REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)

CRIMINAL APPEAL NO. 216 OF 2004

BETWEEN

ABDI WARIO BURU ………………………………………………. APPELLANT

AND

REPUBLIC ……….…………………………………….…………. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos

(Lady Justice Wendo) dated 25th February, 2004 in

H.C.CR.A. NO. 36 OF 2003)

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JUDGMENT OF THE COURT

The appellant and another were convicted of the offence of preparation to commit a felony contrary to **section 308 (2)** of the Penal Code and each sentenced to 5 years imprisonment with hard labour. The appellant was the second accused in that count. The appellant was also convicted of the offence of being in possession of firearm without a firearm certificate in count IV and of being in possession of 9 rounds of ammunitions in count V without a firearm certificate and sentenced to 7 years imprisonment respectively.The sentences in the three counts were ordered to run concurrently. The appellant's appeal to the superior court was dismissed. He now appeals to this Court on three

grounds, namely:

> ***1. That the learned High Court Judge erred in law when she upheld the trial court decision and failed to appreciate that the evidence adduced against me was totally inconclusive in that:-***
>
> ***(a) I accounted in my defence how I was in (sic) the scene of my arrest.***
>
> ***(b) The recovered pistol and ammunitions were not proved to have been recovered in my possession as per law required.***
>
> ***(c) No one in particular is said to have handed over the said pistol and ammunition to***

police nor was the same dusted to prove that I was the last person to handle it.

2. That the High Court Judge erred in law and fact and in dismissing my appeal whereas the case for the prosecution was unproved.

3. That the court formed an unbalanced view of the case and reached a decision which was insupportable (sic) had been my defence duly put into accounts (sic).

On 24th September, 2001 at about 1 p.m. Gideon Mutungi Muli (PW2) (Gideon) was at his home at Kavumbi village, Masii when he saw a group of eight people walking along the road four of whom were carrying hand bags. Rose Kilonzo Mwongeli (PW5) (Rose) from the same village also saw the same people. The eight people were strangers and both Gideon and Rose reported to Solomon Mwololo Kimilu (Solomon), the area Assistant Chief, at different times. Solomon instructed a group of people to follow and intercept those strangers. The pursuers formed themselves into small groups and went out in search of the eight strangers. Gideon's group found the people who on seeing the group separated and took off in different directions. Gideon's group pursued the people and arrested two of them at about 6 p.m. The two people were handed over to Solomon who took them to Masii Police Station at 7.30 p.m. Those two people were the appellants' co-accused. Meanwhile as Julius Mali (PW6) (Julius) was walking to his home at Masii at about 7 p.m. he heard shouts from behind and when he turned he saw members of public chasing three people among them the appellant. He joined in the chase. The appellant stopped at a distance and threw down what appeared to be a pistol. A bullet fell from his jacket as he was running.

The appellant was arrested and interrogated. He said he was a Boran from Moyale but the members of the public suspected him to be a thief and beat him up. He was rescued by one Leonard Nzoka (PW7) (Leonard) and taken to Masii Police Station at about 9 p.m. The two bullets were also handed over to the police. David Korir (PW8) and Sgt. Mwangi (PW10) were taken to the area where the appellant was arrested. They searched the area and recovered a pistol loaded with 5 rounds of ammunition. They also recovered two bullets in the same place.

In his testimony at the trial the appellant explained that he lives at Eastleigh in Machakos Town, that on the material day he had gone to sell clothes at Masii market as he often did and that he was arrested at about 7.30 p.m. at the hotel where he had rented a room after failing to get public transport to Machakos. He denied that he was arrested outside Masii area and that he had the gun and ammunitions.

The trial magistrate believed the evidence of Julius, Leonard, P.C. Korir and Sgt. Mwangi and found the defence of the appellant unsustainable. He said in part:

"The second accused was not apprehended in actual possession at the second pistol (P Ex.2) its ammunitions (P Ex.3 (c). However, the evidence against him by Julius Mali (PW6) strongly and credibly shows that he threw down the items just prior to his apprehension. Indeed the items (P Ex.2) and (Ex 3 (c) were found by the police at the scene where they had been thrown. Also found at the scene were two bullets Ex. 3 (d). Two other bullets (P Ex. 3(b) had earlier been connected to the second accused and handed to the police. These extra bullets (P Ex. 3 (b) and (d) were all connected to the pistol (P Ex 2) as depicted in the report by the ballistic expert (i.e. P Ex 6).

The foregoing factors clearly prove that the second accused was in possession of the pistol (Ex 2) loaded with five rounds of ammunitions (P Ex 3 c) as well as additional rounds of ammunitions (P Ex 3 (b) and (d) which appear to have fallen down or thrown down after he had been cornered by the irate villagers".

The superior court reconsidered and re- evaluated the evidence adduced before the trial court and concluded:

"The defence of 2nd appellant was also considered. If he was a clothes dealer in Masii he would have been known there. In the light of evidence adduced by the prosecution that evidence is more believable than the 2nd appellants version of how he was arrested.

The evidence of the prosecution is cogent, consistent and uncontoverted and I do find that he lower court reached the right decision in convicting the 2 appellants of all the charges. The convictions are safe".

Mrs. Murungi, the learned Principal State Counsel does not support the conviction for the offence of preparation to commit a felony in the first count for the reason that, according to her, the charge is defective as the particular felony that the appellant intended to commit is not disclosed and further that the particulars of the charge disclosed an offence under section **308 (1)** of the Penal Code.

It is true that although the appellant was charged with the offence of preparation to commit a felony under section 308 (2) of the Penal Code the particulars of the charge stated that the appellant and others were:

"found armed with dangerous or offensive weapons namely berreta pistols, one home made gun and 16 ammunition in the circumstances that showed they were intending to commit a felony".

Those particulars are the ingredients of the offence of preparation to commit a felony under **section 308 (1)** of the Penal Code and not the ingredients of an offence of preparation to commit a felony under **section 308 (2)** of the Penal Code. The learned trial magistrate appreciated the defect in the charge but was of the opinion that a pistol or its imitation and rounds of ammunition are articles which may be used in connection with theft. He said in the relevant part:

"The said particulars are more consistent and suitable to an offence under section 308 (1) of the Penal Code rather than section 308 (2) which is herein prepared (sic). Nonetheless, a pistol real or imitated and its rounds of ammunitions are articles which may be used in the course of or in connection with theft".

Nevertheless the learned trial magistrate neither amended the charge nor convicted the appellant for the offence under section 308 (1) of the Penal Code. The two offences, that is under s**ection 308 (1)** and **308 (2**) are contained in Chapter XXIX of the Penal Code and by virtue of **section 187** of the Criminal Procedure Code the trial magistrate could have perfectly convicted the appellant of the offence under section 308 (1) of the Penal Code although he was not charged with it. As the High Court correctly said **in Muthiori v Republic** [1987] KLR 468 page 473 paragraph 1 following its decision in **Mwaura & Others v Republic [**1973] EA 373 a dangerous or offensive weapon is one intended solely for causing injury to the person and does not cover house breaking tools.

We respectfully agree with the learned Principal State Counsel that the charge in count I was incurably defective and that the learned magistrate erred in law in convicting the appellant for the offence under section 308 (2) when the particulars of the charge alleged the commission of a different offence and when, in addition, the evidence also proved the commission of an entirely different offence. Moreover, there was no evidence to show, as the particular of the charges alleged, that the appellant and others intended to commit a felony nor evidence from which such an inference would be properly drawn (see **Maina & 3 others v Republic [1986] KLR 301** at page 307 paragraph 15).

With regard to the offence of possession of the pistol and rounds of ammunition the appellant in essence states in his grounds of appeal that there was no sufficient evidence to support the finding of the two courts below that he was in possession of them.

This was a case which was dependent on the credibility of the prosecution witnesses. The trial court has greater advantage than an appellate court in assessing the credibility of witnesses. A first appellate court would not normally interfere with findings of the lower court based on credibility of witnesses unless it is shown that no reasonable tribunal could make such findings or that the trial court erred in law in making the findings (see R**epublic v Oyier** [1985] KLR 353).

Moreover, a second appellate court will not lightly disturb the concurrent findings of fact of the two courts below unless they cannot be supported by the evidence or unless based on misdirections or errors

of law **(see Omolo & 2 others v Republic [1991] KLR 328).**

In this case, the portions of both the judgment of the trial magistrate and the superior court quoted above show that the two courts below considered and evaluated the relevant evidence including the defence of the appellant.

There was evidence that the appellant was seen in broad daylight walking in the company of seven other persons in the area. There was evidence that all the eight persons were strangers in the area.

There was evidence that the villagers who were in several groups intercepted the strangers. There was also evidence that the appellant was chased and arrested in the bush late in the evening and that in the course of the chase the appellant dropped something resembling a pistol and that the area where the appellant was arrested was later searched by police and a pistol and two rounds of ammunition were recovered.

All that evidence was believed. The evidence of the appellant that he was an innocent trader and that he was arrested in the town and not in the bush for no apparent reason was disbelieved.

There were concurrent findings of fact by the two courts below regarding the circumstances under which the appellant was arrested and the pistol and rounds of ammunition recovered. There was evidence to support those findings which the two courts below found to be credible. On our part, we are satisfied that there are no grounds for interfering with the decision of the two courts below and that the appellant was properly convicted.

For those reasons, we allow the appeal against conviction in count I quash the conviction and set aside the sentence. The appeal against conviction and sentence in count IV and V is dismissed. Orders accordingly.

Dated and delivered at Nairobi this 16th day of December, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR