



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU  
Criminal Appeal 367 of 2006**

**ROBERT BOB OKELLO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya**

**Kisumu (Warsame, J) dated 11<sup>th</sup> May, 2005**

**in**

**H.C.C.R.A. NO. 208 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant, *ROBERT BOB OKELLO* was arraigned before the Chief Magistrate's Court at Kisumu in *Criminal Case No. 78 of 2004* in which he was charged on the following two counts: -

**(i) *Being in possession of a Firearm contrary to section 21 (1) of the Firearms Act (Cap. 114 Laws of Kenya).***

**(ii) *Being in possession of ammunition contrary to section 4 (2) as read with section 4 (3) of the Firearms Act (Cap. 114 Laws of Kenya)***

The offences are alleged to have taken place on 8<sup>th</sup> November, 2003 at Manyatta Estate in Kisumu District. Although the appellant was arrested on same day, 8<sup>th</sup> November, 2003, he was not arraigned in court until 28<sup>th</sup> January, 2004. The explanation is that he was undergoing treatment in hospital for gun – shot wounds inflicted during his arrest.

The prosecution case was based on the evidence of two police officers PC Philemon Kemboi (PW1) and Cpl. Simeon Oloo (PW2). That evidence was that, acting on information received, they proceeded to the house of the appellant within Sije area. They knocked at the door but it was not opened. The police officers then broke into the house and found the appellant with his wife standing in the sitting room. The police officers handcuffed the appellant and then conducted a search. Suddenly the appellant grabbed a paper bag which was on the table and inside the paperbag he (appellant) removed a pistol and rushed to the door where PC Kemboi (PW1) was. The appellant aimed the pistol at PC Kemboi who took cover and moved aside. The appellant then ran out of the house with PC Kemboi in hot pursuit warning the appellant to surrender. The appellant would not surrender and so PC Kemboi started chasing him

shooting severally in the air but the appellant would not stop. PC Kemboi chased the appellant for about 300 metres upto a point where the appellant could not go any further. The appellant turned back and grabbed the muzzle of PC Kemboi's G3 rifle. The two struggled and at that point PC Kemboi decided to shoot the appellant who fell down as he dropped the pistol he had been holding. PC Kemboi reported the incident to his superiors who came to the scene and arrested the appellant. From the appellant's house, the police recovered two other rounds of ammunition. The appellant was subsequently charged.

When put to his defence, the appellant in his sworn evidence testified that on 7<sup>th</sup> November, 2003 at about 11.30 p.m. he and his companion were in a certain house in Sije, Manyatta area, taking liquor when police officers burst in and carried out a search. They recovered five litres of changaa and arrested the appellant. He was handcuffed and forced to carry the recovered changaa but he refused claiming that the liquor was not his. Bitter arguments ensued and in the process one of the police officers shot the appellant twice at the left hip around the waist. On the following day, the appellant found himself in hospital where he stayed for five months.

The learned Senior Resident Magistrate (Ms. W. B. Mokaya) considered the evidence before her and came to the conclusion that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on both counts. She proceeded to sentence the appellant to seven (7) years imprisonment on each count. The sentences were to run concurrently.

The appellant being aggrieved by the decision of the trial court preferred an appeal to the High Court of Kenya at Kisumu (Warsame J) who after re-evaluating the evidence held:

***“Having considered the matter in its entirety, I have no cause to interfere with the finding of fact that the appellant was found in possession of a home made gun with three modified home made ammunition capable of being used as dangerous weapon. I am satisfied that the evidence against the appellant is overwhelming and water tight and the prosecution has proved its case beyond reasonable doubt. The two prosecution witnesses were consistent and credible and their evidence cannot be termed as a concoction as there was no reason to make or create a fiction (sic) story which can lead to the shooting and subsequently conviction of the appellant. I am alive to the fact that the accused bears no responsibility in proving his innocence but when he was given an opportunity to make his defence, his attempts to exonerate himself miserably failed, I can only term his defence as a gimmick to hoodwink the Court. And in view of the watertight evidence presented by the prosecution, I am less inclined to believe his defence, as he made no attempts to call the many witnesses who were allegedly present when he was shot and arrested. He failed to call the owner of the home and the lady he was with at the time he was arrested. In short the appeal has no merit, therefore it must fail”.***

Let us point it out at this stage that some of the remarks made by the learned Judge in this passage are unfortunate. He appears to think that the appellant was under some legal duty to call witnesses in support of his defence and the failure to call those witnesses meant the appellant's defence had no basis. We know of no such legal requirement being placed on a person charged with a criminal offence.

Still pursuing his right of appeal to the highest court in the land, the appellant now comes before us by way of second and last appeal.

When this appeal came up for hearing before us on 12<sup>th</sup> June, 2007, we asked Mr. Musau the learned Senior Principal State Counsel whether he was supporting the conviction of the appellant. At first, Mr. Musau reminded us that as we were dealing with a second appeal only matters of law fell for consideration. But on further consideration, Mr. Musau agreed that the evidence tendered in court had nothing to do with the offence for which the appellant was charged and for that reason, he (Mr. Musau) conceded the appeal.

On the outset, we wish to point out that **section 21 (1)** of the Firearms Act, under which the appellant was charged in the first count provides:

***“21. (1) No person other than a registered firearms dealer shall convert into a firearm anything***

**which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through the barrel thereof.**

**(2) Any person who contravenes the provisions of this section shall be guilty of an offence and liable to imprisonment for a term of not less than seven but not exceeding fifteen years”.**

The marginal notes to **section 21** of the Firearms Act provides:

**“Provisions as to converting imitation firearms into firearms”.**

The evidence tendered in relation to that count was about unlawful possession of a firearm which is totally unrelated to that section. From the foregoing, it is clear that the appellant was charged under the wrong section as regards the first count. No issue arises from the second count but the totality of the evidence adduced in relation thereto must be considered.

We have considered the background to this appeal, the evidence on record and the written submissions by the appellant. It would appear that although the first appellate court appreciated its duty, we do not think it carried out that duty exhaustively. In the often cited case of ***Okeno v R*** [1972] EA 32 the predecessor of this Court stated:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.* [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424”.**

Did the first appellate court comply with the foregoing? We do not think so. If it had done so, we think, it would have found it unlikely that the appellant who, according to PC Kemboi, was handcuffed could grab a paper bag, open it up and remove a pistol, run for about 300 metres, turn round, hold the muzzle of PC Kemboi’s G3 rifle with one hand and at the same time holding a pistol with his other hand, and engage in the kind of struggle narrated by PC Kemboi which led to the shooting of the appellant.

In ***Ogeto v Republic*** [2004] 2 KLR 14 at page 17, this Court dealt with the duty of the first appellate court as set out in ***Okeno v R*** (supra) and proceeded to state as follows:

**“Nevertheless a court of appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision – *Chemagong v Republic* [1984] KLR 611, *Kiarie v Republic* [1984] KLR 739”.**

Having considered the issues raised in this appeal, we are of the view that had the first appellate court performed its duty properly it would have found that the trial magistrate misapprehended the evidence before her. In ***Ngui v Republic*** [1984] KLR 729 at page 730 this Court stated:

**“It is not enough for the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions. It is accordingly incumbent on this court to make its own evaluation of the evidence, so as to satisfy itself that no failure of justice has been occasioned by the defects in the first appellate court’s judgment”.**

This Court will interfere with concurrent findings of fact(s) where such findings are either based on no evidence at all or the findings are such that no reasonable tribunal basing itself on the evidence and the law could have made the findings; in other words the findings are perverse. We think that if the two

courts below had properly considered the circumstances under which PC Kemboi said the offences were committed, they would not have made the findings that they did make on the evidence.

In view of the foregoing and as Mr. Musau conceded the appeal, in our view properly so, we think that the appellant's conviction on the two counts cannot be allowed to stand. Consequently, this appeal is allowed, the conviction of the appellant on the two counts are quashed and the sentences are set aside. We order that the appellant be and is hereby set free forthwith unless he is otherwise lawfully held.

**Dated and delivered at Kisumu this 15<sup>th</sup> day of June, 2007.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR