investigating Officer. I therefore concur, with Ms Ogwen's submissions that the issue of infringement of the appellant's constitutional rights have been canvassed in the wrong forum.

Contradictory evidence

30. On ground No. 2 of the appeal, the appellant contends that the evidence of PW2 and PW3 was contradictory as to the person who handed over the paper bag containing the bullets to the Police. PW2 in his evidence stated that he took over driving the Simba Coach bus from PW3 at Mtito Andei. The evidence of PW3 is that he was also a Driver aboard bus registration No. KCH 821B. He drove the said bus from Nairobi enroute to Malindi. It is thus clear that there were 2 Drivers aboard the said bus. PW2 in his evidence said that it was the Driver Gilbert (PW3) who handed over the appellant's luggage to the Police. PW3 on the other hand said that it was the Driver (PW2) who handed over the tomatoes and onions to the Police. I have considered the said inconsistency and found that it does not go to the root of the case. The evidence that remains unshaken is that the tomatoes and onions in the yellow paper bag belonged to the appellant. It was the evidence of PW3 that the appellant is the one who bought the polythene paper bag at Mtito Andei and proceeded to put in the said tomatoes and onions. The 10 bullets were recovered in a black nylon paper bag nestled between the onions and tomatoes. I therefore find the said ground of appeal to be without merit.

Failure to call an informer

31. On the failure of the Prosecution to call an informer, Ms Ogwen submitted that there was no need to call the informer as a witness as the evidence adduced was adequate to warrant a conviction. PW1 was clear in his evidence that it was an informer who gave Police information that the appellant would be transporting bullets. They were also given his name and the information about the bus he would be traveling in. The Police laid an ambush and arrested the appellant. In the present case there was adequate evidence upon which the court could rely on to convict even without calling the informer.

32. In the case of **Joseph Otieno Juma vs Republic** [2011] eKLR, the Court of Appeal stated thus regarding informers:-

"Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired. However, all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient having identified the Appellant at an identification parade."

33. This court takes cognizance of the fact that it is not the number of witnesses called by the prosecution to testify that counts in a criminal case but the quality of the evidence adduced to support a charge.

Possession of ammunition

34. On the last issue of whether the appellant was found in possession of 10 rounds of ammunition. PW2's evidence was that while at Emali, the appellant asked PW3 to buy tomatoes and onions for him which he placed on the dashboard. PW2's evidence was corroborated by PW3 who stated in cross-examination that the appellant requested him to buy tomatoes and onions which he put on the dashboard. He bought them without a polythene paper bag and that the appellant bought a paper bag at Mtito Andei. The evidence on record states that recovery of the bullets was made in the appellant's paper bag that contained tomatoes and onions.

35. **Section 4** of the **Penal Code**, Chapter 63 of the Laws of Kenya defines '**possession**' as follows:-

(a) "being 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" (emphasis added).

36. The circumstances of this case demonstrate that the appellant was in actual possession of the said yellow paper bag as he is the one who bought it at Mtito Andei. All the contents of the said paper bag therefore belonged to him. He could therefore not be heard to say that he did not know what was contained in the said paperbag.

37. The Police had been informed that the appellant would be traveling aboard a Simba Coach bus and that he would have some bullets. The appellant, PW2 and PW3 did not know that the Police would be waiting for them at a road block. The appellant was with PW2 and PW3 at all material times aboard the bus and therefore PW2 and PW3 could not have planted ammunition in the said paper bag. On the other hand, this court does not believe that a contingent of 10 Police Officers could lay an ambush so as to plant ammunition in a paper bag that was on the dashboard of the bus and arrest the appellant for being in possession of bullets. The bullets upon examination by PW6, the Firearms Examiner were found to be live.

38. It is my finding that the prosecution proved its case beyond reasonable doubt. The defence case could not be held to be true in the face of the water tight evidence against the appellant. I have perused the decisions cited by the appellant in **Albanus Mwasia Mutua vs Republic** (supra) and **Kigecha vs Republic** (supra) but they are not applicable to the circumstances of this case.

39. The minimum sentence for the offence of being in possession of ammunition under Section 89(1) of the Penal Code is 7 years imprisonment and a maximum sentence of 15 years imprisonment. The appellant was sentenced to serve 11 years imprisonment. The Hon. Magistrate correctly found that the offence was a serious one and that having 10 bullets in the wrong hands is at least having 10 lives lost.

40. This court notes that bullets in the wrong hands can lead to death, maiming and destruction of property. The Hon. Magistrate did not impose the maximum sentence but exercised his discretion in sentencing the appellant to 11 years imprisonment. This was after he considered the appellant's mitigation. I hereby uphold the conviction and the sentence meted out against the appellant. The appeal is hereby dismissed in its entirety. The appellant has 14 days right of appeal.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant person

Ms Ogwen - Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant