



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 531 of 2007**

**CHARLES KARIUKI NYAGA .....APPELLANT**

**- AND -**

**REPUBLIC .....RESPONDENT**

***(An appeal from the Judgement of Senior Resident Magistrate Ms. L. Nyambura dated 11<sup>th</sup> September, 2007 in Criminal Case No. 2406 of 2005 at Nairobi Law Courts)***

**JUDGMENT**

*Charles Kariuki Nyaga*, the appellant herein, was jointly charged with another, on five different counts, and the trial resulted in the conviction of the appellant herein on the *third* and *fourth* counts. In count 3 the charge was, being in possession of a firearm without a firearm certificate contrary to section 4 (2) (a) of the Firearms Act (Cap 114, Laws of Kenya). And in count 4 the charge was, being in possession of ammunition without a firearm certificate contrary to s. 4 (2) (b) of the Firearms Act. The particulars were that the appellant, on *11<sup>th</sup> October, 2005* along Kaunda Street in Nairobi, was found in possession of a firearm, a Browning Pistol, Ser. No. 75069112, without a firearm certificate; he was at the same time and place found in possession of thirteen rounds of ammunition without a firearm certificate.

*Pius Muya Musia* (PW1), a bank agent of Capital Real Time was, on the material date, at his office at Lonrho House, Standard Street in Nairobi. Two men then entered and ordered PW1 and his assistant accountant, *Jackline Wanjiku* (not called as a witness) to lie down, as the two men grabbed Kshs.1.3 million and departed.

*City Constable Jared Marui Makundi* (PW2) was walking along Mama Ngina Street in Nairobi, on the material date at about *9.00 a.m.* when he saw a crowd of people along Kaunda Street, and there was a commotion taking place; he noticed that two Tourist Police officers had arrested a man, the appellant herein, who was resisting arrest. PW2 joined the Police officers in effecting the arrest of the appellant, and they found him to have a pistol in his pocket; this was a Browning Pistol Serial No. 75C6112. The appellant and a fellow-suspect were arrested and taken to Central Police Station.

*Police Constable Faraj Saidi*, of Tourist Police Unit was on patrol at the material time, in the company of other Police officers when they noticed members of the public raising alarm on persons they said were thieves. Coming out of the motor vehicle, PW3 saw that members of the public had already arrested one of the suspects, while the other was fleeing. The one who was fleeing is the appellant herein. PW3 and his fellow officers, with the help of members of the public, arrested the appellant herein who was armed; he had a pistol, serial no. C75C71004, loaded with a magazine and 13 rounds of ammunition. PW3 and his

colleague escorted the two arrested men to the Central Police Station.

*Johnstone Musyoki* (PW5), a firearm examiner, received exhibits from CID for examination ? and these included one pistol, Serial No. 75C69112 on the slide, and serial No. 75C71004 on the barrel. He examined the exhibits, and prepared a report.

The appellant herein when put to his defence, gave a sworn statement and denied the charge. He said he had, on the material day, come into town to meet a customer and, as he walked along the street, he was arrested by city Council *askaris* who were arresting hawkers. He denied having been in possession of a Browning pistol.

The learned magistrate found that the witnesses at the offices of Capital Real Time had not been able to identify the suspects in the robbery incident, and no money had been recovered from the suspects, when they were arrested.

The learned magistrate attached credence to the testimony of PW2, who found the appellant herein resisting arrest, and found a pistol on the appellant, which pistol he was able to identify in Court. PW3 too had testified that he was involved in the arrest of the appellant herein, who was fleeing from the irate street crowd; and he confirmed that he and PW2 had recovered a pistol from the appellant ? and he identified the firearm in Court. It was PW5's evidence that the said pistol was, indeed, a firearm, and it had several rounds of ammunition. The learned Magistrate came to the conclusion that the appellant herein was caught red-handed, with the pistol in question, and with the ammunition. She thus held:

"I will disregard the defence of [the appellant herein] and find that [he] was found in possession of a firearm and 13 rounds of ammunition. He did not have a certificate to own the same. The prosecution has, therefore, proved its case against [the appellant herein] on counts 3 and 4 beyond [all] reasonable doubt."

The learned Magistrate convicted the appellant herein, and committed him to jail for a period of *five years*, on each of the firearm-related counts, these terms to run concurrently.

In the grounds of appeal, the appellant challenged the trial court's reliance on the evidence of PW2, on the ground that the serial number this witness had given for the recovered pistol was not consistent with the particulars given by other witnesses. The appellant contended that the testimony of PW1 had not tallied with that of PW2. It was contended that the prosecution failed to prove their case beyond reasonable doubt.

The appellant came before this Court with a set of pre-written submissions, to which he attached a document of "Supplementary Grounds of Appeal". In these entirely new grounds, it was contended that the trial process had failed to reveal that the appellant's trial rights under ss. 72 (3) (b) and 77 (1) (2) (a) (b), (c) of the Constitution had been contravened. The appellant chose to make no oral submissions, and said the written submissions sufficed.

Learned Counsel *Ms. Gateru*, for the respondent, contested the appeal, and urged that there was cogent evidence on record to support the conviction. The appellant had been arrested as he tried to flee, and then he was with the pistol and the ammunition ? and this was clear from the evidence of both PW2 and PW3. The appellant had no certificate authorizing him to hold the firearm and ammunition.

While agreeing with the appellant that the gun serial numbers given by PW2 and PW3 were inconsistent, counsel submitted that this discrepancy had been addressed by the trial Magistrate: some of the numbers as inscribed on the gun were not entirely visible. And so the trial Court took the decision to overlook the said inconsistencies. Counsel urged that this Court do treat such inconsistencies as immaterial.

Learned counsel submitted that it was not proper for the appellant to raise objections based on s. 72 (3) (b) of the Constitution trial-rights so belatedly, at the time when the appeal is being heard; the appellant did not raise this question at the beginning, and did not raise it at all, at any stage in the trial. This

ground, counsel urged, was now coming as an afterthought, and should be disallowed.

*Ms. Gateru* contested the appellant's contention, that the trial Court had not considered his defence at all; on the contrary, the defence statement had been considered but rejected, in the face of the cogency of the prosecution case.

On sentence, learned counsel noted that a *fourteen-year* term of imprisonment was the lawful maximum sentence; but the trial Court had imposed a *five-year* term on both counts, and running concurrently. Counsel urged that the objection to sentence had no merit.

I have considered the appellant's objection to the critical testimony of PW2 ? regarding the recovery of the pistol and ammunition from his person. Since the same evidence was also given, in essence, by PW3, it follows that there was, before the learned Magistrate, focused evidence showing the appellant to have been *in possession* of a pistol and ammunition, without a firearm certificate. Besides, I have to take into account the finding of the learned Magistrate on the question: that the inscriptions on the gun were unclear, and thus, were apt to confuse. There is, in substance, no inconsistency between the testimony of PW2 and that of PW3: both perceived a gun and ammunition in the appellant's possession, and these witnesses are credible; therefore, an offence had been committed, in both counts 3 and 4, as rightly found by the learned Magistrate.

I have considered all relevant matters touching on the charge and proceedings in this case, and I do not consider it right to allow the appellant to come belatedly before this Court with the claim that while he was being tried, there had been breaches of his trial-rights founded on s. 72 (3) (b) of the Constitution.

This is a principled position based on the vital public interest which has to be protected by the mounting of the relevant prosecution case ? an interest which is specifically provided for in *s. 70 of the Constitution*, the foundation of the several individual-rights provisions. Besides, there is now much case law which determines that fair trial, in respect of claims under s. 72 (3) (b) of the Constitution aforesaid, requires that any claim be raised *early*, and the prosecutor afforded an opportunity to provide the kind of *explanation* which may justify a delay in arraigning a suspect in Court: *Dominic Mutie Mwalimu v. Republic*, Criminal Appeal No. 217 of 2005; *David Karobia Kiiru v. Republic*, Nairobi High Court Criminal Application No. 863 of 2007; *Republic v. Richard Mwathi Nyambura and Another*, Nairobi High Court Criminal case No. 34 of 2006; *Ponnuthurai Balakumar v. Republic*, Nairobi High Court Misc. Criminal Application No. 218 of 2008; *Alfred Kimathi Meme v. Republic*, Nairobi High Court Misc. Criminal Application No 857 of 2007, *Evanson K. Chege v. Republic*, Nairobi High Court Misc. Criminal Application No. 722 of 2007.

I hereby dismiss the appellant's appeal; uphold his conviction; and affirm the sentence as imposed by the trial Court, in respect of counts 3 and 4 of the charge.

Orders accordingly

DATED and DELIVERED at Nairobi this 16<sup>th</sup> day of February, 2009.

**J. B. OJWANG**

**JUDGE**

Coram: Ojwang, J

Court clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person.