



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO.204 OF 2011

BETWEEN

WOODFORD OLANG'O OKUMU.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (Musinga, J.) dated 14th May, 2010

in

H.C.C.R.A. NO. 124 OF 2008)

JUDGEMENT OF THE COURT

1. **WOODFORD OLANG'O OKUMU**, the appellant, charged with two offences. In the first count, he was with another person, one Ezekiel Kedogo Meja, charged with the offence of preparation to commit a felony contrary to **Section 308** of the Penal Code. It was alleged that on the 27th March, 2007, at Migori township in Migori District of Nyanza Province, not being in their places of abode, they had with them an article for use in the course of or in connection with robbery with violence, namely, a homemade gun. In the second count, the appellant was alone charged with the offence of being in possession of a firearm without a certificate contrary to **Section 4(2) (a)** of the Firearms Act, Cap 11 of the Laws of Kenya. In that count, it was alleged that on the same day and at the same place, the appellant was unlawfully found in possession one homemade gun.

2. The appellant pleaded not guilty to both counts but after trial before the acting Principal Magistrate at Migori, he was acquitted of the offence in count 1 but found guilty on count 2 and sentenced to 10 years imprisonment. His appeal to the High Court having been dismissed, he has come to this Court on a second appeal.

3. In his memorandum of appeal the appellant complains that his constitutional rights to a fair trial were violated; that the charge against him was a fabrication; and that the learned Judge of the High Court failed to properly re evaluate the evidence on record.

4. At the hearing of the appeal, the appellant relied on written submissions in which he argued with regard

to ground 1 that contrary to **Section 72** of the retired Constitution, he was unlawfully detained for five days before he was taken to court.

5. On grounds 2 and 3, he argued that had the learned Judge of the High Court properly re-evaluated the evidence on record, he would have found that the same was not only contradictory but also that the charge against the appellant was fabricated. He referred us to the copy of the investigation diary that was produced as an exhibit which shows that the allegation of being found with a gun was an afterthought.

6. The appellant also submitted that the two prosecution witnesses contradicted themselves. Whereas PW1 said the homemade gun the appellant was allegedly found with was wrapped in a yellow polythene bag, PW2 said the gun was in a yellow paper bag. With those submissions, the appellant urged us to allow his appeal.

7. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution counsel, submitted that this appeal has no merit. Although the investigation diary shows that the bit relating to the possession of a homemade gun was added, he argued that the rest of the evidence demonstrated that the appellant was indeed found in possession of a homemade gun without a firearm certificate. He therefore urged us to dismiss this appeal.

8. We have considered the matter. We do not wish to go into the appellant's complaint in ground 1 that contrary to Section 72 of the retired Constitution, he was detained for more than 24 hours before he was taken to court. As we have repeatedly stated, illegal detention by police, if any, entitles the victim to a claim for damages against the State.

We therefore dismiss ground 1 of the appeal.

9. We are, however, of the view that the appellant's complaint in grounds 2 and 3 has merit. The appellant has, from the time of his arrest and throughout the trial, maintained that the charges against him were trumped up by PC Abdalla, who was one of the police officers who arrested him, to settle previous scores. He said that a day prior to his arrest, Abdalla had claimed that the appellant wanted to kill him because he had previously introduced him to his cousin, Achieng, who had HIV and AIDS.

Despite the appellant's protestations that he did not know that Achieng was HIV positive, PC Abdalla slapped him and they fought. When the appellant got free and ran away, PC Abdalla swore to teach him a lesson. The following day PC Abdalla and two others went to his house and arrested him on allegations of preparations to commit a felony.

10. The investigation diary, a copy of which was produced in court as an exhibit, shows that the appellant and another person were arrested on suspicion of preparing to commit robbery with violence. One does not need to be a handwriting expert to see that the allegation of the appellant having been found in possession of a homemade gun was a later addition. That bolsters the appellant's contention that the charges against him were a fabrication.

We are therefore satisfied that had the learned Judge's attention been drawn to this, he would definitely have come to a different conclusion. Consequently, we allow this appeal, quash the appellant's conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 12th day of February 2015

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR

