



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.33 OF 2011

BETWEEN

Wilson Owiti Matete APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SRM's court at Oyugis in Criminal

Case No.798 of 2004 dated and delivered on 25th February, 2011 by Hon. R. Ngetich, PM)

JUDGMENT

Introduction

1. The appellant herein, Wilson Owiti Matete was the accused in Oyugis SPM Criminal Case No.798 of 2004. He was charged in count 1 with being in possession of a firearm without a firearm certificate contrary to **section 4 (2) of the Firearms Act Cap 114 Laws of Kenya**. The particulars being that on the 6th day of September 2004 at Kadongo trading centre within Rachuonyo District of Nyanza Province, he was found in possession of one homemade gun without a firearm certificate.
2. In count II he was charged with escape from lawful custody contrary to **section 123 of the Penal Code**. The particulars being that on the 6th day of September 2004 at Kadongo along Kisumu-Kisii road within Rachuonyo District of Nyanza Province being in lawful custody of No.87685 PC Michael Kilonzo after arrest for the offence of being in possession of firearm escaped from such lawful custody.
3. In Count III he was charged with being in possession of ammunition without firearms certificate contrary to **section 4 (2) of the Firearms Act Cap 114 Laws of Kenya**. The particulars being that on the 7th of September 2004 at Runga within Rachuonyo District of Nyanza Province he was found in possession of the rounds of ammunition of a caliber 7.62mm. One live cartridge of 12 ball short gun one empty cartridge of 7.62 mm without a firearm certificate.
4. In Count IV he was charged with being in possession of suspected stolen property contrary to **section 323 of the Penal Code**. The particulars being that on the 7th day of September 2004 at Runga within Rachuonyo District of Nyanza Province had in his possession (1) one sonic radio cassette serial No.(Removed) (2) K.V. Solar Battery (3) Television "14" make Great Wall S/No. (removed) (4) Solar panel – make Helios which were reasonably suspected to have been stolen or unlawfully obtained.
5. The appellant pleaded not guilty to all the four counts. The case thus went to full trial during which the prosecution called 7 witnesses in support of the case against the appellant.

Prosecution's case and Evidence

6. The prosecution's case is that at about 4.30 a.m. on 7th September 2004, PW2, No.57685 PC Michael Kilonzo was travelling aboard motor vehicle Reg. No. KAR 915 J, a premium Nissan matatu from Isebania to Kisumu along the Kisii-Kisumu Road. When they got to a place called Ringa, one passenger, who was eventually identified as the appellant herein boarded the same vehicle in which PW2 was travelling. He carried a polythene paper. On entering the vehicle, the appellant took a seat towards the rear part of the vehicle. He sat on a seat in front of PW2. PW2 was suspicious that the polythene bag which the appellant was carrying had something that was not good.
7. When M/V Reg. No. KAR 915 J got to a roadblock at Kadongo, Number 75878 PC Pius Amudani stopped the motor vehicle for inspection. The vehicle stopped about 100 metres from the roadblock. Just before the vehicle was stopped, PW2 grabbed the appellant and strangled him. On touching the polythene bag, PW2 felt something like a weapon. The appellant threw the paper bag through the window. PW2 shouted to his colleagues manning the roadblock that there was a thief in the vehicle. Other officers at the roadblock included No.39123 PC Michael Ochola, PW1 and No.52789 PC Zachary Ombui, PW3. At the same time, PW2 shouted to the driver of the motor vehicle to stop and pick up the polythene bag and to drive the vehicle back to the road block. As PW2 struggled with the appellant, the appellant was violent. On the way to Othoro police post, the appellant tried to escape but he was overpowered.
8. During the arrest of the appellant, a firearm which PW4 was carrying developed some problems and spilled all the bullets from inside. During that moment when PW2, with the help of Number 34577 PC Abina Makori, was collecting the spilled bullets, the appellant escaped though he was handcuffed.
9. At about 7.30 a.m., the officers regrouped so that they could mount a search for the appellant. PW4, together with PW5 received information that the appellant was at his home at Mabera. The officers went to the homestead and found the appellant there, having removed the handcuffs. On seeing PW2, PW4 and other officers, the appellant took to his heels and they lost him. The officers returned to the appellant's home and carried out a search during which PW4 said they recovered an empty cartridge of 7.62 mm calibre, live ammunition of 7.62 mm and homemade gun parts that had not been fitted together. These gun parts, according to PW4 were buried in the appellant's compound.
10. From inside the appellant's house, PW4 and his colleagues recovered the following items: solar panel, battery, radio and pass ball with the name Matete. The radio and battery were wrapped. PW4 then decided to call for reinforcement from the OCS, Oyugis police station.
11. The firearm which had been recovered from the polythene bag was later taken to Kisumu through the DCIO Rachuonyo. Later, the firearm and other related gun parts recovered from the appellant's house were taken to the ballistic experts for examination.
12. PW6, Number 230245 Chief Inspector Lawrence Nziwa, a firearms examiner at the Firearms Laboratory Headquarters testified concerning the examination of the firearm and ammunition of the firearm and ammunition components which had been done by his colleague, Lindsay Kipkemoi. During the hearing of the case, Mr. Kipkemoi was away on training.
13. The exhibits were received at the Firearms Laboratory Headquarters on 5th January 2005, the same having been escorted by Number 54493 Sgt. Peter Moi of CID Office, Rachuonyo. The exhibits were:-

"A" – Homemade pistol.

"B" – A round of ammunition.

"C" – Another round of ammunition.

"D" – A fired cartridge.

14. The findings of the ballistic examination were as follows:-

Exhibit “A” - A metallic homemade pistol designed using a metallic pipe as a barrel. It had a trigger guard, a trigger mechanism and it had a coking provision. Its calibre was however indeterminable though according to the observations, Exhibit “A” was a firearm in terms of the Firearms Act.

Exhibit “B” - was found to be a round of ammunition in calibre 7.62 x 14 mm. The same was observed to have a ring adopter at the base.

Exhibit “C” – was found to be a 12 gauge shot gun shell. On dissection, the ammunition marked “B” and the shell marked “C” were found to be complete in their component parts. Sensitivity tests were conducted on the premas and propellant powders with positive results. It was concluded that the ammunitions were live in terms of the Firearms Act.

Exhibit “D” – was found to be a spent cartridge of a fired cartridge. Calibre 45 inch, with a ring adopter at its base. On further observation of the prima, the firing pin intention on the prima was not consistent with conventional firearms. Mr. Kipkemoi had formed the opinion that Exhibit “D” could have been fired from any of the homemade firearms.

- 15.PW6 produced the duly filled and signed ballistic report as **P. Exhibit 9** while the dissected exhibits **“B and “C”** were produced as **P. Exhibit 10**.
- 16.PW7, Number 63133, PC James Matere of CID Office Rachuonyo as Investigating Officer produced **P. Exhibit 2, 3 and 8** respectively.
- 17.Eventually, the appellant was arrested and charged with the various offences whose outcome at the trial court gave rise to this appeal.

The appellant’s case

- 18.The appellant gave an unsworn statement in which he told the court that he carried on business as a fishmonger at Port Victoria and in Kericho. He stated that on 22nd October 2004, he went to Othoro police post to demand some items of his which had been taken from him. He was then arrested and taken to Kosele where he was detained for 23 days. Subsequently he was charged with the various counts of which he knew nothing about.

The Judgment

- 19.After carefully considering all the evidence on record, the trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on counts I, II and III. He was accordingly found guilty and convicted on each of those three counts. The court found that there was no evidence to support count IV as the suspected stolen property was never produced in court as exhibits. The appellant was accordingly acquitted on the said count IV.
- 20.The appellant was sentenced to 10 years imprisonment on count I, 6 months imprisonment on count II and 10 years imprisonment on count III. The sentences were to run concurrently.

The Appeal

- 21.Being dissatisfied with both conviction and sentence, the appellant mounted this appeal on the basis of the following homemade grounds:-

- *That the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution had not proved its case beyond any reasonable doubt on any of the counts facing the appellant;*
- *That the learned trial magistrate failed to appreciate that the appellant was not positively identified as the person who was found in possession of the homemade gun;*
- *That the learned trial magistrate failed in both law and fact in failing to appreciate that the alleged exhibits were not duly dusted for finger prints;*
- *That the learned trial magistrate erred in both law and fact in failing to appreciate that the*

prosecution failed to call the driver of the motor vehicle in which the appellant was allegedly travelling before his arrest;

- *That the learned trial magistrate erred in both law and fact in relying on contradictory evidence to convict the appellant.*

22. REASONS wherefore the appellant prays that the appeal be allowed, all convictions quashed and the sentences set aside.

The Duty of this Court

23. As the first appellate court, this court has a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. In doing this, this court has to remember that it does not have the privilege of seeing and hearing the witnesses who testified before the trial court. This court has also to remember that where there was no obvious departure by the trial court from the law and evidence in reaching the conclusions it did then this court has to act with circumspection in deciding whether or not to overturn the decision of the lower court. See generally **Okeno –vs- Republic [1972] EA 32; Pandya –vs- R[1957] EA 336** and **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1970] EA 123.**

Arguments during hearing

24. When the matter came up for hearing on 1st August 2013, the appellant handed in supplementary grounds of appeal and his written submissions. In his supplementary grounds of appeal he challenged the prosecution's evidence of production of parts of a homemade gun and ammunition while failing to produce the signed inventory record to prove authenticity and the fact that no finger dusting was done on the gun taken from him in the matatu to establish the owner.

25. In his written submissions, the appellant challenged the trial magistrate's observation in her judgment that the evidence of PW3 and PW4 was collaborative especially on the number plates of the motor vehicle he was travelling in, his purported escape from lawful custody, the non production of the inventory of the items recovered in his house and how the order dismissing his case under **section 206** was overturned. He also took issue with the magistrate's failure to consider his alibi defence.

26. The appeal was opposed by the State. Miss Cheruiyot learned counsel for the state submitted that though the evidence in court appeared contradictory concerning the number plates of the motor vehicle in which the appellant was arrested, that however did not contradict the rest of the evidence since appellant was arrested at scene of crime where the source of light was not in doubt.

27. Secondly, counsel submitted that a firearm was also recovered from the appellant and whether the firearm was dusted or not is immaterial. She further submitted that on the appellant's contention that the driver and the conductor of the motor vehicle were not called, it was the Criminal Procedure Code which empowers court to summon witnesses but this requirement does not impose a burden on the state to call all or any particular witnesses and the fact that the driver and conductor did not testify was therefore not fatal to the proceedings.

28. Lastly on the allegation that the appellant was denied bond, counsel referred to page 24 of the record of proceedings which indicated that there was evidence that the appellant had jumped bail necessitating a warrant of arrest to be issued. On these grounds, counsel urged the court to dismiss the appeal and uphold both conviction and sentence.

29. The appellant in reply submitted that the police did not produce the inventory to prove that he had the firearm and ammunition and if it were true that he was found in possession of the firearm he wondered why it was not dusted for his finger prints.

Issues for determination

30. I have now carefully reconsidered and evaluated all the evidence afresh. I have also weighed and considered the judgment of the trial court. I have also considered all the submissions. From an analysis of all the above, I note that the prosecution's case turns on 4 issues:-

- a. *Was the appellant identified positively by the prosecution witnesses?*
- b. *Were the charges against the appellant dismissed by the trial court?*
- c. *Did the police need to lift fingerprints recovered from the firearm found in possession of the appellant?*

Analysis and Findings

31. On the first issue for determination PW2 told court on cross-examination that:-

“I used the lights inside the vehicle to identify the accused. I sat next to the accused on the same seat I struggled with the accused to get the bag then he threw it outside the vehicle. He also tried to strangle me. I held the accused firmly.”

32. PW4 during examination in chief told the court that: **“During the arrest the accused sustained a minor injury on the forehead Reaching his homestead we found the accused person outside his homestead and the handcuffs were hanging.”**

On cross examination PW4 revealed:

“At that time I had three battery torches, there was a lamp at the road block. When the suspect was handed over he was violent and during the struggling my bullets spilled After handcuffing him the accused squatted and I was able to see him on that day I was able to master the physical appearance of the accused I could identify the accused about 50 metres away. He was seated and the other was bandaging him and both ran away.”

33. In her judgment, the learned trial magistrate stated the following with regard to the appellant's identification:-

“The 3 officers took time struggling with accused and they therefore had sufficient time to see him and identify him as they had a torch and also a lamp was on at the road block. All the 3 saw him flee as PW1 collected bullets which had spilled from his gun as they struggled with accused. Their evidence is corroborated by evidence of their visit to accused's home the same day after making enquiries. They said that on approaching the home they saw accused who ran away and they found handcuffs having been hanged at his home.”

34. The trial court also observed that the evidence of the 3 police officers was corroborated by the evidence of both PW1 and PW3 who were manning a roadblock at Kadongo on 22nd October 2004, when they found the appellant in motor vehicle Registration Number KAN 279 K when the said motor vehicle was stopped at the roadblock; and that on searching the appellant, they found on him a trigger assemble of a homemade gun. According to the testimony of both PW1 and PW3, they were aware that the appellant had earlier escaped from police custody.

35. The above facts describe how the appellant was identified by the prosecution witnesses. I have considered the trial court's findings vis-à-vis the evidence of PW2 to the effect that after the appellant was arrested, he was handcuffed and later seen by both PW4 and PW5. I am however not satisfied that the question of identification of the appellant was clearly settled by the evidence

- that is on record. The prosecution witnesses did not tell the court how they managed to trace the appellant's house, nor did they indicate whether they knew the appellant before and for how long. These lapses cast some considerable doubt on the identity of the appellant. That doubt goes to the benefit of the appellant.
36. Secondly the appellant has argued in his petition that he does not understand why he is being convicted and sentenced for charges which he had been acquitted of. The position on this issue is that when the magistrate initially hearing this matter was transferred, **section 210** was correctly read to the appellant by a new magistrate named Yalwala (RM) whereupon the appellant chose to continue with the trial from where the transferred magistrate had left it. Later, the new magistrate made another order under **section 210** of the **Criminal Procedure Code** dismissing the charges against the appellant for failure by the prosecution to appear for hearing. The said order was subsequently reviewed by Musinga, J and he directed that: **“a retrial be commenced before another magistrate other than Yalwala (RM)**. As a result of that direction, Principal Magistrate R. Ngetich, took over the case and at this point, read out provisions of **section 210** to the accused who then preferred the case to continue from where Hon. Yalwala had left it.
37. Strictly speaking a retrial here would mean that the case against the appellant would begin *denovo*. This did not happen as the appellant was only told of his rights under **section 200** of the **Criminal Procedure Code** after which the appellant chose not to recall any of the prosecution witnesses for cross examination. In addition Hon. Musinga's direction did not set aside the order to dismiss the prosecution's case by Yalwala(RM). However, taking all factors into consideration I find that the trial court did not comply with Hon. Musinga's orders for the case to start afresh. It was not a question of whether or not the appellant wished to recall any of the witnesses for cross examination. The case was to start again. The upshot of what I have stated above is that the appellant suffered prejudice when his case did not start all once again. The appellant's position was more precarious because the appellant's counsel who had hitherto represented him was not available. The record does not show that the appellant was given an opportunity to look for another lawyer.
38. On the question of the recovery of the firearms, I note that all the recoveries were made in the appellant's absence although the prosecution witnesses testified that before the search, the appellant was found at home, but took off when he saw the police officers. The question that begs an answer is whether the firearm that was allegedly recovered at the appellant's home was the same one that he had thrown to the ground from the matatu in the wee hours of 6th September 2004, especially considering the fact that the appellant was handcuffed when he fled from the police. I have my doubts on this issue and the benefit of that doubt goes to the appellant.
39. In light of what is stated in the preceding paragraph, it was absolutely necessary for the police to dust the recovered firearm for the appellant's fingerprint in order to tie the loose ends of its case against the appellant. Having failed to do so, there is doubt in my mind as to whether indeed the firearm produced in court was the one the appellant allegedly had. In this regard, the appellant gets the benefit of the doubt.
40. I also agree with the appellant that the prosecution evidence was not all together consistent and there was no indication that the officers at the roadblock on 6th September 2004 were the same officers at the roadblock at the time of the appellant's arrest.
41. For all the reasons above stated, I am satisfied that this appeal has merit. The same is allowed. Accordingly the convictions are quashed and the sentences set aside. Unless the appellant is otherwise lawfully held, he is to be released from prison custody forthwith.
42. It is so ordered.

Dated and delivered at Kisii this 8th day of October, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Present in person for the Appellant

Mr. Majale for the Respondent

Mr. Bibu - Court Clerk