



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 116 of 2006

(From original conviction and in Criminal Case No. 116 of 2006 sentence of the Senior

Resident Magistrate's Court at Kilifi before Mr. C. Obulutsa – SRM)

TIMOTHY MURITHI RARIAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

Timothy Murithi Raria (the appellant) was convicted on a charge of being in possession of a firearm contrary to section 89(1) Penal Code to serve 2 years imprisonment.

He was also convicted on a charge of preparation to commit a felony contrary to section 308(1) Penal Code and sentenced to serve 12 years imprisonment – the sentences were to run concurrently.

The appellant had denied the charges and prosecution called a total of five witnesses to prove their case. It was the prosecution's case that on 7th day of June 2005 at 10.50pm, at Soko Mjinga, Mtwapa Township, Kilifi District, without reasonable excuse, the appellant carried or had in his possession a firearm, namely Browning Pistol, serial Number L90435 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

Secondly that jointly with others not before court, he was found armed with the said firearm in circumstances that indicated that he intended to commit a felony, namely robbery.

Pc Onyango (PW1) was on patrol on 7-6-05 at 10.50pm with Pc Muchongu in Mtwapa and as they walked towards Soko Mjinga, they saw three people walking towards them – there was light. The three people appeared startled upon seeing the police officers they stopped, then begun running. The officers ordered them to stop – they refused; a chase ensued and one of them who had difficulty in running as he kept holding his crotch was eventually apprehended. Police carried out a quick search and recovered what resembled a gun. This evidence is repeated in similar terms by Pc. Muchangi (PW2). PW2 had in his statement referred to the gun's serial number as 90436 but in evidence in chief he said it was a mistake and that the number was 90435. This was confirmed by PW1 when recalled for cross-examination and he explained that the gun was rusty so the last figure appeared as 6.

Duty officer (PW3) Cpl. Mwandau told the trial court that appellant was taken to the police station along with the recovered gun.

Cpl. Sulubu (PW4) who was assigned the case took the gun along with the exhibit memo and he explained on cross-examination that his request was for the ballistics expert to examine the gun and find out what make it was – he had thought it was a Browning.

The ballistics expert Emmanuel Langat produced the report which was prepared by Johnstone Mwangata and upon examination the same was found to be a FEG model P9 made in Hungary – its trigger lever was missing and he explained in court that the same resembled a Browning as their parts are interchangeable. When the trigger was put for testing, it could fire and he concluded it was firearm within the meaning of the Firearms Act.

In his unsworn defence, appellant stated that on 7-6-05, he was at Soko Mjinga buying supper when after walking a few steps, he met two police officers on patrol. They asked him where he was going to, claiming that they had lost two suspects and that appellant was one of them. He stated that there was no proof that he had a gun, no finger prints were taken and that although the officers claimed that he had a Browning, the ballistics report stated that it was a FEG.

The learned trial magistrate in his judgment found that it was clear appellant was arrested by the officers as he admitted. He noted that the police searched and recovered a pistol tucked in his underwear and that the testimony of the two officers was credible and consistent.

The learned trial magistrate noted that although the police officers and even the particulars of the charge sheet referred to the gun as a Browning Pistol; it was actually a FEG pistol. He considered this anomaly in the light of the explanation by the firearms examiner Mr. Langat, to the effect that the two models closely resembled and were manufactured by the same company and that only an expert could differentiate the two makes and accepted that the evidence clearly shows that it was the very pistol which was recovered from the appellant and further that it was in a working condition.

The learned trial magistrate found that appellant had no reasonable excuse to be in possession of the pistol at all as he was not licensed, nor justified and the circumstances under which he was found showed that he was preparing to commit a robbery.

These findings have been challenged on grounds that:

- (1) The learned trial magistrate failed to carefully consider that the make of the said weapon, as indicated in the charge sheet was different from the weapon produced.
- (2) The learned trial magistrate failed to consider that the weapon identified in court by prosecution witnesses was different from the one referred to in the ballistic report.
- (3) Prosecution failed to tender any evidence to substantiate the alleged facts as there was no dusting done.
- (4) The trial magistrate failed to consider the grudge that existed between appellant and some of the prosecution witnesses.
- (5) The case was poorly investigated and defence remained unshaken by the prosecution.

Mr. Magolo (for the appellant) submitted that section 89(1) creates so many offences so that in the particulars, the prosecution must choose which particular it is intended to charge and that in this instance the charge just said he had in his possession without defining the nature of possession.

Further that the charge sheet referred to the pistol as a Browning and gave a serial number yet the ballistics' expert said it was a FEG which resembled a Browning, so what was presented to him was different from what was charged, which means that the evidence does not support the charge and this entitles the appellant to an acquittal. It is his contention that the prosecution ought to have sought an amendment before the close of its case and section 382 Criminal Procedure Code cannot cure the defect

pointed out here.

Mr. Magolo also argued that the evidence of police (PW2) had weaknesses as the serial number of the pistol he recorded in his statement differed with what was produced in court and that three different serial numbers were given by three different witnesses – PW1 and PW3 referred to SN 90435, PW2's statement referred to 904336 and the exhibit memo referred to L904335, which he said, could well mean, three different pistols and due to this contradiction, appellant should be given the benefit of doubt and be acquitted.

As for the second count, Mr. Magolo submitted that none of the witnesses gave any evidence as to what felony was intended or why they thought robbery was the only offence one can commit when he has a pistol.

The appeal both on conviction and sentence was opposed and the Assistant Deputy Public Prosecutor, Mr. Ogoti submitted that appellant was properly convicted as the evidence of the police officers was that appellant was arrested with what looked like a gun and the serial number was not legible, hence the discrepancy by the three witnesses. He pointed out that the evidence showed that the firearm was rusty, so that figure 5 appeared as 6. He also asked the court to consider the explanation by the Ballistics Expert the resemblance between a Browning and a FEG and that a layman cannot differentiate the two and that the learned trial magistrate actually considered this contradiction and resolved it as the witnesses were consistent.

Mr. Ogoti argued that in law, a firearm is a firearm irrespective of the model and serial number.

Mr. Ogoti further urged the court, that if there was a defect in the evidence visa was the charge sheet, then it was curable under section 382 Criminal Procedure Code and that in any event, this was a defect which could have been pointed out at the earliest opportunity, available i.e during the trial and not wait to reverse it on appeal and that if appellant felt prejudiced, then he would have raised it – he did not. He says there was only one firearm recovered and the question of there being different guns and three different serial numbers doesn't arise.

With regard to possession, Mr. Ogoti urged the court to consider the consistent evidence of two police officers (PW1 and PW2) leading to the eventual recovery from appellant and to find that, the evidence had not been displaced.

On count 2, Mr. Ogoti states that the question to ask is “what was appellant doing with a gun at 1045pm” and that police were properly directed to suspect the group of three men who fled upon seeing them, as being up to no good other than preparing to commit a felony.

There is no dispute that appellant was arrested at Soko Mjinga area of Mtwapa at about 1045pm. What was he doing there? Appellant says he had gone to buy supper, police say he was in a gang of three who on seeing them fled – appellant was not light footed and seemed hampered by something he kept clutching on at his crotch and which turned out to be the gun. There is no denying that the gun in terms of model as referred to in the charge sheet is different from the one which was presented to the ballistics expert. However this difference was explained by PW2 who said he had thought it was a Browning and this is given credibility by the Ballistics expert, that to the ordinary eye, Feg and Browning look the same – its only an expert (with an eye for detail) who would notice the difference – indeed the learned trial magistrate took this into consideration and accepted it as a genuine error and that the gun recovered from the appellant was the same one presented to the ballistics expert and is the same one referred to in the charge sheet. There is also the different serial number – again the record explains why PW2 initially recorded the number as 90436 but later realised it was 90435 – this was because the weapon was rusty and the last digit was not clear to him – this too was considered by the learned trial magistrate, who resolved the issue thus and found that the numbers indeed referred to one and the same object which had been recovered from the appellant. That was a natural analysis. As a matter of fact section 89(3) offers refuge for all this – what is of significance is that it was a firearm - not the make – I think that is even why a charge was preferred under the Penal Code and not the Firearms Act. I make detailed reference to

section 89 (3) in the later part of this judgment.

Is it fatal that the charge sheet is not more specific as to the nature of possession, and the make of firearm differs. Section 89(1) Penal Code reads as follows:

“Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition offensive weapon - ...is intended to be used or has recently been used in a manner or for purposes prejudicial to public order is liable to imprisonment for a term of not less than seven years and not more than fifteen years”

89(3) In any prosecution for an offence under this section, it shall be presumed, until the contrary is proved, that a weapon having the appearance of a firearm is a firearm.

I do not know what other specification of possession Mr. Magolo expected the particulars of the charge to contain, those particulars are as stated in the provisions of the Penal Code – and there is completely no defect in the manner the particulars of charge were drawn and the appellant suffered no prejudice at all.

The conviction on Count I was pegged on well evaluated evidence and a reasoned judgment and the same was safe. I uphold the conviction on Count I. As regards Count II – what was there to make the police think that the appellant had the firearm for purposes of committing a robbery?

Section 308(1) provides:

“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment...”

It would seem to me that the police made a presumption that appellant having been in the company of two others, intended to commit a robbery due to the many incidences of armed robberies in the country – yet that would not be the only felony a gun can be used for – may be they were out to commit a murder – or perhaps they were taking the gun to someone to use, or to hire from them.

Just apart from that, my view is that the circumstances anticipated in section 308(1) Penal Code were already captured by the charge under section 89(1) Penal Code which incidentally carries the same penalty) and to have again charged the appellant under this section, exposed him to double jeopardy and was thus prejudicial to him.

I therefore quash the conviction on count 2 and set aside the sentence.

As regards the sentence on count 1 bearing in mind the circumstances and the nature of the offence and the sentence provided, I think 12 years is rather harsh and would reduce the same to seven (7) years, which shall take effect from the date of conviction.

Delivered and dated this 4th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE