



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 16 OF 2015

ALEXANDER KIHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence by Hon. D.O. Ogola, Chief Magistrate in Chief Magistrate Criminal case No. 987 of 2013 delivered on 28.4.2015)

JUDGMENT

1. The Appellant, Alexander Kihara was charged and convicted in Busia Chief Magistrate's Court Criminal Case No. 987 of 2013 with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and causing grievous harm contrary to section 234 of the Penal Code. He was sentenced to five years imprisonment on each count. The sentences were ordered to run concurrently.

2. Being dissatisfied with the decision of the trial court he now appeals to his court on the grounds that:

“(1) THAT the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to 5 years imprisonment in count 1 and 5 years imprisonment in count 2 by wrongly holding that it was the appellant who shot and killed the deceased in count 1 and at the same time injured the complainant in count 2 by firing his firearm viz Ceska Pistol S.No. G5961 when there is evidence on record of the existence of another firearm viz Ceska Pistol S.No. F6723 that the complainant in count 2 had at the scene which was sent to the ballistics expert for examination but whose results were never presented before the trial court thus leaving room for possibilities that he firearm was used for the commission of the offences and thereafter a cover-up made

(2) THAT the learned trial magistrate erred in law and fact by convicting and sentencing he appellant to 5 years imprisonment in count 1 and 5 years imprisonment in count 2 when there is no enough evidence on record to sustain such conviction and sentence.

(3) THAT the leaned trial magistrate erred in law and fact by convicting and sentencing the appellant to 5 years imprisonment in count 1 and 5 years imprisonment in count 2 by totally ignoring his defence that he fired one round of ammunition in the air to scare off a surging crowd.”

3. Mr. Ombaye for the Appellant filed written submissions which he argued before the court when the appeal came for hearing on 13th June, 2016.

4. On the first ground of appeal, Counsel for the appellant submitted that the Arms Movement Register

which was produced as an exhibit, showed that PW1 Police Constable Joseph Kirimi Kirera who is the complainant in regard to the charge of grievous harm had been issued with a Ceska Pistol Serial Number F6723 during the date of the incident. Further, that the Exhibit Memo Form that was produced as an exhibit also showed that the same firearm had been taken for examination by the firearms examiner. It is the Appellant's case that although reports for all the firearms taken for examination were later produced as exhibits, no report was produced for this particular firearm.

5. It is the Appellant's submission that failure to produce a report for Ceska pistol F6723 created room for speculation that two or more firearms may have been used during the incident. He asserts that the trial magistrate erred in concluding that the pistol F6723 was one and the same with G6723 whereas the Arms Movement Register had clearly identified the pistol as F6723. It is the Appellant's case therefore that the firearm may have been used on the material night and there was a cover-up.

6. On the second ground of appeal, counsel for the Appellant submitted that there is no evidence on record to show that the Appellant shot the deceased and at the same time injured PW1. It is the Appellant's case that the medical evidence on record shows that both PW1 and Mohamed Haro (the deceased) were shot from behind thus contradicting the evidence of PW1 that he met the Appellant face to face meaning that he could have only shot them from the front.

7. It is the Appellant's case that there is no evidence showing that the Appellant found himself behind the deceased and PW1 to be able to shoot them from behind. Counsel for the Appellant submitted that this points to the fact that the firearm that was issued to PW1 had been used to kill the deceased thus the reason why there was a cover-up and the ballistics report was never produced.

8. On the third ground of appeal, the Appellant asserted that he gave sworn evidence of the fact that there was a commotion outside the hotel forcing him to dash outside the hotel where he shot once in the air to scare a mob that was surging towards the hotel. It was further his defence that he had heard gunshots earlier. It is the Appellant's case that the trial court ignored his evidence and proceeded to hold that if he had shot in the air then there should have been a bullet mark on the ceiling of the hotel. It is the Appellant's case that this was a wrong conclusion as he did not shoot in the air while in the hotel but outside hence the ceiling could not have been hit.

9. In opposing the appeal, counsel for the State submitted that the trial court had considered both the prosecution and the defence evidence and it was erroneous for the Appellant to claim that his defence was not considered.

10. It is the Respondent's position that there was indeed shooting as confirmed by the 1st to 8th prosecution witnesses. Further, that PW8 Martha Wanjiru Muniu who was the owner of the hotel was an independent witness as she was not a police officer.

11. The State asserted that there was sufficient light at the scene and the Appellant did not deny that he was at the scene as indicated by the prosecution witnesses. It is also the prosecution's case that there is evidence on record to show that the Appellant was found inside the hotel pointing his gun at PW1.

12. On the issue of firearm serial No. F6723, counsel for the State submitted that witnesses had adduced evidence that the correct serial number of the firearm issued to PW1 was G6723 and not F6723 and that there was an error in the Arms Movement Register and Exhibit Memo Form which indicated the firearm issued to PW1 was F6723 instead of G 6723. It is the Respondent's case that the trial magistrate analyzed the evidence adduced in regard to the error and concluded that a firearm F6723 did not exist.

13. According to the Respondent, any contradiction that may have existed in the evidence of the prosecution witnesses was not enough to cause any prejudice to the Appellant. The State therefore urged this Court to dismiss the appeal.

14. This being a first appeal, this court has a duty to evaluate afresh the entire evidence as given in the trial and thereafter reach its independent conclusion on the same. In doing so, the court must bear in mind

the fact that it never saw nor heard the witnesses testify-**See Okeno v Republic [1972] E.A. 32.**

15. In brief, the evidence that was adduced before the trial court is that on the fateful night of 4th November, 2011, the deceased, PW1 and PW6 Michael Muthiora Mungai were on patrol duties within Malaba town. The patrol squad was under the command of the deceased. PW1 was armed with a pistol serial No. F6723 or G6723. PW6 had firearm No. G6038 while the deceased's pistol was serial number G 5047. Each firearm had fifteen rounds of ammunition.

16. During the patrol, the officers passed outside Mama Kevin's Hotel where they saw the OCS Chief Inspector Peter Ndungu and the Appellant who was the officer in charge of the crime section sitting with PW8 the proprietor of the hotel. PW1 waved at them and PW2 who was seated facing the door responded.

17. After passing the hotel they saw a man who was sitting in darkness outside a shop. They confronted the man who took off towards Mama Kevin's Hotel. PW1 and the deceased gave chase with PW1 leading. PW6 went towards the back of the hotel. As PW1 and the deceased entered the hotel, they heard gunshots. It was at that juncture that PW1 saw the Appellant pointing a gun at him. He stood still, fearing that he would be shot. PW1 then heard somebody from behind say they have killed. PW1 attempted to retreat and that is when he stepped on the body of the deceased who was groaning on the floor. It was then that PW1 realized that he had also been shot.

18. PW2 and PW8 had followed the man that was being chased by the officers towards the back of the hotel. On re-entering the hotel together with PW6, they saw the Appellant holding his gun. The deceased was on the floor. Next to him was PW1 whose arm was injured.

19. With all the officers who were at the scene accounted for immediately after the shooting, PW2 organized for the deceased and PW1 to be taken to hospital where the deceased was pronounced dead on arrival.

20. PW3 PC Boya Lotiro Philemon who was on patrol in another part of the town on hearing the news of the shooting from a boda boda operator proceeded to the scene. At the hotel he recovered a spent cartridge that had been left behind on a plastic chair.

21. All the firearms that were at the scene were later collected and submitted to the firearms examiner for examination. PW9 Lawrence Nthiwa, a firearms examiner, testified that upon examination of the spent cartridge he concluded that the same had the imprints of Ceska Pistol G5961. It was his evidence that an imprint is made on a cartridge when a shot is fired.

22. Looking at the evidence adduced before the trial court, it is clear that the Appellant used his firearm on the material night. Although he claims that he only used one bullet to shoot in the air, the evidence of PW13 Senior Superintendent Evans Korir and PW14 Sergeant Vincent Juma establishes that he used three bullets. These two witnesses stated that when PW13 disarmed the Appellant at the police station he had 12 rounds of ammunition. Three out of the 15 rounds of ammunition that had been issued to the Appellant earlier in the day could not be accounted for.

23. PW9 confirmed that the spent cartridge that had been recovered from the hotel by PW3 was fired from Ceska pistol G5961. This is the same pistol, which according to the evidence of the armourer PW14 and the investigating officers (PW12 police constable Benson Labot and PW15 Superintendent John Kemboi) had been issued to the Appellant.

24. The fact that a spent cartridge was found inside the hotel goes a long way to corroborate the evidence of PW1, PW2, PW6 and PW8 that the Appellant was holding his pistol inside the hotel. This dispels the Appellant's claim that he fired in the air outside the hotel. This also goes a long way in supporting the trial magistrate's finding that had the Appellant fired in the air there would have been a mark in the ceiling of the hotel.

25. On the question of the presence of a fifth firearm at the scene, the magistrate found that the firearm identified as F6723 in the Arms Movement Register and the Exhibit Memo Form was indeed the same as the firearm which PW9 identified as G6723. The learned trial magistrate considered the question at length and stated that:

“An issue was raised about the identity of one of the firearms presented for examination i.e. whether PW1 PC Kirimi had been issued with Ceska S/N G6723 or F-6723 or whether the firearm presented to the examiner and indeed examined was S/N G-6723 or F-6723. In the testimony of the witness (PW1), it was G-6723 and not F-6723. From the arms movement register, it is noted that it was F-6723. On the exhibit memo form prepared by PC Labott, it is also shown as F-6723. On the examiner’s report, there is a clear alteration from F-6723 to G-6723, so which firearm was issued to PW1 and later examined? Apart from the evidence of PW1 himself, the examiner of firearms also gave evidence that the one he examined was G-6723 and not F-6723, and that he indeed made the alteration on his report to reflect the correct position after noting the same. The investigating officer PC Labott, also admitted that S/N noted as F-6723 was an error and that G-6723 was the correct serial number.

The armorer and one in charge of arms movement register, PW14 Sgt. Vincent Juma conceded also that the noting of the serial number as F-6723 was an error, as the gun he had issued to PW1 and which was later presented for examination was G-6723. This witness even went further to note that at Malaba police station there was no firearm S/N 6723. This court does not see any reason why all these witnesses would have falsely noted and falsely presented the wrong firearm for examination. This is because all these witnesses were colleagues of accused and there is no evidence on record to show that they or any had any differences as to make them act falsely against accused. It is for these reason that I am persuaded by the prosecution witnesses that the firearm that had been issued to PW1 on the material night and which was later presented for examination and examined was indeed S/N G-6723, and that it was on error to note the same as F-6723.

This court otherwise notes the finding of the firearms examiner that it was accused’s gun which had fired the single spent cartridge recovered. Also noted, is the evidence of at least 2 witnesses, PW13 Spt. Elphas Korir and PW14 Sgt. Vincent Juma that on his gun being recovered from him (accused) same was found only with 12 rounds of ammunition. I have perused the copy of the arms movement register produced in court. This exhibit clearly shows that accused had been issued with the firearm and 15 rounds of ammunition on 4/11/11 (EXH 25(a). At EXH 15(b) the same firearm was received back on 4/11/11 but with 3 rounds of ammunition missing. Again this court finds no reason whatsoever or any evidence on record as to why armorer would have made a false entry in his register. In the absence of any specific evidence, this court is convinced that the evidence of both PW13 and PW14 that on the recovery of accuseds firearm from him, same had only 12 rounds of ammunition. This obviously means that accused must have fired and or failed to account for at least 3 rounds of ammunition since he had signed for and been issued with 15.”

26. The magistrate did a thorough analysis of the evidence and concluded that the firearm that was issued to PW1 was indeed G 6723 and there was no firearm with the number F-6723. I find nothing to make me fault this finding.

27. In fact the Appellant’s claim that PW1 may have used another firearm which was not taken for examination cannot be believed. The Appellant in his defence never stated that he saw PW1 fire any pistol or even hold one.

28. The evidence of PW1 was indeed corroborated by that of PW3 who picked a spent cartridge from the hotel and that of PW9 who confirmed that the said spent cartridge was ejected by the firearm that had been issued to the Appellant. When PW2, PW6 and PW8 entered the hotel they found the Appellant holding his pistol.

29. The trial magistrate correctly rejected the Appellant's defence. He found that there was no evidence to support his statement that there were gunshots from outside. There was also no evidence to show that all the prosecution witnesses could have conspired against the Appellant.

30. Any contradictions in the evidence of the prosecution witnesses were so minor that they could not have turned the tide in favour of the Appellant. He is the person who discharged the bullets that took away the life of the deceased and injured PW1.

31. There was the issue of the points of entry and exit of the bullets from the bodies of the deceased and PW1. The evidence shows that the bullets entered the body of PW1 from the left side and exited towards the right. As for the deceased, they entered through the left buttock and exited through the right groin. It can therefore be concluded that the bullets entered their bodies from the sides. There was no evidence adduced regarding the position of the Appellant as opposed to that of PW1 and the deceased as they entered the hotel. It was therefore possible that the bullet could have hit PW1 and the deceased from any side. It is important to note that PW1 heard the gunshots inside the hotel and realized later that he had been hit.

32. The Appellant was expected to know that discharging his firearm in the prevailing situation was likely to cause injury or death. I therefore find no reason to fault the decision of the trial court.

33. For the reasons stated, this appeal fails and the same is dismissed. The Appellant will serve his sentence, which I note was lenient, to its logical conclusion.

Dated, signed and delivered at Busia this 11th day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT