REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 88 of 2007

JOSEPH SWAKA MERITA……………………......……..…...APPELLANT

-AND-

REPUBLIC……………………..…...…………………..………..…RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate

Ms. Karani dated 29th June, 2005 in Criminal Case No. 7709 of 2004

at Makadara Law Courts)

JUDGEMENT

The appellant, along with a second person who did not appeal, faced charges set out in three counts: firstly, that of preparation to commit a felony contrary to s.308(2) of the Penal Code (Cap.63, Laws of Kenya); secondly, that of being in possession of a firearm contrary to s.4(2) (a) of the Firearms Act (Cap.114, Laws of Kenya); and thirdly, that of being in possession of an imitation firearm contrary to s.4(2)(a) of the Firearms Act aforesaid.

The particulars were that the accused persons, jointly with others not before the Court, were found on 15th March, 2004 at Eastleigh in Nairobi, a place which was not their place of abode, with articles for use in the course of or in connection with robbery, namely pistols and toy pistols. On the second count it was stated that the appellant herein, on the same date and at the same venue, was found in possession of a firearm, namely a Browning pistol. And on the third count it was stated that the appellant herein, on the said date and at the same place, was found being unlawfully in possession of five rounds of ammunition, 7.65 mm calibre, without a firearm certificate authorising his action.

PW1, ***Police Constable Simon Mutungi***, was in the company of his colleagues, on patrol in their car, on 15th March, 2004 at about 7.00 p.m. These officers received a tip-off that some four young men, armed with guns, were terrorising members of the public and staging robberies in the area at the time. PW1 and his colleagues left their car, and entered Second Avenue Eastleigh, for the purpose of identifying the mischief as it unfolded. These officers found young men fitting the description which had been provided; and they challenged these young men, ordered them to lie down, and inspected them. In this search, a Browning pistol was found on the appellant herein; it had a cartridge and four live rounds of ammunition.

PW2, ***Police Constable Francis Chirchir***, who was on patrol with PW1 at the material time, corroborated the evidence of PW1.

PW3, ***Lawrence Ndiwa***, who was a firearm expert attached to the CID Firearms Laboratory, confirmed that the firearm found on the appellant was a Browning pistol, and a gun capable of firing bullets, within the terms of the Firearms Act. This witness also confirmed that the bullets found with the appellant were genuine bullets, in good condition.

When put to his defence, the appellant told the Court that on the material date he was going to his place of work, when Police officers arrested him for no good cause.

In his findings on the evidence, the learned Magistrate stated:

"**I find the prosecution witnesses to have been very consistent ...with regard to [the appellant herein]. I am satisfied that indeed, on the material night...[the] Browning pistol, calibre 765mm was found...I note [that the appellant's] defence with regard to the said count 1 was not persuasive. It was unsworn and uncorroborated. Further, [the appellant] was positively identified in so far as he was arrested right at the scene of crime."**

The learned Magistrate thus found:

"**...I am satisfied that the prosecution has satisfactorily proven all three counts against [the appellant herein] and I shall convict [him] accordingly**."

The learned Magistrate imposed sentence as follows: (i) for count 1, five years' imprisonment; (ii) for count 2, seven years' imprisonment. But somehow, the Court overlooked award of sentence in respect of count 3; and learned counsel ***Ms. Gateru,*** in her submissions before this Court, urged that the said irregularity be set right – and she proposed that all the three sentences be made to run concurrently.

The appellant came to Court with written submissions which also bore new grounds of appeal being urged for the very first time. One of these grounds was that the appellant had been held in Police custody for longer than twenty-four hours, before being charged in Court. The appellant also contended that the evidence relied on by the trial Court to convict, was uncorroborated; he contended that the prosecution failed to discharge the burden of proof falling upon it; and he urged that the prosecution evidence was all concocted evidence.

Apart from the several grounds of appeal, and the written submissions the appellant said little, at the hearing of the appeal itself.

Learned counsel ***Ms. Gateru*** submitted that the prosecution had proved its case to the required standard. PW1 had acted on information which gave accurate description of the appellant and his accomplices who were being involved in robbery attacks; and the description led to the arrest of the appellant who was, just as intimated, arrested while in unlawful possession of gun and ammunition. ***Ms. Gateru*** urged that PW1's evidence was well corroborated by that of PW2 and PW5; and PW3 had tested the said gun and ammunition, and found them to fall squarely within the category of things prohibited by, and made punishable under the Firearms Act. The evidence showed, counsel urged, that the appellant had no licence permitting him to hold a Browning pistol or ammunition, though these were found on him. Counsel urged that the appellant had rightly been found guilty, on all the counts, particularly as the gun and ammunition found on him would have been used in connection with burglary or theft.

Although the five year sentence imposed on the first count was the maximum allowed by law, counsel urged that it was lawful and right. On the second count, the sentence awarded was seven years' imprisonment, whereas the maximum allowed was 15 years. Counsel urged that this sentence was lawful, and was not harsh or excessive. On the third count, in respect of which no sentence was pronounced, the maximum sentence was 15 years' imprisonment; and counsel now asked that this Court should impose sentence in that regard.

Learned counsel urged that the appellant's defence had been duly considered, but found to be devoid of merits. She submitted that the prosecution witnesses were credible witnesses, and their testimonies were well corroborated. Counsel urged that the appeal be dismissed.

The foregoing analysis has disclosed no flaw in the integrity of the prosecution evidence as appraised by the learned Magistrate. There would be no basis for questioning the credibility of the well-corroborated evidence given by the prosecution's eye witnesses. By contrast, I find, the record shows nothing in the defence case that, to any degree, shook the prosecution case; and I must hold that the prosecution case was proved satisfactorily, and beyond any reasonable doubt. In these circumstances, I will order as follows:

(a) The appellant's appeal is dismissed; his conviction is upheld.

(b) The sentences imposed by the learned Magistrate in respect of the first two counts of the charge, are upheld.

(c) In respect of the third count of the charge, I hereby impose a

sentence of seven years' imprisonment against the appellant.

(d) All the three sentences shall run concurrently.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person