



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 78 of 2006

MOHAMMED HASSAN APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from a judgment of W. K. Korir SRM

delivered on 8.6.2006

JUDGMENT

The appellant was convicted of the offences of being in unlawful possession of firearm without a firearm certificate contrary to section 4(2) of the Firearm Act and being in unlawful possession of ammunition without a certificate contrary to section 4(2) of the Firearm Act. He was sentenced upon his conviction to seven years imprisonment on each count and the sentences were ordered to run concurrently.

He was aggrieved by both the conviction and sentence hence this appeal. Through his advocate he has raised six grounds in the Petition of Appeal, which were argued together. In a nutshell, the decision of the court below is challenged on the ground that it was arrived at without sufficient evidence; that the trial court failed to consider the appellant's defence; and that the sentence was harsh considering the appellant's mitigation.

It is the duty of this court, being the first appellate court to re-evaluate the evidence recorded by the court below in order to come to its own conclusion, always bearing in mind its disadvantaged position as the evidence was adduced before the court below.

It was the prosecution evidence that police officers from the C.I.D office, Isiolo, acting on a tip-off from an informer, went to a *manyata* within Komu area of Isiolo District where it was alleged that there were firearms in possession of some resident. When the officers numbering six to eight got to the *manyata* on the 22nd June 2005 at 10.30pm, PW1 P.C. Moses Lellogong and PW3 P.C. James Ngure entered the manyatta while the rest remained outside. Inside the manyatta the two officers saw the appellant lying outside his hut.

On seeing the officers, the appellant who had a firearm under his head (being used as a pillow) moved as if to attack the officers but the officers acted swiftly and disarmed him. He was arrested and taken to the police station. Both the firearm and ammunitions were submitted to the ballistic expert for examination. The report which was produced during the trial confirmed that the same were a firearm and ammunitions as defined under the Firearms Act.

The appellant gave a sworn defence and called three witnesses. They were unanimous that on the fateful night police officers went to their manyatta and arrested the appellant. It was the evidence of the

appellant that on the night in question he was unwell. His brother had gone to Isiolo Police Station to report a planned theft of their livestock by the Borana and Garre communities. He suspected that the cattle rustlers were behind his arrest. He denied being in possession of the firearm in question or any other.

The appellant's brother, DW2 Adan Hassan Hussein confirmed going to report the planned theft and that in his absence the appellant was arrested. Both DW3 Ali Abdul Rahman Musa and DW4, Ali Aden Mohammed were in the manyatta with the appellant when the latter was arrested.

It was their evidence that there were many people in the manyatta when the arrest was effected; that the police went straight to where the appellant was sleeping, woke him up and arrested him; that he was not found with a firearm.

The learned trial magistrate was satisfied after considering the evidence adduced by both sides that the prosecution evidence was overwhelming and convicted the appellant.

The only issue that fell for determination before the lower court and which must also be determined by this court is whether the appellant was in possession of the firearm and ammunitions as charged. Both the officers who effected the arrest confirmed that the appellant was not known to them prior to the evening in question; that they were only tipped-off by an informer about the presence of a gun in the manyatta and specifically that the appellant had the firearm.

The appellant on his part maintained that there were threats from two communities in the area to steal their livestock and that he suspected that they were behind his arrest. If indeed, as conceded by the witnesses called by the appellant there were several people in the manyatta at the time of his arrest, why, one may ask, did the police, who were strangers to him, go straight to his hut? If it was because of the planned livestock theft, there is evidence that the other people too had their livestock in the manyatta. Indeed, if anything it is the appellants' brother, DW2, Adan Hassan Hussein, who ought to have been the target of the would-be raiders for it was him who went to report to the police the planned raid.

There is no evidence of any role the appellant played in checking the planned raid. It is clear to me that the prosecution tendered evidence that showed beyond any reasonable doubt that the appellant was armed with the firearm in question which was loaded with live ammunitions. The appellant did not have a certificate or certificates for the two and therefore committed the offences charged. The firearm was right under the head of the appellant hence he was in exclusive and actual possession of the same.

The trial magistrate duly considered the defence of the appellant but found, as I have also done, no merit in it. On sentence, having regard to the provisions of section 4 (3) (b) of the Firearms Act, the sentence of seven years, in my view, is not unlawful or excessive. It was further contended that the prosecution evidence was full of contradictions. I have noted the following contradictions. While PW1, PC Moses Lellegong stated when he testified in chief that they were six officers who went to the manyatta, on cross-examination he said they were eight. The other contradiction is whether there were goats and sheep as stated by PW1 or goats and camels in the manyatta as maintained by PW3. These are, in my humble view, not material contradictions. Whether there were six or eight officers, it is not in dispute that the officers went to the manyatta and arrested the appellant. Whether the animals in the manyatta were goats and sheep or goats and camels, once again nothing turns on this. It must be remembered that it was at night and the officers had not gone to the manyatta in connection with stock theft but looking for a firearm.

In the result, I find no merit in this appeal which is dismissed in its entirety.

Dated and delivered at Meru this 15th day of October 2008.

W. OUKO

JUDGE