



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO 4 OF 2013

BENSON ALWANYI LUBOBI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

**(APPEAL FROM THE JUDGMENT OF THE CHIEF MAGISTRATE, KITALE DATED 14TH
JANUARY 2013 IN CRIMINAL CASE NO 2581 OF 2011)**

JUDGMENT

Introduction

The Appellant, BENSON ALWANYI LUBOBI was charged with possession of ammunitions contrary to Section 89(1) of the Penal Code, the particulars of the charge being that on the 31st Day of October 2011 at Kitale Ndogo within Trans Nzoia County, without reasonable excuse he had in his possession eight (8) Rounds of 7.62 mm Special Ammunitions in circumstances which raised reasonable presumption that the said Ammunitions were intended to be used in a manner likely to be prejudicial to public order.

The Appellant faced a 2nd count of consorting with a person in possession of a fire arm contrary to Section 89(2) of the Penal Code. The particulars of this charge were that on the 30th Day of October 2011 at Kitale Ndogo within Trans Nzoia County, jointly with others not before court, he consorted with another person (Deceased) who without reasonable excuse had in his possession a fire arm namely AK 47 Assault Rifle loaded with four rounds of 7.62 mm Special Ammunitions in circumstances which raised reasonable presumption that the said fire arm was intended to be used in a manner prejudicial to public order.

The facts of the case as recorded by the trial court are that on 30th October 2011 at about 8.00 pm, the police acting on an informer's tip off intercepted the Appellant and three (3) other men in Liavo area. On being ordered to surrender, the Appellant, one Patrick and one Solo surrendered. The fourth man who was armed defied the Police and shot at them. The Police opened fire and killed the armed man. An AK 47 rifle 7.62x39mm calibre and one magazine with four rounds of ammunition were recovered.

In the exchange of fire, the Appellant, Patrick and Solo escaped. The Appellant had a magazine in his hands. On 31st October 2011, the Appellant was arrested in Matisi area. Upon interrogation, he led the Police to a house in Liavo area where a magazine with 8 rounds of 7.62x33mm calibre ammunition was recovered. According to the Police, the Appellant intended to rob the proprietor of a Club known as Poa but the police thwarted his efforts. The Appellant was tried and convicted at the Chief Magistrate's Court at Kitale and sentenced to six (6) years imprisonment on each count, the sentences running concurrently.

The Appellant's Appeal

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 16th January 2013, raising the following Grounds of Appeal:

- a. That the learned trial Magistrate erred in law and fact in convicting the Appellant yet he was not found in possession of ammunitions;
- b. That the learned trial Magistrate erred in law and fact in convicting the Appellant on a defective charge sheet;
- c. That learned trial Magistrate erred in convicting the Appellant on contradictory evidence;
- d. That the learned trial Magistrate erred in law and fact in convicting the Appellant in the absence of expert evidence and other key witnesses;
- e. That the learned trial Magistrate erred in law and fact in failing to analyse the Appellant's defence;
- f. That the learned trial Magistrate erred in law and fact in convicting the Appellant in the absence of conclusive circumstances for positive identification at the scene of the crime.

The appeal was heard on 17th October 2013 with the Appellant appearing in person and Mr. Konga appearing for the State. The Appellant relied on his written submissions.

Opposition by the State

In opposing the appeal, Mr. Konga learned State Counsel submitted that the Appellant was positively identified by PW 2 who knew him as "Benja". PW 4 also knew the Appellant previously. The scene of crime was well lit by electric light. Counsel further submitted that the charge sheet was not defective in any way. Neither was the evidence by prosecution witnesses contradictory since PW 2, PW 3 and PW 4 were all at the scene of crime.

Findings and Determination

The main issue for determination before me is whether the Appellant was positively identified at the scene of crime. According to the charge sheet, the events of 30th October 2011 took place at 8.00 p.m. PW 2 and PW 4 testified that the Appellant was previously known to them. PW 2, PC Paul Kamau Mwangi testified that he was able to identify the Appellant, whom he knew by his nickname "Benja" with the aid of electric light at the scene. This evidence was corroborated by PW 3 and PW 4.

In the case of *Dennis Muthee Chokera Vs Republic [2010] eKLR* the Court of Appeal upheld a conviction where the Complainant was able to recognise her assailant with the aid of a hurricane lamp. In the instant case, the Appellant was recognised by at least two witnesses with the aid of electric light. I therefore agree with the learned trial Magistrate that the Appellant was positively identified at the scene on 30th October 2011.

With regard to the events of 31st October 2011, I agree with the view taken by the trial court that PW 2, PW 3 and PW 4 were consistent in their evidence and that they had no reason to lie. The ammunitions found in the Appellant's possession were confirmed to be live by the CID Headquarters and were produced in the trial court as evidence.

For the foregoing reasons, I find that the Appellant's conviction was proper and confirm the judgment of the learned trial Magistrate on both conviction and sentence. Ultimately, the Appellant's appeal fails and is hereby dismissed.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT KITALE THIS 7TH DAY OF NOVEMBER 2013

J.R KARANJA

JUDGE

In the Presence of:

.....**Appellant**

.....**Respondent**