



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 32 OF 2014

JEREMIAH KILONZO MUSYOKI.....1st APPELLANT

JOSEPH MATHEKA NGOLA.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the criminal case No.3438 of 2010 of the Chief Magistrate's Court at Mombasa- Hon R. Odenyo (SPM))

J U D G M E N T

1. JEREMIAH KILONZO MUSYOKI and JOSEPH MATHEKA NGOLA herein after referred to as “the appellants” were jointly charged with others with the following:

2. In count 1 the offence of being in possession of firearms without a Firearms certificate contrary to section 4(1) as read with section 4 (3) of the Firearm act cap 114, Laws of Kenya.

The particulars are that; On the 28th day of October, 2010 at ferry area in Likoni Location in Likoni District within Coast Province, the appellants with others not before court were found in possession of one AK47 rifle S/No. 762008 AMERICAN COLTS US ARMY 1017 s/No. 63686, AMERICAN COLTS US ARMY model 1917 S/No. not visible without a firearm certificate.

3. In count II, were with preparing to commit a felony contrary to section 308 (3) (a) of the Penal code.

The particulars are that; On the 28th day of October, 2010 at FERRY area in Likoni Location in Likoni district within coast province, the appellant jointly with others not before court were found in possession of one AK47 rifle s/No. 762008 AMERICAN COLTS US , ARMY model 1917 s/No. 63686, AMERICAN COLTS US, ARMY model 1917 s/No. not visible with fake motor vehicle number plate KBG 137 X aboard motor vehicle registration KBF 326E Toyota station Wagon whit in colour with intent to commit a felony namely robbery with violence:

4. In count (iii), were with being in possession of ammunitions without a firearms certificate contrary to section 5 (1) as read with section 4 (3) of the firearms Act Cap 144, laws of Kenya:

The facts being that; On the 28th day of October, 2010 at FERRY area in Likoni Location in Likoni District within Coast Province, the appellants jointly with others were found in possession of 7 rounds of 38 mm special and 27 rounds of 7.62 mm special without a firearm certificate.

5. The appellants took a plea of NOT GUILTY in all counts. They were subsequently tried and convicted for counts 1,2 and 3 respectively while the others were acquitted. Each appellant was then sentenced to serve;

(a) a term of twenty (20) years imprisonment in count I;

(b) a term of fifteen (15) years imprisonment in count II and;

(c) a term of ten (10) years imprisonment in count III.

6. Being aggrieved, the appellants have appealed against the conviction and sentence on the following grounds;

(a) that the trial magistrate erred in law and fact by not considering that the offence of preparation to commit a felony was not proved to the required standard of law hence his conviction was unsustainable and unsafe;

(b) the learned trial magistrate erred in law and fact in finding their conviction and sentence believing that the 1st appellant was in possession of the alleged firearm without seeing that the same was not in his possession.;

(c) that the learned trial magistrate erred in law and fact in relying that the 2nd appellant was in possession of the firearm without considering that he was not arrested with anything in question, hence miscarriage of justice'

(d) that the learned trial magistrate erred in law and fact by not considering that the motor vehicle purported to have been seized with firearm was not evidenced in court a violation of section 63 (3) of the Evidence Act, and also that the 2nd appellant had no connection with it;

(e) that the learned trial magistrate erred in law and fact failing to consider that the burden of proof was not satisfied beyond reasonable doubt hence violation of section 109 of the Evidence Act;

(f) that the learned trial magistrate erred in law and fact by failing to award one consideration to the defence by the 1st appellant and the 2nd appellant's ALIBI defence, as the same were reasonable to cast doubt on the prosecution's case

PROSECUTION'S CASE

7. The prosecution's case is that police officers, who included No 61359 IP Charles Owino No. 66595, PC Mutisya (herein referred to as Pw5), PC Mercy, PC Opiyo and PC Mwanzia were on duty at the container at Likoni main land on 28.10.2010 at about 5.00pm. Pw3 explained that the containers are used as police offices.

8. It is evidenced that on the alleged date and time, a vehicle which was identified as KBF 326E was seen coming from Ukunda direction to enter the ferry for Mombasa island.

9. This vehicle was stopped by PC Mwanzia who directed the occupants to lower their windows and instructed the driver to park the vehicle aside.

10. Pw3, IP Charles Owino and Pw5 PC Mutisya moved to the vehicle to see what was happening.

11. According to Pw3, he approached the person who was sitting on the co-driver's seat as PC Mutisya opened the door. That they saw a black polythene bag between the man's legs.

12. Pw3, PC Mutisya asked the man what was in the bag and the man passed it to the driver. Pw5 hit the

man's hand and the bag fell between him and the driver. Meanwhile, the three passengers who were on the rear seat, got out of the vehicle and fled. The driver also opened the door and ran away.

13. That as he held the bag, Pw5 felt a gun on his belly as the man threatened to shot him.

14. That Pw3 urged the man not to shoot and got hold of the gun which he pointed upwards.

15. A struggle ensued as Pw3 wrestled the gun from the man and was joined by Pw5 and other security guards to overpower the man. They arrested and put him in the container.

16. The OCS came with other officers and the vehicle was duly searched and recovered

(a) a polythene bag which had an AK 47 with 26 rounds of ammunition in its magazine and one in its chamber from the rear seat, its serial No was No.. 762008,

(b) the polythene bag what was being passed to the driver had a pistol 1917 America US Colt with five (5) rounds of ammunition.

(c) another black bag which had fake number plates being KAG 137X

(d) Casio calculator;

(e) Scratch cards in the following specifications;

(1) Safaricom being

20 pieces for 50/= each

194 pieces of 20/= each

47 pieces for 5.00 each

(ii) Orange being 50 pieces for ksh 50/each;

(iii) Airtel being

50 for ksh 5 /= each

200 for 10/= each

225 for Ksh 20/= each

9 for Ksh 100 each

6 for ksh each

(f) a photograph of the driver (2nd appellant) and a lady.

(g) A mobile phone belonging to Jeremiah (the 1st appellant) make Nokia 1680-2;

(h) a remote control.

17. The suspect, who was identified as the 1st appellant, Jeremiah Kilonzi Musyoki was arrested and escorted to the Likoni police station together with the vehicle and all that had been recovered inside.

18. Pw6 said that on 20.10.2010, he went to Bamburi to look for 4th suspect and were shown his house from where they arrested him and recovered a motor cycle registration No NZC 12c 1Ao9476589 which had not been registered.

19. That it is the 4th suspect who told them that the motorcycle had been taken to him by the 3rd suspect, who in turn told them

that the number plates from another suspect who is still at large.

20. Pw6 went on to state that he wrote to Kenya Revenue Authority on 9.12.2010 and the response showed that Registration No KRK 132 B belonged to a prime mover in the name of Robert. The response also showed that the motor cycle had not been registered.

21. Pw6 said that the 2nd appellant was arrested and taken to Likoni police station on 15.12.2010 and the 3rd suspect on 25.12.2010.

22. He also said that he sent the guns and ammunition to the ballistic expert for examination.

23. He also established that the vehicle in question belonged to Joseph Ouma (Pw1 Joseph Ouma (Pw1 herein)

24. In his evidence as Pw1, Joseph Ouma told court that the he had employed the 2nd appellant to drive his motor vehicle registration No KBF 326 make Toyota on 16.9.2010. He said that they signed an agreement to this effect which he identified to court.

25. Pw4, No 40411 Sergeant Ishmael Oduor, a gazetted scenes of crime officer testified that on 7.11.2010 at about 10.00am, he was called to Likoni police station where he photographed motor vehicle registration No. KBF 326 E together with some arms that were said to have been found therein. He produced the photographs thereby and negatives as exhibit P8. He also said that on 29.10.2011, he photographed a motorcycle and prepared a certificate which he produced as exhibits.

26. Pw6, PC Steven Sachota, the investigating officer in case sent the guns and ammunition to the Ballistic expert for examination which were received by Pw7, No 231831, CIP Hassan Muhugu, a Forensic Firearms examiner on 22.12.2010 for examination.

27. Pw7 said he received;

(a) 1 AK 47 rifle marked 'D1'

(b) 1 magazine marked 'D2'

(c) 2 US colt revolver marked 'D3&D4'

(d) 27 rounds of ammunition in calibre 7.62 mm and 39mm marked D2-D27

(e) 5 rounds of ammunition in calibre 9x18 mm marked D31-D35

(f) 32 rounds of ammunition in caliber 4.5 marked D 41-D42.

They were sent vide exhibit memo form.

28. Pw7 said that he examined the said exhibits and established;

(a) the AK47 rifle serial No 762008 was in fair general condition, a bit worn out but it was in good mechanical condition; he also noted that he had successfully tested- fired 3 rounds of

ammunition which were picked from the exhibits.

(b) the AK 47 box magazine (exhibit B2) was in good working condition and forms part of AK47;

(c) Two US colt revolvers serial Nos. 57013 and 63686, Exhibit D3 and D4 were in fair general and working condition and he successfully test fired them using 2 rounds of ammunition from the exhibit;

(d) 3 rounds of ammunition randomly fired from 27 rounds of ammunition exhibit D21-D27, were successively test -fired in the AK 47 rifle;

(e) two rounds of ammunition B31-B35 were tested and found they were not designed for the revolvers hence had been used by a sticking tape to enhance the chambering therein;

(f) two rounds of ammunition marked B41 to B42 were successfully test fired in the colt revolver:

He formed the opinion that exhibits D2, D3 and D4 were firearms while exhibit D21-D27, D31-D35, and D41 –D42 were ammunitions as defined in the firearms Act. He prepared and signed a report to its effect on 27.12.2010 which he produced as exhibit P19.

29. Pw8 No 49431, Corporal Boniface Musunga gave evidence that on 5.12.2010, he arrested the 2nd appellant.

30. Pw6 produced all the identified exhibits as exhibits 1-19.

31. The appellants were placed on defence and they opted to give unsworn and sworn statements in defence respectively. They each indicated that they had no witness to call.

32. The 1st appellant, Jeremiah Kilonzo Musyoki, in his unsworn defence told court that on 28.10.2010, he had been invited to visit a friend at Mtongwe. And on his way there, while using the Likoni ferry, at about 5.00pm, he found so many people since it was rush hour. And on reaching Likoni mainland, he alighted and started walking is the norm.

33. He was surprised when he was arrested by Pw5, PC Mutisya who asked him why he was leaving the vehicle. The appellant said he told him that he did not know what he was talking about but. That Pw5 was found by other officers who the 1st appellant argued with.

34. He was taken to the police station where he was interrogated by other officers about the vehicle ad he denied knowing anything about a vehicle. He said the OCS came and he was taken to Likoni police station where he was charged. The 1st appellant also said that he was injured and he told the court about it. The court ordered that he be issued with a P3 form and he was. He produced it in court as exhibit D1.

35. The 2nd appellant Joseph Matheka Ngla, on the other hand, testified in this sworn defence confirming that he was a driver and had been employed by Peter Odour (PW1) to drive his motor vehicle registration No KBF 326 E. He even confirmed that there was an agreement to this effect and evidenced it as exhibit D2.

36. He further testified that on 28.8.2010, he was arrested when he was found waiting for a client who had hired him to bring luggage to the vehicle. He was eventually arraigned in court having been charged as per the charge sheet. He produced as exhibit DD3.

37. The 2nd appellant went on to state that on 24.12.2010 he was arrested at Makupa roundabout and taken to Makupa police station from where he was taken moved to Central police station and eventually to Likoni police station where he was interrogated by Pw6 as to where he had been on 28.10.2010 and if he knew Jeremiah Kilonzo, the 1st appellant, which he denied. He was charged in court with the

offence herein.

38. After considering all the evidence adduced in court, the trial magistrate had this to say:

“I have evaluated the evidence of Pw1, Pw3 and Pw5 on the one hand and that of the 1st accused on the other hand and I find that the defence of the 1st accused lacks credibility and I address it as being diversionary. All the 3 prosecution witnesses gave very credible evidence that they had over powered the 1st accused at the scene. I also find that having been arrested at the scene, the identification of the 1st accused as the co driver on motor vehicle KBF 326 E who came out with a gun and was over powered is beyond question.....”

He went on to state;

“As for the 2nd accused person, Pw1 gave evidence that he had employed him as a taxi driver to operate motor vehicle KBF 326E. Pw1 produced as exhibit P1 an agreement which he said was signed by other himself and the 2nd accused persons,..... the denial by the 2nd accused of having been the driver of motor vehicle KBF 326 E is therefore hard to believe. The version by accused 2 that he had ceased being the driver of the vehicle when he was arrested on 28.8.2010 is unbelievable since exhibit one was signed on 16.9.2010 and Pw1 explained that this was the 2nd time he was giving accused 2 the vehicle.....”

39. As a result thereof, the trial court stated:

“In conclusion, I have come to a finding that the prosecution has proved its case against the 1st and 2nd accused in the 1st, 2nd and 3rd counts. I thus convicting the 1st and 2nd accused persons with the offences as charged in counts 1,2 and 3.”

40. At the hearing of the appeal, both appellants filed written submissions which they highlighted.

41. The 1st appellant submitted that he disagreed with the trial magistrate for convicting him on evidence that was full of discrepancies in the evidence of pw3 and Pw5 which he dismissed as minor. He submitted that the evidence of these witnesses was scanty, imprecise and exaggerated. He also submitted that Pw1, also denied to be the driver of the vehicle where the firearms were recovered and did not produce any documents in court to confirm that the vehicle belonged to him. The vehicle is alleged to have been photographed but the said photographs were not shown to Pw1 in court to indentify the same to court. Further, the 1st appellant submitted that the prosecution failed to prove the case against him to the required standard. He finally submitted that the trial magistrate sentenced him to serve 20 years imprisonment on the first count which was excessive because the sentence provided under section 4 (3) of the firearms Act is

“for a term of not less than seven years and not more than fifteen years”.

42. The 2nd appellant on the other hand submitted that the trial magistrate relied on the evidence of one witness being Pw1 to convict him. He stated that while he claimed to be the owner of the motor vehicle registration No KBF 326 E, Pw1 had no documents to confirm him name was Joseph Ounda, or a log book or letter of purchase to confirm the vehicle belonged to him, or confirm the authenticity of the agreement he produced. He also submitted that he had been charged it another offence under Cr case of 343/06/2010 during the period that he is alleged to have been found in possession of firearms, which is 28/8/10 and 16/9/10. He further submitted Pw3 and Pw5 told court that they were able to identify the driver of the said vehicle but they did not take any trouble to conduct identification, so that their identification of him is just dock identification. The 2nd appellant submitted that the sentence of 20 years for the offence of having been found in possession of firearms is excessive.

43. M/s Ocholla Counsel, for the state, opposed the appeal by the appellants in their submissions. She

submitted in respect of Joseph Matheka, that he was positively identified by Pw1 as the driver of the vehicle in question on the material date since he had employed him. She also submitted that 2nd appellant did not challenge the particulars of the motor vehicle or the ownership of the same. She further submitted that photocopies are not admissible in a court of law as evidence. As for the grounds advanced by the 1st appellant, Ms/ Ocholla, counsel for the state, submitted that the court should dismiss the grounds raised by him since he was arrested at the scene and was the person who came out with a pistol and pointed at Pw3 threatening to kill him. She stated that the photographs of the vehicle were produced as exhibit P8 in court. She also submitted that the evidence of the witnesses against the 1st appellant was corroborated by all of them.

On the issue of sentence, M/s Ocholla submitted that they were not supposed to be sentenced for more than 15 years and so she left the decision thereof to court.

44. I now wish to deal with the issues raised in the amended grounds of appeal. In so doing, I have considered the said amended grounds of appeal, the argument before me in the submissions filed and orally highlighted by the appellants and the oral submissions by the learned state counsel together with the cited authorities and provisions of the law.

45. However, I have cautioned myself that my duty as the first appellate court is to carefully re-examine, re-evaluate and analyse the evidence on record afresh to arrive at my own conclusion. I further caution myself that I did not have the benefit of seeing the witnesses and observe their demeanor. This was so held in the case of *Odhiambo-vrs Republic*, Criminal Appeal No 280 of 2004 (2005) KRL, that;

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and assess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses, when they testified as the trial court did and therefore cannot tell their demeanor.”

46. I have considered the appeal herein. I find that it is not in dispute that on 28.10.2010 at around 5.00pm, a vehicle registration No KBF 326 E which was being driven from Ukunda direction and was headed towards Mombasa mainland in a ferry at Likoni, was stopped by police and found to have five occupants. It is also not in dispute that while interrogating the co-driver, 4 of the occupants who included the driver, escaped. The key witnesses in this case were P1 Joseph Oduor, Pw2, Boniface Mwangi Ndiema, Pw3, IP Caleb Owindo and Pw 5 PC Mutisya. The court relied on their evidence to convict the appellants.

47. With regard to the amended grounds raised by the 1st appellant, I will deal with grounds 1,2,and 3 as one since they relate to one main issue, which is;

“whether the prosecution evidence was sufficient enough to warrant that 1st appellant’s conviction”.

48. According to the prosecution’s witness, the 1st appellant was said to have been arrested at the scene.

Pw2 testified that;

“.....I was with a police officer. The officer stopped a vehicle that was coming from Ukunda direction to enter into the ferry. I was about 10m away from where the officer stopped the vehicle. The vehicle was a car KBF 326 E, saloon. It had tinted windows. I saw 4 people come out of the vehicle and ran away in different directions. The officer then beckoned his colleagues. I went to see for myself. I reached the vehicle and saw the officer who had stopped vehicle wrestling a person who had been in the vehicle. The man who had been in the vehicle was almost escaping. He had a pistol in his hands which he was pointing at the waist of the officer. I and the 2nd officer joined forces and over powered the man. His pistol was taken by one of the officers.....”

The man was arrested with a pistol while struggling to flee is now sitting here” (pointing at 1st accused) (from the original handwriting proceedings).

In cross examination, Pw2 said;

“ At the scene of your arrest, I was the only guard from my company, other members of the public joined us to subdue you. They beat you. You were bleeding on the head as we ……….”

Pw 3 testified that:

“ I approached the person sitting on the co-driver’s seat. PC Mutisya opened the door as I approached. I saw a black polythene bag between his legs. PC Mutisya asked him what was in the bag. I saw he passenger take the bag and give it to the driver. PC Mutisya hit his arm and the bag teal between the driver and his co-driver. At that instance, all the three passengers in the back seat came out of the vehicle and fled………the passenger in the co-driver’s seat all of a sudden got a gun from his seat and pointed it at my belly threatening to shoot me. I used my left hand to hold the pistol by the nozzle and pointed it upwards. A struggle ensued between me and the co-driver. Eventually I managed to snatch the pistol from him. I then held him by both hands. One of the security guards around there to help me. He was called Emuyi. PC Mutisya came. 2nd security guards joined us. We over powered the co-driver and hand cuffed him………The one we arrested at the scene and took to Likoni police station is that one (points at 1st accused) He told me he is called Jeremiah Kilonzo…….”

In cross examination by the 1st appellant, pw3 said;

“At the time of stopping your vehicle, the ferry had not off loaded. The ferry off loaded people after we had arrested you. The passengers in the car ran away. I could not chase others as I was restraining you from sleeping ……….”

Pw5 in his evidence had this to say;

“When I approached the vehicle, the 3 passengers in the rear seat came out towards me. I told them to go back to the vehicle. They obliged. I went and stood next to the co-driver. I asked him where they had come from. By that time, IP Owino (Pw3) had reached.

I saw a small bag and a big bag next to the co-driver. I saw as he took the small bag to pass to the driver. I held the bag and asked him what it was. The bag was black in colour. As I held the bag, I felt the shape of a gun. I told Pw3 of what I felt. The co-driver opened the door as I stepped back. He removed a gun from his waist. Instantly, Pw3 reached for the gun. The man pointed the gun at Pw3’s stomach and ………Pw3 struggled with the co-driver. I joined Pw3. Another security guard also joined us and we over- powered the man and arrested him”

When cross examined by the 1st appellant, Pw5 said

“The person we escorted to Likoni police station is that one (points at accused 1)”

48. I have analysed the evidence by Pw2, pw3 and Pw5 and agree with the trial magistrate that the discrepancy pointed out by the 1st appellant is indeed immaterial as it does not affect the evidence of how and from where he was arrested. Clearly, Pw2 and Pw5 in their evidence corroborated the evidence of Pw3 on how he wrestled the 1st appellant when he threatened to shoot him with a pistol/gun. They all indentified the 1st appellant as the gun- man who came out of the vehicle with a gun and threatened to shoot Pw3 (see the handwritten record of proceedings on the last paragraph of each of these witnesses statements).

50. I wish to point out that the typed proceedings that were supplied to the appellants may not have been

proof read to correct the mistakes such as the one the 1st appellant relied on in his submissions that Pw2 identified the “ 2nd accused “ as the man who was arrested with a pistol. In the handwritten proceedings it is the 1st accused” who Pw2 identified as this man. However, the 1st appellant having been present during the trial must have listened to Pw2 testifying and identified him so that if it had been the case, he would have cross examined him on this issue since he had a chance to.

51. The next issue for consideration is with regard to the evidence of Pw3 and Pw5 that the 1st appellant was arrested and firearms recovered.

Clearly, from the evidence of pw2, Pw3 and Pw5, when the 1st appellant was over- powered and arrested, the gun/pistol he was wielding was recovered from him (MF1-P2). Pw3 and 5 also testified that the vehicle in which the 1st appellant and others were travelling was searched and a 1917 American Colt pistol recovered from a black polythene bag which the 1st appellant was passing to the driver, Exhibit P3), and AK 47 which was in a black bag in the back seat (Exhibit P4)

52. They also testified that the guns were loaded with the one which the 1st appellant armed at Pw3 having 2 bullets, the 9717 American colt having 5 bullets and the AK 47 having 27 bullets. Their evidence with regard to what firearms and ammunition was recovered from the vehicle was consistent and this was confirmed by the evidence of Pw6, the investigating officer and Pw7, the forensic firearms examiner and the exhibit memo form. The evidence of pw4, who is not a expert on firearms and ammunition is disregarded as he would not be in a position to know and describe what kind of pistol or gun he sees.

53. The 1st appellant is charged with the offences of being in possession of firearms and being in possession of ammunition respectively in counts 1 and 2. This is because he was arrested from a vehicle in which firearms and ammunition were recovered. He was also in custody of a pistol/gun which he pointed at Pw3 and threatened to shot him with.

This was evidence which was consistently adduced by pw2, Pw3 and pw5 I find the trial magistrate properly directed his mind to this evidence in finding the 1st appellant guilty of the two counts.

54. As for the motor vehicle which was recovered and detained having been released to the owner, I find nothing irregular with this since the same was said to have been photographed by the scene of crime (Pw4). For photographs to be used in evidence. The provision of section 121 of the Criminal Procedure Code are not in mandatory terms as they state:

(i) “When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable case being taken of its preservations”.

The operative word there being “may” thus making the provision not mandatory.

55. The 1st appellant also took issue with the fact that Pw1 who testified on the ownership of the vehicle, was never shown the vehicle or photographs of it for him to identify it. It is my contention that the ownership of the vehicle was not in issue with regard to the 1st appellant.

56. The 1st appellant also raised the issue of his defence having been dismissed by the trial magistrate. In analyzing the evidence, I find that the trial magistrate weighed the defence by the 1st appellant against the evidence of the prosecution’s witnesses and analyzed it quite well. I agree with his finding on the defence which was raised by the 1st appellant and add that the prosecution’s witnesses were unknown to the 1st appellant and he gave no reason why they would pick him out of the many people who were said to have been at the scene at the time. When he cross examined Pw3, he had this to say;

“There were many people at the scene. There was also a big jam brought by vehicles that were

crossing the ferry....”

57. On the issue of the sentence of 20 years imprisonment which was meted against the 1st appellant on the first count of being in possession of firearms without firearms certificate contrary to section 4 (1) as read with 4 (3) of the Firearms Act, being excessive, I find that section 4 (3) of the said Act provides that;

“any person who is convicted of an offence under sub section (2) shall –

(a) If the firearm concerned is a prohibited weapon of a type specified in paragraph (h) of the definition of that term contained in section 2 or the ammunition is ammunition for use in such firearms be liable to imprisonment for a term of not less than seven years and not more than fifteen years;

This being the punitive section, I find that the sentence of 20 years imprisonment against the 1st appellant in respect of count 1 is definitely excessive and illegal as it is not what is provided for.

58. I now move to consider the amended grounds raised by the 2nd appellant.

In analyzing the evidence on record, I find that the 2nd appellant was arrested by Pw8, Corporal Musungu on 15.12.2010 which was after the motor vehicle in which the firearms and ammunition were recovered was found at Likoni main land.

From the evidence, it is likely that the 2nd appellant was arrested after investigations revealed that she had been employed as a driver of the vehicle which was said to have been operating as taxi by Pw1 at the time.

Also, there was evidence that when this vehicle was searched, a photograph with the 2^d appellant and a lady was recovered from the dash board (exhibit Pw8)

The trial magistrate in findings the 2nd appellant guilty in this case had this to say:

“ I therefore find that both accused 1 and 2 were found in possession of e 3 guns and their ammunitions. On the 2nd parte of the questions, I note that both accused 1 and 2 are not licenced gun holders they did not offer any reasonable explanation why they had, in company of others, the guns in the car that day. Guns are meant for violence. In the hands if security officers, they are instruments of protection in any other person’s hand, they can only be instruments of terror. Hence the only reasonable inference I can draw in that the two accused persons were having those arms and ammunitions to further illegal activities. Thus it is correct to state that the two were preparing to commit a felony”

It is clear that the 2nd appellant was not arrested from the scene. He was arrested on 15.12.2010, the vehicle he was alleged to have been driving having been found and impounded on 28.8.2010. And as he submitted, he was not found with anything in -criminating.

Pw1 testified that he had employed the 2nd appellant as his taxi driver and given him full control of the vehicle, at the time. He was however not present at the scene when the vehicle was stopped and arrested to be able to tell who the occupants were.

Pw1 even indentified at agreement he alleged he and 2nd appellant entered. I find that the said agreement is dated 16.9.2010 while the date of the incident is given as 28.10.2010.

It is worth noting that a vehicle is something that usually, casually and easily changes hands. There is therefore the possibility that it may not have been driven by the 2nd appellant on this day.

Pw3 and pw5 in their evidence to court said that the 2nd appellant is the one they saw on the driver's seat.

I agree with the 2nd appellant submissions that theirs was dock identification of him because there was no evidence that they knew him before or a description of the driver they alleged to have been seated behind the wheel of this vehicle. They both admitted that they only saw him that once. And since he is alleged to have ran away, this was a case where an identification parade was required. This was not done. I disagree with the trial magistrate that it was not necessary, and yet the 2nd appellant, unlike, the 1st appellant was not arrested at the scene or in the act.

Dock identification has been held in numerous occasions by court in this country as "worthless".

As found for 1st appellant, I find no contradictions as to firearms and ammunition were found in this vehicle.

Having said all that, I conclude that the conviction against the 2nd appellant in all counts was unsafe. I allow his appeal and set aside the sentence imposed upon him in all the three counts. I order that he be set at liberty forthwith , unless lawfully held.

However, I find the conviction against the 1st appellant sound and I proceed to uphold the same and dismiss his appeal.

As for the sentences imposed against him, I find that the sentence of 20 years imprisonment in count 1 is excessive and illegal.

I have considered the sentences that were meted out against the 1st appellant in all the counts, his mitigation and period already spent in jail. I believe, having been a first offender, he has learnt his lessons and is headed for reform.

I reduce the sentence in each count to seven (7) years imprisonment. The same to commence from the day he was sentenced and to run concurrently.

Judgment signed, dated and delivered this 10th day of October 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr Mutua for the state

Appellants in person

C/clerk- Kiarie