



Director of Public Prosecutions v Benard Njuguna Ng'ang'a (Criminal Case E350 of 2021) [2021] KEMC 8 (KLR) (18 October 2021) (Judgment)

Director of Public Prosecutions v Benard Njuguna Ng'ang'a [2021] eKLR

Neutral citation: [2021] KEMC 8 (KLR)

**REPUBLIC OF KENYA
IN THE MPEKETONI LAW COURTS
CRIMINAL CASE E350 OF 2021
EP NABWANA, RM
OCTOBER 18, 2021**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

BENARD NJUGUNA NG'ANG'A ACCUSED

JUDGMENT

A. Introduction

1. The accused faced the serious charge of loss of a firearm and ammunition through neglect contrary to Section 92 (2) of the [National Police Service Act](#) No. 11A of 2011 of the laws of Kenya. The particulars to the charge read as follows: -

“On the 2nd day of June, 2021 at Naivasha area in Lamu West Sub-County within Lamu County, being a National Police Reservist officer of certificate of appointment number 0.5358 lost by neglect one AK 47 assault rifle of serial number 5522794 and two magazines containing sixty rounds of 7.62 x 39mm special caliber ammunition which was entrusted to his possession by the National Police Service in contravention of the said Act.”

2. The prosecution called a total of four (4) witnesses and produced two (2) exhibits in support of their case.

B. Points For Determination.

3. From a cursory reading of the offence the accused is charged with this court notes that the following points fall for determination: -
 - i) Whether the accused is a National Police Reservist Officer;



- ii) Whether the accused was issued with a rifle together with ammunition and he lost it; and
- iii) Whether the loss was as a result of the negligence of the accused.

C. Analysis

I. Whether the accused is an NPR officer?

- 4. This aspect of the prosecution evidence was largely unchallenged. PW 1 (John Kome Njuguna) who is the in charge of National Police Reservists within Lamu County of the rank of Superintendent confirmed that the accused is an NPR officer. However, it is Inspector of Police David Nyaramba (PW 4) who confirmed that the accused was indeed an NPR officer and produced in court a copy of his certificate of appointment of serial number NPR 32217 indicating that Benard Ng'ang'a Njuguna of service number 0.5358 is an NPR officer of the rank PC.(R). It was produced as P. Exh.2.
- 5. Accordingly, this court is satisfied that the accused is an NPR officer and it so finds as such.

II. Was the accused issued with a rifle and ammunition which he lost?

- 6. CPL Sammy Ouma (PW 3) based at Mpeketoni Police Station and the in charge of the armoury testified that part of his work entails issuing of firearms and ammunition to NPS officers before they engage in any police operation. It was CPL Ouma's testimony that on March 26, 2021 he issued to the accused an AK 47 assault rifle of serial number 5522794. That the issuance was accompanied with 60 rounds of ammunition of caliber 7.62 special which the accused duly received and this was articulately captured in the arms movement register produced as P. Exh. 1. This evidence was not contradicted at all by the accused during cross-examination.
- 7. CPL James Okoth (PW 2) on the other hand testified that on June 2, 2021 he made a formal report vide OB 42/02/06/2021 at about 1950 HRS from the accused that his AK 47 assault rifle of serial number 5522794 with 60 rounds of ammunition had gotten lost in his house. He was, as is by law required, placed in the police cells pending investigations into the matter.
- 8. SP John Koome Njuguna (PW 1) testified that on June 2, 2021 at about 1730 – 1800HRS, the accused called him saying that when he had reached home he found his gun missing together with two magazines and with each magazine containing 30 bullets. PW 1 quickly informed the Sub-County Police Commander who immediately communicated to other relevant departments and set up a search party.
- 9. IP David Nyaramba (PW 4) the DCIO of the Directorate of Criminal Investigations in Mpeketoni testified that since Lamu West was a security operation area, National Police Reservist are armed with assault rifles to help boost security against national elements that threaten national security. PW 4 confirmed that on the material date, the accused left his rifle in the house at about 1100HRS and returned at about 1800HRS only to find it missing.
- 10. After being placed on his defence, the accused testified that on June 2, 2021 he left home at 1100HRs and came back at 1700 HRS or thereabouts to find his house had been broken into and the rifle and ammunition stolen.
- 11. Accordingly, the court answers in the affirmative on this second limb of the points for determination and finds that the accused was indeed issued with an AK47 assault rifle of serial no. 5522794 and 60 rounds of ammunition of 7.62 x 39mm and that the same got lost while in his possession.



III. Whether the loss of the said firearm and ammunition was occasioned by the negligence of the accused?

12. In answering this limb the court wishes to state that this being a criminal case the threshold of determining whether the accused was negligent or not is not on a balance of probabilities. This is so because not only are the charges serious but also the accused stands to lose his freedom and convicted as a criminal. It is for this reason that courts are required to exercise a somewhat higher standard than that of a balance of probabilities.
13. Indeed, even in definition, in civil cases, negligence may be loosely defined as the failure to exercise the standard of care that a reasonably prudent person would exercise in a similar situation to avert damage(s). The locus classicus being the standard of the man on the Clapham Omnibus.
14. The National Police Service Act and the Penal Code do not have provisions for what Criminal Negligence entails or how it is defined. However, the *Black's Law Dictionary*, 11th Edition as edited by Bryan A. Garner defines criminal negligence in the following manner: -

“Gross negligence so extreme that it is punishable as a crime. For example, involuntary manslaughter or other negligent homicide can be based on criminal negligence, as when an extremely careless automobile driver kills someone.”
15. The above presupposes that an accused's actions should have been extremely negligent that he ought to have been aware of the risk his action may have occasioned. Applying the above threshold to the case at hand, can the accused be said to have been so negligent as to occasion the loss of the firearm issued to him by the government?
16. Section 92 (2) of the National Police Service Act No. 11A of 2011 states as follows: -

“Notwithstanding subsection (1), any officer who pawns, sells, loses by neglect, makes away with or willfully or negligently damages any firearms, ammunition, accouterment or uniform commits an offence and is on conviction, liable to imprisonment for a term not exceeding five years, or a fine not exceeding five hundred thousand.”
17. This section is in sharp contrast with Section 22 of the Firearms Act which was hitherto the only law against loss of firearms by police officers. See the case of No. 45140 PC David Yator V Republic (2021) eKLR. The said section only required the officer to report such loss at the earliest. The National Police Service Act criminalizes the said loss if it was in a negligent manner. It was therefore incumbent upon the prosecution to prove that the accused was negligent in handling or omitting to handle his firearm.
18. In the instant case, PW 1 testified that the accused called him and informed him of the loss of his firearm. The SPC immediately sent officers for a scene visit and PW 1 together with other NPR officers visited the accused's home and neighbourhood. They discovered that his house had been broken into through a back window. An extensive search did not yield any results. PW 2 narrated that upon the accused making the report, they visited his house and found that it had been broken into. A search did not yield results even to date. PW 3 other than issuing the firearm and the 60 rounds of ammunition on cross-examination admitted that the report made was that the gun had been stolen from the house of the accused. When the court sought a clarification from PW 3 he informed the court that as a police officer, when your rifle is stolen, it is deemed that it was your negligence that it was stolen. Further, that if a rifle is not within the reach of your hands you should deposit it at the police station's armoury. PW 4, the investigating officer shed more light on this issue. He stated that a scene visit by himself and DCI officers revealed that the accused's house had been broken into using the window at the back of the



house. Further, that the house is semi-permanent in nature which in his view was not safe to hold arms. Interrogations also revealed that on the same day the rifle was stolen there were a number of break ins in the neighbourhood. However, at the accused's house only the rifle was stolen. PW 4 took issue with the accused leaving his firearm unattended for a period of over five hours before he noticed it had been stolen. He stated that according to the police force standing orders one should not be more than one (1) metre away from his or her rifle and that if you cannot stay close to it, you should take it to the armoury.

19. In his Defence, the accused stated that he has worked for 19 years as a National Police Reservist stationed at Chikomani area and has never had any single disciplinary issue nor has he ever been charged for a crime. That for the number of years in service, he only took his firearm to the armoury whenever he was going for a trip or when he was not intending to sleep at home. Due to the low amount of stipends they get, most NPR officers engage in activities to help to boost their income and it is not a strange phenomenon at all. Others work as bodaboda riders whilst others take up farming like he does. On February 2, 2021 he left Mpeketoni Boys High School where he guards at 0600HRS and went and slept at home until 1100HRS. He then left for his farm in Lake Amu. When he came back in the evening to prepare to go back to work he found his house had been broken into. He called his wife who informed him that at about 1300HRS as she was closing the door, Thiong'o a convicted felon for the offence of house breaking and stealing before this very court in a previous case greeted her and asked if that is where they live. She answered in the affirmative and took no note of the issue. He had a hammer on his waistline. The accused stated that he had arrested Thiong'o in the past about three times with the last one culminating into him being sentenced to jail for two years. His mode of stealing was by cutting off or bending steel bars from windows and accessing houses. The accused said a knife was recovered in his house and the hammer in a bush behind his house. The said suspect was arrested but never prosecuted for reasons unknown to him. The said suspect was then burnt alive a few months later after the incident by members of the public for another suspected case of house breaking.
20. From the foregoing, this court does not find that the accused was negligent for the following reasons-
- a) Is it possible for an NPR officer who are paid a salary scale akin to minimum wages to purchase a safe or safety deposit box huge enough to fit an AK47? If his own house was semi-permanent is it logical to expect such an officer to build a safe in it?;
 - b) Assuming that the police force standing orders require one to have a safe for storage of ammunition and firearms, would the accused have been issued such an assault rifle if he did not have a safe? Even then, is that a disciplinary issue or a crime? The accused has not been charged for contravening Police Force Standing orders. Is the accused really a suspected criminal based on the actions of a criminally minded intruder?;
 - c) Where is the negligence, when an intruder breaks into your house? No evidence was led to show that the said rifle was left exposed in such a reckless manner as to invoke criminal negligence in his conduct;
 - d) For the last 19 years of duty, is it possible that the accused was with his gun throughout within the 1 metre range and that only on June 2, 2021 was when he left it unattended? This is doubtful;
 - e) Can the state now apportion criminal negligence on the accused simply because his house was broken into and his firearm and ammunition stolen? Absolutely not. The circumstances under which the said firearm was stolen cannot be equated to criminal negligence on his part at all. The firearm was not recklessly exposed to members of the public, the intruder only managed to access it by committing a crime. At best, orderly room proceeding may issue as per the disciplinary processes of the National Police Service.;



- f) The fact that the *National Police Service Act* introduced the criminalization of the negligent loss of firearms without defining what criminal negligence entails adds to the conundrum this case presents.

Conclusion

21. In the end, this court finds that the last limb of the points for determination was not established to the required standard.
22. It may be prudent that the persons in charge of the various security organs within Lamu-West sub-county to hold urgent meetings and find ways of training and advising National Police Reservist officers who work sometimes hundreds of kilometres away from major police stations or armouries and who hold assault rifles to find out better means of safeguarding their rifles. This court is acutely aware of the huge cost of the assault rifles. The court is also aware of the great role played by NPR officers in the very deep parts of Lamu County in safe guarding this country.
23. In finality, the court finds, for the reasons afore-stated, that the prosecution has failed to prove to the required standard that the accused lost his firearm and ammunition due to his negligence and he is therefore acquitted of the said charge as provided by section 215 of *Criminal Procedure Code* cap 75 of the Laws of Kenya.

DATED THIS 18TH DAY OF OCTOBER, 2021 AT MPEKETONI LAW COURTS.

HON. P. E. NABWANA

RESIDENT MAGISTRATE

In the presence of:

Counsel for DPP: Wambua Kyalo

Court Assistant: Warsame Hassan

Accused: Present in person.

