



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 128 OF 2014

(Being an appeal arising from Kitale Chief Magistrate's court criminal case No. 2364 of 2012 delivered by J.M. Nang'ea Senior Principal Magistrate on 19/11/2014)

STEPHEN BUKULE KIRIWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant and his co-accused were charged with the following offences:-

The first count was **being in possession of ammunition contrary to Section 89(1) of the Penal Code**. The particulars of the offence were that **on the 26th day of September, 2012 at Bwayi area along Bwayi – Kitale Murram road Trans-Nzoia County, without reasonable excuse had under their control ammunition namely One Chinese Stick Hand Grenade in circumstances which raised reasonable presumption that the said ammunitions were intended to be used in a manner prejudicial to public order.**

2. They were equally charged with the second count of **preparation to commit a felony contrary to Section 308 (1) of the penal code**. The particulars of the offence were that **on the 26th day of September, 2012 at Bwayi area along Bwayi – Kitale Murram road Trans-Nzoia County, without reasonable excuse had under their control ammunition namely One Chinese Stick Hand Grenade in circumstances that indicated that they were so armed with the intent to commit a felony namely Poaching in Mt. Elgon National Park.**

3. His co-accused were set free and he was convicted on Count 1 and sentenced to 8 years imprisonment hence this appeal.

4. The appellant has raised fundamentally in his amended grounds of appeal the fact that the case was not proved beyond the standard of proof and that there were various inconsistencies in the prosecution evidence which merited his acquittal.

5. The summary of the evidence as presented by the prosecution was that **PW1 Corporal Galana Bakari** from Kitale police station testified that he accompanied some officers to Bwayi area within Kwanza, to set up an ambush for some suspects who were in possession of explosives on 26/9/2012. This was around 12.00 pm. The ambush team was being led by Sergeant Tinego. As they approached where they were hiding they confronted the 3 men who were walking on foot and ordered them to lie down. Sergeant Tinego searched them and removed a grenade from one of the suspects. They then took them to Kitale police station. He identified the grenade which was produced as exhibit.

6. **PW2 Moses Ruto** a police informer was the star witness. He said that he was told by the appellant concerning the business of selling arms from Uganda which included grenades. He then tipped the police and organised for the ambush. They drove in a motor vehicle Probox which he had hired. They were confronted by the police officers along Bwayi-Kitale road. The officers blocked their way and the appellant attempted to remove the grenade but the witness struggled with him and was unable to remove. They were then transported to Kitale police station where they recorded their statements.

7. **PW3 SSP Eliud Lagat** from CID Headquarters bomb disposal unit verified the exhibit that the same was a grenade and he produced it as part of the prosecution evidence or exhibit.

8. **PW4 Sgt James Tinego** carried out the investigations. He said that under the instructions of the DCIO they laid an ambush at Bwayi area and managed to arrest the suspects who included the appellant. They found the grenade with one of the suspects and they did arrest them and later released the motor vehicle to the owner.

9. When put on his defence the appellant gave unsworn evidence denying the charge. He said that on the material day one Isaac Lokal had

asked him to go to his home for a fund raising event. As they drove in a probox vehicle belonging to his co-accused, they were blocked by the police and arrested. He denied being in possession of the explosive.

Analysis and Determination

10. There are two critical issues to consider in this appeal. The first one is who was in actual possession of the grenade and whether the appellant was in a motor vehicle or were walking.

11. PW1 stated that the three were walking when they laid an ambush. Apparently on the question of who had the grenade he said;

“ I saw Sergeant Tinego removing a hand grenade in possession of one of the suspects. I cannot tell from which part of his body it was removed.”

12. On cross-examination he said;

“ The accused did not arrive in a motor vehicle”

13. PW2 stated that they were in a motor vehicle and that;

“ ----- the grenade was in a pocket behind the back seat of the motor vehicle. Steve attempted to remove the grenade when he saw the officers. I struggled with him to prevent him from removing the grenade. The officers quickly approached and took away the grenade.”

14. On cross-examination he stated that

“ the police found the grenade under the back seat of the motor vehicle. They arrived before the suspects could remove it”

15. PW4 on his part stated that the suspects drove in a motor vehicle. He said that the grenade was found in possession of Chanito who was the 1st accused. On cross-examination he stated that his statement does not indicate that they walked on foot. He was equally empathic on cross-examination that;

“ the grenade was in Chanito's coat pocket wrapped in a paper bag.”

Even at re-examination he said accused 1 was in possession of grenade.

16. Obviously, from the two issues of whether they were on foot or in a motor vehicle and who was in possession of the grenade, the prosecution witnesses contradicted each other. The element of whether they were in a motor vehicle is critical because PW2 stated that the grenade was behind the seat whereas PW4 said that it was in the 1st accused pocket.

17. This issue is very important noting that the rest of the accused were set free. In my view it was not clear who actually had the grenade for according to PW1, he did not see whom PW4 searched and removed it from. Whereas PW2 stated that it was behind the car seat and the appellante struggled to remove it, on the other hand PW4 stated that the 1st accused had the grenade.

18. With the above contradictions and taking into account that the rest of the co-accused were set free the same benefit must go to the appellant. It would have been different if all the three had been convicted. Obviously one must have had the grenade, whether they were arrested in a car or while walking.

19. In my view this was a classic case of poor investigation. The offence as expected was serious in nature and the respondent should have done better.

20. For the foregoing reasons, the appeal is allowed, the appellant set free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

1/11/18

In the presence of:

Kakoi for State

Appellant – present

Court Assistant – Kirong

Court: Judgment read in open court