REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 43 OF 2018

MARTIN MBOTO MATIVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Thika Chief Magistrate's Court

Criminal Case No 4730 of 2014 (Hon. L. Komingoi, CM) dated 22nd August 2016)

JUDGMENT

1. Martin Mboto Mativo, the appellant in this appeal, was charged alongside Aden Wario Jillo with the offence of being in possession of a firearm contrary to section 12(1)(b) of the Firearms Act, Chapter 114 of the Laws of Kenya. The particulars of the offence were that the accused persons, on the 20th December 2014 at Juja Township within Kiambu County, were jointly found in possession of a Taurus firearm serial number TK 70942, without a valid firearms licence. The appellant and his co-accused denied the offence but following a full trial, they were found guilty as charged and sentenced to serve a term of imprisonment for six (6) years.

2. Dissatisfied with both his conviction and sentence, the appellant filed the present appeal in which he raises six grounds of appeal which I shall consider later in this judgment.

3. As the first appellate court, however, I am under a duty to re-evaluate the evidence adduced before the trial court and reach my own conclusion. In doing so, I am required to bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno v Republic (1972) EA 32.**

4. The evidence led by the prosecution against the appellant and his co-accused was as follows. On 27th November 2014, No 81011385 Administration Police Sergeant Paul Munyao (PW1) was in the course of his duties when one Corporal Joseph Mugo gave him a pistol, Taurus Serial No 70942, and nine rounds of ammunition, and asked him to keep it in the armoury. At the time, the station did not have enough firearms, so he was told to go on patrol with it from 6:00 p.m. that evening to 7:30 a.m. the next morning.

5. On the 29th November 2014, the pistol was allocated to Administration Police Constable Charles Wahome (PW3) who went on patrol with it and returned it on 30th November 2014 at 6:45 a.m. On 1st December 2014, Sergeant Munyao handed the armour box back to Administration Police Corporal Ndirangu (PW2) who was in charge of keeping the armoury box. He then went on leave until 5th December 2014. He later came to learn that the firearm was missing. On 6th December 2014, Corporal Ndirangu told him that the firearm was missing and that he needed some time to look for it.

6. Corporal Ndirangu on his part testified that on the 5th December 2014, Corporal Munyao asked him why he had not been allocated a firearm, prompting Corporal Ndirangu to enquire as to why he wanted one when he had not returned the firearm that had previously been assigned to him. On the 6th December 2014, both Corporal Munyao and Corporal Ndirangu were summoned by Chief Inspector Patrick Nyagah and questioned about the missing gun. Thereafter, they were booked at the Juja Police Station and later the Ruiru CID Offices where they recorded statements.

7. The gun was recovered during a patrol conducted by Administration Police Constable Cyrus Mutwiri (PW4), AP Sergeant Sylvester Orembo (PW6) and Corporal Josephat Ndirangu (PW5). The officers were on patrol within Thika Town when they were informed that there was someone selling a firearm in Juja. The informant led them to Juja estate where they met with the appellant. They interrogated him and he told them that he had given the gun to Aden Wario, his co-accused in the criminal trial, and led the officers to him. Aden is the one who showed them where he had hidden the gun in an open field. They found the gun buried in the ground, wrapped in a black polythene bag.

8. The matter was investigated by Police Constable Timon Melly (PW7) who on 6th December 2012 got a report that the gun was missing

from the AP Juja Sub-County offices. He checked the arms register and noted that the firearm had been in use until 29th November 2014. He recorded statements from Sergeant Munyao and Corporal Ndirangu, both of whom could not explain how the firearm went missing. Thereafter, some officers from Thika sub County recovered the firearm. After the appellant and his co-accused were arrested, he interrogated them and found that they did not have certificates to be in possession of the firearm, and he therefore charged them.

9. In his defence, the appellant stated that he was a *boda boda* operator within Juja area. He claimed that at about 8:30 p.m. on the 19th December 2014, he was called by a customer. He went to the area and saw two people who ran away as he approached. When he reached the area, he saw a gun, and being a good citizen, he took the gun to the Juja Administration Police camp and told them where he had picked it up from. The next day, he went about his business, and at about 1:30 p.m., he got a call from a customer to transport some items for him. As he waited for the consignment to be prepared, someone came and held him from the back and told him to accompany him to Juja Police station. There he was beaten up and asked for the gun. He told them that he had picked up the gun and handed it over to the Administration Police camp at Juja. He took them to the place from where he picked the gun and thereafter, he was taken to Ruiru Police Station, tortured and then charged.

10. Based on this evidence, the trial court convicted both the appellant and his co-accused and sentenced each to serve a term of imprisonment for six years.

11. The appellant challenges his conviction and sentence on the grounds, first, that the trial court relied on the prosecution evidence to reach an unsafe conviction. Secondly, that it failed to take into account his mitigation as required by law. His third ground was that the trial court failed to observe his age during sentencing, and fourthly, for failing to take into account the time that he had spent in custody as required by section 333(2) of the Criminal Procedure Code.

12. He pleaded for leniency, stating that he was a first offender, that prior to his arrest, he was the sole bread winner of his young family, and that the lower court erred in failing to give him a chance to mitigate contrary to section 216 of the Criminal Procedure Code. He also filed written submissions in which he reiterated his grounds of appeal and added that he has undergone various rehabilitation programmes in prison; that he is remorseful for the crime that he committed and that if released, he would be a law-abiding citizen. He therefore prayed that the appeal succeeds and that the sentence imposed on him be suspended or changed to a non-custodial sentence.

13. The appeal was opposed by the state through Learned Prosecution Counsel Mr Ongira. He submitted that the entire trial was properly conducted; that the charge faced by the appellant was properly drafted and the evidence led by the prosecution witnesses was cogent and pointed to the appellant as being involved in the sale of the firearm. Further, that the appellant led the police to his co-accused who had hidden the firearm and later, when they were arrested by the investigating officer, neither of them had certificates for the gun.

14. Mr Ongira further submitted that the appellant's defence was a mere denial which did not displace the prosecution's case. He therefore submitted that the trial court was right in convicting both the appellant and his co-accused, and that the trial court considered the mitigation given and gave an appropriate sentence bearing in mind that the offence in question carries a penalty of not less than five years and not more than ten years. He therefore submitted that the appeal should be dismissed and the conviction and sentence upheld.

15. I have considered the present appeal and the submissions of the appellant and the state. I have also considered the case presented by the prosecution against the appellant. Section 12(1)(b) of the Firearms Act under which the appellant was charged provides as follows:

> ***12. Penalty for dealing in firearms without being registered***
>
> ***(1) Subject to this section, no person shall, by way of trade or business—***
>
> ***(b) expose for sale or transfer, or have in his possession for sale, transfer, repair, test or proof, any firearm or ammunition, unless he is registered under this Act as a firearms dealer:***
>
> ***Provided that an auctioneer may sell by auction, and have in his possession for sale by auction, a firearm or ammunition without being registered if he has obtained from a licensing officer a permit for that purpose in the prescribed form, and complies with the terms of the permit.***

16. The penalty for contravening this provision of the law is found in section 12(2) which provides that:

> ***(2) If any person contravenes any of the provisions of this section, or makes any statement which he knows to be false for the purpose of procuring, whether for himself or for any other person, the grant of a permit under this section, he shall be guilty of an offence and liable to imprisonment for a term of not less than five, but not exceeding ten years.***

17. Thus, in order to prove a charge under this section, the evidence should show that the accused person was in possession of a firearm for any dealings and was in such possession without being registered as a firearms dealer. The evidence of AP Constable Cyrus Mutwiri (PW4), AP Sergeant Sylvester Orembo (PW6) and Corporal Joseph Ndirangu (PW5) was that during the course of their duties on patrol on the 20th December 2014, they were informed that there was someone who had a firearm for sale.

18. The information they received led them to arrest the appellant, and he in turn led them to his co-accused, Aden Wario, and eventually to the recovery of the firearm. The gun was the same one that had gone missing from the armoury at the Juja Sub County Administration Police camp sometime between the 30th November 2014 and 6th December 2014. This fact was attested to by Sergeant Munyao and Corporal Ndirangu. The evidence therefore shows that the appellant, together with his co-accused, were in possession of the firearm. When they were interrogated by PC Melly (PW7) they did not have certificates authorizing them to be in possession of the firearm. Their conviction was therefore in accordance with the provisions of the law under which they were charged, and was therefore safe.

19. The appellant has raised two issues with respect to his sentence. The first is that the trial court did not take his mitigation into account prior to sentencing him. The record bears out this fact: judgment in the trial was rendered by Hon. B. Ireri on 4th October 2016. The court prosecutor informed the court that he would need to confirm if the appellant and his co-accused had previous records. The matter was then mentioned on the 13th October 2016 and again on the 18th October 2016 when the court sentenced the appellant to serve a term of six years imprisonment.

20. Mitigation is provided for under sections 216 and 329 of the Criminal Procedure Code. These sections give discretion to the court to receive evidence in order to inform itself on the proper sentence to pass. Although these sections are worded in discretionary terms, the Court of Appeal has stated that the right to offer mitigation is mandatory and that courts must give convicts the opportunity to offer mitigation before passing sentence. In **Amos Changalwa Juma V Republic [2009] eKLR (Criminal Appeal 482 of 2007)** the Court stated as follows:

> ***"Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We have reproduced the concluding paragraph of the learned Judge's judgment and it is clear that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was clearly improper. As we have stated previously in other judgments, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person (or his counsel) before sentencing him/her. This obtains even in the cases where death penalty is mandatory. The reasons for the requirement are clear in that when the matter goes to appeal as this matter has come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing appropriate sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal, or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly, matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be recorded even in cases of mandatory death row sentence."***

(Emphasis added)

21. This view was adopted with approval in **Isaack Kimanthi Kanuachobi v Republic [2013] eKLR (Criminal Appeal 97 of 2007)** in which the court expressed the following view:

> ***"We believe we have said enough on this ground and only reiterate that an accused person has a right to mitigate even in cases that attract minimum mandatory sentences and even in cases which attract the death penalty. As rightly submitted by learned counsel for the state, the appellant ought to have been allowed to mitigate before the sentence was pronounced. Failure to mitigate does not however in our view ipso facto vitiate a conviction."*** (Emphasis added)

22. In **Sango Mohamed Sango & another v Republic [2015] eKLR (Criminal Appeal No. 1 of 2013)** the Court adopted this view with approval and held that:

> ***"Sections 216 and 329 of the Criminal Procedure Code empower the trial court, before passing sentence to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Although the above provisions are couched in permissive terms, this Court has held over time that it is imperative for the trial Court to afford an accused person an opportunity to mitigate before he or she is sentenced, even in offences where the prescribed sentence is death."***

(Emphasis added).

23. The need for mitigation was also considered by the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR (Petition 15 & 16 of 2015 (Consolidated))** in which the court observed that:

> ***"[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."***
>
> ***[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive."***

24. These authorities, which are all binding on this court, demonstrate the correct position on the requirement on receiving mitigation. Mr Ongira submitted that the trial court considered mitigation and that the offence for which the appellant was convicted carries a minimum sentence. However, the record shows that at no time was the appellant afforded an opportunity to mitigate prior to being sentenced. In my view, this omission justifies interference by this court with the sentence imposed by the trial court.

25. The second aspect raised by the appellant with respect to his sentence is that prior to sentencing, the lower court did not consider the time that he had served as required by section 333(2) of the Criminal Procedure Code. This section provides that:

> ***(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

26. The appellant was arrested on the 20th December 2014. He took plea on the 22nd December 2014. While he was granted bail on the 5th January 2015, it appears that he was unable to raise the amount and on several occasions asked for a reduction of bond terms. The appellant was remanded from the date of his arrest throughout the period of his trial, until he was eventually sentenced on 18th October 2016. He was in custody for a period of approximately one year ten months before his sentencing, a period of time that the magistrate did not take into account when passing sentence on him. As noted by the court in **Kyalo Muindi v Republic [2017] eKLR (High Court Criminal Appeal No 22 of 2017)** a failure to comply with section 333(2) of the Criminal Procedure Code:

"…impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

27. Since the court did not afford the appellant an opportunity to mitigate before sentencing, and since the court failed to comply with the provisions of section 333(2) of the Criminal Procedure Code, I find that there was a failure to consider material factors before sentencing the appellant. As the Court of Appeal stated in **Bernard Kimani Gacheru v. Republic [2002] eKLR (Criminal Appeal No 188 of 2000)**:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

28. I take the view that in the circumstances, the trial court having failed to consider mitigation and the time the appellant spent in custody, the interests of justice demand that this court interferes and reduces the sentence passed on the appellant. Taking into consideration that the appellant had been in custody since his arrest on 20th December 2014, was sentenced on 18th October 2016, and has been in custody since then, I make the following orders:

a) **The appeal is dismissed with respect to conviction and the conviction is affirmed;**

b) **The appeal on sentence succeeds to the extent that the sentence is reduced to the minimum term of five years imprisonment prescribed under section 12(2) of the Firearms Act. The term shall run from the 22nd of December 2014.**

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this 10th day of April 2019

C. MEOLI

JUDGE