



REPUBLIC OF KENYA



**Naibei v Republic (Criminal Appeal E020 of 2022)
[2024] KEHC 4408 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E020 OF 2022
REA OUGO, J
APRIL 24, 2024**

BETWEEN

LEONARD KIBOI NAIBEI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of Hon G. Adhiambo, PM dated 15th February 2022 in Criminal Case No. 064 of 2021 at the Magistrate's Court at Kimilili)

JUDGMENT

1. The appellant, Leonard Kiboi Naibei, was charged with four counts:

Count I: Possession Of A Specified Firearm Without A Firearm Certificate Contrary To Section 4 A (1) (a) Of The [Firearm Act](#) Laws Of Kenya.

The particulars were that on 11th March 2021 at Namorio Area in Mt. Elgon Sub-County within Bungoma County, he was unlawfully found in possession of an AK-47 assault rifle S/NO. AX2697 (receiver cover) and S/NO, 4568 (bolt carrier) without a firearm certificate.

Count Ii: Possession Of Ammunition Without A Firearm Certificate Contrary To Section 4 (2) (a) As Read With Section 4 (3) (a) Of The [Firearm Act](#) Laws Of Kenya.

The particulars were that on 11th March 2021 at Namorio Area in Mt. Elgon Sub-County within Bungoma County, he was unlawfully found in possession of thirteen (13) rounds of ammunition without a firearm certificate.

Count Iii: Preparation To Commit Felony Contrary To Section 308 (1) Of The [Penal Code](#).

The particulars were that on 11th March 2021 at Namorio Area in Mt. Elgon Sub-County within Bungoma County, he was found armed with a dangerous weapon namely AK-47 in circumstances that indicated that he was so armed with the intent to commit a felony.



Count Iv: Possession Of Cannabis Sativa (bhang) Contrary To Section 3 (1) As Read With Section 3 (2) Of The Psychotropic Substances Act, No. 4 Of 1994.

The particulars were that on 11th March 2021 at Kapsokwony Police Station report office and inquiries office in Mt. Elgon Sub-County within Bungoma County, he was found being in possession of cannabis sativa (bhang) wits of approximately 200 gms of street value Kshs 300.

2. The prosecution called six (6) witnesses in support of its case against the accused. No. 255806 PC Mrei Cornelius (Pw1), worked undercover to meet with the appellant. The officers who were present during the arrest were No. 118579 Gariel Ndungu (Pw3), No. 78205 PC Martin Mutunge (Pw4) and No. 61732 Corporal Dominic Augustine Muthika (Pw5). Pw5 was the investigating officer. No. 231845 SSP Florence Karani (Pw2) was the ballistic expert and the government analyst was Jane Wabulofu (Pw6). The appellant testified as Dw1 and called one witness, Andrew Kiptalam (Dw2), in his defence. He was convicted and sentenced to serve 10 years imprisonment; 12 months imprisonment; 12 months imprisonment; and pay a fine of Kshs 2,000/- in default to be imprisoned for 30 days in respect to Count I, Count II, Count III and Count IV respectively. The imprisonment term was to run consecutively.
3. The appellant is dissatisfied with the judgment of the trial court and has filed a petition of appeal on the following grounds:
 1. That I pleaded not guilty to the said charges.
 2. That the magistrate erred in law and fact in convicting the appellant based on a flawed charge sheet.
 3. That there was no OB No. which showed where the matter originated.
 4. That the trial magistrate was biased in favouring the prosecution when he made his decision.
 5. That there was misinterpretation of the law when the trial court was analysing the evidence on record.
 6. That the trial magistrate arrived at a decision based on evidence that were not dusted for fingerprints.
 7. That I wish to raise more grounds of mitigation in support of this appeal.
4. As a first appellate court, this court has to evaluate the evidence afresh and make its conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. (See *Okeno v Republic* [1972] E.A 32). The evidence from the subordinate court was as follows:
5. (Pw1) testified as follows that; he is currently attached at Bungoma South at the DCI's office but was previously working at Kapsokwony police station. On 4/3/2021 he was rung by an informant, who was a person known to him. The informant told him that he knew the appellant who had offered to sell him a gun but referred the appellant to Pw1 who posed as a buyer. Pw1 later called the informant and told him to ask the appellant how much he was selling the gun for and he was told that it was going for Kshs 85,000/-. The informant then sent Pw1 the phone number of the appellant, 0112xxx186. Pw1 concealed his identity and rang the appellant with the phone number 0741xxx912 which was not registered in his name. He called the appellant and they negotiated the price of the gun to Kshs 80,000/-. The appellant told him that the gun was an AK47 that could be folded. They agreed to meet on 11/3/2020 at 7:00 p.m. in Waruono area. Pw1 informed his boss, OCS Kapsokwony, Chief Inspector Okoth who referred him to Mt. Elgon Superintendent, Bukari.



6. Pw1 noted that the appellant arrived before him and on the way, he saw motorcycle registration number KMFA 938Q. The appellant told him to meet him near the plot that was next to the water pump. He reached close to a home and called the appellant who was standing outside the compound. He met the appellant at 8:00 p.m. and was with him until 9:00 p.m. The appellant moved to where he was and the nozzle of the gun was protruding from his jacket. Pw1 asked the appellant to confirm he was Leonard and he answered in the affirmative. They entered the house where they found 2 women and 2 children and asked the appellant if they should finish their business outside.
7. Pw3, Pw4 and Pw5 had also proceeded to the scene so that they could assist in the recovery of the AK47 Rifle. Pw3 and Pw4 testified that they saw the motorcycle registration number KMFA 938Q on their way to the agreed spot.
8. Pw1 knew that his team was approaching. The plan was that some police officers would be at the bush while others behind the house. They agreed that when the appellant is close to Pw1, he should flash the light of the torch. Pw1 did so whereupon the appellant saw some police officers, he was scared and tried to escape. As he tried to escape Pw1 grabbed him and forced him to the ground. While he was lying on the ground facing up. Pw1 told him that he was a police officer and that he was under arrest. Pw1 removed the jacket that he was wearing, pulled the sling of the gun from his hand and took precautionary safety measures. He testified that he found 12 rounds of ammunition in the magazine and that 1 round had been lodged in the chamber and was ready for firing. Pw1 testified that he saw the appellant well as there was a lamp that was on in the house. The appellant admitted that he was not licensed to handle the gun.
9. Pw3 testified that he was at the scene the moonlight was bright and he saw Pw1 talking to the appellant. Pw3 saw the light flash from Pw3's torch giving them the signal to join in. He then saw the appellant try to escape before Pw1 held him to the ground. They handcuffed the appellant. Pw4 and Pw5 who were also at the scene testified that the appellant was in the company of another man who managed to escape. Pw5 saw Pw1 pin the appellant down. Pw4 testified that they fired some shots as they were not sure whether the person who escaped was armed. Pw1 and Pw3 rode to the station the motorcycle that was by the roadside.
10. Pw1 testified that when they arrived at the police station bhang was found in the pocket of his trouser. Pw3 testified that the bhang was found in his pocket. Pw4 testified that after a thorough search of him in the jacket that he was wearing, cannabis sativa was found in one of the pockets. Pw5 testified that bhang was found on the right-side pocket of his trousers.
11. Pw6, the government analyst testified that she is a graduate of Moi University with a BSc in chemistry and has worked in the Kisumu Branch for over 8 years. On 5/5/2021 she received an exhibit memo from DCI Mt Elgon. It was accompanied by an extra-large plain khaki envelope with OB No. 25/11/03/2021 with the name of the appellant. It contained loose leaves and seeds wrapped in a polythene. The government chemist was asked to ascertain whether it was cannabis sativa. Pw6 did the analysis and found that the loose leaves examined were cannabis which is included in the first schedule of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act 1994](#).
12. The ballistic expert, Pw2 testified that she examines guns and other weapons. She has taken various courses one of them being a Forensic course at the DCIO Training Collage. She did Forensics to Criminal Investigations at Ribak University in Khartoum, Sudan. She has also done an Armourous course at Kenya Police Technical Collage and a shooting reconstruction course at the S.S.I University Florida. She also has a BSc in Biochemistry from Kenyatta University. She testified that on 16/3/2021, there was an exhibit remitted at the ballistic laboratory by No. 5062 Sergeant Paul Chebet. The exhibits were 1 AK-47 assault rifle with a serial no. AX 2697 on the receiver cover and serial no. 4568 was



on the bolt carrier, the exhibit was marked as A. The second exhibit was one magazine marked B. The third exhibit was 13 rounds of ammunition marked as C1-C13. Pw2 examined the exhibits and her findings were that exhibit A is an AK-47 rifle in calibre 7.62mm and designed to chamber and fire rounds of ammunition in calibre 7.62x39mm such as exhibit C1 to C13. The exhibit was in fair physical and mechanical condition and was also complete in its component parts and serviceable. The exhibit forearm was successfully test-fired by use of three rounds of ammunition picked at random from exhibits C1-C3. She recovered 3 cartridge cases marked TC1-TC3 and conducted a comparative microscopic examination of TC1-TC3 in conjunction with equivalent calibre ammunition fired cartridge cases submitted in ballistic laboratory of unresolved cases. She concluded that exhibit A was used in an attempted robbery with violence incident as per exhibits submitted by DCI Cheptais vide OB NO. 20/7/3/2021 laboratory reference number 122/2021. She explained that sufficient matching firing pin identification markings and sufficient matching breech face markings formed the basis of her opinion. Exhibit A and C1 to C13 were firearm and ammunition respectively as defined in the [Firearms Act](#) Cap 114, Laws of Kenya.

13. The appellant in his defence testified that he was at his brother-in-law's house taking supper at around 8:00 p.m. When the police arrived, his brother-in-law escaped. He testified that in 2014, his brother-in-law, Chemosis was wanted for having a similar firearm. In his testimony, he questioned why other people who were at the scene were not called as witnesses and why the informant was also not availed. He testified that he had a land dispute with the informant and was therefore framed. He told the subordinate court that the alleged jacket with bhang did not belong to him.
14. Dw2 testified that they had requested the appellant to come home to help with ploughing. When the appellant got home, he went to check on his brother-in-law. Dw2 testified that at night, he heard the sound of gunshots coming from the home where the appellant had visited. He testified that they bought land in 2013 but the occupants of the land refused to leave. They made a report vide O/B 17/10/6/2001. The owner of the home in 2020 after obtaining a title deed wanted to attack them.

Submissions

15. The appellant in his submissions argues that the evidence on his arrest, search and recovery was not clear. The prosecution case was based on visual identification and the incident took place at 8:25 p.m. The prosecution failed to avail the alleged communication between the informant and the appellant. The prosecution also failed to tender evidence of the phone records of 01112xxx186 purportedly used by the appellant and 0741xxx912 used by Pw1. He also questioned why the prosecution did not call the witnesses at the scene. He argues that there was a possibility the appellant was mistakenly identified. He also faulted the investigation officer for not conducting proper investigations. He submits that had proper investigations been conducted, the prosecution would have established who hired the motorcycle and whether there was any nexus with the appellant. He testified that the informant did not give a description of the perpetrator and therefore it was not possible for Pw1 to know exactly who he was meeting.
16. He contends that there were contradictions in the evidence of Pw1 and Pw4 regarding where the appellant had kept the gun at the time of the arrest. He also testified that some of the prosecution witnesses testified cannabis sativa was found in the pocket of his trousers while others testified that it was in the pocket of his jacket. He submits that he was arrested owing to a grudge concerning a land dispute and the OB report was produced by Dw2. He also questions how the DNA samples were collected as Pw5 testified that DNA was done on the jacket. He submits that the prosecution did not prove their case to the required standard.



17. The respondent submits that the appellant was arrested at the scene of the crime and that his case couldn't have been that of mistaken identity. In any event, Pw1 was in close proximity with the appellant and had enough time to identify him. There was also light from the moon and the other officers had shorn their torches. He was found to be in possession of a firearm, 13 rounds of ammunition in the magazine and 1 in the chamber. Testimonies of Pw1, Pw3, Pw4 and Pw5 are corroborative of what transpired that night. The prosecution brought out all the ingredients of the offences in relation to counts I, II and IV.
18. Pw1 posed as a purchaser and the appellant was willing to sell him the firearm with the knowledge that he was not licenced. They also argue that the fact that one bullet was already lodged in the chamber was sufficient evidence that the appellant was preparing to commit a felony. (See *Manuek Legasiani & 3 others v Republic* (2000) eKLR). It was also argued out that the trial magistrate correctly held that the inconsistency as to where the bhang was found was not fatal.
19. On sentence, the respondent submitted that the sentence meted out by the trial magistrate was lenient considering that the appellant refused to give his mitigation despite being afforded the opportunity. They therefore urged the court to dismiss the appeal.

Analysis And Determination

20. Upon considering the appeal, submissions and the evidence on record, the primary issue for determination is whether the prosecution proved all the charges levelled against the appellant to the required standard, beyond reasonable doubt.
21. On of the issues raised by the appellant was whether he was positively identified as the perpetrator. He submits that the prosecution ought to have availed the communication between his alleged phone number and that of Pw1. He also argued that the other people in the house ought to have been called as witnesses.
22. It is not in dispute that the events leading to the arrest of the appellant took place at night. It is trite that evidence of visual identification should always be approached with great care and caution (see *Waitbaka Chege v R* {1979} KLR 271). In *R v Turnbull & Others* (1976) 3 ALL ER 549, the court considered the factors that ought to be considered for positive identification:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
23. Pw1 testified that he had been in communication with the appellant before the material day. They spoke on the phone and agreed to meet on the material day. Pw1 upon arriving called the appellant who asked Pw1 to meet him near the plot that was next to the water pump. When Pw1 met with the appellant he asked him if he was ‘Leonard’ and he answered in the affirmative. The appellant and Pw1 entered a house that had a lamp and Pw1 was able to clearly see the appellant. They proceeded outside



where Pw1 shone his torch and saw the appellant. The appellant was arrested at the scene after Pw1 signalled other police officers. Pw1, Pw3, Pw4 and Pw5 caught the appellant red-handed with a gun and rounds of ammunition in his possession and given the circumstances, his identification cannot be questioned. Even without any evidence of the DNA from the jacket and the dusting of fingerprints, all evidence points to the fact that the appellant was arrested at the scene of crime and there was no room for mistaken identity.

24. On count I, section 4A of the [Firearms Act](#) provides as follows:

4. A Offences relating to specified firearms

1) Notwithstanding section 4, any person who—

(a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or

(b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take, possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence under this Act and is liable to imprisonment for life.

(2) For the purposes of this section, “specified firearm” means any of the following firearms

—

(a) AK 47;

25. Pw1 testified that when he met the appellant, he wore a jacket and the nozzle of a gun was protruding from out of his jacket. Pw1 signalled Pw3, Pw4 and Pw5 who were hiding in the bushes and behind the house. The appellant was arrested immediately at the scene. Pw1, Pw3, Pw4 and Pw5 who were involved in the operation testified that the appellant had a gun. Pw2 testified that the exhibit marked ‘A’ was an AK 47 rifle, in calibre 7.62mm, designed to chamber and fire rounds of ammunition. Pw1, Pw3, Pw4 and Pw5 all testified that the appellant was found in possession of the AK 47 firearm. Pw1 further testified that the appellant did not have a licence to handle the gun. The trial court cannot be faulted for finding that the prosecution had laid down sufficient evidence to prove their case with respect to count I.

26. On the second, count the appellant is charged with the offence of being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) (a) of the [Firearm Act](#). The relevant sections provide as follows:

“2) If any person—

(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or

(b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to this Act, be guilty of an offence.



- (3) Any person who is convicted of an offence under subsection (2) shall—
- (a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years”

27. There was further evidence by Pw1 that after he arrested the appellant, he found in his possession 12 rounds of ammunition in the magazine and that 1 round had been lodged in the chamber. This evidence was corroborated by Pw3, Pw4 and Pw5 who were at the scene and the evidence of the ballistic expert. According to the ballistic report, exhibits C1-C13 were 13 rounds of ammunition in calibre 7.62x39mm, each one was live and 3 rounds were picked at random which were successfully test-fired in the AK 47 rifle. In my view, the prosecution proved the offence under the second count.
28. The whole operation was set for the appellant to sell the firearm and 13 rounds of ammunition to Pw2. Section 308(1) of the *Penal Code* provides thus;
- “Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”
29. The Court of Appeal in *Manuel Legasiani & 3 others v Republic* [2000] eKLR defined the offence as follows;
- “The word 'Preparation' is not a term of art. In its ordinary meaning it means “the act or an instance of preparing” or “the process of being prepared”. This is the meaning ascribed to the word “Preparation” in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code.”
30. The appellant had made steps to sell the AK47 rifle to Pw1 although he was not a firearms dealer. He had negotiated the price for the rifle and set up a meeting with the intent of selling the rifle. Section 12 1(a) as read with section 12 (2) of the *Firearms Act* prohibits any person from selling any firearm or ammunition unless he is registered under this Act as a firearms dealer and the penalty for the offence would be a term of not less than five, but not exceeding ten years. In this case, the prosecution evidence is clear that he was not licenced to hold the rifle and the 13 rounds of ammunition and neither was he a firearms dealer. The appellant was therefore rightfully convicted of the offence of preparation to commit a felony contrary to section 308 (1) of the *Penal Code*.
31. Pw1, Pw3, Pw4 and Pw5 all testified that after the appellant’s arrest, and while at the police station, the appellant was found with a substance inside a polythene paper believed to be bhang. The substance was sent to the government chemist for further analysis. Pw6 examined the loose leaves and found them to be cannabis which is included on the first schedule of the *Narcotic Drugs and Psychotropic Substances (Control)*. However, the appellant in his appeal argues that there were contradictions in regards to whether it was found in the pocket of his jacket or trousers. Pw1 and Pw4 testified that the substance was found in the pocket of his jacket while the investigating officer testified that it was found in the pocket of his trousers. However, I find that such a contradiction was not so material as to vitiate the conviction and therefore the offence was proved.



32. The appellant's defence was that he was being framed by his brother-in-law due to a land dispute. He denied committing the offence and relied on the testimony of Dw2 who testified to the existing land dispute. I have considered the evidence of the appellant; however, the prosecution case was watertight. Pw1 testified that the appellant had the AK-47 inside his jacket. He was found arrested at the scene and also found with 13 rounds of ammunition as well as cannabis sativa. Before his arrest, he had also been in direct communication with Pw2 and therefore he could not have been framed.
33. I have considered the sentence meted out by the trial court as against the conviction and I find them to be lenient considering the gravity of the offences committed by the appellant. The trial court considered his mitigation and that he was a first offender before rendering the sentence. I therefore see no reason to interfere with the subordinate court's ruling on the sentence.
34. In the end, having considered all factors and the evidence on record, this court affirms the appellant's conviction and sentence. The Appeal lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL 2024

R.E. OUGO

JUDGE

In the presence of:

Appellant in person – Present

Miss Matere -For the Respondent

Wilkister -C/A

