



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 90 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 1781 of 2012 delivered by V.W. Wandera Chief Magistrate on 3/11/2017)

ABRAHAM KEMOI SOTOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of **Possession of Ammunition contrary to Section 89(1) of the Penal Code**. The particulars of the offence were that **on the 21st day of July 2012 at around 1930 hours at Kitale Guest House lodging in Section Nineteen, Kitale Township within the Trans Nzoia County, without reasonable excuse had under their control ammunitions namely Two Chinese Stick Hand Grenades in circumstances which raised reasonable presumption that the said ammunitions were intended to be used in a manner prejudicial to public order.**

2. He was convicted and sentenced to 8 years imprisonment hence this appeal. Before analysing the grounds of appeal raised in the amended petition it shall be worthwhile to summarise the proceedings during trial.

PW1 Moses Ruto who was a protected witness testified that he had known the appellant for a long time. He told him that he had some work which he required to be done, namely bombing a place. He accompanied them to Kitale Jehova Jire Hotel where they met some people who had grenades. He was able to see the grenades brought by some young men.

3. The appellant then telephoned one Caleb who was to purchase the said explosives the following day. They spent the night at Dayah Lodgings. The appellant gave the witness Kshs 5000 to purchase a phone. He changed his mind and decided to report the matter at the police station. From there he began cooperating with the OCS and the DCIO.

4. The following morning they went and met Caleb at Jehovah Jire hotel and they met the fellows with grenades at Kenyatta Stadium. He got to know John Mukenya and Juma except the 3rd person as the people who were selling the explosives. After bargaining the 2 grenades were bought at Kshs 20,000 each. After being paid the 2 grenades were given to the appellant and Caleb. (Caleb apparently is still at large after being granted bond) by the trial court).

5. They left for Kapenguria the home of the appellant as they awaited Caleb's call. They then on 19/9/2012 travelled to Nairobi where they examined the Catholic church at Umoja 1 estate where they were to bomb and how they would escape after the bombing. At Charina Resort club, Caleb demonstrated how they would execute the bombing.

6. Caleb gave him ignition key for motor vehicle Registration Number KTS 197 Peugeot 504 and they went to meet an Arab who would pay them Kshs 5 million to execute the bombing.

7. They then left for Kapenguria where they collected the grenades which had been left at the appellant's house. They met Caleb at Kitale Guest house where they booked room 5 and kept the grenades there under the bed. They then planned how to travel to Nairobi.

8. The witness then went and informed the police who organised to raid the place. As PW1 went to the room they were confronted by the police and then appellant was arrested. Caleb was arrested despite his attempt to escape. The police recovered the two grenades and other assorted items which were produced as evidence.

9. **PW2 SSP Eliud Kipkoech Lagat** from CID Headquarters Bomb Disposal Unit examined the two grenades after being delivered to him by PC Michael Olunga and produced his report which concluded that the same were **“serviceable and capable of exploding and causing a blast when the safety pin is removed.”**

10. **PW3 Corp John Otieno** from Kitale police station testified that he was summoned by the OCS and informed of the incident. PW1, a member of public was at the DCIO's office where he told them about the booking at Room 5 at Kitale Guest house. He told them that the two suspects were dangerous and had a scheme of carrying out a bombing attack in Nairobi Umoja estate.
11. Together with others they laid an ambush at Kitale Guest house. They were about 7 armed but in civilian clothes. The informer described to them how one of them was and the clothes he had worn. They proceeded there around 4.00 pm where they laid an ambush. At 7.30 pm they arrived and he followed them. They waylaid them as they opened room 5. One tried to escape but he was arrested as the police had cordoned off the area.
12. When they entered the room they found a small travelling bag and on searching they found official academic documents of the appellant. They lifted the bed and found two brown metal devices on the bed. They scrutinise and found them to be 2 Chinese hand grenades.
13. The scenes of crime personnel took photographs of the said Room 5. The two were then arrested and taken to the police station.
14. On cross-examination the witness stated that the hotel management had not been notified of the ambush.
15. **PW4 P.C. William Kimtai Kemboi**, a scene of crime officer took the photographs and produced them as pieces of evidence.
16. **PW5 Corporal Daniel Njoroge** was the investigating officer in the matter. He said that they received information on 21/7/2012 concerning the incident and they laid an ambush. They were given description of one of the suspects and at 7.30 pm the two headed to room 5. They waylaid them as they open room No. 5 Kitale Guest house. He described how they entered the said room and recovered the 2 grenades and the appellants personal testimonies. He went ahead to produce them in evidence. Apart from the academic records there were also the appellant's passport size photographs. He recorded the witnesses statements.
17. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was a businessman based at Kitale selling gemstones. He said that on 21/7/2012 he received a letter from Vincent Katai Kasava a broker who informed him of a client who needed the minerals. He asked him to take the gold and unprocessed silver to Kitale. They were to meet at Vision Gate hotel Kitale.
18. Later at 6.00 pm he was told by Vincent through a telephone call to go to Kitale Guest house at Laini Moja. He however insisted that they meet the following day. On his way back to the bus stage he was arrested by police officers. Apart from him the rest of the people arrested were hawkers. The appellant said his co-accused was a passersby. The police took his phone and the gold (600gms) and his wallet.
19. At the station the appellant and Galeb were taken to the DCIO and accused of taking grenades. He said that he was beaten until he lost consciousness and the following day he found himself at Matisi police station where he was interrogated by anti terror police officers. He denied being a Muslim or having any Muslim friend. They further attempted to trace Kiptai the person who had called him to come to Kitale but they were unable to trace him since he had sold his shamba and disappeared.
20. He said that the police did a search in his house where they recovered 5 Kgs of Silver and 10 Kgs of white wash and his school testimonials and photographs.
21. Generally, that was the brief evidence as presented by the parties at the trial court.

Analysis and Determination

22. Having heard the parties the trial court proceeded to pronounce its judgment which the appellant has now appealed against. The salient issues raised by the appellant appeal is whether PW1 was a trusted witness taking into account that he was an accomplice; whether there was need to call other independent witnesses and whether the element of possession was established. Finally is whether there is any probative value in the appellant's unsworn testimony.
23. On the first question, it is not in doubt that PW1 was an "accomplice". His accomplice evidence however was only to the extent that he jumped ship and decided to report the plot to the police. The said report eventually led to the arrest of the appellant and his co-accused who later jumped bail.
24. Black Law Dictionary 10th Edition has defined an accomplice as;
- " Someone who is in any way involved with another in the commission of a crime, whether as a principal in the first instance or second degree or as an accessory."***
25. **Section 141 of the Evidence Act** states that a conviction shall not be illegal;
- " ----- merely because it proceeds upon the uncorroborated evidence of an accomplice,"***
26. It thus requires that an accomplice evidence must be corroborated. ***See Kinyua Versus Republic (2002) 1KLR 256.***
27. Was PW1 evidence corroborated? In my view yes. PW3 and PW5 did corroborate. As a result of his report, the appellant and his

colleagues were arrested and the items including the explosives recovered. Were it not for his collaboration with the police and betraying the appellant and his colleagues, the appellant would not have been arrested.

28. This brings in the question of the appellants unsworn evidence. According to his evidence, he was napped in a police swoop. Apart from the hawkers, he was got up in the mix. Whereas this could be true or not, he did not accord the prosecution the benefit of cross-examination. It is not known for example whether he dealt with gemstones or not. Neither was he questioned in respect to one Kiptai who called him to bring the gold and Silver to Kitale. At best the line of defence he offered was untested and of no probative value.

29. There was an argument that the prosecution ought to have called an independent witness apart from the police officers who testified. In particular, the appellant submitted that the owner of Kitale Guest house should have been called.

30. Whereas this could have been appropriate, I do not find anything to suggest that there was a set up. PW1 clearly explained to the police the situation of the explosives and the description of the suspects. PW3 and PW5 found exactly the details given by the witness. They were arrested at the scene.

31. Although there was a bit of discrepancy on who opened the door to room No. 5, whether it was the appellant, Galeb or PW1, this nonetheless was not very material to water down the evidence as adduced by the Respondent.

32. Needless to state Section 143 of the Evidence Act does not require specific number of witness for a conviction to be sustained.

33. In the premises I do not find this appeal meritorious at all. The state clearly proved the appellant intention and PW1 was at the centre of proceedings. The appellant did not offer any tangible defence including any evidence of beatings at the police station. The explosives were found in the room he had booked with his accomplice and even though the management of Kitale Guest house were not called to testify, the court is persuaded that the same were found in the room (No. 5) where the appellant had booked and was arrested therein.

34. The appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 1st day of November, 2018.

H.K. CHEMITEI

JUDGE

1/11/18

In the presence of:

Munialo holding brief for Nyamu for Appellant

Appellant – present

Kakoi for State

Kirong – Court Assistant

Judgment read in open court.