



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 22 OF 2015

MARTHA NJOKI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J. N. NYAGA – SENIOR PRINCIPAL MAGISTRATE dated 10th November, 2011 in Nanyuki Senior Principal Magistrate’s Court Criminal Case No. 1825 of 2010)

JUDGMENT

1. **BETH WANJIRU KINYANJUI (Beth Wanjiru), MARTHA NJOKI MAINA (the appellant) and FRANCIS GACHIRI KIHARA** were convicted before the Nanyuki Chief Magistrate’s Court with two offences. The first offence was that of **being in possession of ammunition contrary to section 4(1) as read with section 4(3) of the Firearms Act Cap 114**. The second offence was that of **being in possession of a firearm contrary to section 89(1) of the Penal Code Cap 63**. The said court sentenced all the three to seven years imprisonment on each count which sentences were to run concurrently. Beth Wanjiru did not file an appeal against her conviction and sentence. Francis Gachiri filed Criminal Appeal no. 229 of 2011 before the Nyeri High Court. He however withdrew that appeal before that court on 30th July 2015. The only appeal therefore before this court in respect of the aforesaid conviction is the one filed by the appellant **MARTHA NJOKI MAINA**. The appellant has filed this appeal against conviction and sentence.

2. This court will as it is required reconsider and re-evaluate the trial court’s evidence but in doing so this court will bear in mind that it neither heard nor saw the witnesses testify. See **OKENO-v-REPUBLIC (1972)E.A 32**.

3. The appellant has presented **eight** grounds of appeal. Those grounds are directed at the prosecution’s evidence which in the appellant’s view did not meet the criminal standard of proof. By those grounds the appellant has also termed the prosecution’s evidence as being circumstantial.

4. Appellant’s learned Counsel Mr. Wamahu submitted that the prosecution’s evidence was contradictory and inconsistent. He further submitted that the prosecution failed to give evidence which pointed to all the persons that were charged as being in possession of ammunition and the firearm. He particularly faulted the conviction of the appellant because as he submitted the ammunition and the firearm were not recovered from the appellant by the police.

5. Learned Senior Principal Prosecution Counsel Mr. Tanui did not oppose the appeal. He submitted that the person who was shot by the police at the time of the appellant’s arrest was the person who was in

possession of the firearm. He further submitted that Beth Wanjiru on being searched by the police was found to have ammunition in her pocket. In the learned counsel's view the appellant should have been charged with the offence under **Section 89 (2) of Cap 63**. This is the offence of being found to consort with or in the company of a person in possession of a firearm. In Mr. Tanui's view there being no evidence that the appellant was in possession of either the firearm or the ammunition there was no basis of convicting the appellant.

PROSECUTION'S EVIDENCE

6. **Joseph Kinyua Muriga (Joseph)** was a security guard at a popular lodging in Nanyuki town. Some of his other duties at that lodging were to rent out rooms to customers. On 2nd October 2010 at 7.00 p.m. a man not before the trial court and a woman Beth Wanjiru arrived at the lodging and requested to hire one room. On making payment of ksh.200 they were allocated by Joseph room No. 46. Joseph escorted this couple to that room. After 30 minutes another man and a woman, that is the appellant herein, arrived and went to room no. 46. At about midnight the two men in room no. 46 left the lodging leaving behind the two women. The two men returned at the lodging at 2.00 a.m. in the company of a third man. The three men entered room no. 46. Joseph in his testimony stated that 20 minutes later the appellant walked out of the room. She joined Joseph at the fireplace in the lodging. Joseph saw police officers arrive at the lodging at 3 a.m. When the appellant noticed the arrival of the police she ran to room no. 46. The police went toward room no. 46 and as they did so the 3rd man passed them by the corridor. Joseph heard the police officer order the occupants in room no. 46 to raise their hands. He then heard gunshots. Joseph on going to that room found a man lying on the floor holding a gun and an axe. The other occupants of that room were arrested. The appellant was one of those persons that were arrested.

7. On being cross examined Joseph responded by saying that the lodging did not issue receipts for rooms that were hired.

8. **Corporal Kenneth Mugambi (Kenneth)** testified and stated that the police had received intelligence information that there were people planning to eliminate a key witness in a pending criminal matter before the court. The police later were informed that those persons had hired a room at a popular Nanyuki lodging and in particular room no. 46. It is that information that led them to go to that lodging and to that room. On going there he found the room locked from inside. They informed the occupants of the room that they were policemen. The occupants threatened to shoot them if they attempted to enter the room. Kenneth kicked the door open and saw a person holding a gun behind the door. He shot him. It was in that room that they arrested the appellant in the company of her two co-accused. Kenneth testified that four rounds of ammunition were recovered from the side pocket of the trousers of Beth Wanjiru. They also recovered a knife from the appellant.

9. On being cross-examined Kenneth denied that the only person in that room no. 46 was the one who was shot dead. Although Joseph in his testimony had said that when the police first arrived at the lodging they did not talk to him Kenneth on being cross examined stated that they spoke to the watchman of the lodge on their arrival. It is not clear from the evidence whether the lodging had more than one watchman.

10. **Chief Inspector Benjamin Gitonga (Benjamin)** was in the company of police officers who raided room no. 46. He confirmed that Kenneth shot at the person who had a gun in that room. That it was also Kenneth who recovered four rounds of ammunition from Beth Wanjiru.

11. Benjamin stated in cross examination that it was the watchman who later informed him that it was one of the suspects in that room who had booked the room.

12. **Chief Inspector Mudindi Mwandawiro** the firearm examiner produced a report prepared by his colleague. That report stated that the gun recovered at the scene was home-made gun which was designed to chamber round of ammunition. The gun according to the firearm examiner successfully test fired. The report also showed that the ammunition successfully test fired in the laboratory.

DEFENCE

13. The appellant stated that on 3rd of October 2010 she hired a room no. 41 at a famous lodging in nanyuki town and she did so because she had missed the last public transport which would have taken her to a place of residence in Ngobit. On that night at 3 a.m. she said she heard gunshots. After 10 minutes the policemen told those that were lodging to come out of their rooms with their hands up. She came out of her room and was searched by the policemen but nothing was found. She said that it was then that she and other lodgers were taken to the police station. In her defence she said that she did not know her co-accused. In respect of her co-accused Francis Gachiri she said that she first saw him at the court during the trial.

ANALYSIS AND DETERMINATION

14. I will begin by posing the question, was there a **common intention** between the appellant and the persons that were in room no. 46? **Section 21** of the **Penal Code Cap 63** defines **common intention** as:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

15. What evidence shows common intention? The prosecution by its evidence showed that the appellant was part of a group among whom one was found to possess a gun and another was found to possess four rounds of ammunition. Joseph the security guard cum the receptionist described the way different persons came and left room no. 46. The appellant arrived in the company of a man 30 minutes after the room was hired to another man and woman. All the four were in that room before the two men went for a third man. One of those men escaped when the police raided the lodging. The other one was shot. The remaining one was arrested together with the appellant and Beth Wanjiru and was charged before court. Joseph described how the appellant at one time joined him at the fireplace in the lodging. The appellant however ran from that fireplace to room no. 46 on seeing the police arrive. Joseph in this regard was very clear and was uncontradicted in cross-examination.

16. Although the appellant in her defence alleged to have rented room no. 41. That was not put to Joseph when he was cross examined. It follows that that alibi defence can only be termed as an afterthought. It does not dislodge the very clear evidence of Joseph.

17. Appellant was therefore part and parcel of the persons who had the gun and ammunition. In the case **DICKSON MWANGI MUNENE and ANOTHER V REPUBLIC (2014)eKLR** Court of Appeal in discussing the doctrine of common intention had this to say:-

“In Njoroge v Republic, (1983)KLR 197 at P. 204, the Court of Appeal stated that:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

As to its proof, referring to its earlier decision in R vs Tabulayenka s/o Kirya (1943)EACA 51, it continued to state that:-

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the cause of the commission of an offence. In *Dracaku s/o Afia Vs R (1963) E.A. 363* where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” “where a number of person took part in beating a

thief.”

18. In my evaluation of the prosecution’s evidence I find that there was a common intention or a joint enterprise to unlawfully possess a gun and ammunition. That common intention is clear from the appellant’s reaction when she saw the police arrive at the lodging. She ran to room no. 46. Her action makes it clear she was aware that the dead man had a home-made gun in contravention of section 89(1) of cap 63 and she was also aware that Beth Wanjiru had ammunition contrary to section 4(3) of cap 114. It is for that reason that I part ways with the submissions of the appellant and DPP.

19. It is pertinent to note that the trial magistrate who had the opportunity to see and hear the witnesses testify by his reasoned judgment believed the evidence of the police and disbelieved the defence offered by the appellant.

20. It is for the above reasons that I uphold the trial court’s conviction and confirm the sentence of seven years on each count which was ordered to run concurrently. **Accordingly I hereby cancel the bail granted to Martha Njoki Maina and I order that she be placed in prison custody to serve the sentence meted out by the trial court.**

DATED AND DELIVERED THIS 8TH DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Martha Njoki Maina

For Appellant:

For the State:.....

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE