



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.83 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. C.M. Njagi - SRM

delivered on 28th March 2019 in JKIA -Nairobi SRM. CR. Case No.152 of 2018)

RICHARD OTIENO SAMUEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Richard Otieno Samuel was charged with two counts under the **Firearm Act**. In the 1st count, he was charged with **being in possession of the Firearm** contrary to **Section 4(a)** as read with **Section 4(3)(a)**. The particulars of the offence were that 30th December 2018 at Terminal 1A Arrivals Customs Cleaning Point at Jomo Kenyatta International Airport within Nairobi County, the Appellant was found in possession of a Firearm make Ruger-Prescott-Az-US of Serial No.378-1975 without a valid Firearm Certificate. In the 2nd count, he was charged with **being in possession of ammunition** contrary to **Section 4(2)(a)** as read with **Section 4(3)**. The particulars of the offence were that on the same day and in the same place, the Appellant was found in possession of 6 rounds of .380 calibre without a valid Firearm Certificate. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on both counts. He was sentenced to serve seven (7) years imprisonment on each count. The sentences were ordered to run concurrently.

Aggrieved by this decision, the Appellant filed an appeal to this court challenging both the conviction and sentence. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted in the absence of evidence which established his guilt to the required standard of proof beyond any reasonable doubt. He faulted the decision on the grounds that it was based on contradictory and inconsistent evidence that was not properly evaluated. In particular, he was aggrieved that the prosecution had advanced theories and speculations which enabled it to fill glaring loopholes in the prosecution’s case. The Appellant was aggrieved that he was convicted of being in possession of the firearm and ammunition yet no evidence was adduced by the prosecution to connect him with the bag that the firearm and ammunition was recovered from. He was finally aggrieved that his defence was not properly evaluated by the trial court thereby reaching a skewed and slanted decision that was not supported by evidence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant filed written submission in support of his appeal. The Appellant’s counsel Mr. Oronge further made oral submission urging the court to allow the appeal. Mr. Miiri for the State opposed the appeal. He submitted that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. He therefore urged the court not to interfere with the conviction and the sentence of the trial court.

This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case. The Appellant in this case is a Kenyan citizen who ordinarily resides and works in the United States of America. His family however resides in Kenya. According to his testimony, on 27th December 2018 at about 5.00 p.m., he left Baltimore on a flight whose final destination was Nairobi Kenya. He checked in four bags. The flight had a stopover in Detroit, United States of America and Amsterdam, Netherlands. The first part of his flight was with Delta Airlines. This was from Baltimore to the Netherlands. The second part of his flight was from the Netherlands to Nairobi. It was with KLM Airlines. He arrived in Kenya on 28th December 2018. When he went to collect his luggage, he discovered that only three bags had arrived. He lodged a complaint with KLM on the lost bag. He then left the Airport and booked a hotel to spend the night at the City. On 29th December 2018, he was informed that the lost bag had been traced and would arrive in Nairobi at 10.00 p.m. He was required to be at the Airport at the time to collect the recovered bag.

At that time, PW1 Charles Nzioka, PW2 Wilberforce Chirchir and PW3 Victor Adede Odongo, employees of Kenya Airport Authority were on duty. They narrated how, when they were on duty, they saw something suspicious inside a black bag. This was during the screening of the

bag. PW1 and PW2 testified that the item appeared to be similar to a pistol. PW2 called police officers attached to the Airport who included PW4 PC Wilfred Katana. They decided to follow the bag until the place where it was due to be collected by the owner. Shortly thereafter, a Kenya Airways staff came and informed them that the owner of the bag had come and wanted to collect the bag. The owner is the Appellant in this case. The Appellant was requested to open the bag in the presence of PW1, PW2, PW3 and PW4. He opened the bag using a code that was known to him only. The officers searched the bag and inside a blue shoe which was produced into evidence, they found a pistol with five rounds of ammunition inside the chamber.

Although the Appellant in his testimony denied owning the firearm and ammunition, during the hearing of the appeal, he admitted that he had indeed purchased the firearm from Walmart in the United States of America using his Bank of America debit Card. He produced the receipt from Walmart and a copy of his debit card before the court to prove it. Indeed the receipt showed that the Appellant had on 20th October 2018 purchased a Ruger pistol that matched the particulars of the pistol that was recovered from the bag. The pistol was purchased using the Appellant's debit card. The receipt also indicated that the Appellant had purchased the pistol with ammunition.

The pistol was sent to the Directorate of Criminal Investigations Headquarters to determine whether the same was a firearm within the meaning ascribed to it by the **Firearm Act**. PW5 Alex Chirchir, a Firearm Examiner confirmed that the pistol was indeed a firearm within the meaning ascribed to the term under the **Firearm Act**. The ammunition too was ammunition within the meaning ascribed to the term under the **Firearm Act**.

It is clear from the above facts and the admission by the Appellant on this appeal that indeed the Appellant was found in possession of the firearm and ammunition without a firearm certificate contrary to **Section 4(2)(a)** which provides that:

“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 case of ammunition, in quantities in excess of those so authorized...

(b) ...

he shall, subject to this Act, be guilty of an offence.”

The Appellant therefore purchased, acquired and had in his possession the firearm and the ammunition. His appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. **Section 4(3)** of the **Firearm Act** recognizes that a person who is otherwise authorized to have a firearm may however be found to be in illegal possession of the same if he fails or neglects to renew a firearm certificate. The **Proviso to Section 4(3)** of the **Firearm Act** states as follows:

“Provided that where the offences for which the person is convicted (not being an offence in relation to a prohibited weapon or to any ammunition therefor) is failure by neglect to renew a firearm certificate such person shall be liable to pay a fine at the rate of five hundred shillings per day for every day or part thereof during which his default continues but so that no person shall be liable to pay a fine greater than the maximum provided by this subsection and if such fine is not paid then to imprisonment for a term not exceeding two years.”

The **Firearm Act** therefore provides for two sentencing options for those found in illegal possession of firearm where they did not in the first place have legal authority to possess the same and those who had legal authority to possess the same but did not obtain a firearm certificate.

In the present appeal, it was clear to the court that had the Appellant declared the firearm at the Airport, most probably he would not have been charged with the offence that he was convicted of. The Appellant's misguided decision to conceal the firearm which he had legal authority to own and possess in the United States of America led him to the path that he now unfortunately finds himself in. This court holds that the Appellant has been able to establish to the required of proof beyond any reasonable doubt that he lawfully purchased and took possession of the firearm and ammunition in the United States of America. He was required to declare the firearm and surrender it to the Kenyan authorities so that he could apply for a firearm certificate to enable him legally possess the same in Kenya. This court further holds that the sentence that ought to have been meted to the Appellant ought to have been similar to a person convicted for neglecting to renew a firearm certificate and not a person found in illegal possession of a firearm in circumstances that clearly point to the fact that he had no authority either in Kenya or in any other country to be in lawful possession of the firearm.

In the premises therefore, this court holds that the custodial sentence that was imposed on the Appellant cannot stand and ought to be revised to accord with the law. The Appellant was sentenced to serve a custodial sentence that did not take into account the fact that in United States of America, where the Appellant is a legal resident, he had authority to possess the firearm and ammunition. It did not help matters that the Appellant concealed this fact from the trial court out of the misguided notion that by denying ownership of the same he would escape criminal liability. That sentence is set aside and substituted by a sentence of this court commuting the sentence of the Appellant to the period served. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. The firearm and ammunition shall be forfeited to the State. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2019.

L. KIMARU

JUDGE