



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.52 OF 2015

JOSEPH GITUMA MBURUGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No. 157 of 2013 of the Chief Magistrate's Court at Meru by Hon. D.O Onyango – Senior Principal Magistrate)

JUDGMENT

The appellant, **JOSEPH GITUMA MBURUGU**, was charged with an offence of being in possession of a firearm without a firearm certificate contrary to 4(1) (2) (a) as read with section 4 (3) (a) of the Firearms Act cap 114 laws of Kenya.

The particulars of the offence were that on 31st January 2013 at Mboroga village, Buuri District of Meru County he was found in possession of an AK 47 assault rifle serial number not visible without a valid firearm certificate.

The appellant was found guilty of the offence and sentenced to serve seven years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by M/s J.K. Ntaragwi, learned counsel. She raised seven grounds of appeal. The grounds can be summarized as follows:

1. That the learned trial magistrate erred in law and in facts by relying on an alleged confession that was not taken in accordance with the law.
2. That the learned trial magistrate erred in law and in facts by failing to resolve the discrepancy between the witnesses who allegedly recovered the rifle and the ballistic expert in respect of the missing serial number.
3. That the learned trial magistrate erred in law and in facts by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

After police officers were tipped by an informer about the possession of a firearm by the appellant, they

proceeded to his house and after a search, they recovered the rifle that is the subject of this case.

In his defence the appellant contended that he was arrested from his house where he was found asleep on a sofa set. He denied knowledge of the firearm.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

The charge was wrongly drafted. It ought to have read:

"... contrary to section 4 (2) as read with section 4 (3) (a)..."

I however find that the appellant was not prejudiced for he understood the charge against him. The defect is curable under section 382 of the Criminal Procedure Code.

A confession is defined under section 25 of the Evidence Act in the following terms:

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Section 25A(1) of the Evidence Act has limited persons who can take a confession from a suspect in the following terms:

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

PW1 and PW2 were police constables while PW3 was of the rank of a corporal of police. These witnesses testified that the appellant confessed to them about the ownership of the rifle. They are not envisaged under section 25 A (1) for they are below the rank of Chief inspector of Police. Their evidence of confession is both illegal and prejudicial to the appellant. The trial court heavily relied on it. This was a grave misdirection. Article 50(4) of the constitution provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

This evidence of alleged confession is therefore expunged from the record for it rendered the trial unfair.

The witnesses who allegedly recovered the rifle testified that the serial number was invisible. However, the ballistic expert testified that the rifle she examined had serial number 25033543. The prosecution did not bother to reconcile her evidence and that of the other witnesses who had said the number was not visible. The trial court had observed that the number had faded. This failure is fatal to the prosecution case for one is left wondering whether what was allegedly recovered from the appellant is the same rifle that was taken for examination. One may be tempted to conclude that one is not sure whether the same is a firearm as defined under the Firearms Act.

The upshot of the foregoing analysis of the evidence on record is that the conviction of the appellant is not safe. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless if he is otherwise lawfully held.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE