



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 44 OF 2014

HUSSEIN GURE BOLEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the judgment in Hola SRM Criminal Case No. 181 of 2013 delivered on 5th June 2014 – M. D. Kiprono Ag. SRM)

JUDGMENT

The appellant was charged in the subordinate court with four counts. Count 1 was preparation to commit a felony contrary to section 30 (1) of the Criminal Code. The particulars of offence were that on 14th September 2013 at Hirimani Bridge along Bura Garissa Road in Bura Tana County jointly with others not before court was found armed with a dangerous weapon namely an AK 47, loaded with a magazine with 23 rounds of 7.62mm ammunition in circumstances that indicated that he was so armed with the intent to commit a felony namely robbery with violence. Count 2 was for possession of a firearm contrary to section 4 (1) (2) (2b) as read with section 4 (b) of the Firearms Act. The particulars of the offence were that on the same day and place he was found being in possession of one AK 47 S/No. 1955 (R) 1418 without a Firearm Certificate. Count 3 was for being in possession of a magazine contrary to section 4 (1) (2) (b) as read with section 4 (b) of the same Act. The particulars of the offence were that on the same day and place he was found in possession of two AK 47 rifle magazines without a Firearms Certificate. Count 4 was for possession of ammunition contrary to section 4 (1) (2) (b) as read with section 4b of the same Act. The particulars of the offence were that on the same day and place was found in possession of 23 (7.62) special round of ammunition without a Firearm Certificate.

He pleaded not guilty to the four counts. After a full trial he was convicted of count 2, 3 and 4. He was sentenced to serve 7 years imprisonment on count 2, 7 years imprisonment on count 3 and 7 years imprisonment on count 4. The court ordered that the sentences run concurrently.

Aggrieved by the decision of the trial court the appellant has brought this appeal. His grounds of appeal are as follows

1. That he did not plead guilty to the charge.
2. That the magistrate only relied on the prosecution side which did not prove the case beyond reasonable doubts.
3. That he was looking for lost camels in the bush and met the arresting officers who arrested other men and himself.
4. That he met the arresting officers with other men and the motor bike and a rifle and that the police released the other men and escorted him to Bura Police Station.
5. That he was beaten up by the arresting officers who alleged that the rifle and the motorbike were

- his, while he was aged 60 years and did not know how to ride.
6. That the motor bike had a log book which indicated the owner and that the magistrate could have ordered that investigations be conducted to ascertain the owner but the court did not do so.
 7. That the case was based on force imposed to him by the arresting officer and the honourable magistrate did not ascertain the truth of the matter and he went ahead and convicted him.

The appellant also filed written submissions to the appeal. I have read the said written submissions. In addition the appellant stated orally in court that after arrest the police searched him and found nothing. He stated that the alleged eye witness to the incident was not called in court by the prosecution to testify. That he was arrested when he did not have a gun and that it was the police who had the gun. He further submitted that though the police said that he had a motor bike, there was no evidence from Kenya Revenue Authority on the ownership of the motor bike.

The Learned Prosecuting Counsel Mr. Okemwa conceded to the appeal. Counsel submitted that after perusing the record, the grounds of appeal and submissions, the state is convinced that there were anomalies done by the investigating team such as the fact that the gun was not dusted and the same applied to the magazine and ammunition. In addition there was no clear chain of custody of the items. Counsel also submitted that the appellant had faced four charges before the magistrate. He was acquitted on count 1 which weakened the whole case. According to counsel even the expert witness was not clear with regard to the evidence he tendered in court.

In summary the prosecution called four witnesses in the trial court. Pw1 was Pc Tom Onyango from Bura Police Station. It was his evidence that on 14th September 2013 together with PC Raymond Limo they proceeded to a scene of an accident vehicle KAP 827H a scania lorry along Bura Garissa road. That vehicle was from Mombasa to Dadaab and was carrying goods when it got the accident. The time was around 8pm. On arrival at the scene, the witness was drawing a sketch map when a motor cycle appeared from Bura direction carrying two passengers. Its registration number was KMCC 217 make Bajaj Boxer. The motor cycle came at high speed and on reaching where he was the appellant produced a gun and the witness shot in the air. The person who was with the appellant then ran into the bush but the appellant was told to surrender and he raised his hands up. At that point PW1 took the gun from under the jacket of the appellant. It was an AK 47 rifle with a magazine loaded with 23 rounds of live ammunition. They searched the appellant and found a knife in his black jacket. They searched the motor cycle and found an empty magazine wrapped in a green paper bag. They took the exhibits and prepared an exhibit memo and forwarded the items to the firearms examiner for examination.

Pw2 was PC Raymond Limo. His evidence was that on the day in question he proceeded with PW1 to an accident scene where a lorry had spilt some food. A motor cycle then appeared carrying two people. They challenged the motor cyclist to stop and his colleague fired 3 shots. They managed to arrest the appellant but his two accomplices ran away. They recovered an AK 47 gun with 23 rounds of ammunition. On the motor cycle there was an empty magazine. They also recovered a knife from the appellant. The appellant was later taken to the police station by the OCS. They recovered 17 live and 6 spent cartridges. They also recovered a knife from the black jacket of the appellant.

Pw3 was Corp. Joseph Mwaniki. It was his evidence that on the 17th September 2014 a good Samaritan made a telephone call saying there was an accident along the Bura Garissa Road. After informing the OCS, PW1 and PW2 were directed to go to the scene. They found that the conductor had serious injuries and was taken to Bura dispensary. He received a call from PC Onyango (PW1) that they had arrested a suspect with AK 47 rifle. He proceeded to the scene and found the suspect lying down with his hands tied from behind. He took the suspect to the police station. At the police station he was handed another empty magazine and a Somali knife. The magazine was wrapped in a paper bag. He was also given a black jacket and a motor cycle. He later prepared an exhibit memo and handed the rifle, two magazines and 23 rounds ammunition to the firearms bureau. He later received the report from the firearms examiner.

PW4 was chief inspector Alex Mwandawiro the firearms examiner from Nairobi. It was his evidence that he examined the rifle, rounds of ammunition and two rifle magazines. The rifle (firearm) was Russian made. It had 4 rounds of ammunition. The firearm was in fair general condition and capable of being

fired. All 23 rounds of ammunition were suitable for use. He examined 2 AK 47 magazines. Both were capable of use. Each magazine could carry 30 rounds of ammunition of calibre 7.62 x 39mm. He prepared a report of the findings, signed the same and produced it as an exhibit. He did not dust the items for fingerprints.

When put on his defence the appellant said he would leave the matter to the court to make decision. He elected to remain silent.

Faced with the above evidence the learned magistrate found that the prosecution had proved its case against the appellant with regard to count 2, 3 and 4. He found that the prosecution had failed to prove its case with regard to count 1. The court thus acquitted the appellant on count 1 and convicted and sentenced the appellant on count 2, 3 and 4. The appellant has now appealed against both conviction and sentence.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have re-evaluated the evidence on record. I am mindful of the fact that the Learned Prosecuting Counsel has conceded to the appeal.

The main ground on which the Prosecuting Counsel has conceded the appeal is that the appellant was acquitted of count 1 of preparation to commit a felony. The other ground is that the recovered items that is the rifle, magazines and ammunitions were not handled properly to clear any doubt that there might not have been a mix up.

Having evaluated the evidence on record, I don't think that the acquittal on count 1 was fatal to the whole case. The appellant was charged with 4 separate counts. Preparation to commit a felony is an offence with specific ingredients. Those ingredients are different from unlawful possession of a firearm or ammunition or a magazine. In effect one can be in lawful possession of a firearm but still use the same firearm to prepare to commit a felony. Conversely one can possess a firearm unlawfully, even if that firearm was not used for preparation to commit a felony. In my view therefore the offence of preparation to commit a felony and the offence of unlawful possession of a firearm or ammunition are mutually exclusive. The proof of one offence, does not depend on proof of the other offence. One can be convinced of one offence and not convicted on the other.

With regard to the way the exhibits were handled from the police to the firearms examiner, I also find nothing outrageous. The items were taken possession of by PC Tom Onyango. They were handed over to Corporal Joseph Mwaniki at Bura Police Station. Corporal Mwaniki prepared an exhibit memo for the rifle, two magazines and 23 rounds of ammunition and handed the same items to Pc Onyango who took them to the CID headquarters. After the same were examined a report was received from the firearm examiner by Corporal Joseph Mwaniki. This was the report that was produced by the firearms examiner C.I. Mwandawiro. Indeed the rifle and the magazines and the ammunition were not dusted for fingerprints. However in my view that failure of the police to dust the items for fingerprints did not indicate that the chain of handling those items was not satisfactory. It only meant that there was no evidence showing who had touched that firearm and magazine before and after its recovery. With the evidence on record however I find that that default on the part of prosecution of not taking finger prints, did not destroy the case against the appellant.

The appellant submitted that he chose not to tender his defence, because the prosecution had not proved a case against him. Indeed the appellant had a Constitutional right to keep quiet. However that choice is made by an accused knowing that there are consequences to it. If the appellant was not mentioned by the prosecution witnesses as a culprit, then keeping quiet could assist him. If he was mentioned but also with contradictions that other people were mentioned as being the culprits, then keeping quiet would assist him. In our present case however all the allegations are against the appellant himself. There is no allegation by the prosecution witnesses that somebody else was the culprit. In my view the appellant was misadvised in his choice of keeping quiet. When all the evidence of the prosecution points at someone, it is not prudent for that person to keep quiet instead of giving his own version of what happened or of what the situation was. In my view the evidence of the prosecution was such that if the appellant wanted to get

off the hook, he should have said something in response to the charge or to the evidence of the prosecution witnesses. He did not do so and in effect the case of the prosecution remained overwhelmingly against him.

In my view the prosecution proved its case against the appellant beyond any reasonable doubt. The concurrent sentence of 7 years imprisonment is also within the law.

I thus find that the appeal lacks merit. I dismiss the appeal and uphold both the conviction and sentence of the trial court. The appellant may appeal to a higher court if he so chooses.

Dated and delivered at Garissa this 3rd day of March, 2015

GEORGE DULU

JUDGE

In the presence of:-

The appellant in person

Mr. Okemwa for the State

Martin/Abdikheir Court Clerks.