



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 197 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No. 911 of 2007 of the Principal Magistrate's Court at Voi: P.N. Ndwiga – S.R.M.)*

**ROBERT MWASHAU MWAKICHWA ..... APPELLANT**

**=VERSUS=**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **ROBERT MWASHAU MWAKICHWA**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Voi Law Courts. The Appellant was together with 2 others arraigned before the trial court on 29<sup>th</sup> August 2007 facing the following two charges:

**COUNT NO. ONE “BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARMS CERTIFICATE CONTRARY TO SECTION 4(1) AS READ WITH SECTION 4(3) OF THE FIREARMS ACT CAP 114, LAWS OF KENYA”**

***On the 28<sup>th</sup> day of August, 2007 at Mwakingali Village within Voi township in Taita Taveta District of Coast Province were jointly found in possession of two firearms make Smith And Wesson revolver serial number not visible and a Tokalev pistol serial number EA 53188 without firearm certificates:***

**COUNT NO. TWO and THREE  
(which were identically framed)**

**BEING IN POSSESSION OF AMMUNITIONS WITHOUT A FIREARMS CERTIFICATE CONTRARY TO SECTION 4(1) AS READ WITH SECTION 4(3) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA**

***On the 28<sup>th</sup> day of August 2007 at Mwakingali Village within Voi township in Taita Taveta District of Coast Province were jointly found in possession of five (5) rounds of 38 mm ammunition without a firearm certificate”***

The Appellant entered a plea of ‘**not guilty**’ to all the three counts and his trial commenced on 10<sup>th</sup> June 2008. The prosecution led by **INSPECTOR GITHOGE** called a total of five (5) witnesses in support of their case. The brief facts of the case were that on 27<sup>th</sup> August 2007 acting on information from the **chief – Abel Mwangemi** of Mwakingali ‘A’ Village police went to the said village and were led by one suspect

to the house of the Appellant. The Appellant told police that he had buried a pistol in the ground inside his house. Police dug up the area pointed out to them by the Appellant and recovered hidden in the ground a pistol make Tokalev serial number EA 53188 together with five rounds of ammunition. The Appellant was then taken to the police station and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he totally denied having possession of the pistol or ammunition as alleged. On 15<sup>th</sup> July 2009 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the 1<sup>st</sup> and 2<sup>nd</sup> counts and thereafter sentenced him to serve ten (10) years imprisonment on each count. The sentences were ordered to be served concurrently. The Appellant's two co-accuseds having been dealt with, one pleaded guilty and was placed on three (3) years probation and the other having been acquitted of all charges by the trial court, it is only the Appellant who filed this appeal against both his conviction and sentence.

The Appellant who was not represented during the hearing of this appeal relied entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, who appeared for the Respondent State made oral submissions by which he opposed the appeal. The Appellant was initially implicated in this matter by his co-accused one Thomas Mwawasi Chola who police had arrested on 27<sup>th</sup> August 2007. If this evidence of a co-accused were the only evidence adduced against the Appellant in the lower court then I would have had no hesitation in dismissing this appeal. However **PW1 PC JOSEPH MAUNDE** told the court that upon being led to the home of the Appellant in Mwakingali B Village by the said '**Thomas**' the police met and interrogated the Appellant who told them that he had hidden the pistol inside his house. The Appellant then proceeded to point out to the police a spot on the floor where he had buried said pistol. The police dug up the spot and recovered a Tokalev Pistol serial No. EA53188 containing five rounds of 0.38 mm caliber ammunition. The pistol as well as the 5 rounds of ammunition were duly produced as exhibits before the trial court **Pexb3** and **Pexb4**. This evidence of **PW1** is corroborated in all its material aspects by **PW2 ABEL MWANGEMI** the chief of the area told the court that he accompanied police to the home of the Appellant and that he was present and witnessed the recovery of the pistol and ammunition from the ground. **PW2** states at page 17 line 8:

***"We were led to Robert Mwashaus [the appellants] house. At first he denied but later admitted he had buried a pistol inside his house. He pointed to us in the middle of the house. The police officers dug up the area and they found a safaricom bag on pulling it out, they recovered a pistol and a small iron rod ..."***

**PW1** and **PW2** did positively identify in court the pistol and ammunition that were recovered from the house of the Appellant. Both witnesses have also positively identified the Appellant as the one who pointed out to police the spot where the pistol was buried. The fact that the Appellant had buried these items in the ground shows a guilty mind. The fact that they were found buried inside the Appellant's house proves that he was in actual possession and control of these items. The Appellant does not deny that the house is his. Indeed in his defence he states that it was he and his co-accused '**Thomas**' who shared that house.

**PW5 ALEX MUDINDI MWANAWIRO** is a firearms expert attached to the Ballistics laboratory at CID Headquarters in Nairobi. He told the court that he did examine the exhibits in question. He found the pistol **Pexb3** to be in good general and mechanical condition and was capable of being fired therefore he found it to be a Firearm within the meaning of the Firearms Act Cap 114 Laws of Kenya. **PW5** did also examine the five (5) rounds of ammunition which he test fired and he further found that attempts had been made to fire them. He concluded that these were ammunition in the terms of Cap 114. He filled and signed his report which was produced in court as an exhibit **Pexb9**.

The evidence adduced therefore leaves no doubt that the Appellant was found in possession of a firearm and ammunition. The Appellant had no licence to possess he same neither did he in his defence allege that he had any such licence. The learned trial magistrate did consider the Appellant's defence but found in her judgement at page 21 line 6:

***“For the 2<sup>nd</sup> accused [the appellant herein] to now feign ignorance of one pistol buried in his house, is an unmeritorious and false defence. I do not believe him at all. Further a dug up area is quite easy to know so the 2<sup>nd</sup> accused knew of the pistol. He is the one who buried it there. I find that the prosecution has proved its case against the 2<sup>nd</sup> accused Robert Mwashau beyond any reasonable doubt. The 2<sup>nd</sup> accused is guilty as charged”***

I am satisfied that the above findings of the learned trial magistrate were supported by the evidence on record and were indeed sound. The Appellant’s conviction on both counts was merited and I do hereby confirm the same.

The Appellant has also appealed against his sentence of ten (10) years imprisonment on each count. No doubt the weapons found on the Appellant are dangerous indeed deadly weapons but the fact is they were found buried in the ground. There is no evidence that the Appellant had used or that he intended to put the pistol to any use. In my opinion the ten year sentence was excessive given the circumstances of the case. I do therefore set aside both ten year sentences and instead substitute a term of five (5) years imprisonment on each count to run from the date of first conviction in the lower court. Both 5 year terms of imprisonment will be served concurrently. It is so ordered.

**Dated and Delivered in Mombasa this 13<sup>th</sup> day of April 2011.**

**M. ODERO  
JUDGE**

In the presence of:  
Mr. Onserio for State  
Appellant in person