



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 62 OF 2019

MARTINE MURIUNGI MAOREAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence by

Hon. Sogomo SPM made on 19/3/2019 in

Tigania Cr. Case No. 33 of 2017

JUDGMENT

1. **Martine Muriungi Maore (“the appellant”)** was charged before the Tigania Principal Magistrate’s Court with three counts. The first count was for the offence of being in possession of a firearm without a firearm certificate contrary to **section 4(1) of the Firearms Act CAP 114**. The particulars of the offence were that, on the 7/1/2017 in Nairiri village, Kianjai Location, Tigania West sub-county within Meru County the appellant and one Julius Gitiye Rukunga were jointly found in possession of a firearm; PATCHET S/No. AB – 00142 without a firearm certificate in contravention of the said Act.
2. Count II was; being in possession of ammunitions without a firearm certificate contrary to **section 4 (1) of the Firearms Act CAP 114**. It was alleged that on the 7/1/2017 in Nairiri village, Kianjai Location, Tigania West sub-county within Meru County, the appellant and the said Julius Gitiye were jointly found in possession of eight (8) rounds of 9MM ammunitions, without a firearm certificate in contravention of the said Act.
3. Count III was being in possession of specified firearm without a license contrary to **section 4A (1) (a) and 4A (2) (d) of Firearms Act CAP 114**. The particulars of the offence being that on the 7/1/2017 in Nairiri village, Kianjai Location, Tigania West sub-county within Meru County the appellant and Julius Gitiye were jointly found in possession of a firearm; PATCHET S/No. AB – 00142 a specified firearm, without a firearm license in contravention of the said Act.
4. The appellant denied the charges but after the trial, he was found guilty and convicted of counts I and II and was sentenced to serve ten years imprisonment for each count. The trial court found count III to be the duplicity of count I and acquitted the appellant of the same.
5. Aggrieved by the said decision, the appellant has now appealed to this court against both the conviction and sentence, He set out 8 grounds of appeal which can be collapsed into three; **that the trial court erred in failing to note that the evidence presented was insufficient and contradictory; the trial process was not conducted fairly and the case was not proved beyond reasonable doubt.**
6. The appellant submitted that the evidence tendered by the prosecution was not sufficient to sustain a conviction. That the testimony of witnesses was inconsistent, contradictory and conflicting. In addition, a shoddy investigation was done as the authenticity of the weapon the appellant is said to have been in possession of was not established and that the ballistic report was inconclusive. Moreover, the whole trial process was biased as the matter proceeded without him as he never expected a fair trial.
7. This being a first appeal, this Court is obligated to revisit and re-evaluate the evidence before the trial court afresh, assess the same and make its own conclusions and findings bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okemo vs. R [1977] EALR 32**
8. The prosecution called seven witnesses to support their case. **PW1 Mwenda Wilson** told the court that on the material day at about 8 pm, he was coming home when he reached at the gate of their home and heard their dog barking in the farm. He went to check and found the appellant seated there. There was sufficient moonlight that aided him to see. His mother, **Gladys** thinking it was thief called the police. The police came and found the accused with a gunny bag which they emptied and found a rifle, blanket and a jacket.

9. **PW2 No. 87085625 Corporal Joseph Tsoka** of Nairiri Administration Police post testified that on the material day at 8pm, he was with **PC Shadrack Bario** on patrol when they heard screams. They went to the homestead of one Gitonga whereby they found him and other neighbors beating a man who was carrying a gun underneath his armpit. He was falling and rising up without dropping his gunny bag. They dispersed the mob and retrieved the bag which had clothes and a rifle make SMG which **APC Bario** tested and it discharged a live bullet.

10. **PW3 IP Kenneth Chomba**, a firearms examiner from Directorate of Criminal Investigations Nairobi testified that he received machine gun (*EXB*) and 8 rounds of ammunition (*EX A1 – A8*). He established that *EXB* and *EX A1 – A8* were capable of being fired and were ammunition respectively as defined by the **Firearms Act CAP 114**. He produced his report as *PEX 5*.

11. **PW4 Nathan Gitonga** testified that on the material day at about 8.30pm he was at his shop when he heard screams emanating from his mother, **Mary Kalayu's**, home. He rushed there and met the accused who was struggling to free himself from the grip of **Gladys Karibithu (PW4)** and **Andrew Kailikia**. The accused had a gunny bag which he was reluctant to surrender. Corporal Joseph arrived and recovered the sack which had a firearm.

12. **PW5 Elizabeth Nkirote** stated that on the material day at about 8pm, she heard screams from the home of **Gladys Kabirithu**. When she rushed there, she saw the appellant and a policeman holding a gun which he had removed from a gunny bag. When Martine was asked what he was doing with the gun he said that he was taking the weapon to one Gitiye.

13. **PW6 Gladys Kabirithu** told the court that on the material day at about 7.30pm, she was at home when she heard dogs barking. She and her mother, **Mary Kalayu**, went out to check what was happening. They found the accused in the farm. She grabbed him and took him to her homestead together with the sack which he had. Two local administration police officers arrived and recovered a rifle and clothing items from the sack which the appellant had.

14. **PW7 No. 108062 PC Andrew Kipruto** stated that he took over the case from PC Robert Ngeno. At midnight of the material date, **PW2** brought the accused together with the firearm with three rounds of ammunition and a magazine at the station. The appellant revealed that the firearm had been hidden along a fence near a latrine in Julius' home and that the latter had instructed him to take the weapon to Embu. When they visited Julius's home, they found a freshly unearthed hole near the latrine.

15. When put to his defence, the appellant opted to remain silent.

16. The issue of determination is *whether the prosecution proved its case beyond reasonable doubt*.

17. **Section 4 (1) of the Firearms Act CAP 114** states that:-

“Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.”

Anyone one in contravention of this is guilty of an offence as provided for under **sub section (2)** of the section. The penalty therefor is laid down under **subsection (3)**.

18. Although the charge sheet did not state the punishment section but the offence only, that error is curable under **section 382 of the Criminal Procedure Code**. All the prosecution was supposed to prove was; *Whether the appellant was found in possession of the firearm and ammunition, and whether the appellant had no firearm certificate?*

19. On the first issue, the term possession is defined under **section 2 of the Firearms Act**:

“(a) includes not only having in 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 of benefit of oneself or of any other person and the expressions “be in possession” or “have in possession” shall be construed accordingly; and

(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.”

20. According to **PW2, PW4, PW5** and **PW6**, on the material day and time, the appellant was found in the farm of one Gitonga while in possession of the rifle which they all identified as *EXB*. It was contended that their testimonies was contradictory. I have examined the alleged contradictions and have found them to be minimal. They do not affect the substance of the issue which is that the accused was found in the farm in possession of a firearm and ammunition.

21. In **Richard Munene v Republic [2018] eKLR**, the Court of Appeal held:-

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

22. When put to his defence, the appellant decided to keep quiet. Under **Article 50 (2) (i) of the Constitution of Kenya**, an accused has every

right to a fair trial which includes the right to remain silent and not to testify during proceedings. Firstly, the appellant refused to participate in the proceedings and secondly, chose to remain silent. Having chosen to remain silent, the appellant cannot now turn around and criticize the trial court. That was his constitutional right which he was entitled to and which he exercised the same appropriately. **Article 50 2 (f) of the Constitution of Kenya and Geoffrey Muriithi alias Gikundi & Anor –vs- DPP [2017] eKLR.**

23. The appellant was not bound to prove his innocence. However, the prosecution having established that he was on the material day and time found in possession of the offending objects, it was upon the appellant to rebut the evidentiary burden which rested on him. This he failed to. To this court's mind, the charges were proved to the required standard.

24. On the second issue, a firearm holder is supposed to have a certificate in respect thereof. The prosecution called a ballistic expert who told the trial court that he had tested the gun and it discharged ammunitions. That the gun was a fire arm in terms of the Act.

25. The appellant kept silent and did not produce any certificate for being in possession thereof. Accordingly, I find the appeal to be unmeritorious and I dismiss the same.

DATED and **DELIVERED** at Meru this 24th day of October, 2019.

A. MABEYA

JUDGE