REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.5 OF 2013

PAUL MUNENE PETER ALIAS SONKO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(AN APPEAL ARISING FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.974 OF 2010 AT THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KERUGOYA ON 7.2.2012

JUDGMENT

The appellant herein **PAUL MUNENE PETER ALIAS SONKO** had been charged jointly with three other persons in five counts with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** .

The appellant was also separately charged in count 6 with the offence of being in possession of ammunitions without a firearm certificate contrary **section 4(1) (a)** as read with **section 3 (2) (a)** of the **Firearms Act cap 114 Laws** of Kenya.

The particulars of the charge in count 6 allege that on 16th October 2010 at Kagio township within Kirinyaga County, the appellant was found in possession of nine rounds of 7.62mm special without a firearm's certificate .

The matter proceeded to full hearing andin a judgment delivered on 7th February 2012 , the appellant and his co-accused were acquitted of the offences of robbery with violence for lack of sufficient evidence.

The appellant was however convicted of the offence of being in unlawful possession of ammunitions as alleged in count 6. He was sentenced to seven years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal raising several grounds. The grounds which are relevant to the conviction being challenged herein are as follows:

1. ***The learned magistrate erred in law and in fact by relying on the evidence of a single witness. The magistrate relied on the evidence of PW8 who told the court that he recovered the ammunitions in my house.***
2. ***The learned magistrate erred in law and in facts by relying on a shoddy investigation which was done by the prosecution side. There was no independent witness who confirmed the recovery of the said ammunitions in question. No finger prints evidence availed in court to implicate me to the said ammunitions in question.***

3. ***The learned magistrate erred in law and in fact by dictating to me on how and where to state my defence. When I was put on defence the magistrate told me not to give stories and only tell the court how I was arrested. Therefore I was denied a chance to show the court how these ammunitions were implanted on me by the police officers.***
4. ***The learned magistrate erred in law and in fact by failing to consider that the prosecution side did not produce the land lord of the said house where they were recovered. They also failed to take my photos with the exhibits. The prosecution side also did not record a statement from any resident from the same plot to confirm the same. There was no recovery form.***
5. ***The learned magistrate erred in law and in fact by failing to consider my sworn defence which was not shaken by the prosecution side. However, the trial magistrate while rejecting the defence did not give cogent reasons as per the objection of the same. She did not explain how much she wants me to satisfy him in my defence.***

When the appeal came up for hearing, the appellant relied on written submissions which he presented to the court. The state through the state counsel M/S Macharia conceded to the appeal on grounds that the evidence on record was insufficient to found a conviction. She therefore joined the appellant in urging this court to allow the appeal.

Since this appeal relates to the conviction and sentence in count 6 only, I do not find it useful to analyze the entire prosecution case as presented to the lower court in respect of all the charges that had been preferred against theappellant and his co-accused. I will only restrict myself to the evidence adduced in respect of count 6 since it is the conviction in that count that concerns the court in this appeal.

The prosecution case in count 6 is that on 16th October 2010, the appellant was arrested by police officers from Kianyaga police station on suspicion of having been involved in the commission of a spate of robberies then prevalent in Kirinyaga District. PW9 **NO. 231175 IP GEORGE OTIENO** who at the time was attached to the Kerugoya CID office was among the police officers tasked with the responsibility of investigating the cases of robbery reported to the police around that time.

After the arrest of the appellant, PW9 accompanied by the Deputy District Criminal investigating officer (DCIO) collected him from Kianyaga police station. And upon interrogation, the appellant allegedly led PW9 and the Deputy DCIO to his house at Kagio where after conducting a search, the police officers allegedly recovered nine rounds of ammunition from under the appellant's mattress. The appellant did not have a fire arm certificate. In the course of his testimony, PW9 identified the recovered ammunitions in court and produced them in evidence as exhibit 5 and exhibit 6.

The recovered ammunition was subsequently escorted to a firearms examiner for examination.According to the report of the firearms examiner produced as exhibit 4, it was confirmed that the nine rounds of ammunition were capable of being fired and were infact ammunitions as defined under the **Firearms Act.**

After completing his investigations, PW9 charged the appellant and his co-accused persons with the offences for which they were tried in the lower court.

In his defence, the appellant gave a sworn statement in which he denied the offence. He claimed that on 16th October 2010, he was at his place of work selling beer when he was arrested on allegations of selling illicit liquor. In cross-examination, he denied that he had a house at kagio and that he had ever taken any police officer to his house as alleged.

This being a first appeal, this court is enjoined to review and re-consider the evidence in order to make its own conclusion whether the conviction being challenged was well founded bearing in mind that it did not see or hear the witnesses – see

- ***OKENO V REPUBLIC (1972) EA 32***
- ***MWANGI V REPUBLIC (2004) 2 KLR 28***

I have considered the submissions made by the appellant and the state counsel as well as the grounds of appeal. I have also re-examined the evidence on record.

I find that the only witness who gave evidence against the appellant was PW9 who claimed that the appellant ledhim and the Deputy DCIO to his house wherein they recovered the nine rounds of ammunition. The Deputy DCIO was for undisclosed reasons not called as a witness to confirm or deny that indeed the ammunition was recovered from a house identified by the appellant.

Considering that the appellant had pleaded not guilty to the charges and the prosecution did not adduce any documentary evidence say for instance an inventory witnessed by the appellant acknowledging that the rounds of ammunition produced as exhibits were infact recovered from his house, I find that failure to call the Deputy DCIO who according to PW9 witnessed the alleged recovery substantially weakened the prosecution's case .

The unexplained failure tocall such an important witness leads to an inference that had he been called, he would have given evidence which was adverse to the prosecution case.

In***JUMA NGODIA V REPUBLIC (1982-1988) 1 KAR 454,*** the court of appeal held that;

"The prosecutor has in general a discretion whether to call or not to

call someone as a witness. If he does not call a vital witness

without a satisfactory explanation, he runs the risk of the court

presuming that his evidence which could be and is not produced,

would of produced have been unfavorable to the prosecution"

As there was no evidence to support PW9's allegations, the evidence on record amounted to the word of PW9 against the word of the appellant who gave evidence on oath denying having committed the offence as alleged.

In convicting the appellant, the learned trial magistrate chose to believe the evidence of PW9 who according to her impressed her as a truthful witness. This is despite the fact that the record shows that PW9 had contradicted himself in his evidence when describing the place where the rounds of ammunitions had been found in the house attributed to the appellant.

In his evidence in chief, he claimed that the exhibits were found under a mattress but in his evidence in cross –examination, he claimed that the ammunitions were found under the bed. These are two completely different places in my view and such a contradiction from a police officer who claimed to have personally recovered the ammunition casts doubts as to his credibility. It is not practically possible for the ammunition to have been recovered from two different places at the same time.

In view of the foregoing, it is my conclusion that the trial magistrate failed to carefully analyse the evidence presented by the prosecution in support of count 6 and thereby made a wrong finding that the evidence proved the charges preferred against the appellant beyond any reasonable doubt. My finding is that the evidence was not sufficient to support a safe conviction.

I am therefore satisfied that the appellant was not properly convicted and the state counsel was right in conceding to the appeal.

I thus allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at KERUGOYA THIS 7TH DAY OF NOVEMBER, 2013 in the presence of:

The appellant

M/S Sitati for the state

Kariuki Court Clerk