



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 175 of 2008**

ALAN MINGATI MOKORO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted on own plea of guilty by the Resident Magistrate, Nyamira, of being in possession of a firearm without certificate contrary to *section 4(2) (a) by the Firearms Act*, and sentenced to serve 10 years in jail. The particulars of the charge were that on 3/9/2008 at Nyakongo sub-location in Nyamira District within Nyanza Province he was found in possession of a firearm serial no.7815 without a firearm certificate.

The particulars that were narrated by the prosecution, and accepted by the appellant to be true, were that on 3/9/2008 Police officers from Manga AP Camp were on patrol in Nyakongo sub-location. Acting on the information received, they went to the home of the appellant and knocked the door to his house which he opened. They identified themselves and searched the house. In his bedroom, between the bed and a ceiling board, they removed a pistol with serial no.7815. The appellant was asked how he had come by it. He told the police he was given by his father before he died. He was subsequently charged by CID at Nyamira. To the facts the appellant respondent:

“The facts as explained are true. I had the pistol at home.”

The prosecution informed court that the appellant was a first offender. In mitigation, the appellant indicated he was the sole bread winner of his family and that his sisters and brothers depended on him.

In sentencing, the magistrate indicated he had considered the appellant’s mitigation but that the offence was serious and deterrent punishment was called for. He jailed him for 10 years. I will revert to this issue of sentencing shortly.

The appellant complained that the plea taken was not unequivocal. He stated in his Petition that the trial court had not considered his defence that his late father who was a policeman had left him the firearm, and that the court had gone ahead and formed the impression that the firearm was being illegally held for illicit purposes.

Mr. Mutai for the state submitted that the plea was unequivocal as the appellant had throughout stated he was found with the firearm.

I have no doubt the Magistrate followed the correct procedure in recording plea in this case. The charge alleged that the appellant had been found with the firearm without certificate. The facts narrated showed he was found with the pistol in his bedroom. He even explained it had come from his late father. When the facts were put to him he agreed he had the pistol. In the Petition of Appeal he reiterates he had the pistol, but thinks the fact that his late father had given it to him provided a defence. I find he understood the charge and pleaded guilty to it. He did not have certificate. He could not have had it if the pistol came from his late father. It is an offence under *section 4(2) (a) of the Firearms Act (cap.144)* to purchase, acquire or be in possession of a Firearm or ammunition without holding a valid certificate. The offence is strict and fact that the pistol was given to the appellant by his late father could not offer a defence.

Regarding sentence, the appellant issue was that it was a harsh one, and that the court had not considered non-custodial treatment. Mr. Mutai in response submitted that the sentence was legal. Sentencing entails the exercise of a discretion by the trial court. The appellate court cannot interfere with that discretion unless it can be demonstrated that the court did not consider a material factor, considered immaterial factor, it proceeded on wrong principle or that the sentence was manifestly harsh or excessive in the circumstances of the case.(See *Wanjema.V.Republic [1971] EA 493*). *Section 4(3) of the Act* above provides for a sentence of not less than seven years and not more than fifteen years. Ten years was therefore within what the law provided.

The prosecution addressed court as follows:

“.....the offence the Accused is facing is very serious. The firearm might have been used in Robberies and I pray that a stiff penalty be given to the Accused person.”

In sentencing, the court noted that:

“.....the offence the Accused person is facing is serious and a deterrent penalty is called for.”

There is no question that from the punishment prescribed, the appellant was charged with a serious offence. However, the observations by the prosecution were uncalled for and he should not have been allowed to make them. It would appear the remarks influenced the court and caused it to go for a deterrent punishment. In *Shiani .V.Republic [1972] EA 557* it was held by the Court of Appeal that it was not for the prosecution to tell the court of his view as to the seriousness of the offence. He is required simply to put the facts before the court. It was wrong and prejudicial for the prosecution to speculate that the pistol had been used to commit robberies. There was no evidence regarding when the pistol had last been shot, for instance.

The record does not reflect the court considered the appellant was a first offender and that he had pleaded guilty to the charge. In *Nilsson .V. Republic [1970] EA 599 Harris J* pointed out that the fact that the appellant pleaded guilty to the charge, and that he had no previous conviction should be considered. I find that the court, in reaching the sentence, considered immaterial factors and also failed to consider material factors.

In conclusion, the appeal against conviction fails. The appeal against sentence succeeds to the extent that the 10 years term is reduced to 7 years term which I consider appropriate in the circumstances of the case.

Dated, signed and delivered this 13th Day of November, 2009.

A.O.MUCHELULE

JUDGE

13/11/1009

13/11/2009

Before A.O.Muchelule-J

Court clerk-mongare

Appellant-present

Mr. Kemo for State

COURT: Judgment in open court

A.O.MUCHELULE

JUDGE

13/11/2009