



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.209 OF 2010**

**JACKSON MURIITHI GIKUNDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**(An Appeal from original conviction and sentence in Naivasha SNR. P.M.CR.C.NO.1529/2010 by  
Hon T. C. C. Wamae Senior Principal Magistrate, dated 29<sup>th</sup> June, 2010)**

**JUDGMENT**

The appellant **Jackson Muriithi Gikunda**, was convicted on his own plea of guilty and sentenced to serve five years imprisonment for the offence of **being in possession of an imitation of firearm** stated in the charge sheet to be contrary to **section 21(1)** as read with **sub-section (2)** of the **Firearms Act**.

The appellant was aggrieved and has filed this appeal through the firm of Karanja Mbugua and Company Advocates on five grounds which can be distilled into only two, namely:

- i) that the charge was defective, and
- ii) that the plea was not unequivocal.

There is, of course the ground that the appellant's constitutional rights were violated by the failure to produce him before the court within 24 hours.

In view of several recent decisions, this question is only relevant where the appellant is seeking a remedy in the form of compensation against the relevant body.

Learned counsel for the respondent correctly, in my view conceded the appeal.

The charge was brought under provisions of the law which do not create the crime charged. **Section 21(1)** aforesaid deals with converting imitation firearms into firearms. There was no evidence that the imitation found on the appellant was converted into a firearm. Although marginal notes to **section 34** of the **Firearms Act** alludes to "*Penalty for use and possession of firearms or imitation firearms, in certain cases*", the content of that section does not talk of possession. In any case, the section is a penalty section and does not create an offence. To the extent that the charge was defective, I respectfully agree with both counsel.

Secondly, the plea was clearly not unequivocal. The appellant admitted the facts as narrated but in mitigation explained that he had made the item (the imitation) in the course of his study as a welding student at the NYS College. The facts he pleaded guilty to were that when inspection was conducted at the NYS college Barracks, the imitation firearm was found in his box.

Possession if created as an offence by statute, only constitutes *actus reus*. What was the *mens rea* in this matter? With the appellant's explanation that the imitation was moulded in the course of his study, possession *per se* cannot be a crime.

This appeal succeeds and is accordingly allowed. The conviction is quashed and the sentence of five years imprisonment set aside. The appellant is forthwith set free unless lawfully held.

**Dated, Delivered and Signed at Nakuru this 24<sup>th</sup> day of February, 2011.**

**W. OUKO  
JUDGE**