REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCCA. 113 OF 2015

REPUBLIC.………………………………..…..…………………....…....…APPELLANT

=VERSUS=

ISAAK NOOR IBRAHIM …..…………………………………………..…RESPONDENT

(An Appeal from the ruling of Hon. J. KITUKU (PM) in CR. CASE No. 561 of 2014 acquitting the Respondent under section 210 of the criminal procedure code on 28th May 2015)

JUDGMENT

1. The Appellant is aggrieved by the ruling of Hon. J. KITUKU (PM) delivered on 28th May 2015 acquitting the Respondent under section 210 of the criminal procedure code.

2. The Respondent was jointly charged with another with nine (9) counts as follows:-

(i) Count I is being in possession of uncustomed goods contrary to section 200 (d) (iii) of the East Africa Community Customs Management Act No. 2004.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe division, jointly with others not before the court, the accused were found in possession of uncustomed vehicle chassis number KZNI 30-2066080 a Toyota Surf dark green in colour valued at Kshs. 1,646,241.30/=.

(ii) Count II is having suspected stolen property contrary to section 323 of the penal code.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe division, Mombasa, jointly with others not before the court, accused were found in possession of uncustomed vehicle chassis number KZNI 30-2066080 a Toyota Surf green in colour which was reasonably suspected to have been stolen or unlawfully obtained valued at Kshs. 1,646,241.30/=.

(iii) Count III is making a false document without authority contrary to section 357 (a) of the penal code.

Particulars are that on unknown date and time within the Republic of Kenya jointly with others not before the court with intent to deceive and without lawful authority or excuse made a vehicle number plate KAN 410E purporting to be a genuine document issued by the registrar of motor vehicles.

(iv) Count IV is preparation to commit a felony contrary to section 308 (1) of the penal code.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe division, accused were found in possession of six (6) hand grenades, one AK 47 rifle serial number BR26237, five AK rifle magazines and two hundred and seventy (270) rounds of ammunitions of 7.62mm special caliber in circumstances that indicate that accused were so armed with intent to commit a felony, namely murder.

(v) Count V is being in possession of explosives contrary to section 6 (1) of the Explosives Act Cap. 115 Laws of Kenya.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe, accused were found in possession of six (6) hand grenades without the authority of the explosives licensing officer.

(vi) Count VI is being in possession of a firearm without a firearm certificate contrary to section 4 (2) of the Firearms Act as read with section 4 (3) of the said Act.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe division, accused were found in possession of one AK 47 rifle serial number BR 26237 without a firearm certificate.

(vii) Count VII is being in possession of ammunition without a firearm certificate contrary to section 4 (3) of the Firearm Act.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe, accused were found in possession of two hundred and seventy (270) rounds of ammunitions of 7.62mm special caliber without a firearm certificate.

(viii) Count VIII is being a member of a terrorist group contrary to section 24 of Prevention of Terrorist Act No. 30 of 2012.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe division, accused knowingly engaged in a criminal activity on being a member of a terrorist group, namely Al-Shabaab.

(ix) Count IX is being in possession of a terrorist property in commission of Terrorist Act contrary to section 6 of the Prevention of the Terrorist Act No. 30 of 2012.

Particulars are that on the 11th day of March 2014 at around 12oo hours at Changamwe, accused were found in possession of motor vehicle registration number KAN 410E, chassis number KZNI 30-2066080 a Toyota Surf dark green in colour used to carry and conceal an improvised explosive device for commission of a Terrorism Act.

3. The prosecution evidence in summary was that PW1, Inspector Daniel Makau Kilonzo, the in-charge Anti-Terrorist Police Unit at Moi Airport detachment received information on 11/03/2014 from a police informer that motor vehicle registration number KAN 410E Toyota Surf was driven by a man of Somali origin to Berago yard/garage at Changamwe.

4. PW1 proceeded to Changamwe with PW12 and other officers and they found PW3 manning the gate to the garage.

5. PW3 identified the Respondent in this case as the person who parked the motor vehicle at the garage. The Respondent told PW1 that his co-accused had given him the vehicle to get a parking at the yard where the Respondent had parked his lorry registration number KBB 750D for repairs.

6. PW1 conducted a search on the Respondent and recovered his ID, two mobile phones, three sim cards and one coloured copy of an ID in the name of MOHAMMED NDA NOR.

7. PW2, the owner of the garage in which the motor vehicle was parked and PW5, the manager of the garage said it was the Respondent who took the motor vehicle to the garage.

8. The following items were recovered from the motor vehicle registration number KAN 410E:-

(i) Two metallic pipes fixed to the back seat.

(ii) A mobile phone with connections covered in black cello tape.

(iii) Two cylinders wielded and bolted in the rear seats.

(iv) A yellowish substance and a piece of tapped detonating cord protruding from its ceiling top cover.

(v) A cell phone – Nokia

(vi) Three gas cylinders at the back seat neatly concealed and coiled with a yellow substance.

(vii) One AK 47 and 270 rounds of ammunitions wrapped in a piece of cloth

(viii) Six hand grenades wrapped in a piece of cloth.

(ix) Two blacing caps concealed on a PVC plastic pipe.

(x) A jungle military coat.

(xi) Five AK 47 magazines

(xii) Four magazine batches all concealed on the back rest of the driver's seat.

(xiii) Two detonators concealed on a plastic syringe and tapped to a detonating card.

9. At the close of the prosecution case, the trial Magistrate acquitted the Respondent under section 210 of the criminal procedure code.

10. The Appellant was aggrieved with the acquittal and has appealed to this court on the following grounds:-

(i) The learned, Honorable Magistrate erred in law by acquitting the accused person having found that an offence (s) had been committed thus the acquittal amounted to a miscarriage of justice.

(ii) The learned, Honorable Magistrate erred in law by acquitting the Respondent on all the eight counts against the weight of evidence by the prosecution.

(iii) The learned, Honorable Magistrate erred in law by failing to appreciate the principle of joint offenders and thereby arriving at a wrong conclusion in law; that there was no proof that both the accused persons were guilty of having suspected stolen property, being in possession of uncustomed goods, preparation to commit a felony, being in possession of explosives, being in possession of firearms without firearms certificate, being in possession of ammunition without firearm certificate and being a member of a terrorist group.

(iv) The learned, Honorable Magistrate erred in law by acquitting the Respondent having

found as a matter of fact that the prosecution witnesses were consistent, credible and their evidence independently corroborated.

(v) The learned, Honorable Magistrate erred in law by acquitting having found that the exhibits by the prosecution were credible and the same could form a sole basis for conviction.

(vi) The learned Honorable trial court erred in law when it failed to apply its mind to the provisions of section 179 of the criminal procedure code whilst there was evidence to establish a conspiracy between all the accused persons with the commission of the offences charged.

(vii) The learned Honorable trial Magistrate took to account irrelevant considerations that had no factual basis therefore reaching wrong conclusions in law hence the entire decision amounts to a miscarriage of justice.

11. The parties submitted in court as follows:-

THE APPELLANT'S SUBMISSIONS

(i) The Appellant submitted that the acquittal of the Respondent amounted to miscarriage of justice since the evidence placed him squarely at the centre of the crime.

(ii) The question for determination is whether a trial court or a reasonable tribunal properly directing its mind to the law and the evidence could arrive at a decision to acquit the Respondent.

(iii) The Appellant further submitted that establishing a prima facie case does not mean that the prosecution has to prove the case beyond reasonable doubt.

(iv) The trial court found that the Respondent drove the motor vehicle the subject of this case to the garage where it was recovered and the trial court had no basis for concluding that the Respondent did not know what the vehicle was carrying.

(v) The Appellant urged the court to allow the appeal; set aside the order acquitting the Respondent and order that the Respondent be placed on his defence or order that the Respondent goes for a retrial.

12. The Respondent was represented at the Appeal by Simiyu Advocate who submitted as follows:-

(i) That the Respondent was tried and acquitted by a court of competent jurisdiction and that article 25 of the Constitution provides that the right to a fair trial cannot be limited.

(ii) The Respondent was subjected to a fair trial process and that the burden of prove does not shift to the Respondent but it was upon the prosecution.

(iii) The Respondent also submitted that the motor vehicle never left the parking and that it is not true that the Respondent was in possession of the motor vehicle. Further, that there is no evidence that the Respondent stole the motor vehicle since there is no witness who testified that the motor vehicle was stolen.

(iv) On the charge of preparation to commit a felony, the Respondent submitted that when the motor vehicle was parked at the garage, nothing was recovered from it until the bomb expert arrived and further that the investigations in this case are wanting as there was no search done to find out to whom the scratch card found in the motor vehicle was loaded.

(v) The Respondent urged the court to dismiss the Appeal and to uphold the trial court's decision.

THE COURT'S FINDING

13. I have carefully re-evaluated the evidence adduced before the trial court. My findings are as follows:-

(i) The right of the DPP to appeal against an acquittal is provided for in section 348A of the criminal procedure code which provides:-

"348A (1) when an accused has been acquitted on a trial held by a subordinate court or high court or when an order refusing to admit a complaint or formal charge or an order dismissing a charge has been made by a subordinate court or High court, the Director of Prosecutions may appeal to the high court or the court of appeal as the case may be form the acquittal or order on a matter of fact and law

> ***(2) if the appeal under sub-section (1) is successful the High Court or court of appeal as the case may be may substitute the acquittal with a conviction and may sentence the accused person appropriately"***

(ii) *In the case of* **State v Josphine Achieng Okoko [2016] eKLR** *the court held as follows:-*

> "**What is a question of law was dealt with by the court of appeal in Paul Kobia M'Mbaya – VS – Republic criminal appeal No.267 of 2003 (2007) EKL as follows:-**
>
> > **'we recognize that what constitute a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of determination by the subordinate court and will vary infinitely from case to case. In some cases the point of law can be gleaned from the decision without much ado. For justice the subordinate court would make findings which are ex-facie erroneous in law and embark on erroneous statutory interpretation. These cases where the error of aw is patent or apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law arise from the manner the subordinate court has treated the evidence adduced at the trial".**

(iii) I find that **t**he issue for determination is whether a reasonable tribunal properly directing itself on the evidence and the law would come to the conclusion reached by the trial magistrate.

(iv) I find that there is evidence that the Respondent is the one who drove the motor vehicle to the garage where it was recovered.

(v) PW1 said the Respondent told him that his co-accused who was the owner of the motor vehicle the subject of this suit asked the Respondent to park it at the garage where the Respondent's motor vehicle registration number KBB 750D was parked for repairs.

(vi) In the case of **Republic v Cornelius Kipkosgei Kogo [2013] eKLR it was held as follows:-**

" The standard of proof as to whether the prosecution has established a prima facie case was laid down in the celebrated case of **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332** as follows:-

> **(i) 'The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.**
>
> **(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."**

And in **R -VS- JAGJIVAN M. PATEL AND OTHERS 1, TLR, 85** the learned Judge said;

"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply, its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion."

(iii) In view of the evidence adduced by the prosecution I find that the Appellant ought to have been placed on his defence. I accordingly allow the Appeal and I set aside the order acquitting the Respondent under section 210 of the Criminal Procedure Code.

(iv) I order that the case be taken back for a retrial by any other court other than the one that acquitted the Respondent.

Delivered and signed at Mombasa this 15th day of November 2016.

ASENATH ONGERI

JUDGE