



**Mamo & 3 others v Republic (Criminal Appeal E025 of 2023)  
[2024] KEHC 3579 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E025 OF 2023  
JN NJAGI, J  
MARCH 20, 2024**

**BETWEEN**

**DIKA MAMO ..... 1<sup>ST</sup> APPELLANT  
ABUDO GONOBA ..... 2<sup>ND</sup> APPELLANT  
ELEMA GONOBA ..... 3<sup>RD</sup> APPELLANT  
ABDUB GUFU ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. Christine Wekesa - SPM in Marsabit S.P.M's Court MCCR Case E337 of 2021 delivered on 18/10/2023)*

**JUDGMENT**

1. The Appellants were convicted in count 1 for the offence of being in possession of firearms without holding a firearms certificate contrary to section 4A (1) (a) of the firearms Act, 2014. The particulars of the offence were that on the 25<sup>th</sup> June 2021 at Manyatta Gabra Scheme in Jaldesa location within Marsabit County without reasonable excuse they were found in of firearms namely AK 47 Serial No. R940308, 2 G3 rifles serial No.A3611427 and FMP 301986 respectively in circumstances which raised reasonable presumption that the said firearms were intended to be used in a manner prejudicial to public order, without firearms certificate.
2. The appellants were also convicted of count 2 for the offence of being in possession of ammunition without holding a firearms certificate contrary to section 4 (1) (2) (a) as read with section 3(a) of the firearms Act, 2014. The particulars of the offence were on the same day, time and place as in count 1 without reasonable excuse they were found in possession of 26 rounds of ammunition of 7.62 x 39mm special, 20 rounds of ammunition of 7.62 39mm special and 20 rounds of ammunition of 7.62 x 39mm



special respectively in circumstances which raised reasonable presumption that the said ammunition were intended to be used in a manner prejudicial to public order, without firearms certificate.

3. The trial magistrate sentenced the appellants as follows:

“ the accused persons are sentenced to serve imprisonment for a period of four years.”

4. The appellants were aggrieved by the conviction and sentence and lodged the instant appeal. The grounds of appeal are that:

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### **Case for prosecution**

5. The prosecution called 4 witnesses in the case. PW1, Ali Jirmo, is the chief of Jaldesa location. His evidence was that on the 24/7/2021 he was on the way home from Marsabit town on a motor cycle when he found an old man called Wario Bukicha who told him that some people were restraining him from going home. That as he talked to him, the 2<sup>nd</sup> appellant called Abudo emerged from the bush while carrying an AK 47 rifle. He pointed it him, the chief. He noted that the 2<sup>nd</sup> appellant was drunk and he grabbed him. The gun fell down. The 3<sup>rd</sup> appellant called Elema went to the place and took the gun. He ran away with it. The people left him. He, PW1 went and reported at the police station. He went back with policemen and found the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants. They were arrested and taken to the police station. They did not have the gun when they were arrested. He was not there when the guns were recovered.
6. It was the evidence of PC Samuel Rugut PW2 of Marsabit police station that he took over investigations from PC Lorio in a case where the chief PW1 was complaining he had been confronted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants. That the 2<sup>nd</sup> appellant went to his home and came with a gun and fired at him and missed him. That the 2<sup>nd</sup> appellant admitted that he was in possession of a gun. He led them to Gabra scheme. They looked for the gun but they did not get it. That as they interrogated the 2<sup>nd</sup> appellant, the 1<sup>st</sup> and 5<sup>th</sup> appellants emerged from the bush near where they were interrogating the 2<sup>nd</sup> appellant. They arrested them. The 1<sup>st</sup> and 5<sup>th</sup> appellants led them to the bush where they had emerged from. They found 3 rifles, one of which was an AK 47 and the other two were G3 rifles. They were loaded with rounds of ammunition. They took them to the police station. An inventory was prepared. The matter was taken over by DCI personnel.
7. It was the evidence of PC Duncan Wachira PW4 that he took over the case from PC Rugut on 26/6/2021. He charged the appellants with the offences. He prepared an exhibit memo and sent the exhibits to the ballistics expert, CI Chomba for examination. During the hearing of the case in court he produced the exhibit memo, the 3 rifles and the respective rounds of ammunition as exhibits.
8. CI Chomba, PW3, testified that he examined the three rifles and the respective rounds of ammunition and concluded that the same were firearms and rounds of ammunition as defined in the *Firearms Act*, 2014. He prepared a report to that end. He produced the report in court es exhibit, P.EXHT.10.

### **Defence Case**

9. When placed to his defence the 1<sup>st</sup> appellant stated in a sworn statement that he does not know anything about the exhibits.
10. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants stated in their respective sworn statements that they were together when they were arrested. That there were people who had brought a cow to their manyatta. That as they



argued over the cow policemen arrived and arrested them. They were taken to the police station and accused of being found in possession of guns. They denied. They were charged.

11. The 5<sup>th</sup> appellant stated that he went to his manyatta on the material day at 4pm. He saw the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants being arrested. He was arrested on the following day. He denied that he was found in possession of guns and rounds of ammunition.

### **Submissions**

12. The appellants submitted that the prosecution failed to prove their case beyond reasonable doubt. That the evidence of the Investigating Officer PW4 indicated that it is the 1<sup>st</sup> appellant who led policemen to where the guns were recovered. They wondered why the other four were charged with the offence.
13. It was submitted that the appellants were not found in physical possession of the exhibits. That there was no evidence that they had knowledge of their presence in the thicket.
14. The appellants submitted that the guns were not dusted for finger prints to determine whether the appellants had handled them.
15. The appellants submitted that the prosecution failed to call Wako Wario Bukichan as a witness in the case. That failure to do so should invite an inference that it was adverse to the prosecution case.
16. It was submitted that PC Ragut PW2 stated in his evidence that the 2<sup>nd</sup> accused fired at the chief PW1 and missed him while the chief said that the 2<sup>nd</sup> appellant only pointed the gun at him. That this showed that the charges were a frame up.
17. It was submitted that the trial court down looked the defences of the appellants without giving cogent reasons.
18. The prosecution Counsel on the other hand submitted that the 1<sup>st</sup> appellant was found in possession of the firearms because he is the one who led the police to where the firearms were.
19. It was submitted that the chief pw1 saw the 2<sup>nd</sup> appellant with a rifle and identified it. That the 3<sup>rd</sup> appellant ran away with the same rifle. That the 1<sup>st</sup> appellant led the police to where the same rifle was hidden. The prosecution counsel cited the case of Alex Mathenge Gathoni & another v Republic (2020) eKLR where the court noted that:

“ more pertinent to the present circumstances is part (a) of this section: I understand it to say that possession may be actual or constructive; it is actual when one is in action control or custody of a thing but it is constructive when though not in actual or active possession or custody of a person, the thing is either in the custody or possession of another person or at a particular place but, somehow, subject to the control of the accused.”

20. It was submitted that the conviction of the 4<sup>th</sup> and 5<sup>th</sup> appellants was not safe as there was no evidence linking them to the firearms. The prosecution conceded to their appeal. He however urged the court to uphold the conviction on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

### **Analysis and Determination**

21. The duty of a first Appellate Court was stated by the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 to be as follows:

“ 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 vs. Republic (1957) EA. (336) and the appellate



court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

22. Similarly in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the same Court stated thus;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.

23. The trial magistrate in finding the appellants guilty of the offences stated that the evidence on record had put the appellants at the scene of the incident. That the 3<sup>rd</sup> appellant was said to have grabbed the firearm and ran away with it. That this was the same scenario with the 1<sup>st</sup> and 5<sup>th</sup> accused persons. That the 2<sup>nd</sup> appellant took the policeman where the 1<sup>st</sup> and 5<sup>th</sup> appellants were found. That the two emerged from the bush and the 1<sup>st</sup> appellant took the policemen to where they had emerged from and three firearms were recovered. That the actions of the appellants demonstrated that they had knowledge and consent of the existence of the firearms. That all of them were together and hence it was deemed that the firearms were in their possession and custody of each one of them.

24. It is the duty of this court to interrogate whether the findings of the trial court were correct.

The Appellants were charged with possession of firearms and ammunition without licence.

Section 4 of the Penal Code defines possession as;

- (a) "be in possession of" or "have in possession" includes not only having in one's own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;
- (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed taken to be in the custody and possession of each and all of them.

25. In *Daniel Dena Mwangi & 3 others v Republic* [2021] eKLR, Nyakundi J. cited the Stephen's Digest of the Criminal Law where possession is defined as -

"A moveable thing said to be in the possession of a person when he is situated with respect to it, that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances as such that he may be presumed to intend to do so in the case of need".



Further in Hussein V R (1980) KLR 139 the court of Appeal stated that,

“in this definition on possession. It does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that a possession must have such access to and physical control over the thing that he is in a possession to deal with it as an owner could to the exclusion of strangers”.

26. The definition connotes that there is actual possession and constructive possession. The question is whether the appellants had either of these in relation to the recovered guns.
27. The appellants were not found in actual or physical custody and control of the guns. In that case theirs can only have been constructive possession. The question then is whether there was evidence to prove constructive possession.
28. The trial court relied on circumstantial evidence surrounding the recovery of the guns to find that the appellants were linked to the guns. It is trite that circumstantial evidence has to unerringly point to the accused as the person who committed the offence to the exclusion of anyone else and the evidence cannot be explained by any other hypothesis other than that of guilt.
29. In his evidence in court the chief PW1 identified one of the guns that were before the court and said that it is the one he saw with the 2<sup>nd</sup> appellant. However, he did not explain why he thought it was the one. He did not identify any particular marks on it to prove that it is the one. There was thus no evidence that the gun the chief saw the 2<sup>nd</sup> appellant with was before the court.
30. The 1<sup>st</sup> appellant was said to have led policemen to the area where the guns were recovered. That the 1<sup>st</sup> and 5<sup>th</sup> appellants emerged from the bush and the 1<sup>st</sup> appellant led them to the place the two had emerged from and they recovered the 3 firearms and the rounds of ammunition.
31. The evidence is therefore that the 2<sup>nd</sup> appellant admitted to possession of a gun. That he led the police to where the guns were hidden but they could not get them. That the 1<sup>st</sup> appellant led the police to where the guns were recovered.
32. The evidence is therefore one of admission leading to discovery. Evidence on admission leading to discovery requires to be taken with a lot of caution as it can be prone to abuse. The evidence requires to be corroborated by some other material evidence before it can form the basis of a conviction. In the case of Republic Vs. Ahmad Mohamed & Said Musaji Supreme Court Case No. 29 of 2019, the Court dealt with evidence leading to discovery and held that though such evidence is admissible in evidence, it cannot found a conviction unless it is corroborated by other evidence.
33. In this case there was no evidence to corroborate the evidence that the appellants led the police to where the guns were recovered. It seems that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were not at the scene of recovery when the guns were found. The circumstantial evidence did not prove beyond reasonable doubt that the appellants were found with the guns and the ammunition.
34. The upshot is that the convictions on the appellants were not safe. I accordingly quash the convictions and set aside the sentences imposed on them. I order that the appellants be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20<sup>TH</sup> DAY OF MARCH 2024**

**J. N. NJAGI**

**JUDGE**



In the presence of:

Mr. Ngigi for Respondent

Appellants – appearing in person

Court Assistant – Jarso

14 days R/A.

