



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 117 OF 2011

LYDIA MWAYIGEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 5240 of 2010 in the Chief Magistrate's Court at Kibera – Mrs. Nyakundi (PM) on 29/04/2011)

JUDGMENT

1. The origin of this appeal is the appellant's conviction for the offence of being in possession of ammunition without firearm certificate contrary to **Section 4(2)(a)** of the **firearms Act Cap 114** Laws of Kenya, by Mrs. Nyakundi Principal Magistrate in **Kibera CM Cr. Case no. 5240 of 2010**. It had been alleged that on 1st December 2010 at Kibera slums within Nairobi County, had in her possession 25 rounds of 9mm calibre ammunition without a firearms certificate. She was sentenced to 7 years imprisonment.

2. The prosecution's case in sum, was that acting on a tip off, **PW1** and **PW2** both Police Officers attached to CID Headquarters in Nairobi, laid ambush in Kibera near the D.O's office for a woman who was said to be in possession of live ammunition for sale. When the woman emerged and approached the informer who was being used as bait, the police moved in and arrested her. The officers recovered a box containing 25 rounds of ammunition. They escorted her to Kileleshwa Police Station where she was subsequently charged.

3. In her unsworn testimony and without calling any witnesses, the appellant denied the offence. Her

evidence was that she operated an eatery near the Chief's office in Kibera. That on the day of her arrest the police came upon her on the way arguing with a customer who had there before consumed food at her eatery and failed to pay.

4. The police searched her and recovered nothing from her. They searched the other people nearby and put some stuff that she did not know in her pocket. They also escorted her to her house and searched it but did not recover anything. She was taken to the police station and locked up and only learnt of the charges against her, five days later when they were read to her in court.

5. The appellant raised four grounds of appeal in the appeal before me.

She argued that **PW1** and **PW3** did not testify on oath as required by law, that the exhibit memo was not produced in court to prove that ammunition was recovered, and that the case was not proved beyond reasonable doubt since the alleged buyer did not testify. She further averred that the sentence imposed against her was harsh.

6. The learned state counsel, Miss Kuruga opposed the appeal on behalf of the State contending that the prosecution needed to prove only three things to sustain a conviction in this case and that this they did. Miss Kuruga submitted that the prosecution only needed to prove that the appellant was in possession of the exhibits, without a valid certificate and that those exhibits were authentic ammunition.

I have perused the proceedings and find that the handwritten record shows that the witnesses were sworn and they testified in Kiswahili. It is the typed proceedings therefore which seem to have omitted to show that these two witnesses testified on oath. I also note that the lower court record does include exhibit No. 4 which shows that the right procedure was followed in the recovery of the exhibit. **PW1** in his testimony stated that the alleged buyer fled and was not found to testify.

On the sentence, the Act provides for not less than 7 years and not more than 15 years imprisonment upon conviction. The appellant was sentenced to 7 years imprisonment which is within the law.

7. After a careful analysis of the proceedings I have no difficulty agreeing with the submissions of Miss Kuruga. Proof of possession of the ammunition by the appellant is to be found in the evidence of **PW1** and **PW2** who participated in the recovery. Their evidence was corroborative of each other and confirmed that indeed the box containing the 25 rounds of what, at that, time they only suspected to be ammunition, was recovered on the person of the appellant.

8. The authenticity of the exhibits was provided by **PW3** the Ballistics Expert. The exhibits were sent to the Ballistics Expert under a memo prepared by **PW1** with a request to examine and ascertain if indeed these were ammunition for purposes of the Firearm Act. Upon examination he established that the exhibits were indeed ammunition of 9x19mm or 9mm calibre.

9. Three of these were successfully test-fired using a Bruising pistol, and he concluded that the ammunition were capable of being used in a Ceska, or Smith and Wesson Pistols and could also be used in MP5 or Pachet Sub-machine guns, and many other types of guns. It was the expert opinion of the Firearm Examiner that all 25 rounds of ammunition were live and were ammunition for purposes of the Firearm Act. The ammunitions were produced in evidence together with the exhibit Memo and the Ballistic Expert's report.

10. This being a criminal case the burden of proof rests with the prosecution and never shifts to the person who is accused. The appellant was therefore, under no burden to prove her innocence or to explain herself. Having elected to testify in her own defence how her, evidence must be assessed together with the rest of the evidence on record. I have therefore, considered the evidence of the appellant together with and in the context of the rest of the evidence on record and find that it comes across as contrived and difficult to believe.

11. There seems to be no rational explanation for **PW1** and **PW2** who did not know the appellant before, to pluck her off the street and plant a charge of this magnitude against her. There was no evidence of pre-existing bad blood between the appellant and the two officers and there was nothing to be gained by the two officers from such nefarious conduct. I am therefore, satisfied that the exhibits which were later certified to be live ammunition were indeed recovered from the appellant. Having so found, I also find from the proceedings that the appellant did not produce a Firearm Certificate allowing her to have the ammunition in her possession.

12. On the consideration of the entire evidence tendered in the trial court, I am satisfied that the learned trial magistrate was perfectly entitled to find the appellant guilty as charged, and that her conviction is safe and sound.

13. Accordingly I find that this appeal is unmeritorious and is dismissed.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **13th** day of **June 2013**.

L. A. ACHODE

JUDGE