



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT LODWAR**  
**CRIMINAL APPEAL NO. 1 OF 2019**

**CONSOLIDATED WITH CRIMINAL APPEALS 12 OF 2019 & NO. 11 OF 2019**

EKALALE ETAABA ESINYEN.....1<sup>ST</sup> APPELLANT

HANO LOROO AKUNOIT.....2<sup>ND</sup> APPELLANT

EINONG LONGOMA MERIPETA.....3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From original conviction and sentence in Criminal Case No. 197 of 2017 by*

*the Senior Resident Magistrate – Hon. J.M. Wekesa delivered on 4<sup>th</sup> July 2018 at Lodwar)*

**JUDGEMENT**

1. The Appellants were charged two counts of (1) being in possession of ammunition contrary to **Section 89 (1)** of the **Penal Code** and (2) preparation to commit a felony contrary to **Section 308(1)** of the **Penal Code**, the particulars of which were that on the 23<sup>rd</sup> day of June 2017 at Kalobeyei Location in Turkana County without reasonable excuse had in their possession ammunition namely five (5) rounds of 7.62mm x 39mm special caliber which raised reasonable presumption that the said ammunitions were intended to be used in a manner prejudicial to the public order or in circumstances that indicated to be used with intent to commit a felony namely robbery.

2. They pleaded not guilty, were tried, convicted and sentenced each to serve three (3) years and two (2) years respectively on two counts to run consecutively.

3. Being aggrieved by the said conviction and sentence, each filed respective appeals and raised the following summarized grounds of appeal:-

*(a) They prosecution case was not proved beyond reasonable doubt.*

*(b) They were not properly identified.*

*(c) There was no evidence linking each with possession of the offence*

*(d) Vital prosecution witnesses were not called to link them to the offence.*

*(e) No ammunition and firearm were produced to link them to the offence.*

4. The 1<sup>st</sup> Appellant in addition filed supplementary grounds of appeal where he conceded to his conviction and sought for community service order (CSO) based on the fact that he was a first offender, an orphan who had been the sole bread winner of his family, remorseful and therefore sought non-custodial sentence.

5. When the appeals came up for hearing before me, the same were consolidated and directions issued that the same be determined by way of written submissions. At the time of hearing the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants and the Respondent had filed written submissions which they highlighted while the 1<sup>st</sup> Appellant made oral submissions.

## SUBMISSIONS

6. The 1<sup>st</sup> Appellant submitted that on 23<sup>rd</sup> June 2017, he was wrongfully arrested and assaulted leading to him fracturing his leg. He was thereafter taken to the police station where a goat was alleged produced before being charged with the offence. He submitted that the said ammunition were planted on him as there was no gun produced as exhibit.

7. On behalf of the 2<sup>nd</sup> Appellant in addition to his written submissions wherein he submitted that vital witnesses mentioned by the prosecution witnesses were not called to testify including a woman who was with **PW2** during the incident for which the cases of **JOHN KENGA v REPUBLIC, Cr. Appeal No. 1126/84** Nairobi and **BUKENYA v UGANDA [1972] EA 49** were submitted. It was contended that the prosecution case was full of material contradictions in respect of how the ammunitions were recovered between **PW2** and **PW3** and neither was any exhibits produced to connect him with the offence charged. It was contended that he was not positively identified as the conditions prevailing was not ideal for positive identification as there was no light at the scene for which the cases of:- **JOSEPH LEBO v REPUBLIC, Cr. Appeal No. 204 of 1987, ANJONONI & OTHERS v REPUBLIC [1980] KLR, MAITANYI v REPUBLIC [1986] eKLR 198** were submitted in support. It was therefore contended that the prosecution case was not proved beyond reasonable doubt.

8. On behalf of the 3<sup>rd</sup> Appellant it was submitted that no proper investigations were conducted and that there was no exhibits tendered in evidence to connect him with the offence. It was further stated that vital prosecution witnesses were never called to testify and that the prosecution case was full of material contradictions as regards the recovery of the ammunition and who recovered the same from the Appellant. It was submitted that the recovered ammunitions belonged to **PW2** and **PW3** as there was no firearm produced. It was finally submitted that his identification was not free from error as the incidence took place at night without lighting and therefore his conviction was not safe.

9. On behalf of the Respondent, it was submitted by Mr. Kahuthu that the ammunitions were recovered from the Appellants and that ballistic report thereon was produced as per the provisions of **Section 77** of the **Evidence Act**. It was submitted that during the trial the Appellants did not indicate that they required the maker of the report, in support of which reliance was placed on **JOHN MUGUTHI KANGETHE v REPUBLIC, Nairobi Cr. Appeal No. 158 of 2014 [2015] eKLR** where it was held that there was no requirement under **Section 77** of **Evidence Act** for the ballistic report to be produced by the ballistic expert. On the issue of witnesses it was submitted that it was for the DPP to determine the relevant witnesses to call based on the nature of the case.

10. It was contended that **PW2** in her evidence indicated that she saw five (5) rounds of ammunition and there was therefore no contradiction. On the issue of identification it was submitted that the incidence occurred during daytime at 2.00 p.m. and **PW2** saw the Appellants clearly. The Appellants interacted with the witnesses and there was enough time to identify them. The Appellants confronted **PW2** and there was therefore linkage of the said ammunitions with the offence charged of preparing to commit a felony. It was submitted that the ingredients of the second count were proved for which the case of **MOSES KABUE KARUOYA v REPUBLIC, Nyeri Cr. Appeal No. 88 of 2015 [2016] eKLR** was tendered in support as well as in **JOHN IRUNGU v REPUBLIC, Mombasa Cr. Appeal No. 20/2016 [2016] eKLR**. It was submitted that the element of attempt on count two were proved.

11. The 1<sup>st</sup> Appellant's prayer for CSO was opposed on the basis that the sentence imposed by the lower court were within the law and the appeal should therefore be dismissed.

12. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

*“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”*

## ANALYSIS OF EVIDENCE

13. The prosecution case was that **PW1 HELLEN AKAI LOKIRIAMA** had on 23/06/2017 at 2.30 p.m. gone to attend a campaign meeting for the MCA when she received information from her sister that four (4) people had invaded her shop and threatened her with a knife and that one of the attackers asked her to sell the ammunitions which she said they did not sell. She raised alarm which attracted people. One of the attackers escaped while two were arrested. He later on came to demand the release of his two colleagues. She went to the police station where she was shown a knife and five (5) rounds of ammunition. She only saw the Appellants in police custody.

14. **PW2 ALICE ATOT LOKIRIAMA** stated that she was in the shop when four (4) strangers arrived on a motorcycle. She was seated with three (3) women. They asked her to sell them cigarettes which she did not sell. The 1<sup>st</sup> Appellant then said he wanted to tell her something and she followed him when he asked her if they sold ammunitions. She then went back to the woman she had left since she was suspicious of the strangers and called some boys who followed the Appellant and arrested two and later arrested the first one and recovered five (5) rounds of ammunition in the trouser pocket of the 1<sup>st</sup> Accused/Appellant. He also had a knife.

15. **PW3 APC LOSINYEN PAUL** received a distress call from **PW1** and went to the scene where the members of the public had surrounded the 1<sup>st</sup> Appellant who had a knife and the other Appellants were locked in the house of **PW1**. They did a search and recovered five (5) rounds of ammunition and disarmed the 1<sup>st</sup> Appellant. He then re-arrested the Appellants. He did not find anything on the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant. **PW4 PC PETER JUMA** recorded the statements from the witnesses. He said of the five (5) rounds of ammunition recovered two were spent while three were live. He received ballistic report on the same which he produced

16. When put on their defence the 1<sup>st</sup> Appellant stated that he met people on the way to Lokichogio who beat him up and took him to Lopetarega where he found the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants whom the police said were his accomplices. He denied being in possession of the recovered items. The 2<sup>nd</sup> Appellant stated that he was coming from Nalapatui from his uncle's home to Kalobeyi where he found people he had sold a goat to when some boys beat him up and took him to the center of the town where he found the 1<sup>st</sup> and 3<sup>rd</sup> Appellant having been arrested. The 3<sup>rd</sup> Appellant was called and told that his mother had been knocked down by a motor cycle and decided to go home having brought for her some items when he was attacked and beaten by people who took his items. They then called the police who arrested him.

17. In convicting the Appellants the trial court stated as follows: -

*“From the prosecution evidence on record, the accused persons herein were arrested inside PW1’s compound. Although it was during the day, they had in their possession a knife and five rounds of ammunition. Their mission to PW1’s compound during the day while armed is unknown. The accused persons were there arrested out of their places of abode and had in their possession a knife and rounds of ammunition which raises reasonable presumption that such was intended to be used in a manner or for purposes prejudicial to public order. The prosecution’s evidence on record places all suspects herein at the scene of crime.*

*The defences raised have not cast any doubt on the prosecution case which I find to be cogent, precise, well corroborated, flowing and unchallenged. The 3<sup>rd</sup> accused herein raised an alibi that was not supported. He did not call his elder sister to support his alibi yet he had a choice to do so.*

*From the above, it is the finding of the court that the prosecution’s evidence on record which is cogent and unchallenged is capable to sustain a conviction against the three accused persons herein in both counts against them. I also find the prosecution to have proved its case beyond reasonable doubt in both counts. In the circumstances therefore, I find the three accused persons herein to be guilty as charged in both counts and they are convicted accordingly under Section 215 of the CPC.”*

18. I have identified the following issues for determination in this appeal:-

- 1) *Whether the Appellants were properly identified.*
- 2) *Whether the prosecution case was proved beyond reasonable doubt.*
- 3) *Whether the Appellants defences were considered.*

19. From the evidence on record, it is clear that the incidence took place during daytime at 2.00 p.m. and therefore the Appellants’ contention that the conditions prevailing at the time was not conducive has no merit. I have however noted that there was only one eye witness to the incidence PW2 whose evidence is contradicted by that of PW3 the arresting officer. Whereas PW2’s evidence was that the Appellants were arrested by some boys which she had called she did not state that they were locked in the house of PW1 as was the evidence of PW3 who stated that when he went to the home of PW1, he found the 1<sup>st</sup> Appellant having been surrounded by members of the public while the other had been locked up in PW1’s house. As submitted by the Appellants, vital prosecution witnesses including those who arrested the Appellants and the three women who were allegedly with PW2 at the shop were never called to testify thereby raising an inference that had they been called their evidence would have been adverse to the prosecution case.

20. In the absence of the evidence as to how the Appellants were arrested before being rearrested by PW3, I find that a gap had been left in the prosecution case the benefit of which should have been given to the Appellant, this being a criminal trial, where the standard of proof is beyond reasonable doubt. Further in dismissing the 3<sup>rd</sup> Appellant’s defence the court stated that his alibi defence was not supported as it was for him to call his elder sister to support his alibi. It is clear that in holding thus, the trial court fell into error as it was not for the 3<sup>rd</sup> Appellant to prove his alibi defence but for the prosecution to disapprove the same.

21. It is clear from evidence of PW1 that the Appellants were arrested during the campaign period and whereas the Appellants did not raise this in their grounds there remains a possibility of the arrest being to score political settlement and I therefore find based on the gaps I have pointed in the prosecution case that that their conviction was not safe. I would therefore allow the appeal herein, set aside the conviction and quash the sentence herein. The Appellants should be set free forthwith unless otherwise lawfully held.

22. The State retains the right of appeal.

Dated, delivered and signed at Lodwar this 3<sup>rd</sup> day of October, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

\_\_\_\_\_ for the Respondent

\_\_\_\_\_ for the 1<sup>st</sup> Appellant

\_\_\_\_\_ for the 2<sup>nd</sup> Appellant

\_\_\_\_\_ for the 3<sup>rd</sup> Appellant

Accused 1, 2, & 3 \_\_\_\_\_

\_\_\_\_\_ - Court assistant