



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 175 OF 2012

RICHARD LOMITIRI EDUM APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment and conviction in original NYERI CM CR 212/2012 delivered on 8/10/2012 by W.A JUMA – Chief Magistrate)

JUDGMENT

The appellant **Richard Lomitiri Endungu** was charged in the magistrate's court with the offence of being in possession of ammunition without a fire-arm certificate contrary to **section 4(1) as read with section 4(3) of the Firearms Act cap 114 laws of Kenya.**

The particulars of the offence are that on the 5th day of March, 2012 at Lamuria village, Kieni West District within the Central Province was found in possession of 2 rounds of 7.62 x 51mm caliber ammunition without a fire-arm certificate.

Briefly the evidence adduced in the lower court was that on 4th March, 2012 inspector John Losia attached to GSU Solia ranch received information that there had been seen a person who was having a gun. He together with his officers lay an ambush at a bridge while there they saw a motor cycle with a rider and followed him. The rider on reaching a home jumped off the motor bike and over the fence. They entered the home where there were 3 houses. They knocked in one of the houses who on being informed this were police officers opened.

The person who opened the house was the appellant. He was alone. They searched the house which had sofa set and under the cushion they recovered 2 rounds of ammunition. They arrested appellant and forwarded the ammunition to Government Ballistics expert who confirmed same to be ammunition under the Fire-arms Act.

The appellant gave sworn evidence. He testified that, that was his mother's house and he had slept there as the mother had taken a patient to hospital. The house had been opened by his brother who then left for his house. While in the house police officers knocked and he opened the door. On entering they asked him the owner of the house and he told them it belonged to his mother. They searched and then arrested him and took him to the police station where he was later charged of the offence.

The trial magistrate afterthe evidence found appellant guilty, convicted him and sentenced him to serve 8 years imprisonment. Dissatisfied with the conviction and sentence the appellant preferred this appeal.

The appellant faults the judgment of the trial magistrate in the grounds that the trial magistrate failed to consider that he was a victim of circumstances that the conviction was based on mere suspicion; and that the trial magistrate failed to consider his defence. The appellant filed written submission where he amplified the grounds of appeal.

In his submission the appellant submitted that the police were looking for his brother one Wakaba who escaped. It is therefore likely that they planted the ammunition on him; secondly he submits that no inventory of recovered items was produced and finally that his conviction was based on suspicion which is contrary to law. Appellant refers this court to the decision in Joga Kamundia – VS – Republic CR. APP 28/97 where it was held that suspicion however strong cannot be a basis of a conviction.

Mr. Njue learned prosecution counsel opposed the appeal. He submitted that the search and recovery was made in a house where appellant was; and that the claim that that was mother's house was not supported by any evidence on record and that it is not possible that it is the mother who lay a trap for him to be arrested.

This is a first appeal and the duties of the first appellate court were able evidenced in Okelo – VS – Republic 1971 EA 32. This court will re-evaluate the evidence on record and form its own conclusions and at all times bearing in mind that it did not see or hear the witnesses; and giving allowance for the same.

From the evidence on record I find the following was proved or not contested.

1. **That the appellant was found in the house. Indeed he admits that he was sleeping in the house when police officers knocked and he opened for them.**
2. **That the police on entering the house which was one roomed house conducted a search.**
3. **That after the search police alleged to have found the ammunition**
4. **This is the ammunition which was produced and was taken to ballistics expert for analysis and which was found to be ammunition under the Fire-arms Act.**

The issues in contention and which are raised by the appellant in his defence are that though he was found in the house, it belonged to his mother and he is therefore not responsible for what was found in the house; and secondly it is possible that the police "planted" the ammunition after failing to arrest his brother. He however does state that his brother Wakaba whom the police were looking for had his own house in the compound and it was not the one he was in. The learned trial magistrate addressed her mind on the issue and in her judgment stated;

“ the main contention of the accused was that he was a visitor in the house, unfortunately his host was not at home and no host was who came up and it is difficult to imagine that the house did not belong to the accused in the first place and even if it did not he was the one who was found locked up in the house with ammunition”.

I agree with this finding. There is no evidence on record that the house belonged to any other person other than the appellant. He did not call the mother the alleged owner to testify; as in the ownership; and even if he did, he was the one found in the house where the ammunition was found and there is no evidence that there was any other person in the house or access to the house. In the result, I find that the appellant was properly convicted by the trial court as there was evidence that he was the one found in possession of the ammunition. I therefore find no merit in this appeal and same is dismissed and confirm the sentence.

Dated at Nyeri this 31st day of March, 2016

S RIECHI

JUDGE

31/3/2016

Before – Hon S RIECHI Judge

Catherine – C/clerk

Appellant – present

Njoka for state – present

Court – judgment read over and delivered in open court in presence of appellant and Mr. Njoka for state this 31st day of March, 2016.

S RIECHI

JUDGE