



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NANYUKI
CRIMINAL APPEAL. NO. 81 OF 2016

PAUL WACHIRA NDERITU.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 937 of 2012

by Hon. E.BETT Senior Resident Magistrate on 8th July 2016)

JUDGMENT

1. On the evening of 22nd August 2012 five police officer from Nanyuki police station, acting on intelligence information proceeded to the popular bar and lodging in Nanyuki town. Those officers lay an ambush for two persons who were said to be suspicious. The two men were in one of the rooms in that lodging. When the two men were ordered by the police officers to surrender they defied that order. Instead those men began to shoot at the police officers. The police officers respondent by firing back. One of those men was short dead while the other one fled from the scene. The police officers recovered a Taurus pistol, serial No.KPQ 130430, and three rounds of ammunition from the dead suspect. The police officers also recovered two spent cartridges at the scene. The recovery was also witnessed by the Nanyuki officer in charge of police station (O C S) namely chief inspector Joash Nyachiro.

2. On inquiries being made it was found that Paul Wachira Nderitu the appellant who then was a police officer had been issued with the pistol found at the popular bar and lodging. He had been issued with that firearm by Corporal Idd Wako at Umande police station.

3. The appellant following that recovery was charged before the chief magistrate's court Nanyuki with two counts. **On count one** he was charge with the **offence of unlawful use of firearm contrary to section 26A (1) (b) of the firearm act cap 114**. On **count two** he was charged with **the offence of unlawful use of ammunition contrary to section 26A (1) (b) of Cap 114**. He was convicted and charged in both counts and was sentenced to serve 8 years imprisonment on each count which sentences were to run concurrently. He has filed this appeal against conviction and sentence.

4. This court being the first appellant court has an obligation to reconsider the evidence of the trial court evaluate it and draw its own conclusion in deciding whether the trial court's judgment should be upheld. **See the case of Okeno vs Republic 1972 EA 32.**

5. The evidence of the prosecution was that the recovered firearm had been issued to the appellant in his capacity as a policeman. Corporal Wako produced firearm register which bore the appellant's signature. Chief inspector Geoffrey Chania a forensic document examiner compared the specimen signature of the appellant and the signature that appeared on the firearm register and concluded that those two signatures were made by the same person.

6. Chief inspector Joash Nyachiro stated in evidence that the appellant presented himself at Nanyuki police station on 29th August 2012 and informed him that he had lost his firearm in his personal car. That he said he had lost it after he had given lift to some people. The appellant confirmed that he had not reported that loss to any police station.

7. It is pertinent to state that the appellant after the incident which occurred on 22nd August 2012 went missing for 7 days until he presented himself before chief inspect Joash Nyachiro. After it was confirmed that the firearm had been issued to him the officer at Umande police station looked for him to no avail at his house within the Umande police station. His wife when she was asked said that he had left and had not spent the night at their home. He was also looked for at his rural home but could not be found. It was not until the 29th of august 2012 that he presented himself to chief inspector Joash Nyachiro

8. The learned counsel Mr. Wanjohi for the appellant faulted the appellant's conviction by stating that the prosecution had failed to meet the required criminal standard of proof because the ballistic expert did not testify to confirm that the firearm and the ammunition were within the definition of firearm and ammunition in cap 114.

9. Learned counsel also submitted that the prosecution witnesses contradicted themselves on the type of firearm that was issued to the appellant. Learned counsel highlighted the evidence of corporal Wako the officer who issued the appellant with the firearm, where corporal Wako said that he had issued the appellant with a revolver serial no. KPQ 130430. Learned counsel contrasted that evidence with that of other police officers namely PW 1, 2, 3, AND 5 who said that the gun in question which was issued to the appellant was a Taurus pistol. Serial No. KPQ 130430. It should also be noted that PW 3 gave the serial No. of the fire arm as KEP 130430. That evidence according to the appellant learned counsel was unreliable and should not have led to the appellant conviction.

10. Finally learned counsel for the appellant submitted that the prosecution had failed to show a connection between the deceased suspect and the appellant.

11. Senior principal prosecution counsel Mr. Tanui opposed the appeal. He submitted that the prosecution had proved that the appellant was issued with a firearm on 5th August 2012 for which he signed the firearm register. Further he submitted that the handwriting expert had confirmed that the appellant had signed the firearm register. He submitted that the prosecution's evidence showed the appellant had lent his gun to the criminals amongst whom was the one who was shot dead, whose intention was to steal from the bar.

12. Learned counsel was of the view the ballistic report was not required because the firearm was identified by the officer who issued it to the appellant.

13. The appellant in his defence before the trial court confirmed that he was a police officer for the last 26 years. At the time of his arrest he was attached to Umande police station as a driver. He admitted that he was issued with a pistol at Umande police station as stated by corporal Wako. He also stated that it was not the first time he had been issued with a gun. He said that he lost that pistol and on realising he had lost it he went to Umande police station intending to report its loss. He said that Corporal Wako informed him that the gun had been booked in the OB. He further stated that since the OCS of Umande police station was no present he decided to proceed to Nanyuki police station to report its loss. At Nanyuki police station he met the OCS of Nanyuki who proceeded to arrest him. Appellant stated that the pistol in question was the only one he had ever lost. He said that he had lost it in his personal car after he had given a lift to some people.

14. On being cross examined he stated that the pistol was issued to him on 22nd August 2012. That he lost that pistol on the same day at 12.00a.m.

ANALYSIS AND DETERMINATION

15. The appellant in support of his appeal submitted that the prosecution had failed to produce evidence of ballistic report. According to the appellant that omission was fatal to the prosecution. The appellant did not cite any authority to support his contention.

16. In this court view the fact that there was no ballistic report was not at all fatal to the prosecution's case. This is because the pistol in question was confirmed by the prosecution witnesses to be the pistol that was issued to the appellant by Corporal Wako. The serial number in the firearm register, which register bore signature of the appellant, was the same serial number of the pistol before the trial court. It was therefore a firearm as defined under Section 2 of Cap 114. It needs to be borne in mind that the appellant did not deny by cross examining the prosecution witnesses or in his defence that the firearm recovered from the dead suspect was the one issued to him for official duties. The appellant very categorically confirmed that corporal Wako issued him with that firearm. In those circumstances there was no requirement to have a ballistic report. In this regard I fully concur with the finding of the trial court in the learned trial magistrate's considered judgment where he stated as follows:-

“The absence of a ballistic expert report notwithstanding the defence does not contest that what was issued by the register is not a firearm and five live ammunition”.

17. On the 2nd issue raised by the appellant this court finds that there was no contradiction. Corporal Wako stated that he issued the appellant with a revolver. PW 1, 2, 3, and 5 described the firearm as a Taurus pistol. Those witnesses did also state that the firearm had before the serial number initials KP which stood for Kenya police. It would follow that the initials KP could not have been part of the manufacturer's serial number. The manufacturer's serial number from that description was PQ 130430. Further in my inquiry in the dictionaries for the definition of a revolver and pistol I have found that both are hand guns. It follows that the fact one witness of the prosecution described the firearm as a revolver while others described it as pistol is of no consequence. It does not detract the evidence which was adduced that the appellant was issued with a firearm for his official duties. The submissions by the appellant on this second issue are therefore rejected.

18. The appellant submitted that the prosecution's case failed because there was no connection which was laid connecting the appellant to the dead suspect. That submission is rejected. The fact that no such connection was laid is of no consequence to the prosecution's case. The appellant was charged with the offence of unlawful use of firearm and ammunition. The offence was to the effect that the appellant disposed of a government firearm and ammunition to a person without lawful authority. The appellant admitted that he was issued with a firearm to carry out official duties. That same firearm was later found in possession of a deceased suspect. The appellant did not show any authority which entitled him to part with possession of that firearm. It follows that the possession for the firearm by the deceased suspect was unlawful and it mattered not whether a connection was found between the appellant and the deceased person.

19. The appellant in defending himself stated that he lost the firearm that had been issued to him. If indeed he lost the firearm as required under Section 22 of Cap 114 he should have reported that loss to the nearest OCS as soon as possible after the occurrence. Failure to make that report is an offence under section 22. That offence can lead to imprisonment not exceeding one year or a fine of Kshs. 10,000 or both. The appellant in his defence stated that he had been a police officer for 26 years. He also stated that the firearm in question was not the first one he had been issued with. With that long period of service it would be expected that he would be aware of the necessity of reporting the loss of firearm immediately he became aware of such loss. Instead what happened is the appellant went into hiding for 7 days. It was after 7 days that he purported to report the loss of the firearm to the OCS of Nanyuki police station. This court just like the trial court finds the defence offered by the appellant to be unbelievable and fabricated. In this court's view the prosecution proved its case against the appellant. It is for that reason that this court

finds the appellants appeal against conviction is without merit and is dismissed.

22. **Section 26A (1)(b)** attracts imprisonment of not less than 7 years and not more than 15 years. The appellant was sentenced to serve 8 years imprisonment. That sentence was lawful under that section. **Accordingly the appellants appeal against sentence is also dismissed.**

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Ndungu

Appellant: Paul Wachira Nderitu

For Appellant:

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE