



REPUBLIC OF KENYA



KENYA LAW
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**Hamisi v Republic (Criminal Appeal E018 of 2023)
[2025] KEHC 1624 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E018 OF 2023
DR KAVEDZA, J
FEBRUARY 25, 2025**

BETWEEN

OMAR MOHAMED HAMISI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Kabuya I.M (S.P.M) on 15th November 2023 at Kibera Chief Magistrate's Court Case No. 928 of 2023 Republic vs Omar Mohamed Hamisi and 2 others)

JUDGMENT

1. The appellant Omar Mohamed Hamisi was charged and convicted of two counts of offenses. Preparation to commit a felony contrary to section 308(1) of the *Penal Code*, and being in possession of an imitation firearm contrary to section 34(1) of the *Firearm Act* Cap 114 of the Laws of Kenya. He was sentenced to seven (7) years imprisonment on both counts, and the sentences to run concurrently.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In the petition of appeal, he raised the following main grounds: that the prosecution failed to prove their case beyond reasonable doubt, and that the learned magistrate erred in law by failing to establish the mens rea of the felony to be committed.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution's case was as follows: PW1, Corporal Edward Ndungu, testified that on 2nd June 2023 at 11:20 p.m., while patrolling the Next Gen area in South C with PW2, they encountered a motorcycle, KMFV 849K, with two men standing next to it. When asked who they were, the appellant



- denied being thieves, while the other man attempted to flee. The second accused threatened to shoot him if he ran. The officers instructed both men to lie down for a search, but the appellant resisted and fell into a flower bed. PW2 apprehended him and found an imitation pistol that the appellant had attempted to conceal in the flower bed. The officers detained the men and called for reinforcements.
5. The appellant then claimed that an accomplice was delivering a parcel in a nearby flat. When reinforcements arrived, some officers remained with the detainees while others searched the flats. They arrested the accomplice and several other individuals in possession of cannabis sativa in the parking lot. In total, six individuals were arrested, including the appellant, and they were transported to Langata Police Station, where they were detained.
 6. PW2, PC Daniel Nganga, corroborated PW1's testimony. PW3, Corporal Tom Omondi, testified that on 3rd June 2023, he was instructed by the OCPD to investigate the arrests. Upon interrogating the suspects, he discovered that three of them lived in Majengo and had used the motorcycle. He prepared an inventory of the items seized and a letter to NTSA to determine the motorcycle's ownership, which was confirmed to be registered under Kanos Limited. He also prepared a report on the homemade gun, dated 4th August 2023, stating that the gun was capable of firing. The inventory, NTSA letter, and the gun report were produced in court. During cross-examination, PW3 acknowledged that he did not dust the guns for fingerprints and was unable to recover CCTV footage from the scene.
 7. The court was satisfied that the prosecution had established a prima facie case, thus, the appellants and the two co-accused persons were placed on their defense.
 8. DW1, the appellant, testified that on the material day, he was transporting a passenger to Next Gen Mall on his father's motorcycle, registration number KMFV 849G. After dropping the passenger off, police officers appeared from an apartment, and arrested him without explanation, and he denied the charges, including possession of a fake firearm. He claimed that some individuals were able to bribe their way out of custody.
 9. DW2, Simon Mwaura, the second accused, stated that on the same day at 8 p.m., he was waiting for a vehicle at the stage when he was arrested without cause and taken to Langata Police Station.
 10. DW3, Alphan Mugo, recalled being at Next Gen Mall on 2nd June 2023 with DW2. After realizing he had forgotten his pizza, he returned inside. Upon returning outside, he saw people lying on the ground with police officers pointing guns at them. He then went back inside to call a security guard and was arrested by a plainclothes officer when asked if he had rushed back inside. He was subsequently taken to Langata Police Station.
 11. The appeal was canvassed by way of written submissions by the parties which have been duly considered.
 12. The offence of preparation to commit a felony is provided under section 308 of the [Penal Code](#). It states:

“ Any person who, with intent to commit a felony or with knowledge that he is likely by his act to facilitate the commission of a felony, has in his possession or under his control any firearm, ammunition, or imitation firearm, or any explosive or other weapon or article, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding ten years.”
 13. The offence involves any act that demonstrates an intent to commit a criminal act. In this case, the appellants were found in possession of a homemade pistol, classified as a dangerous and offensive weapon under the [Penal Code](#). The possession of such a weapon is a clear indication of preparation for a violent crime, as it is commonly used to facilitate robberies or other felonies. In this case, the



appellant when asked what he was up to by police officers on patrol, tried to hide a homemade pistol in a nearby flower bed.

14. The evidence of mens rea, or the intention to commit a felony, is evident in the appellant's actions and statements. The appellant was found with an imitation pistol, which he tried to conceal when confronted by the police, indicating a conscious awareness of the weapon's potential use in a crime. Furthermore, his attempt to escape and the subsequent admission that he had an accomplice delivering a parcel in a nearby flat suggest he was preparing to commit a criminal act. This conduct reflects an intention to engage in unlawful activities, fulfilling the mens rea requirement for preparation to commit a felony.
15. This act satisfies the ingredients of the offense in Count I. The appellant's conviction in Count I was therefore proper and is upheld.
16. In count II, the appellant was convicted for the offence of being in possession of an imitation firearm contrary to section 34(1) of the *Firearm Act* Cap 114 of the Laws of Kenya.

“ Any person who, without being the holder of a firearms certificate, has in his possession or under his control any firearm, ammunition or other weapon, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding seven years.”
17. The evidence of possession of an imitation of a firearm is provided by PW1 and PW2. PW1, Corporal Edward Ndungu, testified that on 2nd June 2023, he and PW2 encountered the appellant and another man next to a motorcycle. During the search, the appellant attempted to hide an imitation pistol in a flower bed. PW2, PC Daniel Nganga, corroborated this by stating that he managed to recover the imitation pistol from the flower bed where the appellant had tried to conceal it. This evidence of the appellant's direct possession of the imitation pistol is critical to the charges against him, as it shows his attempt to hide the weapon when confronted by the police officers. Additionally, the report prepared by PW3 confirmed that the imitation pistol was capable of firing.
18. The act of attempting to discard the aforementioned firearm also satisfied the elements in the offense of being in possession of an imitation firearm under Count II of the appellant's charges. The prosecution proved actual possession.
19. The appellant's possession in count II was therefore proper and is upheld.
20. On sentence, the appellant was sentenced to serve seven years' imprisonment for each count, and the sentences to run concurrently. During sentencing, the court considered the pre-sentence report and exercised discretion. The sentence imposed was also legal and within the statutory confines. Subsequently, I see no reason to interfere with the sentence.
21. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent



Appellant – present

Achode – court Assistant

