



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal No. 1 of 2010

between

PETER RIOBA MARWA APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kehancha, Hon. J. R Ndururi in Criminal Case No. 1750 of 2010 dated 28th December, 2009)

The appellant, **Peter Rioba Marwa**, was charged with the offence of being in possession of a fire arm contrary to section 89 (1) of the **Penal Code**. The particulars of the offence were that on the 23rd December, 2009 at Mosweto area in Kuria East District within Nyanza Province, without reasonable excuse had in his possession or under his control, as the case may be a firearm namely homemade gun in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

He also faced a second count of being in possession of ammunition contrary to section 89 (1) of the **Penal Code**. The particulars of the offence are that on the 23rd December, 2009 at Mosweto area in Kuria East District within Nyanza Province, without reasonable excuse had in his possession or under his control, as the case may be eleven rounds of 7.62mm ammunitions in circumstances which raised reasonable presumption that the said ammunition were intended to be used in a manner prejudicial to public order.

He appeared for plea on 28th December, 2009. When the charge was read and explained to him he pleaded guilty and a plea of guilty was entered. The facts of the case were read to him and he confirmed them as correct. The appellant was consequently convicted on his own plea of guilty and sentenced to serve 7 years in prison on each count. The sentences imposed on 28th December, 2009 were to run concurrently.

On 8th January, 2010, the appellant filed the present petition of appeal which he subsequently amended on 21st October 2011. He is appealing against both conviction and sentence. The petition is premised on 6 grounds as follows:-

1. *The learned trial magistrate erred in law and fact by convicting the appellant on defective charges.*

2. *The learned trial magistrate erred in law and fact by convicting the appellant when the plea was not clear and unequivocal.*
3. *The learned trial magistrate erred in law and fact by convicting the appellant on the charge of being in possession of a fire arm and ammunition without proof that the suspected items were indeed a fire arm and ammunition respectively.*
4. *The learned trial magistrate erred in law and fact by failing to ensure that the language of the court was understood to the appellant.*
5. *The learned trial magistrate erred in law and fact by handing down a sentence that was harsh and excessive in the circumstances.*

The appeal came up for hearing before me on 8th February 2012. During the hearing the appellant abandoned the grounds of appeal in the petition. He submitted that he was found with the weapons but that he had them for the purpose of guarding his home and livestock. He pleaded with the court to reduce his sentence or to place him on probation stating that his seven minor children who were previously being cared for by his mother were now without a guardian as his mother had since passed on and his wife died prior to his imprisonment.

The appeal was opposed by the state through learned counsel **Mr. Mutai**. He submitted that the appellant was convicted on his own plea of guilty which was unequivocal. Further he submitted that the appellant understood the Kiswahili language into which proceedings were interpreted. On the ground that recovered items were not tested to confirm that they were indeed fire arm and ammunitions respectively, counsel submitted that there was no need for such testing since the appellant had not disputed the same. On the sentencing, counsel submitted that the same was within the law but left it to the court's discretion.

This being a first appeal, the court is under duty to reconsider and evaluate the evidence afresh. See **Okeno –vs- Republic 91972) EA 32.**

In this particular case, the appellant abandoned the appeal during hearing seeking only to mitigate and ask for leniency in the sentence. However for the completeness of the record, the court reviewed the proceedings in the lower court. The appellant was convicted on his own plea of guilty. From the record, the plea was unequivocal. Further the appellant understands the Kiswahili language. That is the language in which the plea and proceedings were interpreted into. The grounds of appeal therefore fail.

On the sentence imposed, under section 89 (i) of the **Penal Code**, the offence attracts a minimum sentence of seven years and a maximum sentence of 15 years. The court imposed the minimum sentence. The appellant has pleaded with this court that he be released or released to serve the remaining part of the sentence on probation having reformed. I have given due consideration to his plea.

I note that the appellant has already served a substantial part of the sentence. I therefore order that a probation report be presented to this court to enable the court decide on an appropriate sentence.

The appeal shall be mentioned on 8th October, 2012 for further orders.

Judgment dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:
Peter Rioba Marwa: :appellant (present/absent)

..... :counsel for respondent (present/absent)

..... :court clerk

R. LAGAT-KORIR
JUDGE