REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 100 OF 2009

NELSON MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

Nelson Maina Mwangi hereinafter referred to as the Appellant was charged with 4 counts before the Senior Resident Magistrate Kerugoya. In count one, he was charged with capital robbery Contrary to Section 296(2) of the penal code but he was acquitted on that charge for lack of evidence. The other counts were of preparation to commit a felony Contrary to Section 308(1) of the penal code and the other 2 counts were being in possession of a firearm and ammunitions without a Firearms Certificate contrary to Section 4(2) (a) of the Firearm Act Cap 14 of the Laws of Kenya.

He pleaded not guilty on all counts. He was tried and convicted on the last 3 counts but acquitted on the capital robbery charge. He was sentenced to serve 5 years imprisonment on counts 2 & 3 and 3 years imprisonment on Count 4. The sentences were ordered to run concurrently.

I may at this point state that if this Appeal fails, then the court has a duty to enhance the sentence in respect of count 4 because the law sets a minimum sentence of 5 years imprisonment under Section 4(2) (b) under which the Appellant was charged.
The Appellant was aggrieved by the conviction and sentence and he consequently filed this Appeal. He proffered 8 home made grounds of Appeal and buttressed the same with a written submission which he presented to court at the hearing. I have considered the said grounds along with the submissions thereto. I have also considered the brief submission by learned counsel for the state who opposes this Appeal.

This being the first Appeal however, it is incumbent upon me to re-evaluate the evidence of the trial court and arrive at my own independent decision. In doing so however, I should clearly bear in mind that I did not have the advantage of seeing the witnesses as they testified first hand. **(see OKENO VS REPUBLIC 1972 EA 23)**

In a nutshell therefore the evidence in respect of the 3 counts was that on the 12.08.08 PW2 one Cyrus Muriuki was traveling to Nairobi aboard a motor vehicle he described as KAS 419 W. There was a

passenger seated next to him who had a luggage in a carton which he had between his legs and which according to PW2 the passenger had said was very delicate. PW3 one Isaac Mukwa was the driver. He said that the Appellant was one of his passengers and that he was carrying some luggage in a carton. They both told the court that they were stopped by some traffic police officers at the Kangaru bus stage near Embu town. Among the police officers in question was PW5 Sgt. Jacob Muriithi. He told the court that he had received a tip off that the matatu in question was carrying a passenger who was carrying something suspicious in a carton. He said that he was given the Registration number of the said motor vehicle and the description of the suspect. He and others therefore waited for the said matatu which was enroute to Nairobi at the Kangaru bus stage. They stopped it and on checking inside, PW5 saw the passenger fitting the description he had been given. He told the court that the realized it was somebody he knew before as a taxi driver in Kerugoya town but who he had arrested previously in respect of other matters. He called him by name and asked him to alight from the matatu with the carton. On opening the carton, they found that it contained a Beretta Sub-machine rifle with 5 rounds of ammunition. That matatu was escorted to the police station and the few passengers recorded the statements.

The Appellant was detained at the police station and subsequently charged with the offence now before court. The recovered exhibits were escorted to the Firearms Examiner at CID Headquarters in Nairobi – i.e. PW4. He told the court that he examined the same and confirmed that it was a Beretta sub machine gun with 5 rounds of ammunition. He confirmed that the same was a firearm in good working condition. The ammunition were in caliber 9x9mm and were in good working order and suitable for use in caliber 9mm Beretta Sub machine gun. The exhibits were a Firearm and ammunition as per the Firearms Act.

The Appellant was therefore charged with the offences listed above.

In his sworn statement of defence the Appellant admitted that he was traveling in motor vehicle Reg. No. KAY 479 R on the date in question. He stated that the motor vehicle was stopped by police at the Kangaru bus stage. He said that he demanded for his money from PW5 who owed him before that date but instead of paying the debt, just arrested him and took him to Kerugoya police station where he was charged with the said offences.

In his defence and submissions and also in his grounds of Appeal and the submissions thereto, he has dwelt extensively on the discrepancies of the Registration number of the motor vehicle he is said to have been arrested from.
In response to this, learned counsel for the state submitted that nobody memorizes the numbers of the matatus they travel in and that there was no doubt that the Appellant was actually arrested from inside the matatu.
The Appellant's appeal actually revolves around those discrepancies in the numbers of the matatu he was arrested and the serial number of the firearm in question.

I have considered the said submissions along with the evidence adduced before the trial court. I agree with counsel for the state that it is not usual for passengers to memorize the registration numbers of the matatus they board and more so when they do not anticipate any problems along the way that would require them to cite the said numbers. In this case, I appreciate that there were minor discrepancies in the registration number of the matatu in question. These discrepancies were nonetheless minor. They did not go into the root of the matter. They did not for instance change the fact that PW3 is the one who was driving the said matatu and that PW2 was a passenger therein. The gist of the evidence is that the Appellant was arrested in the matatu that was being driven by PW3 and in which PW2 was a passenger. The discrepancy in the Registration number does not also alter the fact that the Appellant was actually found inside that motor vehicle and further that he was the one found in actual physical possession of the parcel in which the firearm and ammunitions was recovered. That discrepancy is therefore curable under Section 382 of the Criminal Procedure code. The same goes for the serial number

on the firearm. The Appellant was found with the firearm in the presence of PW2 and PW3 and he was not licensed to hold a firearm or ammunition. PW2 & PW3 were not known to the Appellant before and had only seen him inside the matatu as one of the passengers. They had no reason whatsoever to fabricate the charges against the Appellant. The firearm and the Appellant and witnesses were taken to the police station direct and there was no opportunity for PW5 to "plant" the firearm on the Appellant.

This in my view was a straight forward case where the Appellant was found with the gun in broad daylight in the presence of witnesses with whom he bore no grudge. There was no other verdict the learned trial magistrate could arrive at other than that of guilty on count 3 & 4. The learned trial magistrate did consider the evidence adduced by the Appellant extensively in his judgment at page 5 but he did not find the same sufficient to dislodge the strong case put forward by the prosecution. I make the same finding. As stated earlier on, the evidence is that the Appellant was found with the firearm and ammunition in PW3's matatu following a tip off. He was arrested with the same. He had no license to carry firearms, the firearm and ammunition was certified to be such under the Firearms Act. What other evidence did the magistrate need? I am satisfied that the conviction on counts 3 & 4 was proper and I confirm the same and dismiss the Appeal in respect of those 2 counts.

On count 2 however, my finding is that the intent to commit a felony as at the time the Appellant was arrested was not established. He could have been conveying the firearm to somebody else or even intending to commit a felony in future. There was no proof that he had intent to commit a felony in the said matatu. That count was not therefore proved and I will allow the Appeal in part in respect of that count.

I wish also to observe that had the appeal on count 2 failed, then the sentence would have been enhanced to 7 years as that is the minimum sentence provided for under Section 308(1) of the penal code.

I do nonetheless as mentioned earlier set aside the sentence of 3 years imprisonment in respect of Count 3 and substitute thereof one of 5 years imprisonment as the minimum provided for under the law.

This Appeal is otherwise dismissed except for Count 2 where the conviction and sentence is set aside.

W. KARANJA

JUDGE

Delivered, signed & dated at Embu this 18th day of November 2010

In the presence of:- The Appellant & Ms. Matiru for the state.