



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 365 of 2006**

**FREDRICK WAITHAKA KINUTHIA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original decision in Criminal Case No. 1632 of 2005 in the Chief Magistrate's Court at Nairobi – M. Muigai PM)*

**J U D G M E N T**

**FREDRICK WAITHAKA KINUTHIA**, the appellant, was charged in the subordinate court jointly with another with count 1 of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 6<sup>th</sup> March 2005 at Karen Triangle along Karen road in Nairobi within Nairobi Area Province jointly with others not before court armed with dangerous weapons namely pistols, robbed **SA G** of her motor vehicle registration number *particulars withheld* cash 17,000/=, one Nokia cell phone 1100, and one SIEMEN 025 cellphone all valued at Kshs.4.5 million and or immediately before or immediately after the time of such robbery threatened to use personal violence against the said **S A G**. In the alternative, the appellant was charged alone with handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that on 10<sup>th</sup> July 2005 at Buruburu Phase II house number 607 in Nairobi City within Nairobi Area Province otherwise than in the course of stealing, dishonestly retained a motor vehicle registration number *particulars withheld* the property of **S A G** having reason to believe it to be stolen or unlawfully obtained.

In count 2, the appellant was charged jointly with another with being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearm Act Cap. 114 Laws of Kenya. The particulars of offence were that on 10<sup>th</sup> July 2005 at Buruburu phase II house number 607 in Nairobi City within Nairobi Area Province, jointly with others not before court had in possession (1) AK 47 rifle (2) AK 47 (3) CESKA pistol serial number erased, (4) BROWNING pistol , (5) BERRETA pistol serial number erased, (6) H pistol serial number not visible, (7) a TOKALEV pistol and, (8) SMITH and WESSON automatic pistol S/No erased without a firearm certificate.

In count 3, on the other hand, he was charged alone for being in possession of ammunitions without a firearm certificate contrary to section 4(2) as read with section 4(3) of the Firearm Act, cap 114 Laws of Kenya. The particulars of offence were that on 10<sup>th</sup> July 2005 at Nairobi City within Nairobi Area Province, jointly with others not before court had in his possession(s) 133 rounds of ammunition caliber 7.62, (2) 14 rounds of ammunition caliber 7.62mm and, (3) 79 rounds of ammunition caliber 9mm without a firearm certificate. After a full trial, the appellant was convicted of the alternative charge to count 1. He was also convicted on counts 2 and 3. He was sentenced to serve 5 years imprisonment on

each of the three counts. The sentences were ordered to run concurrently. The appellant being dissatisfied with the decision of the trial court, has appealed to this court against both the convictions and sentences. In addition to his petition of appeal, the appellant filed written submissions, which he relied upon during the hearing of the appeal.

The learned State Counsel, Mr. Makura, opposed the appeal and supported both the conviction and sentence. Counsel contended that there was adequate evidence to sustain the convictions. Counsel submitted that PW1 and PW8 recovered firearms and assorted ammunition in the appellant's kitchen. The items were examined by PW6 who confirmed that the arms and ammunition were serviceable, or in good functional condition. In addition, there was evidence that the motor vehicle registration *particulars withheld* was recovered at the premises where the appellant lived. The vehicle did not belong to the appellant. Counsel submitted that the unsworn defence of the appellant did not shake the prosecution case.

In brief, the prosecution case is as follows. On 6/3/2005 PW2 S N A was at home about 11.55 am. Her children were also in the house playing. Her husband was away. While in the sitting room, a man walked in and removed a pistol from his shirt and ordered her to go to the children bedroom. Another man with a gun came into the same bedroom with the children. The maid, who was in the kitchen was also brought to the bedroom. There were two motor vehicles outside, a Peugeot, and a BMW.

Two of the men took her to the main bedroom, leaving one man guarding the children. They demanded for the keys to the BMW and money, and started ransacking the house. PW2 told them that she did not have the keys for the BMW, but gave them Kshs.17,000/=. The intruders then checked the bag and purse belonging to PW2's husband and found the keys for both vehicles. There was also some money belonging to her husband. They also took an ATM card mobile phones and other items including the keys to the BMW vehicle. One of the three even attempted to rape PW2. The intruders then took the house keys, locked PW2 and the children from outside and drove away with the BMW car. PW2 managed to use another mobile phone to call the police, who came and broke the door.

On 9/7/2005, at night, PW5 SGT MARTIN KILONZO, and other police officers received information that there were robbery suspects who lived at Langata and Buruburu. They proceeded to Buruburu phase 2, Elmentaita Court house No.607 at midnight. They knocked at the door and a man emerged with an AK47 rifle and started firing. The police took cover and fired back killing the man. The police entered the house but found nobody. They however found rifles, pistols, ammunition and other items. Outside the house a car BMW KAL 376C was parked. At that time, the appellant who was the tenant of that house was not in.

During the early hours of the night on 9/7/2005, PW1 AMINA SALEH went to visit his boyfriend, the appellant, at Buruburu. She saw the white BMW. The appellant stated that the BMW belonged to a friend called Dave. She left the house with the appellant at 10 pm, and they parted at the shopping centre. She went on her way to spend the night with friends at Parklands shed. In the evening of the next day 10/7/2005 she called the appellant, just to be told that the police were looking for her because her photo was recovered in the appellant's house where firearms were also recovered. She was arrested; but later released.

Other police officers, including PC ARTHUR ONYANGO, went to search house No. B 30 Uhuru Gardens Estate, Langata. When the officers cordoned this house, a woman MARY NJOKI, and a man RAPHAEL KAMAU emerged from the house. The police identified themselves to these two people. The police proceeded to the gate and VERONICA NJUGUNA, the owner of the house, came out. Though the police identified themselves to this woman, she became violent and started screaming. The police entered the house. In a room adjacent to the sitting room, they recovered an AK 47 rifle, a bullet proof vest, 4 sets of vehicle registration number plates, CCTV monitor, and 2 empty pistol magazines. VERONICA NJUGUNA informed the police that the subject room belonged to JAMES MUCHAI NJUGUNA.

The house at Buruburu was leased to "CASTRO", the appellant, by PW7 NADINE MWENI

MUEMA. He used to pay Kshs.16,000/= a month. The landlady knew the tenant to be running a bar business. She knew him to drive a Volkswagen car. However, the landlady had lately noticed 2 cars parked outside the house, one whitish in color which the appellant informed the landlady that it belonged to a friend.

The appellant was later arrested and charged jointly with JAMES MUCHAI NJUGUNA. The said JAMES MUCHAI NJUGUNA was acquitted for no case to answer.

When the appellant was put on his defence, he gave unsworn testimony. It was his defence that that he was a matatu driver. On 9/7/2005 he was visited by his girlfriend PW1. As they were at home, a friend of his called David "Dave" came. The said David was a car dealer who bought cars and parked them at the appellants place. On that day, Dave came with a BMW as the appellant and PW1 were leaving the house. They left the house keys with Dave. The appellant saw PW1 off. He then met friends up to midnight when he received a call from a neighbour (Rose) informing him that a man had been shot at his house. The appellant called his mother and lawyer (Cliff Ombeta). He later met his lawyer and they went to Nation centre. He was taken to Kileleshwa police station and was there for a week before being transferred to Langata Police Station. The police showed him photographs of the man who was shot, and he informed them that he had seen him with Dave once.

Faced with this evidence, the learned trial magistrate found that the prosecution had not proved count 1 for robbery with violence. However, the magistrate found that the prosecution had proved the alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. The learned magistrate also found that the prosecution had proved count 2 which was for possession of firearms without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearm Act. The magistrate also found that the prosecution had proved count 3 which was for possession of ammunitions without a certificate contrary to section 4(1) as read with section 4(3) of the Firearm Act (Cap 114).

This being a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see the witnesses testify, and give an allowance for the same – see **OKENO –VS- REPUBLIC [1972] EA 32.**

I have evaluated the evidence on record. There is no dispute that the appellant was the special owner of house No. 607 at Buruburu section 2, as a tenant. There is no dispute that a car BMW KAL 376C white, was found outside the house. The appellant stated that it was brought there by his friend, a car dealer called DAVID or DAVE. This was the subject of the charge of handling stolen property. There is evidence from prosecution witnesses that some fire arms and ammunitions were found in the house, in the absence of the appellant. At the time the items were found, there was nobody in the house. One person was shot dead at the house, apparently when he tried to shoot at the police.

Section 323(1) which defines the alternative charge of handling stolen goods for which the appellant was convicted provides ?

**“322(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so”.**

From the above provisions of the law, there are certain ingredients of the offence that the prosecution must prove through evidence. This was clearly stated by the court in the case of THAHABU IBRAHIM –VS- REPUBLIC (1983) KLR 608, where O’Kubasu J (as he then was) held ?

- 1. In a charge of handling stolen property, it is not enough merely to show that the accused person knew something about the origin of the stolen goods. The charge has to be proved beyond reasonable doubt as required by law.**
- 2. The prosecution, in order to prove a charge of handling stolen property must establish that the**

following elements existed:

- (a) that the handling was otherwise than in the course of stealing.
- (b) that the appellants received the goods knowing or having reason to believe that they were stolen, or
- (c) the appellants dishonestly undertook or assisted in the retention, removal or disposal or realization of the goods for the benefit of another person.

In convicting the appellant on this charge, the magistrate sought reliance on the provision of section 111 of the Evidence Act (Cap. 80) In the magistrate's argument, the burden was on the appellant to prove facts especially within his knowledge. The magistrate went further to state in the Judgment as follows ?

**“The 1<sup>st</sup> accused has the burden to prove that David/Davie exists and has the alleged dealership as required under the above quoted section. In the absence of which the court can only assumably and logically infer the 1<sup>st</sup> accused dishonestly retained the stolen vehicle.”**

The above, in my view, was a misdirection and amounted to shifting of the burden of proof. Firstly, the section in the Evidence Act (cap 80) deals with **“exceptions or exemption from or qualifications”** to the offence. This is probably for situations where someone is young and not criminally liable; that he is insane, or that he has been tried on the same facts. Those are the situations where somebody is required to explain to the court those special exceptions or by exemptions that apply to him. It does not shift the burden of proof in criminal cases from the prosecution to the defence. In addition, the prosecution did not allege that the story of “David” was an afterthought. They also did not say that they looked for him and were convicted that such a person did not exist. PW1, who was the first prosecution witness, talked about the said David or Dave. The appellant said that the person who was killed at the house in a shootout was a friend of David. It was for the prosecution to have explained whether they traced that David, and what they found. Possibly that the story was a lied they did not. In the process, the prosecution failed to prove the dishonestly of the appellant in allowing the car to be at his compound, even if it was there for 4 days or more. The issues of the particulars of the insurance certificate can not be an issue for the appellant, as there is no evidence that he must have have reason to have noted any anomalies about the insurance certificate. The prosecution should have given evidence in court, as to factors that made them believe that the appellant dishonestly received or retained the vehicle. They failed to do so and created a doubt in their case. The benefit of that doubt will go to the appellant. I will quash the conviction on the alternative charge.

I now turn to the two offences of possession of firearms and ammunition without a certificate. Section 4 of the Penal Code (cap. 63) defines possession as follows:?

“possession”

- (a) be in possession or have in possession includes not, only having in ones own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself) or of any other person.
- (b) If there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”

The arms and ammunition in the two charges are said to have been found in the house of the appellant. At least one AK 47 rifle was in the hands of the person who was shot and killed by the police around that house. The story about the recovery of the other arms and ammunition does not come out clearly. No inventory of the items appears to have been made immediately. However, photographs of the items recovered were taken. PW5 SGT MARTIN KILONZO recovered the items from the appellant's leased

house. The items were found in the kitchen. They were said to be in a bag or bags. The bags in which the items were recovered from did not appear in the photos. This was crucial evidence to determine how the items could have fitted into those bags.

With the explanation given by the prosecution itself, it is apparent that some people from that house, who were not the appellant, ran away from the back door when one of their colleagues was shot dead. The items of arms and ammunition were found in the kitchen, and not in a place in which the appellant had full or exclusive or near exclusive control of his conduct of not going to report to the police after hearing that someone was shot at his house was suspect. However, it is possible that he was informed that the shoot out was by the police, and thought that the next victim of shooting would be himself, thus taking the caution of calling his mother and going to see his lawyer. It is also true that suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence beyond reasonable doubt – see **SAWE –VS- REPUBLIC (2003) KLR 364**.

The house of the appellant appears to have been used for criminal activities. However, the prosecution did not prove beyond any reasonable doubt that the appellant possessed the arms and ammunition for which he was charged and convicted. The same were said to have been found in his kitchen in bags which were not photographed. No explanation was given for the failure to photograph the arms and ammunition in those bags. Though I have strong suspicion that the appellant was a criminal that suspicion cannot be a basis for sustaining a conviction in a criminal case. On this also this court gives the appellant the benefit of doubt. From the evidence on record, I am actually not fully convinced that the arms and ammunition for which he was charged and convicted, were in his house or in his possession. On this also, this court gives the appellant the benefit of doubt. I find no convincing evidence that the arms and ammunition, other than the one AK 47 rifle with the person who was gunned down by the police, were found in that house.

Consequently, and for the above reasons, I allow the appeal quash the convictions and set aside the sentences. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 29<sup>th</sup> day of April 2008.

**George Dulu**

**Judge**

**In the presence of –**

The appellant in person

Mr. Makura for State

Mwangi – court clerk