REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 32 OF 2013

BONIFACE KIMATHI KINOTI.....1ST APPELLANT

EZEKIEL BUNDI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....STATE COUNSEL

JUDGMENT

1. The appellants BONIFACE KIMATHI, hereinafter the 1st Appellant and EZEKIEL BUNDI, the 2nd Appellant were charged with various counts of offences. In count 1 both Appellants were charged with preparation to commit a Felony contrary to Section 308(a) of the Penal Code. In court 2 and 3 the 2nd Appellant faced the charge of being in possession of a Firearm without a firearms certificate and being in possession of Ammunition without a firearm certificate respectively. Count 4 1st Appellant charged with consorting with a person in possession of firearm under Section 89 (2) of Penal Code.

2. The appellants were convicted as charged. The 1st Appellant was not sentenced as he had jumped bail. The 2nd Appellant was sentenced to seven years imprisonment in Count 1 and five years imprisonment on Counts 2 and 3 which sentence ordered to run concurrently.

3. The counsel for the Appellants Ms Nelima filed grounds of appeal in which the following grounds are raised:

a. **That conviction was against the weight of evidence.**
b. **That the evidence of the prosecution fell below the required proof of beyond reasonable doubt.**
c. **That the ingredients of the offence in count 1, 2, 3 and 4 were not proved**
d. **That the learned magistrate erred in law and in fact in relying on the evidence of PW 5 the ballistic expert when there was no proper and cogent reasons for accepting his evidence.**
e. **That the learned magistrate erred in law and in fact in disregarding the defense of the appellant.**

4. The facts of this case are that the Appellants, in company with two others who escaped were found by three administration police officers on patrol duties walking within Gachanka area. It was 10 p.m. The 1st Appellant had a long coat when the four saw the Administration Police they scattered in different directions. The 1st Appellant was apprehended and from his coat a G3 rifle with six ammunitions was

recovered.

5. The 2nd Appellant was not armed but had been walking in the company of the 1st appellant just before their arrest.

6. I am a first appellate court and I have reanalyzed and reevaluated the entire evidence adduced by both the prosecution and the defence . I am aware that I neither saw nor heard any of the witnesses. I have given due allowance for same and have drawn my own conclusions of the case. In the case of **Okeno Vrs. Republic** 1972 EA 32 it was stated as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and 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 Vrs. R. (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 finding and conclusion; 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 Vrs Sunday Post [1958] E.A 424."**

7. Ms Nelima's line of argument was that the particulars of the offence in Count 1 were inconsistent with the evidence. Further that there was a discrepancy in the serial number produced in court and one allegedly recovered from the 1st appellant. The discrepancy pointed out by counsel is that the third digit of the serial number of the rifle was 6 according to trial magistrate's observation and not "O" as the charge read.

8. Counsel relied on **MUTHONI V REP CA NO. 459 OF 1974(R)** for proposition that since there was doubt the 1st Appellant had a G3 rifle, the offence in Count 1 was not proved. She also cited **KINYA V REP CA NO. 188 OF 2002** for proposition that discrepancy in serial number should lead to acquittal.

9. Mr. Mulochi for the sate opposed the appeal. Counsel urged that the last digit of the serial number of the G3 rifle was scrutinized and convincingly proved to be a zero not a six.

10. The learned counsel for the Appellants raised that same issue before the trial court. The learned trial magistrate directed his mind ably and carefully at that point and conceded that the serial number of the G3 in the charge was the same as the serial number on the G3 rifle exhibited in court and that the same number appeared on the Exhibit Memo Form.

11. I have analysed and evaluated afresh that evidence. I am satisfied that the learned trial magistrate examined evidence and exhibits tendered before him during the trial proceedings and in his judgment arrived at the correct conclusion.

12. There is no discrepancy in the serial number of the firearm as described in the charge and as exhibited in court. It was the same firearm sent to the firearms expert for examination.

13. The serial numbers were described by PW5 the Firearm's Expert. He stated that the serial number was clear. It is noteworthy that Ms Nelima who appeared for the Appellants did not cross examine PW5. I find case cited of **KINYUA V REP** does not apply. Nothing turns on this point.

14. Ms Nelima raised issue with the circumstances which constitutes the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. That Section stipulates:

> "**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**. "

15. Ms Nelima urged that since the long coats the Appellants are alleged to have been found wearing were not produced as exhibits, the charge of "preparation" and "consorting" Counts 1 and 4 respectively should fail.

16. The circumstances of this case were that the Appellants were walking together at 10 p.m. within Gachanka village. The 1st Appellant had concealed a G3 rifle under his clothing. When the Appellants and then accomplices saw police officer (AP's) they scattered in different directions before both Appellants were apprehended.

17. The offence of preparation to commit a Felony is committed where a person is found with any dangerous weapon. There is no doubt that a G3 rifle was a dangerous weapon. The person must be found in circumstances which indicate he was so armed with an internet to commit any felony.

18. The circumstances proved in this case were that 1st Appellant was in company with three others. They were walking along a road in a residential area. It was at night. The learned trial magistrate concluded that these circumstances were sufficient to draw an inference that the Appellants had an intention to commit a felony. I agree with him.

19. Just to add that the fact the Appellants made an attempt to escape from the scene was proof of persons with a guilty mind and with intention to conceal their bad intentions. I find that the learned trial magistrate findings in regard to the circumstances in which the Appellants were found was correct.

20. Regarding the seven rounds of ammunitions recovered from the 1st Appellant not being the ones described in the charge, I have examined the record of proceedings and judgment. I found that there was no discrepancy in the caliber numbers of the ammunition found with the 1st Appellant.

21. PW4 the investigating officer in his evidence in chief explained that some of the rounds of ammunitions recovered from the 1st Appellant had the Calibre 7.62 mm inscribed on the ammunition. The others had other makings.

22. I agree with Ms Nelima that PW4 was not the correct person to explain about numbers on the ammunition. PW5 the ballistic expert was the correct person. PW5 did not disappoint his evidence is clear that what determined the caliber of an ammunition was not the numbers inscribed on the ammunition but the actual length and diameter of the ammunition. PW5 testified that the six live and one blank ammunition sent to him for examination were of the same caliber. Nothing turns on this point.

23. Having carefully considered this appeal I find that the learned trial magistrate correctly directed his mind on the matters in issue in the case ana1lysed entire prosecution and defence cases and came to the correct conclusion. I find no fault in the conviction entered and the sentences imposed. Having come to this conclusion I uphold the convictions and confirm the sentences for each of the two Appellants.

24. The Appellants' appeal is dismissed in its entirety.

DATED AT MERU THIS 3RD DAY OF OCTOBER, 2014

LESIIT, J.

JUDGE