



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NYERI

Criminal Appeal Case 162 of 2006

MICHAEL JOHN KANYERIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 1310 of 2006 dated 23<sup>rd</sup> August 2006 by R. A. A. Otieno Senior Resident Magistrate)*

JUDGMENT

When this appeal came up for hearing before me, **MR. ORINDA**, Learned Senior Principal State Counsel took the unusual step to concede to the same. That decision was informed by the fact that the Charge Sheet was defective and indeed the facts as narrated by the prosecution in support of guilty plea did not support any offence known in law. **MR. MUTHONI**, Learned Counsel for the Appellant was of the same views as Mr. Orinda.

I have perused the Charge Sheet as well as the proceedings in the trial Court and I am completely in agreement with sentiments expressed by both **MR. ORINDA** and **MR. MUTHONI** on the legality of the charges preferred against the Appellant.

The Appellant was charged in the Chief Magistrate's Court at Nyeri with three counts of being in possession of Ammunitions without a firearm certificate contrary to *Section 4 (1)* as read with *Section 4 (3)* of the Firearms Act. The Appellant pleaded guilty to all the counts aforesaid and a plea of guilty was entered against him in respect of the charges. The facts which informed the prosecution case and were accepted by the Appellant were that on 17<sup>th</sup> August, 2006 Police Officers from Kiamariga Police Station who were manning a road block at Giagatika along Kiamachimbi-Nairobi road stopped a motor vehicle registration Number KAU 356S, a Toyota Hiace Matatu travelling from Nanyuki to Nairobi with passengers aboard. When they searched it they found three (3) gunny bags containing assortment of cartridges. On enquiring they established that the same belonged to one **MICHAEL JOHN KANYERIA** the Appellant herein. He was arrested and taken to Kiamachimbi Police Station. The bags were emptied and after counting the cartridges, they found 4 rounds of ammunition of 5.56 M calibre and 3 rounds of ammunition of 7.62 M calibre. They also found 105 blanks of ammunition of 5.56 M. calibre . He was asked for the firearm certificate which he did not have. On further interrogation the Appellant said he had bought the same from some herdsmen at Archers Post within Samburu district and that he was taking them to Eastleigh Nairobi. The Appellant was thereafter charged with the offences.

Upon admitting the facts aforesaid as correct, the Appellant was then convicted on his own plea of guilty. On being asked to mitigate before sentence could be imposed, the Appellant is reported to have said that he deals in scrap metal. That he had bought the cartridges at Archers Range and had been assured that they were spent cartridges and that he did not know that it was illegal to deal in spent cartridges. He thereafter sought leniency from Court. The Court having taken into account the fact that Appellant was a first offender and sentiments in mitigation thereafter sentenced him to 5 years imprisonment on each of the three counts. The Court then ordered the sentences to run concurrently.

It is from that conviction and sentence, that the Appellant now comes to this Court by way of appeal. However, as already stated, the appeal was conceded to by the State. The Charge Sheet is clearly, from

the foregoing, defective. The Appellant was alleged to have been found in possession of live ammunition, to wit bullets. However, when the facts were led by the prosecution, they did not disclose the offences charged. The facts did not show that what the Appellant was arrested with was live ammunition. Indeed there was even no ballistic expert's report tendered in evidence by the prosecution. How then could the Court tell that what was being paraded in Court was in consonance with the charges preferred. For all we care, they may well have been toys which do not qualify for ammunitions. It was thus wrong on the part of the trial Magistrate to have accepted as exhibits the spent cartridges without the report of the ballistic expert which would have shown whether the same qualified to be ammunitions in terms of the Firearms Act. In other words the Learned Magistrate should have addressed her mind to the fact that the spent cartridges found with the Appellant at the Kiamachimbi Police road block in the absence of a report by a ballistic expert that were mere scrap metal as claimed by the Appellant and that he was going to sell them in Eastleigh but not for the use contemplated in the Firearms Act. They were therefore not ammunitions as such.

I also note that during mitigation the Appellant said that he deals in scrap metal and that he had bought the items as scrap metal at Archers Post to sell in Nairobi. At this stage, the Learned Magistrate ought to have changed the plea to one of not guilty. Essentially the Appellant was denying knowledge. Both *mens rea* and *Actus reus* were thus lacking. The plea as taken was thus not clear and unequivocal. The conviction was thus not safe.

In cases such as this where the taking of a plea is found wanting, the proper order to be made by the Appellate Court would be a retrial. However, Mr. Orinda, was not of that persuasion as he felt that the term the Appellant has so far served since conviction and sentence was sufficient punishment. I agree with the sentiments of the Learned State Counsel. **Accordingly I decline to make an order for retrial. In the end, the appeal is allowed, conviction quashed and the sentences imposed set aside. The Appellant should be set at liberty forthwith unless otherwise lawfully held.**

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009.*

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**M. S. A. Makhandia**

**JUDGE**