



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & ODEK, JJA)

CRIMINAL APPEAL NO.274 OF 2010

BETWEEN

NICHOLAS NJOROGI KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at

Nairobi (Lesiit & Ochieng, JJ) dated 15th July, 2010

in

H.C.C.R.A. NO.226 OF 2007)

JUDGMENT OF THE COURT

The appellant herein, **Nicholas Njoroge Kimani**, faced three counts in the lower court at Kiambu in that on 23rd July, 2006 at Kihara Police Post, Kiambu, jointly with others not before court while armed with iron bars and rungu robbed **APC Peter Njogu** of a firearm No.40099 with 25 rounds of ammunition and they used actual violence during the said robbery on **APC Njogu**.

In the second count, the appellant faced a charge of being in possession of a firearm No.40099 on 7th August, 2006 at Mahi Mahiu without due certificate. The third charge was that at the same place and time the appellant was found in possession of 21 rounds of ammunition without a firearm certificate.

After hearing eleven prosecution witnesses as well as the defence, the learned trial magistrate found the appellant guilty on all the 3 counts and sentenced him to suffer death on the first count and to serve ten years in prison for counts two and three. The learned trial magistrate ordered that the sentences be served concurrently, the order the High Court corrected by directing that the death sentence be served first while the prison terms remained suspended.

Being aggrieved by the decision of the lower court, the appellant appealed to the High Court (**Lesiit & Ochieng, JJ**) on grounds that included circumstantial evidence relied on by the trial court. That it was weak and that the appellant's identification was not positive. The learned

Judges' decision was, as the learned trial magistrate found, that identification was not positive but they concurred in the finding that circumstantial evidence centering on recent possession of the gun and ammunition, was sufficient to convict on all the three counts. Thus conviction and sentences were confirmed.

The appellant was further dissatisfied with that judgment and he filed the present appeal.

Mr. K. A. Nyachoti, learned counsel for the appellant, filed a supplementary memorandum of appeal with five grounds which globally formed the basis of his arguments. The appeal was opposed by **Ms M. Oundo**, Assistant Director of Public Prosecutions.

From the grounds of appeal which ranged from identification, reevaluation and fresh analysis of the evidence in the High Court, insufficient evidence and proof of recent possession, **Mr. Nyachoti** chose to argue the ground of recent possession only.

Counsel posited that there was no proof that the appellant was found in exclusive possession of the bag containing the firearm and ammunition said to have been robbed from the complainant **APC Njogu** (PW1) some fifteen days earlier. He advanced reasons that the appellant had been in company of about five other people in the cabin of the lorry which he allegedly ran from when it was stopped at a police road block and **PC Felix Ngumbi** (PW7), in company of other police officers, proceeded to search it. **Mr. Nyachoti** continued that even as it was claimed by the prosecution that members of the public, along with **CPL. Elias Opiyo** (PW8), gave chase of the appellant, none of those members of the public was presented to testify that during the chase, the appellant dropped the bag containing the gun and the ammunition. In essence counsel's position was that **CPL. Opiyo's** evidence was not supported by independent testimony from any member of the public present yet the appellant had denied being in exclusive possession of the gun and ammunition. Thus he neither committed the robbery with violence offence nor had the firearms without due certificates. To the appellant's side, the people who were in possession of the bag containing a gun and ammunition were the lorry crew, **Peter Chege** (PW4) and **Joshua Nyamai** (PW5).

In opposing the appeal **Ms Oundo** maintained that **Peter Chege** (PW4), **Joshua Nyamai** (PW5), **AP CPL Moses Onyango** (PW6) and **PC Felix Ngumbi** (PW7) gave direct evidence of seeing the appellant with the bag that contained the gun and ammunition on the material date, 15 days after **APC Njogu** was robbed of the same. That the two courts below made concurrent findings of fact on this issue of recent possession, and that should not be disturbed. She referred to Section 4 of the Penal Code defining recent possession concluding that it was not the number of witnesses that is obliged to prove a fact (Section 143 of the Evidence Act). A single credible witness could still do so. To her, the evidence before the trial court was sufficient to convict and calling a member of the public from the scene of arrest, was of no moment. And that the appellant's conduct of running away when the lorry he was in was stopped for search was one of a guilty mind.

In response **Mr. Nyachoti** argued that had the appellant to be convicted in the circumstances, it could be on possession of a gun and ammunition only

– not robbery with violence.

This being a second appeal our duty under **Section 361(1) of the Criminal Procedure Code** and as enunciated in many decisions of this Court, including the case of ***Njoroge vs Republic [1982] KLR 388*** is set out thus:

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the Court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

On this issue of recent possession of the gun and ammunition by the appellant, the lower court went over the evidence of the crew of the lorry in which the appellant had hiked a lift – **Peter**

Chege (PW4) and **Joshua Nyamai** (PW5). They had offered him a lift and he came on board with a bag. Then the learned magistrate focused on the evidence of police officers **AP CPL. Moses**

Onyango (PW6) and **PC Felix Ngumbi** (PW7) who stopped and searched the lorry in which the appellant was. He made to flee with his bag but he was chased and arrested. The bag contained the gun and ammunition in question. The learned magistrate then concluded:

“There is overwhelming evidence that the accused had the handbag that had the gun and ammunitions as well as a black mask. I find that the prosecution has established beyond any reasonable doubts that the accused person had the firearm and ammunitions without firearms certificate. The gun and the ammunitions the accused (was) found in possession of, were robbed of the APC Peter Weru Njogu on

23.7.06. The accused was found in their possession on

7/8/2006 ... 15 days after the robbery. This is an apt case for me to invoke the doctrine of recent possession and I find that he should have been one of the robbers.”

Thus on evidence before him, the learned trial magistrate found the fact of the appellant being in exclusive and recent possession of the subject exhibits proved.

When the appellant went before the High Court and **Mr. Ondieki** presented his appeal on grounds including recent possession, the learned judges reviewed the evidence before the lower court, as per all the witnesses referred to earlier, and delivered themselves thus:

“We have considered the rival arguments of counsels (sic). We do not agree with Mr. Ondieki that the issue of possession of the sub machine gun and the rounds of ammunition, that the evidence against the appellant is purely circumstantial evidence. There was direct evidence by four witnesses. That the appellant was in possession of the bag identified as exhibit 5, in which the submachine gun Exh.1 and 21 rounds of ammunitions Exh.2 were found.”

In conclusion:

“The evidence of PW4, 5, 6 and 7 is direct evidence that the appellant had possession of the paper bag in which the firearm and ammunitions were recovered. The evidence of these witnesses is not that of circumstantial nature but direct evidence of possession. we find that there was sufficient evidence to positively prove that the appellant was in actual possession of the firearm and ammunition, 15 days after they were stolen from the complainant.”

For our part we are similarly satisfied from the foregoing concurrent findings of fact by the two lower courts that the appellant was found in actual and exclusive possession of the gun and ammunition that **APC Njogu** (PW1) had recently been robbed of in accordance with Section 4 of the Penal Code which reads:

“Possession” –

(a) ***“be in possession of” or “have in possession” includes not only having in one’s own person possession, but also knowingly having anything in 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 or benefit of oneself or any other person.***

(b) ”

We are indeed satisfied that the High Court properly considered whether the appellant had been found in recent possession of the gun and ammunition.

The learned Judges appreciated the case of Isaac Nanga Kahiga v Republic

Cr.A.272 of 2005 where this Court held:

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, and secondly that the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof at the time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one to another.”

The learned Judges concluded that a gun and ammunition cannot easily move from one person to another. We agree. We are also clear in our minds that the said items could not have been in possession of either or some of the other

people in the lorry or specifically **Peter Chege** (PW4) or **Joshua Nyamai** (PW5)

– the lorry crew as **Mr. Nyachoti** suggested, as no evidence exists to make such a suggestion viable. Accordingly, the findings of fact by the two courts below were based on sound evidence. And rather than discharge the burden that fell on him upon being found in possession, that of explaining how he came about the recently stolen gun and ammunition, the appellant squandered the opportunity by a mere evasive denial. In the result we find that possessive, and exclusive possession of that, was effectively proved and so we do not find the basis to interfere with the conviction and sentences herein.

In the result, we dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 11th day of July, 2014

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO ODEK (PROF)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

jkc

DEPUTY REGISTRAR