REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL No. 15 OF 2014.

LESIIT, J.

LEKUREYA PASSION.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant **LEKUREYA PASSON** was charged and convicted of two counts of offences. Count 1 was Being in Possession of a firearm without a certificate contrary to section 4 (1) as read with S.4 (3) of the Firearm Act. Count 2 was Being in Possession of ammunition without a certificate contrary to section 4 (1) as read with S.4 (3) of the same Act. The Appellant was sentenced to 10 years imprisonment on each count with prison sentences ordered to run concurrently.
2. Being aggrieved by both the conviction and sentence, the Appellant filed this appeal. In his amended grounds of Appeal which are the ones the Appellant relied on in this appeal, he raises the following five grounds, namely:

i) That, the learned trial magistrate erred in both law and facts in failing to make a finding that the prosecution failed to summon vital witnesses for a just decision to be reached.

ii) That, the learned trial magistrate erred in both law and facts in failing to note that the presentation of the exhibited G3 riffle fell short of the required standard in law.

iii) That, the learned trial magistrate erred in both law and facts in failing to make a finding that there was existing grudge between me and PW3.

iv). That the learned trial magistrate erred in both law and facts in failing to make a finding that I was not given a fair trial as the law requires.

v) That the learned trial magistrate erred in both law and facts in flouting the provision of section 169(1) of the Criminal Procedure Code.

3. The Appellant relied on his written submissions filed together with the Amended Grounds of Appeal. I have considered the same.
4. The state was represented by Mr. Edwin Mulochi, Prosecution Counsel. Counsel opposed the appeal and urged the court to dismiss the appeal as the evidence adduced by the prosecution against the Appellant were overwhelming. I have considered his submissions.
5. I am a first appellate court. As such I have subjected the entire evidence adduced therefore the trial court to a fresh analysis and evaluation and have drawn my own conclusions. I have borne in mind the fact I neither saw nor heard any of the witnesses and I am therefore not in a position to make any findings on demeanour. Regarding the duties of a first appellate court I am guided by the court of appeal case of **OKENO VS REPUBIC 1972 EA 32** where the count held:

> "**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

6. The facts of the prosecution case were that the Kenya Army and British Army were conducting a joint exercise at Olkanjau Army Training grounds in Samburu County. This was on 15th October, 2011 at about 3.30pm. The exercise involved firing at target in the Open Training grounds. At the time in question PW3, the Range Warden for British Army saw 2 people walking towards the targets where shoots were being fired. PW3 then called instructors who called PW1, one of those firing, to stop the firing.
7. PW3 then went with 20 other officers to search for the 2 men. PW3 was able to catch up with them. PW3 found the Appellant armed with a rifle, magazines and a total of 77 rounds of ammunition. These were P exhibits 1 to 5. His co accused was unarmed.
8. The Appellant denied the charges in his sworn defence. He denied having possession of any rifle and ammunition and said that these were fabricated charges and the exhibits were planted on him.
9. In ground one, two and three of the petition of appeal, the Appellant challenges failure by the prosecution to call the 20 officers who allegedly worked with PW1 and 3 to recover the arms ammunitions from him. He relied on the favours case of **BUKENYA & ANOTHER VS UGANDA 1972 EA 549** for the preposition the prosecution must make available all witnesses necessary to establish the truth. The Appellant called on this court to make an adverse inference that vital witnesses were not called by the prosecution because their evidence would have favoured the defence. Mr. Mulochi on his part urged the court to find that the evidence of PW1 and 3 was corroborative and sufficient to sustain the conviction.
10. PW1 and 3 were on the ground searching for 2 people seen through the binoculars by PW3 walking towards the firing targets. They stopped the joint Army exercises and mobbed the participants, numbering 20 in all, to look for the 2 strangers. The two were found and apprehended by PW1, PW3 and others. They were handed over to PW2 who investigated the case.
11. The duty of the prosecution is not to avail all those who witnessed a fact required to be established in evidence. The prosecution's duty is to avail those witnesses who are necessary to establish the truth and who are essential to the just decision of the case. The witnesses need not be consistent in their evidence. The important factor being a just decision of the case.
12. The prosecution called 2 out of the 20 persons involved in the search for the two men seen walking in the area the Army was carrying out shooting exercises. Even if all 20 witnessed the arrest, it was not necessary, and their evidence was not essential, for them to be called as witnesses. PW1 was from Kenya Army while PW3 was from British Army. These two who were called as witnesses were vital and sufficient to establish the truth. The adverse inference the

Appellant urged this court to draw does not apply.

13. The Appellant challenged the failure by the prosecution to call the Ballistic Expert to produce his report on the firearm and ammunition he examined. He cited **RAMSON AHMED VS REPUBLIC VS [1955] VOL.22** for the proposition the prosecution must avail all material evidence to the court to arrive at a fair and impartial decision by availing all facts even those whose evidence may be unfavourable to their case.
14. The Appellant urged that he and PW3 had a grudge and that it was the reason he fabricated the case against him.
15. I have perused the proceedings and have confirmed that the Ballistic Expert's Report was produced by CIP Langat on behalf of his colleague CIP Mwandawiro. Both are Ballistic Experts. The defence consented to the production of the Report through that witness. It cannot be made an issue at this late stage.
16. PW4, CIP Langat was an expert in Firearms and could answer any question related to the same. I do not see any prejudice the Appellant may have suffered by having PW4 produce the Ballistic expert's Report.
17. Regarding a grudge between PW3 and the Appellant, that question was never put to PW3 by the Appellant during cross examination. That issue arose for the first time during defence. I find that allegation was an afterthought. The Appellant's suggestion the rifle should have been taken for dusting by the Government Chemist to confirm PW3's evidence that the Appellant was found with the rifle is a fallacy. The Government Chemist cannot be used to test for finger prints as that the work of Police trained to do that job. In any event, the question whether the Appellant had in his possession the rifle is a question of fact, not chemical analysis. It is a matter for evidence.
18. Furthermore, PW3 was not alone when he arrested the Appellant. He was with PW1. The evidence of PW1 and 3 was consistent and they corroborated each others evidence. The learned trial magistrate found the two credible witnesses. I see no reason to differ with the learned trial magistrates finding of facts on the credulity of the two witnesses especially because he had the opportunity to see the two testify and saw their demeanour.
19. The Appellant challenged the evidential value of the investigating officer's evidence given the fact he never visited the scene. That was in support to ground four of his petition. There was no need for a scene visit in this case. There was nothing for PW2 to see at the scene which the Army Officers, PW1 and 3 could not testify to in court. The fact PW2 did not visit the scene does not render his evidence worthless. PW2 played other important roles like taking statements from witnesses, gathering exhibits, having exhibits examined, charging the Appellant and his co-accused and finally bonding witnesses.
20. The final point the Appellant raised in his submissions was that the learned trial magistrate overlooked the fact he, the Appellant, had no burden to prove or disprove his defence. For that proposition the Appellant relied on the case of **SEBYALLA VS UGANDA 1986 EA KLR 2006.**
21. The case cited by the Appellant is not reported in the 1986 EA or 2006 KLR. It is in fact an authoritative decision on the issues of alibi defence. It is cited as **UGANDA v. SEBYALA & OTHERS [1969] EA 204**. In that case, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

> **"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."**

22. The alibi defence was not the Appellant's line of defence. He does not deny being arrested at the place he is alleged to have been found by PW1 and 3. All he denies is being found in possession of a rifle and ammunition as per P exhibits 1 to 5.
23. I have carefully considered Appellant's appeal and every issue raised. I also analysed and evaluated the evidence a fresh. I find that indeed the prosecution proved the charges against the Appellant to the required standard of proof beyond any reasonable doubt. PW1 and 3 were credible witnesses who impressed the trial court as ones who where speaking the truth.
24. After evaluation the evidence, I too agree with the learned trial magistrate's finding of fact that the two witnesses were credible and truthful witnesses. In addition to their consistent evidence, the

prosecution through PW4 has proved that the rifle and rounds of ammunition found with the Appellant were indeed firearm and ammunition as defined under the Firearms Act. The Appellant did not have a licence to have either. The charges were proved as required.

25. Regarding the sentence Appellant was sentenced to 10 years imprisonment. Under S.4 (3) of the Firearms Act, a person convicted of the offence is liable to a sentence of not less than 7 years and not more than 15 years. The Appellant was a first offender. He was walking in the bush, in a remote place. That does not minimize the seriousness of the offence cut has a bearing to the fact offence was not aggravated. That was also the reason the Appellant and his co-accused were acquitted of count 1 of preparation to commit a felony contrary to section 308 (1) of the Penal Code. I find that a sentence of 10 years was on the higher side. I will reduce the sentence from 10 years imprisonment to 8 years imprisonment on each count.
26. Before I end I wish to mention that the Appellant was charged together with a co-accused. The co-accused was convicted of consorting with a person in possession of a firearm contrary to section 82 of the Penal Code and sentenced to 3 years imprisonment. The co-accused was eventually released on CSO after his sentence was reviewed.

27. **In the result, the Appellant's against conviction has no merit and is dismissed and the conviction upheld**. **The Appellant's appeal against sentence of 10 years imprisonment in each of the two counts is set aside. In substitution there of the Appellant will serve 8 years imprisonment on each count from the date of sentence in the lower court. The imprisonment terms will also run concurrently.**
28. **The Appellant's appeal succeeds to the extent set out hereinabove.**

DATED AND DELIVERED AT MERU THIS 17TH JULY, 2014.

LESIIT,J.

JUDGE