IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, MWILU & M'INOTI, JJ.A.

CRIMINAL APPEAL NO. 588 OF 2010

BETWEEN

ABDI ALI BARE……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Omondi, J.) dated 24th March 2009

in

H.C.CR.A. NO. 19 OF 2005)

****

JUDGMENT OF THE COURT

The appellant, ***Abdi Ali Bare***, was charged before the ***Senior Resident Magistrate's Court*** at ***Wajir*** with one offence under the ***Penal Code*** and five offences under the ***Firearms Act, cap 114***. Under the Penal Code, the appellant was charged with attempted murder contrary to ***section 220(a)*** of the Code, the particulars being that on 14th February 2005 at ***Dadajabulla Trading Centre*** in Wajir, North Eastern Province, and while armed with an ***AK 47 rifle Serial No. BE 170886,*** he attempted to kill ***Adan Mohamed Noor***.

Regarding the offences under the Firearms Act, the appellant was charged with being in possession of a firearm, namely an AK 47 rifle Serial No. BE 170886, without a firearms certificate contrary to ***section 4(1)*** as read with ***section 4(3)*** of the Firearms Act; being in possession of ammunition, namely eleven rounds of ***7.62 special ammunition***, without a firearms certificate contrary to the same provisions; transporting a firearm, namely an AK 47 rifle Serial No. BE 170886 without a removal permit contrary to ***section 29(1)*** as read with ***section 29(2)*** of the same Act, transporting ammunition, namely eleven rounds of 7.62 special ammunition, without a removal permit contrary to the same provisions; and dealing in a firearm, namely an AK 47 rifle Serial No. BE 170886, without being registered as a firearms dealer contrary to ***section 12(1)*** as read with section ***12(2)*** of the Firearms Act.

All the offences under the Firearms Act were alleged to have also been committed at ***Dadajabulla Trading Centre*** on 14th February 2005.

After the trial, in which seven witnesses testified for the prosecution and the appellant gave sworn evidence without calling any witness, the trial magistrate, in a judgment dated ***9th July 2007***, convicted the appellant of attempted murder and sentenced him to life imprisonment. The appellant was also convicted of the offences of possession of a firearm and possession of ammunition without a firearm certificate and sentenced to 5 years imprisonment for each offence, the sentences to run concurrently. The appellant was however acquitted of the offences of transporting a firearm; transporting ammunition and dealing in a firearm.

Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by ***Omondi, J***. In a judgment dated ***24th March 2009*** the learned judge quashed the appellant's conviction for the offence of being in possession of ammunition without a firearms certificate, and set aside the sentence. However, the appellant's conviction and sentence in regards to the offences of attempted murder and possession of a firearm without a firearms certificate were upheld, thus precipitating this second appeal.

Before we consider the appellant's grounds of appeal, which by dint of the provisions of ***section 361*** of the ***Criminal Procedure Code*** must be confined to issues of law only (***see KARANI V. REPUBLIC [2010] 1 KLR 73, 77),*** it is imperative, in summary form, to restate the prosecution case before the trial court as well as the appellant's defence.

The prosecution case was that on 14th February 2005 at about 7.30 pm, ***Adam Mohamed Noor (PW1),*** was relaxing in his house at Dadajabulla with his wife, ***Habiba Issack Hassan, (PW2),*** and their two children. The door to the house was open and lighting in the house was supplied by a hurricane lamp. The appellant, who was armed with an AK 47 rifle, and whose left hand was injured and in a sling, peeped through the door before entering the house. Once in the house, the appellant ordered PW1 to sit down and prepare to die.

PW2, who was lying on a bed near the door acted quickly and grabbed the appellant from behind, in a bid to disarm him. She was joined by PW1 in that effort and in the process they raised an alarm and many people came to their rescue. The appellant was soon overpowered and disarmed.

Hassan Farah Hussein, the Chief, Dadajabulla location ***(PW6)***, among others took the appellant, together with the AK 47 rifle Serial No. 170886 and eleven rounds of ammunition, to ***Dadajabulla Administration Police Camp***, where ***Corporal Mohamed Abdi Salat (PW4)*** re-arrested him and took custody of the rifle and ammunition. Subsequently the appellant was transferred to Wajir Police Station before he was charged with the offences mentioned earlier.

In his defence, the appellant claimed that he was a dealer in livestock and in 2001 he was in partnership with PW2 in that business. He further alleged that PW2 owed him ***Kshs 80,000***, which she had failed to pay, compelling him to report her to the elders. It was the appellant's defence that on the material day, he had been invited to PW1's house by PW2's brothers to collect his money, but it turned out to be a trap. He was arrested at the house and taken to the Administration Police Camp. He

contended that he did not commit the offences he was charged with and that his hand ***"was very sick"*** so that he could not even carry a gun.

To impeach his conviction and sentence in the appeal before us, the appellant relied on his supplementary grounds of appeal filed on 3rd March 2015 and his written submissions filed on the same date. In short, the appellant's complaint is that he was convicted on questionable evidence; that the evidence of PW1 and PW2 who were spouses was not corroborated; that the case against him was not proved beyond reasonable doubt; that the person or persons who arrested him were not called as witnesses, that the first appellate court failed in its duty to fully evaluate and analyze the evidence as it was bound to do; and that his defence was not considered by the two courts below.

For the respondent, ***Mrs. Murungi***, learned ***Senior Assistant Deputy Public Prosecutor*** opposed the appeal and supported the conviction and the sentence. In her view, the evidence of PW1 and PW2 proved the offence of attempted murder beyond reasonable doubt. The evidence of the firearms examiner, ***Lawrence Nthiwa (PW5),*** it was submitted, was that the gun recovered from the appellant was capable of firing and the ammunition was capable of being fired. It was also argued that the appellant was properly identified by PW1 and PW2 with the aid of illumination from the hurricane lamp in their house. The appellant, it was contended, was arrested at the scene of the crime and that he had by himself in his defence confirmed his presence at PW1's house at the material time and on the material day.

Regarding the appellant's contention that he was wrongfully convicted on the evidence of spouses which required independent corroboration, Mrs. Murungi submitted that no corroboration was required because the two courts below found the evidence of those two witnesses trustworthy. Lastly, it was submitted that the High Court had properly re-evaluated the evidence and came to the conclusion that the appellant was properly convicted and sentenced. In regards to the sentence of life imprisonment, which is the maximum sentence prescribed for attempted murder, it was contended that the same was properly meted out because the appellant was not remorseful. Accordingly we were urged to dismiss the appeal for lack of merit.

Having duly considered the record, the judgments of the two lower courts, the appellant's grounds of appeal and his written submissions together with the oral submissions on behalf of the Republic, we start by reminding ourselves of the approach that this Court takes when it is invited to interfere with the concurrent findings of the trial court and the first appellate court. In ***BONIFACE KAMANDE & 2 OTHERS V. REPUBLIC (CRIM. APP. NO 166 OF 2004),*** this Court expressed itself as follows:

"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it."

Like in virtually all other offences, the prosecution, in a charge of attempted murder, must prove both the *mens rea* and the *actus reus* of the offence. In ***R V.WHYBROW [1951] 35 CR APP REP, 141, Lord***

Goddard CJ, stated that:

"But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."

And while discussing the *mens rea* of the offence of attempted murder, ***J. C. Smith*** and ***Brain Hogan***, the learned authors of the preeminent text, ***CRIMINAL LAW, Butterworths, 1988 (6th Ed), at page 288*** state that in a charge of attempted murder:

"Nothing less than an intention to kill will do."

In **CHERUIYOT V. REPUBLIC (1976-1985) EA 47**, ***Madan, JA,*** as he then was, quoting with approval ***R. V. GWEMPAZI S/O MUKHONZO (1943) 10 EACA 101, R. V. LUSERU WANDERA (1948) 15 EACA 105*** and **MUSTAFA DAGA S/O ANDU V. R. *(1950) EACA 140***, stated as follows on the *mens rea* of attempted murder:

"In order to constitute an offence contrary to section 220, it must be shown that the accused had a positive intention unlawfully to cause death…The essence of the offence is the intention to murder as it is presented by the prosecution."

Section 388 of the Penal Code defines "attempt" as follows:

388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The more challenging question in a charge of attempted murder is the *actus reus* of the offence. Although a casual reading of ***section 388*** of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere ***preparation*** to commit the offence and ***attempting*** to commit the offence. In the work quoted above by ***Smith & Hogan***, the authors give the following scenario at ***page 291*** to illustrate the distinction:

"D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim

approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder…"

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In ***CROSS & JONES' INTRODUUCTION TO CRIMINAL LAW***, ***Butterworths, 8th Edition, (1976)***, ***P. Asterley Jones*** and ***R. I. E. Card*** state as follows at page 354:

"…[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted…"

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.

We have carefully considered the evidence adduced by the prosecution to satisfy ourselves that it was proved beyond reasonable doubt that the appellant had indeed committed the offence of attempted murder. With great respect, it appears to us that the conclusion that the appellant had attempted to murder PW1 was drawn merely from the evidence that he was armed with an AK 47 rifle and the fact that he had told PW1 to prepare to die. Both PW1 and PW2, who were the only direct witnesses to the alleged attempted murder, gave fairly sketchy evidence, barely half a page each. Although the trial court concluded that the appellant had pointed the gun at PW1, from the record, none of the two witnesses ever mentioned that the appellant had aimed the rifle at PW1.

The failure to testify on whether the appellant had taken aim at PW1 assumes great significance when it is remembered that both PW1 and PW2 testified that the appellant's left had was injured and was in a sling. Indeed, even as of the date when the two witnesses testified in court on 12th February 2007, the record indicates that the appellant's left hand was still bandaged and in a sling. On the appellant's injured left hand, PW1 testified as follows:

"I am sure that he is the one in court because his left hand appeared injured. I now see his left hand in a sling. When we struggled with the rifle, the fellow (appellant) winced in pain and cried saying his hand was painful."

The pertinent evidence of PW2 also confirmed that the appellant's left hand was injured. She stated:

"I got courage and jumped on the man holding him from behind. I embraced him round. I sensed that his left hand was weak. The hand was in a sling."

In his defence the appellant told the court, among other things that:

"I could not have committed the offence. My hand was very sick. I could not carry a gun."

Even the trial magistrate made fleeting reference to the appellant's injured hand in the judgment, but failed to consider the significance of the injury to the charge of attempted murder. The trial court stated:

"PW1 and PW2 identified him (appellant) in court by saying that he was injured on one hand. The court noted that the accused's hand was bandaged and in a sling."

We have carefully perused the judgment of the trial court and that of the first appellant court, and regretfully none of the two courts addressed the question of the possibility of the appellant being able to aim and shoot PW1 ***with an AK 47 rifle***, a rifle that is by no means a short weapon, using only one hand. This is probably why the two eyewitnesses did not testify to the appellant taking aim at PW1. Moreover, the question of whether the appellant, with his left hand injured and in a sling, could have shot PW1 was raised directly by the appellant in his sworn evidence in defence and it deserved to be addressed and either confirmed or discounted. This was not done, leaving a big doubt whether, beyond being armed with an AK 47 rifle and asking PW1 to prepare to die, the appellant had ever taken any action that could in law constitute attempted murder.

What, however, has caused us considerable anxiety is the conclusion arrived at by the two courts below regarding the evidence of the firearms examiner, PW5. The evidence of PW5 was that he had received from the police for examination, an AK 47 rifle Serial No. BE 170886, 11 rounds of ammunition, and a magazine. After examining those exhibits, he formed the opinion that the rifle was manufactured in Bulgaria and was complete in its component parts and capable of being fired. He concluded that it was a firearm within the meaning of the Firearms Act.

As regards the 11 rounds of ammunition, they were of ***7.62 X 39 calibre*** and could be used in the rifle. He selected 3 rounds at random from the 11 and test fired them. He concluded that the 11 rounds were live, capable of being fired and were ammunition within the meaning of the Firearms Act. Lastly, on the magazine, he concluded that it was capable of being used in the rifle and formed a component part of a rifle like the AK 47.

When he testified on 12th February 2007, PW5 was shown 11 rounds of ammunition, which he categorically stated, were not the rounds of ammunition he had examined. Of course it did not make sense for the prosecution to purport to identify and produce as exhibits 11 rounds of ammunition when PW5 had testified that he had test fired 3 rounds from the 11. Be that as it may, the trial court refused to admit the 11 rounds of ammunition as exhibits. Nevertheless, the court still convicted the appellant of possession of the 11 rounds of ammunition, even after rejecting the ammunition as exhibits.

On appeal, the prosecution conceded, and the High Court agreed that the appellant was wrongly convicted of being in possession of ammunition without a firearms certificate because the trial court had refused to admit as exhibits the ammunition that PW5 had disowned. The prosecutor,

Mrs. Gakobo, is recorded submitting as follows:

"In relation to count 3 of being in possession of ammunition without certificate, the court

declined to admit the ammunition as exhibits as PW5 (ballistics expert) testified that the ones before [the] court were not the ones presented to him for examination and so it can be said they were not the ones recovered from [the] appellant. Having rejected the ammunition as exhibit, then the court erred in convicting [the] appellant and count 3 shouldn't stand and that conviction should be quashed."

Agreeing with the prosecutor, the learned judge expressed herself thus:

"With regard to count 3 (that is being in possession of the ammunition), it was the evidence of PW5 that "Those were not the ones that were brought to me" That sentence clearly shook the prosecution case as regards the ammunition that were purportedly recovered from [the] appellant and produced in court. I concur with Mrs. Gakobo that the learned trial magistrate erred in convincing (sic) [the] appellant on count 3, taking into account what PW5 informed the court.

Consequently the conviction on count 3 was unsafe and is quashed."

With respect, the High Court was duty bound to consider the effect of the appellant's acquittal of the charge of being in possession of the 11 rounds of ammunition, on his conviction for attempted murder. This is because the two charges were founded on the existence of the 11 rounds of ammunition. For the appellant to have attempted to murder PW1, he had to have the AK 47 and the ammunition. The appellant's acquittal meant that on the count of possession of the 11 rounds of ammunition, the prosecution had failed to prove beyond reasonable doubt that he was in possession thereof. If he was not in possession of the rounds of ammunition, it also meant that, as far as the charge of attempted murder was concerned, the prosecution had only proved that the appellant was in possession of the AK 47 rifle Serial No. 170886. This then raises the question, how had he attempted to murder PW1 with the AK rifle, but with no ammunition"

When we put this inconsistency to Mrs. Murungi, her response was that on the basis of PW5's report which was admitted as an exhibit and in which he had indicated that he had test fired the 11 rounds of ammunition and found the same to be capable of being fired and to constitute ammunition within the meaning of the Firearms Act, the court could properly find that the appellant had the AK 47 rifle and the rounds of ammunition for the purposes of the charge of attempted murder. With respect, that begs the question, if on the strength of PW5's report, the appellant could not be convicted of the charge of possession of rounds of ammunition without a firearms certificate, how could he be convicted on the strength of the same report, of attempted murder using the same rounds of ammunition that the court had effectively ruled he did not possess"

In our view, the real answer why PW5's report could not, on the facts of this case, be used to convict the appellant on either charge is that although under ***section 77(1)*** of the ***Evidence Act*** the report of PW5 was admissible as a report of a ballistics expert, ***section 77(3)*** empowered the trial court to examine the ballistics expert on his report, and having done so, the court was not satisfied that the 11 rounds of ammunition that the appellant was alleged to possess were in existence. The appellant could not be convicted of possession of the rounds of ammunition on the basis of an expert report that was discredited in that respect.

The trial court therefore found that the 11 rounds of ammunition, which the prosecution wished to produce as exhibits, were not the rounds of ammunition that PW5 had examined and certified to be ammunition within the meaning of the Firearms Act. The rounds of ammunition that the prosecution was relying upon to prove that the appellant was in possession of ammunition without a firearms certificate were the same rounds of ammunition that the prosecution was relying upon to prove that the accused used in the AK 47 rifle in his attempted murder of PW1. If the Court concluded that it could not convict the appellant of being in possession of the rounds of ammunition because it did not have as exhibits the rounds that had been certified by PW5 to be ammunition within the meaning of the Act, it is difficult to understand how the appellant could be convicted of attempted murder using the same rounds of ammunition that the trial court found to be non existent.

Having carefully examined the grounds raised by the appellant in this appeal, we are not satisfied that his conviction of the offence of attempted murder is safe. There are important pieces of evidence, including the appellant's own defence that were not adequately or at all considered by the two courts below. The totality is that failure by the first appellate court to exhaustively re-evaluate the evidence left reasonable doubts whether the appellant was guilty of attempted murder. We would accordingly allow his appeal to that extent and set aside his conviction and sentence of life imprisonment.

As regards the offence of possession of a firearm without a firearms certificate, we are satisfied that the appellant was properly convicted of possession the AK 47 rifle Serial No. 170886 without a firearms certificate contrary to ***section 4(1)*** as read with ***section 4(3)*** of the Firearms Act. Accordingly there is no basis for disturbing the conviction or the sentence of 5 years imprisonment imposed by the trial court.

As the Appellant was sentenced to prison on 7th July 2007, and has already fully served more than the imposed sentence, we hereby order that he shall be set to liberty forthwith unless he is otherwise lawfully detained.

Dated and delivered at Nairobi this 24th day of April, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR

12