REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.78 OF 2012

FLORENCE WANGECHI GITARE.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

The Appellant Florence Wangechi Gitare was charged with being in possession of a Firearm without a Firearms Certificate contrary to Section 4 (1) as read with Section 4 (2) (b) of the Firearms Act, CAP 114, of the Laws of Kenya.

The particulars of the offence were that the Appellant on the 27th day of March, 2012 at Kibumbu Estate, Chuka, within Tharaka-Nithi County, was found in possession of one firearm make AK 47 Serial Number 3B250 without a firearms certificate.

In the second count, the Appellant was charged of being in possession of ammunition without firearm certificate contrary to section 4 (1) as read with section 4 (2) (b) of the Firearms Act CAP 114 of the Laws of Kenya.

The particulars of the offence were that the Appellant on 27th day of March 2012, at Kibumbu estate Chuka within Tharaka Nithi County, jointly with another not before court was found in possession of six rounds of ammunition of 7.62mm without a firearm certificate.

The Appellant was tried and at the end was convicted of both offences and sentenced to 10 years on each count with an order that the sentences do run consecutively.

The Appellant was aggrieved by both conviction and sentence and therefore filed this appeal. In her memorandum of Appeal, the Appellant raised the following issues:

1. **That the court failed to consider the appellants defence;**

2. **That the prosecution failed to prove its case beyond any reasonable doubt and conviction went against the weight of the evidence.**

3. **The judgment is contrary to the law.**
4. **The sentence is manifestly excessive.**

The prosecution's case was as follows: PW1 Everlyne Akinyi testified that on 27 March 2012, the Appellant who was her friend called her as she was preparing to go to work and asked her for her keys, and told her that she wanted to store something in her (PW1) house. Since PW1 was in a hurry, she did not ask the Appellant what she wanted to store and she gave her the key and went to work at Bahati bar within Chuka Town. Later on, the Appellant, the landlord and the police came to her place of work. They asked her if she was Akinyi and they went outside the bar and her employer, one Mbogo followed them outside whereupon she was informed it was a home issue. They then went to where she used to stay and found a plain clothes officer at the door while another one was patrolling the plot. She then showed the police officers her house and told them that the Appellant had her keys whereupon the Appellant opened the house. They entered into the house and the police officers conducted a search on the house and discovered a firearm hidden under the bed. They then went to the Appellants house and a search was conducted but nothing was recovered. She further testified that the Appellant admitted having put the firearm in her house. She said that they would visit each other occasionally and that she had no grudge against appellant.

PW 2 Senior Sgt. Dedan Nyamu, and PW3 Cpl Moffat Kariuki all of who were police officers testified that the Appellant confessed to having planted the firearm in Akinyi's (PW1) house and that further they searched the Appellant's house but recovered nothing. PW 2 narrated to court how they were informed by an informer that there was a certain house with a firearm and that the said firearm was in the fourth house within a plot which belonged to a person called Marinjani. The said person told them that it had been moved from fourth room to the first room and that the first house where the firearm was belonged to Akinyi and that they had been given information that room four where the firearm had been removed belonged to the Appellant.

PW5 Chief Inspector of Police Hassan Maningo, a Firearms Examiner attached to CID Headquarters in Nairobi testified that on 3rd April 2012, he received some exhibits from PW4 which included one rifle with serial number 3B250 and six rounds of ammunition. He testified that he successfully test fired the rifle using two rounds of ammunition and that from the examination, he formed the opinion that the firearm and ammunition were capable of being fired and were thus a firearm and ammunition respectively within the meaning of the Firearms Act. He prepared a report dated 8th May 2012, and produced it as an exhibit.

This being the first appeal, it is incumbent upon me to evaluate and analyse the evidence adduced before the trial court afresh and come to my own findings. This court had no opportunity to see the witnesses in order to weigh their demeanour and I am guided on the duties of a first appellate court as espoused by the Court of Appeal in the decision of ***KIILU AND ANOTHER V R (2005) 1 KLR 174*** where the Court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

When the appeal came up for hearing on 12th February 2015, Mr. Mulochi counsel for the State did not oppose the appeal for reasons that the firearm was not found in the Appellant's house and that nobody saw the Appellant carry the ammunition to Akinyi's house. On this ground alone, the State conceded the appeal. In reply, the Appellant pleaded for leniency.

Having carefully considered the evidence on record, grounds of appeal, there is no doubt that the firearm and ammunition were not found in actual possession of the appellant. They were found in the house of

PW1 who was treated as a witness. The police officers PW2 & 3 acted on the evidence of an informer. The informer was not called as a witness and the court was not told why the police decided to believe PW1 in whose house the exhibits were recovered and not the Appellant. The exhibits having been recovered in her house, PW1 may have been an accomplice or a suspect. Accomplice is a person who participates in the commission of an offence as a principal or accessory. It is only this informer who could have shed light on how the exhibits came to be in PW1's house. In the case of **Peter Wembundi Wepukhulu V. Republic CRA 1068/2003** J. Makhandia considered the court of appeal decision on when evidence of an informer is admissible. **Patrick Kabui Maina and another vs Republic 1986 KCA 889** where the court of appeal said;

> "…. **If any accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief, and be cross examined, such evidence should be disregarded…."**

The police relied on evidence of an informer who should have been put in the witness box to explain how the exhibits came to be in PW1's house. The evidence of the informer was to corroborate PW1s evidence as to how the exhibits got to PW1's house but without that evidence PW1 was also a suspect and the trial court in failing to consider that fact that, PW1 may as well have been the owner of the exhibits fell into error.

The Arresting Officers seem to have preferred the charge against the appellant based on an alleged confession by the appellant. Confession or admissions are admissible pursuant to section 25A of the Evidence Act. A confession is only admissible if made before a judge, magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of the Chief Inspector of Police (CIP) PW2, 3 and 4 were all below the rank of CIP. What the appellant told them if at all did not amount to a confession. I believe the police officers' evidence on the alleged confession influenced the finding of the magistrate.

I have seen the judgment of the court and in my view it does not meet the requirements of section 169 of the CPC on a well-structured judgement. Apart from summarizing the evidence adduced in court, the magistrate did not analyze or evaluate the evidence nor did the court give the reasons for the decision arrived at. This court has however cured that defect by re-evaluating the evidence before the trial court afresh.

I noted that the appellant was charged under the wrong section as she ought to have been charged under section 4 (2) as read with section 4(3) (a) of the Firearms Act Cap 114 of the Laws of Kenya.

After the above considerations, it is my view that the prosecution did not prove their case beyond any doubt, that it is the appellant who was found in actual possession of the firearm and ammunition. The doubt that was left lingering in the court's mind should have been resolved in favour of the appellant.

For the above reasons, I find that the conviction was unsafe. It is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AT MERU THIS 20TH DAY OF MARCH, 2015

R. P. V. WENDOH

JUDGE.

Appellant present

Mr. Muriuki Mugo for state

Kirimi/Jane Court Assistant