



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.291 OF 2011**

*(An Appeal arising out of the conviction and sentence of Hon. K. Bidali - PM delivered on 17<sup>th</sup> November 2010 in Nairobi CM. CR. Case No.2092 of 2012)*

**ABRAHAM YAKOBO.....**

**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Abraham Yakobo was charged with **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. The particulars of the offence were that on 27<sup>th</sup> October 2009 at Tsavo West National Park in Taveta District, the Appellant unlawfully attempted to cause the death of Tony Mosaire. He was further charged of three (3) counts of being in possession of two firearms and three rounds of ammunition without a firearm certificate contrary to **Sections 4(2)(a)** and **4(3)(b)** of the **Firearms Act**. The particulars of the offence were that on 12<sup>th</sup> November 2009 at Tsavo West National Park in Taveta District, the Appellant was found in possession of .458 rifle, a shotgun and three rounds of 12 bore ammunition without a firearm certificate. The Appellant was further charged with three counts in contravention of the **Immigration Laws**. He was charged under **Sections 13(2)(c)** of the **Immigration Act** (now repealed) for unlawfully entry into Kenya, for failing to register as an alien under **Regulation 4(1)** of the **Alien Restriction Order** as read with **Section 3(3)** of the **Aliens Restriction Act** (now repealed) and failing to report entry to the nearest immigration officer contrary to **Section 3(1)** as read with **Section 3(6)** of the **Immigration Regulations** (now repealed). When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, he was convicted of all the seven (7) counts that he was charged with. In respect of the first count, the Appellant was sentenced to serve ten (10) years imprisonment. In respect of the second, third and fourth counts (under the **Firearms Act**), the Appellant was sentenced to serve one (1) year imprisonment on each of the counts. In respect of the fifth, sixth and seventh counts, he was sentenced to serve six (6) months imprisonment on each count. The sentences were ordered to run concurrently.

The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court. He was aggrieved that the trial magistrate had failed to properly evaluate the evidence adduced by the prosecution witnesses and thereby reached the erroneous decision that the prosecution had established its case to the required standard of proof. He faulted the trial magistrate for convicting him on the basis of the evidence of identification that was not free of error. He took issue with the fact that the trial court had

put forward a speculative theory not canvassed in evidence and thereby reached the faulty determination that the Appellant had been identified by the prosecution witnesses. The Appellant was of the view that he had been framed by the prosecution witnesses in regard to the alleged recovery of the firearms and therefore he should have been acquitted of the charges. The Appellant was aggrieved that the trial magistrate failed to consider the totality of the evidence adduced and thereby reached the wrong decision finding the Appellant guilty as charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the respective custodial sentences that were imposed on him.

Prior to the hearing of the appeal, counsel for the respective parties to this appeal agreed by consent to file written submission in support of their respective opposing positions. The written submission was duly filed. During the hearing of the appeal, counsel agreed that the court writes its judgment on the basis of the written submission. Before giving reasons for its decision, this court will set out the brief facts of this case. PW2 Constable Mwashwa was at the material time a Kenya Wildlife Service senior officer based at Tsavo West National Park. He told the court that on 26<sup>th</sup> October 2009 he was informed that gunshots were heard at an area known as Vilima Viwili near Jipe within the Tsavo West National Park. He got this information at about 6.00 p.m. As it was late, he waited until the following day in the morning when he sent PW3 Senior Sergeant Mtooni Ole Musai and PW5 Letuken Levap to investigate the source of the gunshots.

PW3 and PW5 testified that they reached the Vilima Viwili area at about 8.00 a.m. They found a dead elephant. The carcass was fresh. From observation, they realized that the elephant had been shot. Its tusks were missing. They followed a set of two footprints and bicycle tracks from the scene where the elephant was killed. 500 metres from the scene, they saw two people at a distance. One was holding a gun. He was wearing a maasai shuka. PW3 described the man holding a gun as being of dark complexion and walking with a limp. PW5 described the man as being of average height and walking with a limp. When the two persons saw them, the person with the gun fired at them. According to PW3, the shot hit a soil mound in front of him causing dust to blind him. There was an exchange of fire between PW3 and PW5 and the two persons. The two persons made good their escape but left behind a bicycle.

PW3 and PW5 went to the scene where the two men were standing and collected spent cartridges which were produced into evidence. PW3 and PW5 were positive that it was the Appellant who had the gun and who had fired at them. What was interesting in this case was that, although PW3 and PW5 said that they identified the Appellant during the shootout, they did not give the physical description of the person to their superiors when they reported back the incident. In fact, neither PW3 nor PW5 gave the facial description of the man who shot at them. The only common aspect of PW3's and PW5's testimony regarding the identification of the man with the gun was that he was wearing a masai shuka and was walking with a limp. Taking into consideration the fact that the area where the incident took place is a place where the majority population is masai, such description cannot be said, in the circumstance of this case, to be specific.

Fast forward to 12<sup>th</sup> November 2009. PW4 David Mutembei an Intelligence Officer working for Kenya Wildlife Service at Tsavo West National Park testified that between the 27<sup>th</sup> October 2009 and 12<sup>th</sup> November 2009, he was able to gather intelligence in regard to the person who was described by PW3 and PW5 as having shot at them. He was able to learn that the suspect was a Tanzanian who had, after the incident had crossed over to Tanzania. On 12<sup>th</sup> November 2009, he got information that the suspect had been seen within Kenya on Kenya-Tanzania border. The suspect had attended a market day on the Kenyan side of the border at Taveta. PW4 accompanied by PW6 John Plima together with PW8 Sergeant William Lokolian (all Kenya Wildlife Service Officers) went to the market and managed to arrest the Appellants with three other men. After interrogation, the three men were released.

PW4 testified that when he saw the Appellant, he realized that he fitted the description that he had been given by his sources and also PW3 and PW5. Upon questioning him, the Appellant offered to show them where he had hidden the guns. PW4 testified that the Appellant took them to a place known as Kochero Jipe where he pointed to the ground where the Appellant alleged he had buried the guns. On digging the spot, PW4 recovered a gunny bag. In the gunny bag were two guns; one was a .458 rifle and another a

shotgun. Also recovered were three rounds of ammunition. All these items were produced by the prosecution in evidence during the hearing of the case. The two firearms were examined by PW9 IP Alex Mutinda Mwandaro, a ballistic expert based at CID Headquarters Nairobi. He test-fired both guns and was of the opinion that the two were firearms within the definition ascribed to it under the **Firearms Act**.

When the Appellant was put on his defence, he denied that he was a poacher. He further denied that he was the one who had been seen PW3 and PW5 on 27<sup>th</sup> October 2009. He denied that he had led the Kenya Wildlife Service Officers to the place where recovery of the two rifles and ammunition was made. It was his case that the rifles and ammunition were planted on him with a view to framing him for the charges for which he was not aware of. He explained that on the material day he was arrested, he had come to Kenya to sell his cows. After selling his cows, he went to a nearby hotel to relax. That was where he was arrested by the Kenya Wildlife Service Officers. The Appellant's testimony in that regard was corroborated by DW2 Anton Bunu Barika, the owner of the hotel where the Appellant was arrested. He told the court that he knew the Appellant as a cattle dealer. The Appellant was his regular customer. He was surprised that the Appellant was arrested and charged with the offences for which he convicted.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (**See Okeno -vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charges that were brought against him.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal put forward by the Appellant. The court also benefited from the written submission filed by counsel for the parties to this appeal. From the evidence adduced, it was apparent that the Appellant was convicted on essentially two pieces of evidence: his alleged identification by PW3 and PW5 and the alleged recovery of the two rifles and ammunition while in his possession. It was the evidence of identification that was used by the trial court to convict the Appellant on the first count of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. According to PW3 and PW5, on 27<sup>th</sup> October 2009 at about 8.00 a.m., they saw two men walking away from the scene where an elephant had been killed and its tusks removed. The elephant carcass was fresh. They saw the men after tracking them for a distance of about 500 metres from the scene where the elephant had been killed.

Both PW3 and PW5 testified that one of the men was carrying a gun. The two men were some distance from them. When the two men saw them, they shot at them. A fire exchange ensued. The two men made good their escape. PW3 and PW5 described the man with the gun. They testified that he was wearing a masai shuka and was limping. They did not see his facial features. More importantly, when they went back to their base, they did not record anywhere the physical description of the man with the gun. On re-evaluation of the evidence, this court is not satisfied that PW3 and PW5 made a proper identification of the person who had shot at them. They did not know the Appellant prior to the incident to enable them be certain that he was the one who shot at them on the material day.

What was clear from the evidence adduced by PW4 is that he used his intelligence network to arrest the Appellant. Upon the arrest of the Appellant on 12<sup>th</sup> November 2009, PW3 and PW5 purported to identify him as the person who had shot at them. It was important in the circumstances of this case, if indeed the two witnesses had identified the Appellant, for the two witnesses to record their description of their assailant with the police or with their superiors at Tsavo West National Park Office. Such description must be recorded in writing.

In the present appeal, the alleged description of the man who shot at them was not recorded. Therefore, it is impossible for this court to be certain that the description given by the two witnesses was the correct one and corresponded with the appearance of the Appellant upon his arrest. It may well be that the two witnesses upon seeing the Appellant decided that he was the one who had shot at them. Another precaution that should have been taken was not to expose the Appellant to the two identifying witnesses before a police identification parade was held. If a police identification parade was mounted, and the two

witnesses identified the Appellant, this court would have been convinced that they had indeed identified the Appellant as the person who shot at them. Further, it was clear from their testimony that PW3 and PW5 were some distance from where the man with the gun stood. The distance was not evident from their testimony. What was clear from their evidence was that the distance was such that they were not in a position to identify the facial features of the man that shot at them.

In the premises therefore, this court holds that the evidence of identification adduced by the prosecution was such that it cannot sustain a conviction. Reasonable doubt has been raised in the mind of this court regarding whether indeed the two witnesses identified the Appellant as being the person that shot at them nearly three weeks before the Appellant was arrested. In that regard therefore, this court holds that the prosecution failed to establish, to the required standard of proof beyond any reasonable doubt that the Appellant was the man who shot at PW3 and PW5. The charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code** was not therefore proved. The Appellant is acquitted of the charge.

As regard the charges under the **Firearm Act**, upon re-evaluation of the evidence adduced before the trial court, it was clear to this court that the Appellant indeed was found in possession with the two rifles and three rounds of ammunition without the requisite Firearm Certificates and licence. PW4 testified that it was the Appellant that led the Kenya Wildlife Service Officers to a scene near Kochero Jipe where the Appellant pointed to a place on the ground. It was this particular spot that the two firearms which were buried in the ground were recovered. Although the Appellant stated that the two firearms were planted on him, on re-assessment of the evidence adduced in that regard, this court is unable to agree with him. This court was persuaded by the evidence adduced by the prosecution witnesses that such rifles are not normally issued to officers working with the Kenya Wildlife Service. Where would the said officers have obtained the rifles to frame the Appellant? And why would they frame the Appellant? There was no evidence to suggest that any of the officers had a grudge with the Appellant to motivate him to fix the Appellant. Further, it was clear from the evidence adduced by prosecution witnesses that it was only the Appellant who had the special knowledge of where specifically and particularly the two rifles were buried in the ground. Such knowledge points to the Appellant and no one else as the person who was in possession of the two rifles. His appeal against the three counts brought against him under the **Firearms Act** lacks merit and is dismissed.

The upshot of the above reasons is that the appeal lodged by the Appellant partially succeeds. His conviction on the charge of attempted murder contrary to **Section 220(a)** of the **Penal Code** is quashed. The sentence of ten (10) years imprisonment is set aside. His conviction and sentence on the three counts under the **Firearms Act** is upheld. Since the Appellant has already served sentence in respect of the Firearm offences, he was in prison by virtue of the attempted murder conviction. The Appellant is therefore ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 15<sup>TH</sup> OCTOBER 2015**

**L. KIMARU**

**JUDGE**