



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Criminal Appeal 16 of 2007**

**GOODLUCK ELIAS MWANGUSI ..... ACCUSED**

**VERSUS**

**REPUBLIC**

**JUDGMENT**

1. Goodluck Elias Mwangosi was the accused person in **Kajiado SRM'S Court Criminal Case Number 1304/2005** where he faced four separate counts. The particular offences were:-

i. Preparation to commit a felony contrary to Section 308 (2) of the Penal Code and the particulars were that:-

“On the 17<sup>th</sup> day of August 2005 at around 12.40 p.m at Namanga custom yard in Kajiado district within the Rift Valley Province, being at his place of abode, had with him an article for use in the course of or in connection with stealing using a toy pistol.”

ii. Destroying evidence contrary to section 116 of the Penal Code and the particulars were that;

“On the 17<sup>th</sup> day of August 2005 at around 12.45 p.m at Namanga report office in Kajiado district within the Rift Valley Province, knowing that a toy pistol was or might be required in evidence in a judicial proceeding willfully destroyed with intents to prevent its being used to evidence. (sic)”

iii. Assaulting a police officer contrary to section 254 (b) of the Penal Code and the particulars were that:

“On the 17<sup>th</sup> day of August 2005 at around 12.45 p.m at Namanga report office in Kajiado District within the Rift Valley Province, assaulted No.67038 P.C. Jairo Marama who at the time of the said assault was acting in the due execution of his duty.”

iv. Behaving in a disorderly conduct in a police building contrary to section 60 as read with section 63 of the Police Act, Cap 84 Laws of Kenya and the particulars were that:

“On the 17<sup>th</sup> day of August 2005 at around 12.45p.m at Namanga police station in Kajiado district within the Rift Valley Province, behaved in a disorderly conduct at the building by abusing police officers while on duty, and shouting aimlessly.”

2. Although he initially admitted all the charges, the Appellant later changed his mind and the matter proceeded to trial. The evidence tendered was that PW1, APC Daniel Kariuki was stationed at the

customs office in Namanga on 17/8/2005 at about 12 p.m. when he noticed that the Appellant had been leaning at a flag post near the customs office for a long time. He approached him and asked him whether he needed any assistance but the Appellant said that he was jobless and was looking for a job. Since he had a pouch or bag tied around his waist, PW1 moved to search it and a toy pistol fell off. He arrested the Appellant and took him to Namanga police station where the Appellant threw a tantrum and crushed the toy pistol. He was restrained and on further being searched, a screw driver was found on him and as he continued being unruly, one P.C. Marama got injured on his finger. The Appellant was locked up and later charged. The toy pistol and screw driver were identified in court by PW1.

3. PW2, P.C. Jairo Marama was at Namanga Police Station on 17/8/2005 when PW1 escorted the Appellant to the station. As some goats were eating some maize which was to be used as an exhibit in a different case, PW2 went out to chase the goats and then he heard commotion in the report office. When he returned, he found that the toy pistol that PW1 had walked in with had been crushed and the Appellant was shouting loudly. As he tried to restrain him, the Appellant twisted PW2's hand. The officer and PW1 however restrained him and on searching him, found a screw driver on him. PW2 went for treatment at Namanga Health Centre and obtained a P3 form and later went for further treatment at Kajiado District Hospital.

4. PW3, Richard Kisang Kibor is the one who treated PW2 at Namanga Health Centre on 18/8/2005. The patient had a swelling on the wrist joint and the injuries had been caused by a blunt object. The degree of injury was classified as harm.

5. When he was asked to defend himself, the Appellant stated that on 17/8/2005 he was traveling from Kajiado to Namanga and while in the bus, he saw a toy pistol under a seat in front of him. He took it and alighted at Namanga. He bought two dry cells for the toy pistol and then went to seek help at **“the police station”**. PW1 was the person he sought help from and instead of rendering assistance, PW1 asked for a bribe since he had found the toy gun. The Appellant told him that he had no money and when he was ordered to sit down, the toy gun broke. PW2 then came and tried to hit him with a piece of timber and when the Appellant ducked, PW2 said that he had been hurt. Later he was locked up and charged in court on 31/8/2005.

6. In her judgment, the learned trial magistrate found that the Appellant was guilty on all counts and he was duly convicted and sentenced to serve one year in prison in respect of each count and the sentences were to run consecutively. The Appeal is both on conviction and the sentences imposed.

7. This court is obligated to review the evidence before the trial court afresh, subject it to its own analysis and evaluation and reach its own independent decision – see Okeno vs R (1972) E.A. 32. That being the law, the evidence before the trial court was in my view consistent, clear and hardly subject to any fault. I say so because there is no denying the fact that the Appellant was accosted by PW1 and this was only because the Appellant was acting suspiciously near the Namanga customs office. On being searched, he was found with a toy pistol and the explanation given by the Appellant was unreasonable then and it is now. That he picked it in a bus but proceeded to buy dry cells for it while he had no money to take him beyond Namanga is certainly unreasonable to this court. In any event, the Appellant's suspicious conduct, his possession of the toy pistol and the unreasonable explanation given would lead one to the reasonable conclusion that he was preparing to commit a felony and count I was thus proved beyond reasonable doubt.

8. Regarding count II, in cross-examination of PW1 the Appellant state in unsolicited evidence;

**“True I had the pistol but I could not destroy it”.**

9. In his defence, he agreed that he was in possession of the pistol but said **“when I sat down it got broken”**. The self incriminating evidence of course is that in fact he had the toy pistol in his possession and therefore had the opportunity to destroy it. The evidence of PW1 is that the Appellant crushed it under his shoes. PW2 had earlier seen PW1 holding the pistol when he stepped out to chase the goats and when he returned; the pistol was on the floor crushed. I believe the evidence of PW1 and PW2 as read

together and disbelieve the defence of the Appellant. I say so because it is inconceivable that a police officer arrests a suspect with a toy pistol, marches him to a police station but leaves the pistol in the suspect's pocket. It is therefore more likely than not that PW1 had the pistol but at the station, the Appellant snatched it and crushed it in a bid to destroy it. That is proof beyond reasonable doubt that the offence in Count II was indeed committed.

10. As to Count III, I will say very little about it because the evidence of PW3 was that in fact PW2 was injured on the wrist and so the injury cannot be denied. As to how it was inflicted, PW1 properly corroborated the evidence of PW2 that it was the Appellant who assaulted PW2 as the officers tried to restrain him as he shouted in the police station. That fact would quickly lead me to Count IV because it is not in doubt that PW2 got injured as the Appellant behaved in a disorderly manner within Namanga Police Station which is evidence that PW1 and PW2 gave and which I find difficult to prove. Counts III and IV were properly proved beyond reasonable doubt.

11. The Appellant's defence which was part self-incrimination and part denial is nothing more than an afterthought and after considering it, I find that it does not in any way dislodge the strong evidence on each count that was tendered by the prosecution.

12. Turning to sentence, I have not been told what principle of sentencing was flouted by the trial magistrate and why this court would tamper with the sentences given. Although generally offences committed at the same place and time should attract concurrent sentences, in this case and in its circumstances, I think that the policy of law generally would demand that the Appellant serves his sentences as meted out.

13. In the event, I see no merit in the Appeal and the same is dismissed.

14. Orders accordingly.

Dated and delivered at Machakos this **14<sup>th</sup>** day of **October** 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: **Mr Wang'ondy for Republic**

**Appellant present in person**

**ISAAC LENAOLA**

**JUDGE**