



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
HIGH COURT CRIMINAL APPEAL NO. 119 OF 2013

PETER MWANGI NJERU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from conviction and sentence in the Senior Principal Magistrates Court Criminal Case No. 3983 of 2009 at Kangema (Hon. I.K. Orange) dated 10th June, 2010)

JUDGMENT

The appellant was charged with and convicted of the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code. He was accordingly sentenced to seven years imprisonment.

The particulars in the information are that on the 19th November, 2009 at Mjini Village in Murang'a district within central province, jointly with others not before court, the appellant was found armed with an offensive weapon namely a toy pistol in circumstances that indicated that he was so armed with intent to commit a felony, namely robbery with violence.

The appellant appealed to this court against both conviction and sentence on grounds that the learned magistrate erred both in law and in fact when he failed to consider that there was no corroboration in the evidence by the prosecution; that the learned magistrate erred both in law and in fact when he disregarded the appellant's defence without giving any reasons and that the learned magistrate erred in fact and in law when he failed consider that the exhibits recovered on the appellant were not dusted to prove his possession.

The prosecution evidence constituted the evidence of three police officers. According to the evidence of the first prosecution witness, Police Constable Philemon Libei, he was on a regular police patrol together with his colleague Tom Mbaya on the night of 19th November, 2009 when they encountered the appellant and others who are said to have fled when they saw the police officers. The appellant fled with them and he was only arrested because he allegedly fell down. A toy pistol and a torch were recovered from him.

Tom Mbaya who is said to have been with the first prosecution witness when the appellant was apprehended said that indeed on 19th November, 2009, they were patrolling Makadara area around 11.30 pm when some people flashed a torch at them; when the officers identified themselves, these people took to their heels; the officers caught up with the appellant and arrested him. A spot light and the pistol that were recovered from him were admitted in evidence as exhibits.

The two witnesses added that the appellant and his accomplices were in a building under construction in an area where, according to the first prosecution witness, members of public had reportedly been mugged.

The investigating officer, police constable Samuel Ngiro who was then attached to Murang'a police station confirmed that on the 19th November, 2009 at around 11.30 pm the appellant was brought to the station by the two officers who had arrested him; he booked the appellant together with the pistol and the spot light that was recovered from him.

When the appellant was put on his defence, he opted to give unsworn statement. He said that he was a hawker and that on the material night he was on his way home at around 8 pm when the police accosted him. He denied having a toy pistol.

Section 308 (1) under which the appellant was charged states:

308. (1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

The prosecution witnesses were consistent and the learned magistrate held as a fact that the appellant was armed with a torch and a toy pistol; the appellant contested this evidence and in his view such possession could not have been established without the pistol together with the torch having been dusted for his finger prints. In my view, the appellant's argument would have held sway if the exhibits were not found on his person. Since they were found on his person, they are deemed to have been in his possession and he was therefore armed as contemplated under section 308(1) of the Penal Code. I did not see anything on record that suggests the learned magistrate could have come to a finding other than what he came to.

In itself a toy pistol is not an offensive or dangerous weapon but it could easily pass off as such in circumstances that indicate that the appellant and his accomplices were intent on committing a felony. An innocent passer-by who has no idea whether the pistol in the hands a stranger is a genuine firearm would certainly be wary of his life if such an instrument was used as a weapon to threaten him, for whatever reason. Such reason would be, as section 308(1) suggests, committing a felony.

The learned magistrate found the prosecution witnesses as credible witnesses; I cannot discern any reason from the record to fault the learned magistrate's finding on this issue. In any event he had the advantage which I do not have, of seeing and hearing the witnesses.

The appellant's unsworn statement that he was only a hawker who was on his way home at the material time could not, for obvious reasons, be tested by way of cross-examination; in my view, it left a weak impression on what would have been considered as a reasonable doubt on the prosecution case. The prosecution evidence was not challenged and in my view, it remained intact and unshaken.

On the issue of sentence, the minimum sentence upon conviction for the offence of which the appellant was charged is seven years imprisonment; having been so convicted, no sentence, less severe than a seven year prison term could have been meted out against the appellant. The learned magistrate sentenced the appellant to the very minimum sentence available. There is therefore, no basis for interfering with the sentence.

For the foregoing reasons the appellant's appeal is dismissed.

Dated, signed and delivered in open court this 10th day of February, 2014

Ngaah Jairus

JUDGE