



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 216 OF 2009

SILAS MPATINGA MUCHEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by Ndungu H. N. Senior Principal Magistrate in the Nanyuki Senior Principal Magistrate's Criminal Case No. 959 of 2006 delivered on 2nd November 2009 at Nanyuki)

JUDGMENT

The appellant herein, **SILAS MPATINGA MUCHEMI**, was tried on a charge of three counts. The Appellant faced a charge of preparation to commit a felony contrary to *Section 308 (1)* of the Penal Code in count I. In count II he was accused of being in possession of a firearm without a firearm certificate contrary to *Section 4(2)(a) 3(a)* of the Firearms Act. The Appellant further faced a charge of being in possession of ammunition without a firearms certificate contrary to *Section 4(2)(a) 3(a)* of the Firearms Act in count III. The Appellant was convicted on all counts and sentenced to serve seven (7) years imprisonment in each count. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant listed the following grounds in his amended Petition of appeal:

- 1. The Learned Senior Principal Magistrate erred the law and fact in failing to find that the appellant was not the sold occupant of the house from which the firearm was recovered.***
- 2. The Learned senior principal magistrate erred in law and fact in failing to find that the appellant was not in exclusive possession and control of the firearm in question.***
- 3. The Learned trial magistrate erred in law and fact in entertaining hearsay evidence.***
- 4. The Learned trial magistrate erred in law in failing to find that the prosecutions failure to call the witnesses who recovered the firearm in question was fatal to the prosecution case.***
- 5. The Learned trial magistrate erred in law and fact in failing to give credence to the evidence of the defence witness.***
- 6. The conviction was unlawful against the weight of the evidence and the sentence was excessive.***

7. *The prosecution and trial of the appellant was null and void abinitio having been conducted by an unqualified person.*

The case before the trial court appears to be short and straightforward. The prosecution's case was supported by the evidence of four witnesses. On 26th April 2006 the government was conducting a disarmament operation in Doldol area. The home of the appellant was raided on 2nd May 2006. During that time, the appellant was at home together with his family. A signal kit pyrotechnic pistol was recovered at the Appellant's home. The Appellant was arrested and taken to the Police Station and later taken to court. The items recovered from the appellant's house were taken for examination by a ballistic expert who confirmed the same to be a firearm and ammunitions as defined under the Firearms Act.

When placed on his defence, the Appellant testified and called for the evidence of one independent witness. He told the trial court that he lived with a brother who was an administration Police officer. He told the Police and the trial court that whatever was recovered from his house belonged to his brother. The Appellant summoned his brother, Solomon Mpatinga (D.W.2) to testify in his defence. D.W.2 stated that on 1st May 2006 he had gone to visit the Appellant. He left his trouser in his brother's house as he left for Nanyuki to buy medicine. D.W. 2 said he had left inside his trouser's pocket the signal kit in issue. He claimed he used the kit to scare away elephants. The kit was given to him by the British army. The learned Senior Principal Magistrate concluded that there was no doubt that the signal kit pyrotechnic pistol was found in the Appellant's house at the time when there was an on going disarmament exercise within Doldol area. The learned Senior Principal Magistrate was of the view that the Appellant was found in possession of a firearm and ammunitions without a firearm's certificate hence he was so armed with intent to commit a felony. The trial magistrate rejected the Appellant's defence claiming there was no cogent evidence.

When the appeal came up for hearing, Mr. Lompo, learned counsel for the Appellant argued before this court that the Appellant and D.W. 2 lived together in the house where the subject matter of this case was recovered. Mr. Lompo further pointed out that the Appellant was prosecuted by an unqualified prosecution. Mr. Makura, learned Senior State Counsel, conceded the appeal on the ground that the ingredients of *Section 308* of the Penal Code were not met i.e. the conditions to establish the offence of preparation to commit a felony were not proved. The learned Senior State Counsel conceded that the Appellant was prosecuted by unqualified prosecutor.

I have reconsidered the case that was before the trial court plus the oral submissions of learned counsels from both sides. This appeal will be determined on three main grounds. First, the question is whether there was sufficient evidence which could sustain a conviction. On the first count, the Appellant was convicted for the offence of preparation to commit a felony. One of the ingredients which must be established in order to prove the offence is that the accused must have been found armed and that he intended to commit a felony. In this case there was no evidence that the Appellant was armed. There is also no evidence that he had intentions to commit a felony. The second ground ably argued is to the effect that the trial magistrate failed to appreciate that the Appellant lived together with D.W.2 hence possession could not have been attributed to him. With great respect, I am convinced the trial magistrate fell into error when she failed to note that there was doubt whether the appellant had knowledge of the existence of the firearm and the ammunitions in D.W.2's pockets. The third ground argued on appeal is to the effect that the appellant's prosecution was conducted by a Police Officer who had no authority to do so. Mr. Makura conceded the appeal on this ground. I have also looked at the record and it is obvious that the appellant's prosecution was conducted by a Police Constable contrary to *Section 85(2)* of the Criminal Procedure Code. I find that the aforesaid lapse renders the whole trial as a nullity. I must commend Mr. Makura for conceding the appeal.

The end result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 1st day of April 2011.

J. K. SERGON
JUDGE

In the presence of Mr. Lompo for Appellant and Mr. Makura for the State.

J.K. SERGON
JUDGE