



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA 125 OF 2013

(From original conviction and sentence in

Criminal Case number 352 of 2013 of the

Chief Magistrate`s court at Kisumu – Hon. J. Sala-RM)

STEPHEN OCHIENGAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The Appellant was charged with possession of Imitation of a firearm contrary to **section 34(i)** of the Firearms Act. The particulars being that on 22nd July, 2013 at Nyalenda slum in Kisumu East District within Kisumu county he was found in possession of an imitation of a firearm without a firearms` certificate. He pleaded not guilty to the charge but after hearing and considering evidence of the three prosecution witnesses, the accused sworn defence and the testimonies of his co-accused the court found him guilty and convicted him. He was together with his co-accused sentenced to serve **seven(7) years** imprisonment. Being aggrieved he has filed this appeal.

The appeal is premised on the grounds the case was poorly investigated that the burden of proof was shifted to him, that key witnesses on his side were not summoned; that the trial magistrate rejected his evidence of alibi without giving good reasons and that the omission to summon his key witnesses weakened his case.

Briefly, the facts of this case were that on 22nd July, 2013 PW1, PW2 and PW3 all police officers attached to the Flying Squad in Kisumu were on patrol when they were tipped of two young men who were harassing and threatening people with a gun at a place called Fanana. They proceeded there and found and arrested the appellant. The appellant allegedly led them to his co-accused and together they took the officers to a house where the imitation firearm was recovered. An inventory was made in their presence which they allegedly signed whereupon they were taken to the police station and subsequently charged with this offence.

In his defence, the appellant testified that he lived at Nyamasaria and was a water vendor; that on the material day police arrested him at 8p.m and said he had a gun, and that Wycliffe Oduor was his accomplice. They went and brought the said Wycliffe and the next day they brought something that was covered in a polythene. They were subsequently taken to court and charged. He contended that he knew nothing of the charge.

As the first appellate court my duty is to reconsider and evaluate the evidence and come to my own conclusion of course bearing in mind that I did not have the privilege of watching/ seeing the witnesses testify. I have duly reconsidered and re-evaluated the evidence tendered and much as I do not find any merit in any of the grounds raised by the Appellant, I find that the charge against him was not proved beyond reasonable doubt. From the evidence it becomes clear that only PW2 and PW3 were involved in the recovery of the imitation firearm. PW1 was categorical that he did not accompany them to the house where it was recovered. However, PW2 and PW3 did not agree on the place where the exhibit was recovered. According to PW2 the exhibit was under a mattress. He did not however, say where that mattress was and one can safely presume that it was on the bed. PW3's evidence on the recovery was as follows:-

“ When we entered we found a bed. Stephen removed a toy pistol from a mat on the ceiling.

The toy pistol was tied with masking tape”

This is a totally different version of the recovery from that painted by PW2 which makes the court to wonder whether they were indeed both present and if they were which of them was telling the truth. In my view, this contradiction goes to their credibility as witnesses and the benefit of doubt should go to the appellant. Accordingly I allow this appeal, quash the conviction and set the sentence aside.

E.N. MAINA

Judge

Signed, Dated and delivered in Kisumu this 5th day of March, 2015.

In the presence of:-

Mr. Ruto for state

Appellant in person

Moses Okumu- Court clerk

Order: The appellant is to be set free forthwith unless lawfully held.

E.N. MAINA

JUDGE

ENM/aar