IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KIAGE & KANTAI, JJA)

CRIMINAL APPEAL NO. 68 OF 2014

BETWEEN

PETER KINYUA IRERI.....APPELLANT

AND

REPUBLIC.....….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu ***(Ong'udi, J.)*** *dated 30th May, 2014* **in H. C. Cr. A. No. 22 of 2013)**

JUDGMENT OF THE COURT

1. What is the legal definition of "possession"? What is the legal effect of an exculpatory extra-judicial statement by one accused against another? Those are the issues of law we are called upon to answer in this appeal.
2. On the 7th March 2011, at about 9am, the appellant was walking along a road in Mukangu Trading Centre within Embu Municipality. Walking with him was another young man, **John Muchangi Njiru** (Njiru), who was carrying a sack. At a point on the said road, they were accosted by three local community policing members, led by the Assistant Chief of Mukangu location, who were out on patrol against illicit brews in the area. The Assistant Chief (PW2) ordered the two young men to stop. He searched the sack held by Njiru and found an old gun inside. According to one of the community police members (PW3), the Assistant Chief asked Njiru whose gun it was and Njiru said it was the appellant's, but the appellant insisted it was not his but Njiru's. Both were arrested and handed over to the CID in Embu for investigations. The gun was submitted to a ballistics expert who confirmed that it was a 1.77 inch caliber Air rifle manufactured in Germany for firing out lead pellets. It was capable of being fired although the broken trigger had been replaced with a nail and was a firearm as defined under the **Firearms Act**, Cap 114, Laws of Kenya.
3. In the course of investigations, one Apolo Nyaga Musa (Musa) was also arrested after Njiru associated him with the ownership of the rifle. According to the investigating officer, Musa admitted that the gun had been left with him by a white person. The appellant, Njiru and Musa were jointly charged and tried before Embu Senior Resident Magistrate **(R. O. Oigara)** who took over from **R. M. Oanda**, on two counts: firstly, preparation to commit a felony contrary to **Section 308(1)** of the **Penal Code**, in that they "… *jointly with others, were found in possession of dangerous/offensive weapon ..in circumstances that indicated that they were armed with intent to commit a felony."* Secondly, being in possession of a firearm without a firearm certificate contrary to **Section 4(1)** as read with **Section 4(3)** of the **Firearms Act**, in that the three of them were *"….found in possession of a rifle..without a firearm certificate"*.

4. At the close of the prosecution case, Musa was found to have no case to answer and was acquitted under **Section 210** of the **Criminal Procedure Code.** The appellant and Njiru were placed on their defence and were subsequently convicted on both counts and sentenced to serve 7 years imprisonment on each count, the sentences to run concurrently. On appeal to the High Court, **(Ong'undi J.)** the appeal against conviction for the offence of preparation to commit a felony was allowed on the ground that the two were found on the road in broad daylight and there was nothing proved to show that they were planning or were about to commit a felony. The appeal on possession of a firearm was however dismissed, but the sentence was reduced to 5 years imprisonment. Njiru did not appeal against that conviction, but the appellant is before us to challenge it on the second and final appeal.
5. The appellant was not represented in the appeal before us but he drew up a supplementary memorandum of appeal raising four grounds whcih maybe summarized as follows:-

> ***"That the learned Judge erred in law when she:-***
>
> ***1. upheld the appellant conviction without considering that no recovery was made from the appellant during the arrest to support the alleged charge of count two of being in possession of a firearm***
>
> ***2. failed to consider that according to PW4 investigation, the alleged exhibit was the property of accused No. 3 who was released during the ruling stage in the subordinate court under Section 210 of C.P.C.***
>
> ***3. relied on a co-accused confession which was not proved under Section 25 (1) of the Evidence Act and the same was not sworn before the court of law.***
>
> ***4. rejected my defence which contained some reasonable facts and the same violated in Section 169 (1) of C.P.C CAP 75 laws of Kenya."***

Essentially, he raised the two issues of law which we summarized at the opening paragraph of this judgment.

6. In his written submissions which he asked us to peruse and allow his appeal, he submitted that all four prosecution witnesses proved that the offending firearm was recovered from Njiru who had physical possession of the bag carrying it. It was in broad daylight, and he and Njiru had only met on a public road. He had denied at the first opportunity when gun was found by the Assistant Chief, that it was Njiru who had it. He had also heard from the investigating officer (PW4) that it belonged to Musa and he repeated that assertion in his defence. If anything therefore, the courts should have found on the evidence that it was Njiru and Musa who had possession of the firearm. He cited the case of ***Mwangi vs. Republic Cr. App. No. 108*** (which we were unable to trace).
7. On the second issue of law, the appellant submitted that it was wrong for the two courts below to accept the reported statement by Njiru to the Assistant Chief that the firearm belonged to the appellant. In his view, this was a purported confession by one accused against a co-accused which is not acceptable as evidence. It was also not a confession since it did not comply with **Section 25** of the **Evidence Act**. In support of those submissions he cited the cases of ***Joseph Odhiambo vs. Republic; Cr. App. No. 4 of 1980*** and ***Anyangu & Others vs. Republic Cr App. No. 5 of 1968***
8. Finally the appellant submitted that his defence was scuttled by the trial court which released the 3rd accused, Musa, after the investigating officer had confirmed Musa's confession that the rifle was left to him by a white man.
9. Opposing the appeal, learned Assistant Director of Public Prosecutions**, Mr. Kaigai**, submitted that the appellant had constructive possession of the firearm and he had a duty under **Section 111** of the **Evidence Act** to give an explanation.
10. This is a second appeal which lies on issues of law only by dint of ***Section 361***, **Criminal Procedure Code**. The concurrent findings of fact made by the two courts deserve respect by this Court and shall not be disturbed unless they were not based on any evidence at all or were based on a perversion of the evidence on record. As this Court put it in the case of ***Christopher Nyoike***

Kangethe v Republic [2010] eKLR :-

> ***"an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

11. **Section 4(1)** of the Firearms Act under which the offence was charged states as follows:

> ***1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time"***. (emphasis added).

So, what is possession? We take it from **Section 2** of the same Act which defines it as follows:

"possession"

> ***(a) includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person and the expressions "be in possession" or "have in possession" shall be construed accordingly; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them".***

The definition is lifted word for word from **Section 4** of the **Penal Code** which has been construed in numerous decisions of this Court as defining actual physical possession as well as constructive possession.

12. There was no doubt in this case that the appellant was not found in actual physical possession of the offending rifle. On that issue, the trial court found as follows:

> ***"In count two the two once again are jointly charged with being in possession of firearm without a firearm certificate contrary to Section 4(1) as read with Section 4(2) of the firearm Act Cap 114 Laws of Kenya. The two accused persons in their defence have not denied that they were found with the rifle which the prosecution produced in court with a report by an expert that it was capable of firing however nothing has been tendered by the accused like a certificate to be in possession and that they were lawfully having its possession. That being the position I find that the charge against the two in count two is proved to the required standard and shall proceed and convict the two."***

After re-evaluating the same evidence, the High Court found:-

> ***(b) "From the evidence of the prosecution and the defence of the appellants they were in possession. The 2nd appellant was the one carrying the sack with the rifle. When asked about it the 2nd appellant said it was the 1st appellant who knew about it. The 1st appellant did not deny what the 2nd appellant had said. This clearly confirmed that they both knew about the firearm. Further the 1st appellant led to the arrest of their co-accused who he said co-owned the gun with him.***
>
> ***There was no evidence to show that they were in lawful possession. They did not produce any certificate allowing them to keep the firearm. The possession was therefor unlawful."***

With respect, those findings are not strictly borne out by the evidence on record.

13. The appellant had consistently denied the offence charged and there is neither the evidence of admission as alluded to by the trial court nor the failure to deny knowledge about the gun when asked about it by Njiru as found by the High Court. The only witnesses who were present at the recovery of the rifle and arrest of the appellant and Njiru were the **Assistant Chief** (PW2) and two community police members: **Patrick Njeru** (PW1) and **Jane Rose Wambeti** (PW3). PW2 simply said he met two people, stopped them, searched a sack they were carrying and finding there was a rifle in it, arrested them. He added:

> ***"The gun was held by Accused 2*** *(John Njiru)****. He was with Accused 1****(the appellant****)."***

In his brief evidence in chief, PW1 said:

> ***"While on patrol we were told that two persons had a gun in a sack. We pursued them and recovered the gun in a sack. We took it to AP camp, Kathangari".***

He added in cross examination by Njiru:

> ***"When I arrested you we inquired what you had and answered that it was a gun. You told us the gun was yours".***

PW3 testified that they:

> ***"..met the two accused on a foot path. Accused 2 had a sack carrying(sic). The Assistant Chief then ordered them to stop then he took the sack which Accused 2 had then found an old gun. Then inquired where Accused 2 was taking, (sic) we once again took the two to Assistant Chief office and contacted Embu CID."***

Cross examined by Njiru, she responded:

> ***"When we arrested you, the Assistant Chief inquired who it was for. You told the Assistant Chief that it was for Accused 1. Then Accused 1 said that since you had it it was yours."***

Finally, PW4 simply said the accused persons had a gun in a sack, adding that he was not present when they were arrested.

14. It is evident therefore that there was no admission by the appellant that he had possession of the rifle. There was no evidence that the appellant 'did not deny the assertion by his co-accused', Njiru, that he knew about the rifle. The investigating officer (PW5) who rearrested the two went no further to establish the role of the appellant but simply took brief statements from the community policing members and submitted the rifle for ballistics examination before charging them with the two offences. He also arrested the third accused *(Musa)* who had said the firearm had been left to him by a white person. In those circumstances, it is doubtful, in our view, that the appellant could be found to have been in constructive possession of the offending weapon.

15. Even assuming the High Court was right in finding that the appellant was incriminated by his co-accused, we hold the view that the evidence of the co-accused was of the weakest kind and incapable of supporting a conviction without corroboration. The law on the value of statements made against co-accused in a joint trial is well settled. In ***Anyangu & Others*** vs. ***Republic [1968] EA 239,*** the Court of Appeal for East Africa held as follows at Page 240:

> ***"A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be "taken into consideration" against that co-accused. It is however, not only accomplice evidence but evidence of the 'weakest kind' (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried."***

16. Clearly, any statement purportedly made by Njiru in relation to the appellant was exculpatory and extra-judicial as it was not a confession properly so called. In the case of ***Joseph Odhiambo vs. Republic Cr. Appeal No. 4 of 1980*** **this Court held** that '*an exculpatory extra judicial statement by one accused cannot be used as evidence against a co-accused'. Even if it could be held to have been a confession, which it was not, the law is that* the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame. See ***Gopa s/o Gidamebanya & Others vs. Republic Cr. Appeal No. 106 of 1983*.**

17. We find on both issues of law that this appeal has merits and we allow it. We quash the conviction of the appellant and set aside the sentence imposed on him. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nyeri this 6th day of April, 2016.

P. N. WAKI

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

S. Ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR