



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS) Criminal Appeal 161 of 2009**

JOSEPH GITAU WAIRIMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant was charged tried and convicted with the offence of being in possession of Ammunition without valid firearm certificate contrary to Section 4 (2) (a) of the Firearms Act Cap. 114 Laws of Kenya.

The particulars are that on 16<sup>th</sup> July 2007 off Naivasha Road near Drumsticks Café Riruta within Nairobi was found in possession of one round of ammunition 7.62 mm special caliber without a valid firearms certificate.

The grounds of appeal are 2.

- (1) That the Trial Magistrate failed to find that the whole trial was a nullity and void on the ground because the rights of the Applicant were violated by the delay occasioned before being taken to court within the prescribed time. He was arrested on 16<sup>th</sup> July 2007 and arraigned in court on 26<sup>th</sup> July 2007.
- (2) The Trial Magistrate failed to find the evidence of PW 1 was not corroborated. PW 1 was a police Corporal Ali Ibrahim working then at Riruta APs Camp.

On 16<sup>th</sup> July 2007 at 12.00 he was on patrol with APC Charles Njeru. They were in civilian clothes. They saw 3 men and stopped them. One entered a hotel Drumstick. PW1 suspected him. His colleague remained with other 2. PW followed the one who entered into the hotel. The appellant had not known him. "He removed something from his pocket. The thing was in a white tissue." PW1 opened it and found one round of ammunition 7.62 mm. PW1 arrested the Appellant who said the item was not his. He arrested him and took him to police station. The two other men did not have anything. PW1 produced a cartridge which initially he said it was a bullet. PW2 the colleague of PW1 confirmed that the Appellant whom he knew was arrested by PW1 at the hotel Drumsticks "My colleague told me Accused ran into hotel and placed ammunition on the table." The ammunition found on table was not for a pistol but for AK 47. His evidence is that he was not present when PW1 collected the ammunition.

PW2's evidence was that ammunition was 7.62 mm "spent caliber is not ammunition but cartridge." He took the cartridge to CID and it was said to be a bullet. The report of Firearms Examiner shows that Exhibit "A" was a round of ammunition Caliber 7.62 x 39 mm. used AK 47 assault rifles tested from AK 47 in stock. It was live and capable of being fired and it is ammunition in terms of Firearms Act Chapter 114 Laws of Kenya.

PW3 is the PC David Wachira who carried the Exhibit to Firearm Examiner. It is clear that the witnesses were all policemen. There were civilian witnesses who were with PW2 but they were not called. No witnesses were called from the hotel. There were defects by the prosecution. The Counsel for the Appellant Mr. Ashimanga cited several authorities in support of the appeal.

However the State Counsel Maina in reply stated that the State does not support conviction and sentence on the issue of violation of

Appellant's rights she admitted that she had not been able to locate the investigation officer to explain the delay. She said the evidence of PW1 was not corroborated and it amounts to be single witness evidence.

Upon considering the record and the arguments of the Appellant Counsel and the authorities relied on and the State Counsel not opposing the appeal I do find that the appeal is merited.

I allow the same quash the conviction and set aside the sentence of 7 years of imprisonment. The Appellant shall be set free forthwith unless he is lawfully detained otherwise.

Dated and delivered at Nairobi this 8th day of March 2010.

**J. N. KHAMINWA**  
**JUDGE**