REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 185 OF 2008

JANE MWIKALI RUMUTI ……..……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal against the judgment of Hon. A.K. Kaniaru P.M.

in Criminal Case No. 1723 of 2005 delivered on 25th September 2008)

JUDGMENT

The appellant faced three counts at the lower court. The first count was the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code. On the second count, she was charged inbeing in possession of firearm without a firearm certificate contrary to section 42 (a) as read with section 43(a) of the Firearm Arm Act Cap 114. On count 3 she was charged with being in possession of ammunition contrary to section 4(2) (a) as read with section 4 (3) (a) of the Firearm Act Cap 114. The appellant pleaded not guilty before the lower court but after trial was convicted and charged. In respect of count 1 she was sentenced to 3 years imprisonment on count 2 she was sentenced to 8 years imprisonment and on count 3 to 8 years imprisonment. All the sentences were to run concurrently. She was aggrieved by the conviction and sentence and has brought this appeal against the same. As the first appellant court, I am expected to submit the whole evidence of the lower court to a fresh and exhaustive examination. I so doing, I must weigh the conflicting evidence and draw my own conclusion. In so doing, I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See the case of **Okeno Vrs. R.** (1972) EA 32. The evidence presented by the prosecution was simple. PWI was the turn boy of a lorry that carried building stones and sand. On 4th July 2005 at about 3 pm him and the driver reached at Mukuune junction. At that junction, they were stopped by the appellant who was in company of another man. They sought to be taken to Marimanti. They negotiated the fare with PWI and agreed to pay Kshs. 40 for the trip. PWI noted that they had a big bag. He described it as brown flowery. He sat with them at the back of the lorry. PWI commented that the bag was big. The appellant said that the bag had eggs and bread and should therefore not be sat on. On their journey, 5 other men boarded the vehicle. The lorry, when it reached the point at which it was making delivery, the passengers were requested to alight to allow the delivery to be made. The appellant together with the man they had boarded the vehicle with went on foot to Marimanti market. PWI was clear on cross examination that the appellant was the one carrying the bag. He stated in response to cross examination by the appellant

"I saw you very well."

PWII a police officer said that he and his colleagues received report that there were suspicious people at Marimanti town. They went to the town and saw the people. These people were on the road and they seemed as though they were waiting to travel. On introducing themselves as police officers, they arrested the people but the appellant who had the bag dropped it and ran away. In the bag was found one AK 47 gun with 7 bullets, 2 guns with 18 rounds of ammunition, cloths, appellant's national identity card, appellant's treatment notes from Consolata Hospital Nkubu and pangas. The appellant was later arrested at Nkubu. PWIII was the driver of the lorry. He too confirmed that the appellant was carried in his lorry. She had a bag with her and he later saw that bag at the police station. He recognized it as the one which was carried by the appellant. PWIV was the CID Ballistic expert. He received the AK47 of 7.62mm which he said was capable of being fired. He tested the firing capability of this gun with the ammunition that was recovered from the bag and he found that they could fire. He also received two sub machine guns of 9mm which he also found were capable of being fired. He also found that all the bullets were in good condition and could be used. PWV was a police officer who together with the other police officers confronted the people who were suspected to be robbers. He identified the appellant as the one who was carrying a bulky bag on her back. When the police officers identified themselves to this people, she run and dropped the bag. He too confirmed that the bag had guns, ammunitions, pangas, torches and clothing. On 6th July 2005, they received information that the appellant had been arrested at Nkubu. She was collected on the following day and was taken to Marimanti police station. With that evidence, the learned trial magistrate found that the appellant had a case to answer. Although the court did not specifically record that the provisions of section 211 of the Criminal Procedure Code were explained to the appellant, the appellant together with her co-accused did respond to the court by saying:- ***"I will give sworn defence."*** That in my view, is indicative of the court having explained section 211 of the Criminal Procedure Code. Section 211 (1) and (2) provides:-

"***211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross- examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence if (if any)***

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

The appellant in defence did not state where she was or what she did on the day that the police accosted her and her co-accused. She gave evidence only on the day of her arrest. Whilst recognizing that the law does not lay any obligation on the appellant to give evidence of where she was on the day her co-accused were arrested, but the fact that she did not give evidence the court will then consider the prosecution's evidence to find whether it does prove that she was at Marimanti on that day. I shall consider ground (a), (b) and (c) of the appellant's petition together. These grounds relate to the trial court's assessment of the prosecution's evidence. The prosecution's evidence in my view had no inconsistencies as argued by the appellant. PWI was very clear that the appellant carried the bag which eventually was found to contain the weapons. He had ample opportunity to observe the appellant since they sat together at the back of the lorry. This was at 3pm in the afternoon. The police who arrested the appellant co-accused saw the appellant drop the bag and ran. In that bag amongst other things was the appellant's national identity card and her treatment notes. The presence of those two documents which are the personal property of the appellant would suggest that the said bag was in her possession. The bag was found to have guns and ammunition and those guns were in accordance with the definition of Firearms as per section 2 of the Firearms Act. Failure by the police to carry out an identity parade of the

appellant was not fatal with the prosecution's case. Further the prosecution by its evidence showed that the appellant did not have a certificate as per section 5. It is that certificate which would have authorized the appellant to be in possession of the fire arms. In respect of count 1, the offence of preparing to commit a felony an doubtly the ammunitions, the guns, the pangas, the clothing and the torches lead this court to find that that count was proved. The other counts also of possessing firearms and ammunition were in my view proved beyond reasonable doubt. The appellant submitted that her constitutional rights as per section 72(3) (b) were violated. It was submitted that she was in custody for 21 days before being brought to court. Section 72(3) (b) lays a burden on the police to show that a person arrested had been brought before court as soon as was reasonably practicable. That section is in the following terms:-

"***72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:- ……..***

(3) A person who is arrested or detained:-

(a) for the purpose of bringing him before a court in execution of the order of a court: or

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

The court of appeal in the case of **Dominic Mute Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported)**. The court stated as follows:-

"***Thus, where an accused person charged with a non- capital offence brought before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, That he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case had to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a beach of the above provision the court must act on evidence."***

The Court of Appeal in that case stated that each case had to be considered in the background of its peculiar circumstance. The prosecution's evidence revealed that the appellant and her co-accused had other criminal cases that they were facing before other courts. During the trial, one of the accused persons produced judgment of one of such cases and it is clear that the appellant was the 8th accused person in that case. That was Criminal Case No. 1026 of 2006 CM Court Meru. PWIV talked of the firearms being the subject of other cases and he listed those cases as Cr. Case No. 464 of 2004 and 207 of 2005. That being so, the appellant in alleging that her constitutional rights were violated ought to have been categorical when she was specifically arrested for the offence which was the subject of this case. Looking at the charge sheet, it does not show the date of the appellant's arrest. Perhaps the reason is because the appellant was first arrested in relation to other cases and not this one. In view of the fact that it is not clear when she was arrested in respect of this case, I find that her constitutional right cannot be said to have been violated. There is therefore no basis for quashing or setting aside the conviction of the lower court. In the appeal against conviction, I find that I am with the agreement with the finding of the lower court. The prosecution proved its case beyond reasonable doubt. On sentence, Section 4 of Cap

114 provides on conviction the sentence to be meted should not be less than 7 years and not more than 15 years. The appellant was sentenced to 8 years imprisonment. That sentence cannot be said to be excessive to attract the interference by this court. Accordingly, the finding of this court is that the appeal against conviction and sentence has no merit and the same is hereby dismissed.

Dated and delivered at Meru this 2nd day of October 2009.

MARY KASANGO

JUDGE