



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KWALE

CRIMINAL APPEAL NO. 23 OF 2018

ABDALLA SAID KATUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Chief Magistrate's Court (KWALE) in criminal case no. 897 of 2016 dated 16th March 2016 by Hon. B. Koech SRM.)

JUDGMENT

1. **Abdalla Said Katumu** the appellant was charged with **being in possession of a weapon within premises contrary to section 12B of the Prevention of Terrorism Act 2012**. The particulars being that the appellant on the 17th day of September 2016 inside his premises at Kigoti village in Bongwe Sub-location within Kwale County was found in unlawful possession of a Smith & Wesson 33 Special revolver for the purpose of terrorism in contravention of the said Act.

2. **COUNT 11**

Being in possession of a fire arm contrary to section 4(2)(a) as read with section 3(a) of the Firearms Act Cap 114 Laws of Kenya.

The particulars being that the appellant on 17th day of September, 2016 at Kigoti village in Bonge sub-location within Kwale County, was in possession of a fire arm namely Smith & Wesson, 33 special without holding a firearm certificate in force at the time in contravention of the said Act.

The appellant was acquitted of count **1** but convicted of count **11** and sentenced to 7 years imprisonment.

3. Being dissatisfied he filed this appeal citing the following grounds:

(i) THAT the learned trial magistrate erred in law and in fact by convicting him on purely circumstantial evidence which did not conclusively point at him with precision.

(ii) THAT the learned trial magistrate erred in law and fact by convicting him after the prosecution failed to prove their case beyond reasonable doubt, and more so in proving that he was found to be in possession of the exhibits in question.

(iii) THAT the learned trial magistrate erred in law and fact by convicting him despite the existence of screaming contradictions , inconsistencies and lack of corroboration on the prosecution's evidence.

(iv) THAT the learned trial magistrate erred in law and fact by convicting him without considering the corroborated defence put

forth by him, hence arriving at a wrong conclusion in law.

(v) THAT the learned trial magistrate erred in law and fact by taking into account irrelevant and extraneous considerations that did not form part of the evidence tendered, therefore reaching a wrong conclusion in law hence the entire decision amounts to miscarriage of Justice.

(vi) THAT the learned trial magistrate erred in law and fact by sentencing him excessively and in violation of the relevant laws and failure to consider the period he has been in custody.

4. A summary of the prosecution case is that PW1 PC **Geoffrey Mutisya** testified that on 17th September 2016, they were called by the DCIO and informed that there was a person in Bongwe Ukunda who was involved in terrorism and also had a gun in his possession. A total of 10 officers went to Bongwe at 5:00a.m in the morning in 4 vehicles. It took them about 10 minutes to arrive at the Appellant's compound.

5. On arrival they proceeded to his house built on coral rocks and iron sheet and surrounded it with the witness at the front. Captain Mudavadi then knocked the door and directed the occupants of the house to open it.

6. The Appellant switched on the lights and they entered. The house, had a living room and two other rooms. They found the Appellant, his wife and children. They informed him that they were going to do a search. He remained guarding the Appellant as his wife and children went to the other rooms.

7. In the living room at the window, he saw a black paper bag which PC Muchiri took and opened. On opening it, he saw a gun revolver, rolls of green dry material, money and a phone. Corporal Mudavadi then prepared an inventory which the Appellant, his son, PC Chesire and PC Muchiri signed. The Appellant was taken to Diani Police Station where he recorded his statement.

8. PW2 PC **Fredrick Muchiri** attached to the Anti-terrorism police unit Diani and PW4 Cpl Joseph Nginyi of DCI Msambweni corroborated PW1's testimony on what transpired that day as they were together.

9. PW3 **Johnstone Mongela** is a firearms examiner at DCI Nairobi. He told the court that on 5th October 2016, he received a revolver(PEXB.2) and an exhibit memo which requested him to examine it and confirm whether it can fire and whether it was a gun.

10. On examining (PEXB.2) he found that it is called Smith and Wesson revolver which can carry five ammunition with .33 special. The serial number had been erased, and he was unable to revive it. He however found a no. CDA5241 on the right side of pistol whipe 22473683.

11. He investigated (PEXB.2) by testing 3 ammunition from the laboratory and found it capable of firing. He therefore confirmed that (PEXB.2) is a firearm as defined under the Firearms Act. He produced a fire arms expert report(PEXB.4(a) (b) (c).

12. PW5 **Corporal Bernard Mudavadi** attached to the ATPU Kwale is the investigating officer in this case. He corroborated PW1, PW2 and PW4's testimony and produced search certificate (PEXB.1), short gun (PEXB.2), Black nylon bag (PEXB.3), Cartridges (PEXB.4) and Exhibit memo (PEXB.6)

13. On cross examination, he revealed that he was not informed of any terrorist activity the Appellant was involved in.

14. The Appellant gave a sworn statement for his defence and called two witnesses. He testified that on 17th September 2016, at around 4:00a.m, he heard noises at the children's bedroom. He produced photos of his house(DEXB & 2). The noises he heard were from police ordering them to open the door and remove bhang and the gun.

15. Upon opening the door, he was taken to his daughter's room where the police found nothing. They then proceeded to the male room and still nothing was recovered. The search was conducted in his company while his family members were in the sitting room.

16. He stated that before they left, a police officer said that they needed to check the window again. He opened the blinders and

found a black paper bag on top of the Quran. Inside the paper bag, there was a pistol and what looked like cigarettes. He was then told to sign what was recovered but declined and insisted that they include the sim card, and Kshs. 7,000. They beat him up and returned Kshs. 700, his sim card and identity card. He however stated that they did not return Kshs. 18,000.

17. DW1 **Aziza Abdalla Said Katum** his daughter testified that on 17th September 2016, she was asleep at home when she heard their door being knocked and a voice saying:- “remove bhang and gun we are police.”

18. Her father opened the door, and was arrested. Three police men remained in the living room, while others went to the rooms with the Appellant. One officer had a black paper bag in his left hand.

19. As they were searching the rooms, the police were demanding for bhang, gun and drugs. At some point, they were even asked to pour out one sack of maize but nothing was recovered. Lastly, she stated that she normally does thorough cleaning and had never seen the black paper bag with the gun.

20. DW3 **Saidi Adballa Saidi** his son testified that on 17th September 2016, they were woken up at around 3:00am when he heard people knocking and identifying themselves as police officers. The Appellant then opened the door and they demanded that he lies on the floor and removes bhang, gun and drugs.

21. They searched every room in Appellant’s company and on searching his room, they asked for bhang and drugs which he said he did not have. They went back to the living room and a sack of maize was poured, but still nothing was found.

22. A black paper bag was however found on the window seal in the living room. The appellant was ordered to open but he declined. The witness was then told to open the paper bag and they found bhang and a pistol. Lastly, he told the court that he had never seen his father with a gun.

23. When the appeal came for hearing, the Appellant’s counsel Mr Chacha A. Mwita in his written submissions on ground one submitted that the learned magistrate had a duty to set the parameters of determining a case based on circumstantial evidence. Counsel relied on the case of **M’rukaria Republic [2014]eKLR** where it was held:-

“In Abanga alias Onyango v Rep Cr. A No. 32 of 1990(UR) the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
- ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

24. Counsel thus submitted that no single prosecution witness alleged to have seen the appellant in actual possession of the said firearm and neither did anyone claim to have seen him with the said firearm elsewhere. According to counsel, the Appellant having been acquitted of count 1 that clearly casts doubt on the alleged possession of the said firearm considering the circumstances surrounding the alleged recovery.

25. On ground two counsel submitted by defining possession under section 4 of the Penal Code which states :- ‘possession’:-

a) “be in possession of” or “have in possession” includes not only having one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of 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 and taken to be in the custody and possession of each and

all of them.”

26. Counsel relied on Abdi Osman Ahmed V Republic [2007]eKLR where it was held:-

“Be in possession of” or have in possession” includes but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or to any other person.

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 and taken to be in the custody and possession of each and all of them.”

27. It was thus counsel’s submission that knowledge is critical in proving possession and throughout the prosecution’s case it was never even suggested that the Appellant had knowledge that the firearm did exist in the first place. Furthermore, it was counsel’s submission that the prosecution never demonstrated that the children had custody of the fire arm on behalf of their father (Appellant).

28. On grounds 4, 5 and 6 counsel submitted that it was wrong for the police to have conducted the search without a search warrant as this interfered with the appellant’s right to privacy. Moreover, counsel faulted the trial court’s failure to take into due regard the fact that the Appellant had served 2 years in remand prior to him being sentenced to seven years imprisonment.

29. Mr Maina for the respondent oppose the Appeal submitting that it was not mandatory for the police to only search a premises with a warrant. It was thus counsel’s submission that the instance here favoured search without a warrant and the Appellant was not prejudiced as the said search was done in the Appellant’s presence as he even signed the inventory.

30. Counsel further submitted that the Appellant was in possession of the revolver as this was his house, whatever the room. He argued that the appellant and his son willingly signed the inventory in the presence of other family members and he was not licensed to hold a firearm.

31. On sentence, counsel submitted that the law is clear on the same and the trial court had no duty to consider the period Appellant had been in custody.

DETERMINATION.

32. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence adduced and arrive at its own independent conclusion. See Okeno v Republic 1972 E.A 32. Pandya v Republic [1957] E.A 336 and Kariuki Karanja v Republic [1986] KLR 190.

33. I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The Appellant has raised a total of 6 grounds of appeal. Upon considering all I have stated above, I will narrow them to three issues which are:-

- a) **Whether it was mandatory for the police to have a search warrant before searching Appellant’s home.**
- b) **Whether the Appellant was found in actual possession of the firearm. If not whether he had knowledge of the possession by any other person.**
- c) **Whether the Appellant’s sentence was lawful”**

34. It was Mr. Chacha Mwita’s submission that that the police did not offer any explanation as why they failed to seek for a search warrant and that issue of a search warrant is hinged on the right to privacy under the Constitution.

With respect to the right to privacy, Article 31 of the Constitution provides that:

Every person has the right to privacy, which includes the right not to have

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed;

(d) the privacy of their communications infringed.

Clearly Article 31 rights do not fall within the non-derogable rights under Article 25 of the Constitution. The rights can therefore be limited. However as held in Manfred Walter Schmitt & Another vs. Attorney General & 3 Others [2014] eKLR:

"[18] The authority given to State agencies to conduct searches and seizures is a limitation of the fundamental right to privacy protected under the provisions of Article 31.

[19] Since searches infringe the right to privacy and the right against arbitrary deprivation of property protected under Article 40, searches must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains, which include obtaining information from third parties like banks, of ordinary citizens is one of the features that distinguish a democracy from a police state."

Further, section 57(1) of the *National Police Service Act*, provides as follows:

Subject to the Constitution, if a police officer has reasonable cause to believe—

a. that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

b. that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

35. In the instant case, the police searched the Appellant's house without a warrant because the police had allegedly received information that the Appellant was involved in terrorism activities. This court takes judicial notice that terrorism has caused untold suffering to citizens of Kenya and greatly compromised national security and the security of the individual. Hence, there was a clear and urgent need for the police in this case to take up appropriate measures like searching the Appellant's house without a warrant since the police have a duty to protect national security. Furthermore, the Appellant did not demonstrate how his rights were violated by the search conducted by the police without a warrant.

36. On whether the Appellant was found in possession of the firearm, it was Mr. Chacha Mwita's submission that no single prosecution witness alleged to have seen the Appellant in actual possession of the said firearm and neither did anyone claim to have seen him with the said firearm elsewhere. Hence, according to counsel, the Appellant's acquittal of count 1 clearly casts doubt on the alleged possession considering the circumstances surrounding the alleged recovery.

37. There is no dispute that the house from which the special revolver was recovered belongs to the appellant. It is not also disputed that PW1, PW2, PW3, PW4, PW5 were involved in the arrest and charging of the Appellant. All of these five (5) witnesses testified that they received instructions from their boss one called Inspector Sihundu. Before I come to the way the search was conducted I wish to refer to the instructions that were given to these officers

38. PW1 states this:

“On 17th September, 2016, we were called by the in charge of station. I was with P.C. Chesire, Corporal Mudavadi. We were called by DCIO. He said that there was a person who was involved in terrorism and that person had a gun.”

PW2 stated this:

“On 17th September 2016, I got information from intelligence that there was one said Abdallah who was involved in terrorism. I got information from my boss Inspector Shiuma. Inspector Shiuma directed us to go to the accused’s house to do search.”

39. PW4 states

“We went to the accused’s house which is at Bongwe. We were to arrest accused because we had informed (sic) accused was involved in terrorism activities.”

PW5 states

“on 16th September, 2016 at 8.00 p.m. my in charge Inspector Shiundu called me and told me that there was an assignment to be carried out the following morning. We were to arrest Abdallah Said because there was (sic) intelligent reports that he was involved in terrorism activities.”

40. From their narrative it is clear that they had instructions to arrest Abdallah Said who was believed to be involved in terrorism activities. The evidence of these witnesses was to the effect that they did not come across any evidence that could have linked the appellant to terrorism activities. That is why he was acquitted by the trial court of the offence in the 1st count.

41. Following the instructions given PW5 explained that after five(5) of them (officers) entered the appellant’s house this is what followed:

“we then explained to the accused that we were there to arrest him and we asked him if we could search the house. The accused agreed. We searched the rooms but there was nothing”.

Even as they explained this to him according to this witness Cpl Muli (who did not testify) had already handcuffed him. PW4 62057 **corporal Joseph Ngunyi** in his evidence said as soon as they entered the house he took the appellant to the sitting room and handcuffed him. It is therefore evident that the appellant was arrested even before any search of his house had begun, and without being told what the search was all about.

42. The Appellant in his defence explained the structure of his house and also produced photos of the same (DEXB1-3). He said his house has 8 rooms at the front part with 3 rooms at the back. The house has a kitchen and a corridor. PW5 mentioned that the appellant’s house had three (3) rooms while PW2 said it has 5 rooms. From the photocopies of the photos produced herein as DEXB1-3 the appellant’s house was big. Unfortunately the photos (DEXB1-3) did not form part of the Record of Appeal. I was therefore not able to see them.

43. Critical in this case as per section 2 of the Firearms Act plus cited authorities is the term “possession”. PW2 pw4 & PW5 state that as they conducted the search the appellant and DW2 were moving with them from room to room. On the other hand PW1 **71745 PC Geoffrey Mutisya** says as the rest did the search he remained guarding the appellant in the sitting room. It is however the prosecution case that they first searched the other rooms before returning to the sitting room where the special revolver was found hanging on a window.

44. It is clear that nothing was found in any of the other rooms, they searched. The sitting room in any house is a common room and not specific to any individual. There is also evidence that in this house lived the appellant, his wife and several children. Some of these children are adults.

45. It was the Appellant's defence including that of DW1 and DW2 that they were not aware of the presence of the firearm in the house or how it came to be there. PC Muchiri (PW2) who is said to have found it stated this in his evidence.

"At the main entrance on the window on your left side, we found a black paper bag which was under the curtains."

Later in cross examination he says.

"I recovered the gun and Nguni witnessed it."

46. PWC Cpl Joseph Ngunyi stated the following of the recovery:

"I called P.C. Muchiri and P.C. Mudavadi. They were to do the search. After sometime while going to every room with accused and his son and when they came there was some black polythene bag which had a gun. Later we went to Diani Police Station."

47. It was PW2's evidence that the recovery of the firearm by him was witnessed by PW4. However, PW4's evidence does not in any way make mention of where and how the recovery was made. PW1 made it clear that his duty was to guard the appellant which he did in the sitting room. He had not seen the black paper bag until PW2 took it and opened it.

48. The sitting room being a common place and in a big house with several adults living therein, the question the prosecution had to answer satisfactorily is how they linked the Appellant to its ownership. In cross exam PW5 said:

"There was no ammunition in the gun. I don't have report(sic) that it had been used to commit crime. Mr. Mongela prepared exhibit memo. There was no dusting for finger prints DNA was not done. PC. Muchiri found it. It is not shown in exhibit memo."

49. It is said the black polythene bag was hanging on the window. This window had a wiremesh and a blinder. PW5 told the court that there was no need to take photos of the scene. It would have been better understood how the paper bag with a special revolver, green dry plants material, a phone, Airtel phone were all hanging on a window which had a wire mesh and blinder without being noted if photos had been taken for the Court to see. In fact PW2 who allegedly recovered it said the paper bag was under the curtains! How was it hanging under curtains"

50. The issue then is exactly where this black polythene bag was hanging" Secondly, since there were several persons living in that house it was important for the prosecution to rule out the possibility of the firearm having been handled by anyone of them by dusting it for fingerprints. This was never done.

51. Finally it is on record that the Appellant was not found in physical possession of the firearm. Did he have knowledge of the presence of that firearm at the said window" He explained that the rooms where the sitting room is are occupied by his children some of whom are adults. That he rarely uses that part of the house. This evidence was not displaced by the prosecution evidence.

52. After all I have stated above I now come back to section 4(2)(a) of the Firearms Act Cap 114 laws of Kenya under which the Appellant was charged. It provides:

(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 authorized".

53. The Appellant was alleged to have been found in constructive possession. I have explained above why the prosecution's theory can't work. I wish to echo the words of Lenaola J (as he then was) in the case of Abdi Osman Ahmed V R [2007] eKLR when he said:

“The net effect of all these matters is that possession in abstract cannot be possession in the sense envisaged by law because save for being in the Manyatta, a little more evidence to determine to whom the Manyatta belonged and who else had access to it would have either exonerate the Appellant or firmly removed any doubt that he was indeed the person unlawfully in possession of the firearm and ammunition. As it is, the evidence against him was conclusive only to the extent of suspicion and no more, suspicion cannot be the basis for a conviction”

54. My conclusion is that the police officers who went to the Appellant’s house had been sent by their boss to arrest him. It did not really matter what he did, had or did not have. They had a mission to accomplish hence the failure to undertake very detailed investigations e.g taking photos of the scene, dusting the firearm for fingerprints etc.

55. Having found possession not to have been proved I will not deal with the issue of the certificate and the sentence passed by the court

56. I find that the appeal has merit and I hereby allow it. The conviction is quashed and sentence set aside.

57. The appellant shall be set free unless otherwise lawfully held under a separate warrant.

Signed, dated and delivered this 26th day of October 2018 in open court at Mombasa.

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HEDWIG LONG’UDI

JUDGE



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