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| Case Number: | Criminal Appeal 32 of 2019 |
| Date Delivered: | 12 May 2020 |
| Case Class: | Criminal |
| Court: | High Court at Lodwar |
| Case Action: | Judgment |
| Judge: | James Wakiaga |
| Citation: | Rebecca Asinyon Esokon v Republic [2020] eKLR |
| Advocates: | Mr. Mwaura for the State Mr. Emarnkor for the Appellant |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Turkana |
| Docket Number: | - |
| History Docket Number: | Criminal case 274 of 2018 |
| Case Outcome: | Appeal dismissed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE HIGH COURT OF KENYA**

**AT LODWAR**

**CRIMINAL APPEAL NO 32 OF 2019**

**REBECCA ASINYON ESOKON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence mated out against the Appellant**

**in lodwarSPM criminal case no 274 of 2018)**

**JUDGEMENT**

1. The appellant was charged, tried and convicted of the offence of being in possession of specified firearms without firearm certificate contrary to section 4A(1)(a) and being in possession of ammunition without firearm certificate contrary to section 4(3)(b) laws of Kenya Cap 114 and sentenced to 3 years and 1 day respectively on the two counts to run concurrently.

2. Being aggrieved by the said conviction and sentence, she filed this appeal and raised the following grounds;

a. that the trialll magistrate erred in law and fact in convicting the appellant under section 4A(1)(a) and 4(2) of the firearms act cap 114 whereas it was clear that the appellant was not found in possession of the alleged firearms and ammunition,

b. that the learned magistrate erred in law and in convicting the appellant against the weight of the evidence

c. that the learned trial magistrate erred in convicting the appellant despite the overwhelming doubts in the prosecution case

d. that the learned trial magistrate erred in convicting the appellant on the basis of conjecture and speculation rather than on the basis of solid evidence

e. the learned trial magistrate erred in law and fact in failing to acquit the appellant against the grain of evidence

f. the learned trial magistrate erred in shifting the burden of proof to the appellant

g. the learned trial magistrate erred in failing to consider the defence evidence

h. the learned trial magistrate erred in granting a harsh sentence.

3. The appellant therefore sought that;

a. The appeal be allowed

b. The conviction and sentence be set aside.

4. The appellant filed written submissions while the State through Mr. Mongare conceded to the appeal on the ground that there was no evidence to show that the appellant was found in possession of the ammunitions as per the prosecution evidence. He submitted that it was for the prosecution to prove possession and that the appellants defence was that she had been given a lift by the driver and the police officer who knew her. He submitted that DW3 corroborated the said evidence and therefore the burden of proof could not be shifted to the appellant

5. On behalf of the Appellant it was submitted that she only hitched a lift in the subject motor vehicle since she was known to the occupants and therefore could not know whether there were firearms and ammunitions therein since they were as per the prosecution evidence concealed in two gunny bags as held by the trial court. She did not have control of the subject motor vehicle, and therefore possession was not proved. It was contended the she signed the inventory of the items without knowing the content thereof. it was submitted that in holding that the offenses were strict liability and therefore shifted the burden of proof to the appellant in error. it was submitted that the burden of proof lies always with the prosecution for which the case of **REPUBLIC v GERALD MUA NTHIWA {2019} EkLR** was tendered in support.

6. It was submitted that judgement did not resonate with the evidence on record and was only based on mere suspicion rather than solid evidence for which the case of **FREDRICK WAITHAKA KINUTHIA V REPUBLIC [2008] e KLR** was submitted in support. it was submitted further that the trial court wrongly held that the accused persons must have jointly acquired the firearms which raised doubt on the prosecution case.

7. It must be stated that the court is not obliged to allow the Appeal simply because it has been conceded to by the State. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

**“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence ‘”**

8. This being a first appeal, the court is under a duty of look a fresh at the evidence and come to its own conclusion though giving allowance to the fact that unlike the trial court, did not have the advantage of seeing and hearing witnesses as was stated in **OKENO V REPUBLIC (1972) E A33**, where the Court of Appeal set out the duties of a first appellate court 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.”**

9. I will therefore proceed to analyse the evidence tendered before the trial court as follows: **PW1 CORPORAL SAMUEL WAITHAKA** a police officer attached to lodwar police station was on1/5/2018 together with other police officers assembled by the OCPD and informed that they had received information on a motor vehicle travelling from Kakuma to lodwar ferrying fire arms. They proceeded to erect a road block and at 4.00pm the subject motor vehicle with the appellant and her co accused, all who were sitting at the front cabin was stopped. When the motor vehicle was searched, they recovered 6 AK 47 rifles loaded with 30rounds of ammunition. The appellant then signed the inventory of the items recovered.

10. In cross examination he stated that they were acting on a tip off from intelligence report. He testified that the inventory was prepared at the CID headquarters after the recording had been done at the scene. The documents were in English but was translated into Turkana and Kiswahili. He stated that four other people were arrested in connection with the incidence by officers from Kakuma police station, who were not part of his operation. He confirmed that the 3rd accused had been issued with a G3 rifle as part of his duties as an NPR. He stated that his role was only to arrest the accused persons and that they spoke to them in Swahili language.

**11. PW2 SP ROBERT KINYUA NDAMBIRI** corroborated the said evidence and stated that he was part of the team that was assembled to arrest the appellant and her co accused and that they erected a roadblock at 1.00pm and recovered two sacks which

were stashed behind the front seat. When they opened the sacks, the fire arms and ammunitions were recovered. On 2/5/2018 he handed over the accused persons to lodwar police station and four others were later on brought to them. He confirmed on cross-examination that he took photographs of the exhibits.

**12. PW3 INSPECTOR ALFRED MBALANI** from the ballistic section of CID produced the ballistic report on the said firearms and ammunitions on behalf of Charles Koilege and confirmed that they were firearms and ammunitions within the meaning of firearm act. He confirmed having not known the accused persons.

**13. PW4 Sp. AGGREY OKOTH** was called on 1/5/2018 by the CCIO, who informed him of the recovery of the firearms but could not go the area since the river was swollen. The day he received the suspects and the recovered items, which were forwarded to the ballistic laboratory. In cross-examination, he confirmed that the motor vehicle belonged to CDF and that he visited the scene where the motor vehicle had been stopped and the ammunitions and fire arms handed over to him. He stated further that four other suspects were arrested from Kakuma on allegations that the accused persons had gotten the guns from them and that he did not know where the accused got the guns from.

14. When put on their defense the Appellant stated that on the material day she had gone to the market and it was raining while aboard a motor cycle when she noticed the subject motor vehicle, which she stopped and the occupants gave her a lift. It was her evidence that she knew them. On the way they were stopped and ordered to get out and lie down. They were then taken to the Chinese camp having been searched at the scene and nothing recovered in her person. She stated that the inventory she signed was at the police station, but was not told what it was for and that the guns which she saw in court were in the sack.

15. On cross-examination, she stated that she did not know the arresting officers and that though sick she was on a motor cycle. She only realizes that she knew her co accused upon boarding the motor vehicle. She stated further that she did not know the rider of the motor cycle which had carried her and that she got sick on the way.

16. The second accused denied knowledge of the guns and testified that he was going to lodwar from kanamkemer for car wash and decided to go to the quarry. On his way he was stopped by a person who was on a bike who turned out to be the 1st accused who had been a nominated MCA whom they carried, after 1 km they were stopped by a police motor vehicle and ordered out before being arrested. He said that he did not know who took charge of the motor vehicle thereafter and was surprised to see guns alleged to had been carried by him. In cross-examination he stated that the appellant did no call him and only met her on the way, he stated that she did not have any luggage save for the handbag.

17. The 3rd accused confirmed that he was an NPR officer working at Turkana south constituency office foe which he was assigned a G3 rifle. On the material day, he met the 2nd accused whom he was working with who asked him to accompany him to the quarry where on their way back the 1st accused who was on a motor bike stopped them. He stated that it was raining and they were about seven kilometers from lodwar when they were stopped at a road block. They were later on taken to the police station where he signed some papers before being charged in court for the offense which he denied. In Cross-examination he stated that he knew the 1st accused, who was sick and was not carrying any luggage.

**JUDGEMENT OF THE TRIAL COURT.**

18. Based upon the above evidence the trial court found that count 1and 2 were offenses of strict liability and therefore once possession is established it was upon the accused persons to establish authorization to have possession. He found as a fact that the gunny bags were clearly visible and no one could occupy the motor vehicle without noticing them. He found that the accused persons were sitting where the items were and therefore could not have been put there without knowledge. he found as a fact that the three accused persons must have jointly acquired the items without certificate and license and therefore found them guilty on two accounts and dismissed count 3 since there was no evidence of robbery they were planning to commit.

**ANALYSIS AND DETERMINATION**.

19. For record purposes, it is noted that this appeal is only in respect of the 1st accused, the 2nd and 3rd accused persons having filed appeals which they later on withdrew. The fact that the appellant was arrested at a road block while travelling in the subject motor vehicle was not in dispute. The only issue for determination is whether possession on her part was proved, whether the inventory

she signed was explained to her in a language she understood and finally whether the burden of proof was shifted to her.

20. Section 4 of the penal code defines possession as to not only having in one's own personal possession, but 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 of any other person. B) if there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his possession, it shall be deemed and taken to be in the custody and possession each and all of them.

21. All the accuse persons denied knowledge of the presence of the said firearms in the motor vehicle, which were recovered therefrom by very senior police offices following a tip off as per the evidence on record. In their defenses all the accused persons admitted that the only person who was not with them at the start of the journey was the 1st accused. There were no evidence that the guns were present in the motor vehicle at the start of the journey. Having been found in the motor vehicle where the Firearms and ammunitions were it was upon the appellant to give an account as to whether she had the requisite certificates and licenses under the fire arms act which she failed to so do and therefore find no fault with the trial courts findings thereon. I find that this case was distinguishable from the case of **FREDRICK WAITHAKA KINUTHIA v. REPUBLIC [2008] eKLR** submitted by the appellant as in this case the items were recovered in the presence of the appellant who signed inventory in respect of the recovery.

22. The fact of the presence of the said fire arms was in the special knowledge of the Appellant and here co accused jointly and similarly for which they were under obligation under the provision of section lll (l) of the evidence Act and the items mentioned being fire arms having taken into account the evidence of the prosecution witness on the how the information on their presence in the said Motor Vehicle was received, the court was entitled to make prescription of fact as provided for in section 119 of the evidence Act. I find the Appellant's explanation on the lack of knowledge of the presence of the fire arms in the subject Motor Vehicle unbelievable taking into account the evidence of her co-accused persons.

23. Having been in the said motor vehicle, I find and hold that the appellant fell within the second limb of definition of possession, she did not have the request certificate and or linces and further fell under the provisions of section 20(1) of the penal code which provides for parties to the offence for which she was rightly convicted. I am not persuaded that the trial court shifted the burden of proof to the appellant, possession having been established.

24. On the issue of the language used to, the evidence on record is that the officers spoke to the appellants and her co accused in Turkana and Kiswahili languages and pw2 stated that he was present throughout the period of recovery and the taking of the preliminary inventory at the scene which the appellant signed voluntarily. Pw1 in cross examination stated and his evidence remained unchallenged that, though the document was in English, it was translated into language by native officers and also in Kiswahili. The Appellant was able to participate fully at her trail and therefore the taking of inventory did not prejudice her.

25. On the issue of sentence, I have noted that the trial court was alive to the fact that the provided sentence was a minimum of 7 years and maximum of 15 years but on the strength of the muruatetu case sentenced the appellant to serve 3 years and I day on each count to run concurrently. I am therefore not satisfied that the same was harsh sentencing being a function of the trial court and the sentencing mated not being illegal, I will not therefore interfere with the same.

26. In the final analysis am satisfied that the case against the appellant was proved beyond reasonable doubt and her conviction safe and free form error. It follows that the appeal herein lacks merit which I hereby dismiss and affirm the trial courts finding on both conviction and sentence and it is so ordered.

27. The appellant has right of appeal.

**Dated, Signed and Delivered at Lodwar through Skype this day 12th of May, 2020.**

**.....**

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

Mr. Mwaura for the State

Appellant – present

Mr. Emarnkor for the Appellant

Court Assistant: Maureen/Lotim