



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 621 of 2004**

**(From original conviction (s) and Sentence(s) in Criminal Case No. 3062 of 2004 of the  
Chief Magistrate's Court at Nairobi (J.O. Oseko - SRM)**

**PETER KAMAU MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**PETER KAMAU MWANGI** was convicted for two counts of **BEING IN POSSESSION OF A FIREARM AND AMMUNITION WITHOUT A FIREARM CERTIFICATE** contrary to **Section 4(2) (a)** as read with **Section 4(3) (a)** of the **Firearms Act**. He was then sentenced to 7 years imprisonment for **POSSESSION OF THE FIREARM** and five years imprisonment for the offence of **POSSESSION OF AMMUNITION** with prison terms ordered to run concurrently.

The facts of the prosecution case were quite simple. Police Officers on mobile patrol along Ngare Area, Gesare Road, saw a stationary vehicle registration No. KPL 729 Datsun, parked with the driver seated inside talking to a person who was standing outside. The Police officers PW1, PW3 and others decided to search the vehicle and so they asked the driver to step out. The driver was identified as the Appellant. Under the seat a blue paper bag was recovered with *inter alia* a blue and black suit, two pistols, one of them with 7 rounds of ammunition and the other 6 rounds of ammunition. The Appellant was then charged for the two offences. The Appellant gave a sworn statement and said that the vehicle in question belonged to his employer. He said that he collected the vehicle that day from the owner. That no sooner had the owner gone than Police Officers arrested him. The Appellant said he was arrested but his brother who was with him was released.

The Appellant through his Counsel **Mr. Naikuni Ngaah & Co. Advocates** has filed a memorandum of appeal with twelve grounds of appeal. These are argumentative and repetitive and after carefully considering them they revolve around the following issues.

One, the issue of whether or not the Appellant was in possession of the two firearms;

Two, there were unresolved inconsistencies in the evidence of the prosecution and;

Three, the sentence was excessive and harsh.

When the appeal came up for hearing **Mrs. Gakobo**, learned State Counsel conceded to the appeal. Due to the concession, I will start by considering the reasons advanced for the same. **Mrs. Gakobo** submitted that there was inconsistency in the description of the firearms recovered in this case. Learned Counsel submitted that while PW1 described them as a German Waitheu and a Colt Revolver, the firearms expert described them as a Luger pistol and Smith and Wesson Revolver. Learned Counsel submitted that after noting the discrepancies, the prosecution applied to amend the charge. I have perused the record and have found as follows: -

The initial charge described the firearms as a Waitheu Pistol Serial No. 3787 and a US Colt. The prosecution amended the charge for the firearms to read Luger Pistol Serial No. 3787 and a Smith and Wesson Revolver Serial No. 160561. That amendment meant that the description of the firearms tallied with the evidence of the Ballistic Expert who said he examined the firearms on 13/12/02. As **Mrs. Gakobo** submitted, the amendment still meant that the evidence of PW1 remained at variance with the charge. The learned State Counsel submitted that there was a possibility that the firearms which were recovered from the vehicle in question were not the ones before the court. Counsel submitted that the two witnesses, PW1 and the firearms expert, PW2 were key witnesses but that their evidence was irreconcilable.

**Mr. Naikuni** in his submission raised similar issues of contradiction in the evidence of the prosecution but for different reasons. The Appellant's advocate submitted that the serial numbers of the firearms recovered was contradicted in evidence. The Advocate submitted that while PW1 said a German Waitheu was Serial No. 3784, PW2 described one of the firearms he recovered for examination as a Luger Serial No. 3787.

There was inconsistency in the prosecution case between the firearms which PW1 and PW3 recovered, those mentioned in the charge and those examined by PW2 the Ballistic Expert. While PW1 described the two firearms as a German Waitheu and a US Colt Revolver, PW3 did not assign any names to them yet he was the recovery officer. That was rather curious. It is however quite clear that the firearms the two officers recovered had no similarity whatsoever to the two a Luger and Smith and Wesson, which PW2 examined. There was a time lapse of just over two weeks between the date of recovery by PW1 and PW3 and the delivery to PW3 for examination. I have also noted that the Police Officer who delivered the firearms to PW2 for examination one **PC Omondi** was not called as a witness. PW5, who produced all exhibits in court, stated that **PC Omondi** had passed away without giving any further details.

Inconsistencies in evidence are bound to happen since the witnesses are human and prone to imperfections and loss of memory for minute details. In such circumstances, the test to apply is whether the inconsistency is material and goes to the core of the prosecution case. In **JOSEPH MAINA MWANGI vs. REPUBLIC CA No. 73 of 1992 (Nairobi) TUNOI, LAKHA & BOSIRE JJA** held: -

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”*

The discrepancies which arose in the instant case are fundamental and in my view affect the conviction and sentence entered. The discrepancies touched on the very identity of the firearms recovered from the Appellant. Not only did the serial numbers keep changing but even the very description and name of the firearms involved. A German Waitheu, Luger, US Colt Revolver and Smith and Wesson Revolver are all very different names. The prosecutor and the court did not inquire, at least from the Ballistic Expert, PW2 whether any of those names were descriptive of another, whether such names could be shared among them and whether there was material differences in any or all of them. The learned trial magistrate did not even address the obvious serious discrepancies in her judgment and was more pre-occupied with the issue of whether or not the Appellant was in possession of the vehicle in which the guns were found.

There was a missing link between the time the firearms were recovered and the time they were received by PW2 for purposes of examination. That link may unravel the mystery of the differences in the description of firearms recovered and those tested. Unfortunately for this case that link could not be filled because **PC Omondi**, who could have provided that link died before he testified in court.

I am of the view that this ground alone is sufficient to dispose of this appeal. However, I wish to make a comment about possession of the firearms. The learned trial magistrate had this to say concerning possession: -

*“They were doing a simple routine check when they stumbled on the firearms which were stashed underneath the driver’s seat. The accused was indeed in control of the vehicle he does not deny that he was in possession of it. Whether it was registered in the name or not is not material (sic) to the issue of ownership. He was the constructive owner of the vehicle. His defence is that he was not aware that the firearms were in his vehicle.”*

The issue of ownership of the vehicle was quite material and indeed was addressed through PW4, **Wilson Mureithi** from KRA. **Wilson** said that the vehicle was registered in the name of **VINCENT A. MABEA** and that one **ROBERT MACHARIA** had unsuccessfully applied for issue of a duplicate logbook. The issue of ownership was material and therefore the learned trial magistrate misdirected herself on it and therefore fell into error since the vehicle was proved to belong to another and not the Appellant, the prosecution had the onus to prove that the Appellant had knowledge that the firearms were in the vehicle. The Appellant’s defence was that he was unaware of their presence. The prosecution needed to rebut that evidence. Throughout the prosecution case, no evidence was led to prove that the Appellant had knowledge of the firearms. The fact he was in possession of the vehicle at the time of arrest did not adequately dispose of the issue of knowledge. Being in charge and control of the vehicle was totally different from being aware of the content of the vehicle and especially where the evidence adduced specifically indicated that the firearms were hidden out of sight.

Having considered this appeal and in my own evaluation of the evidence led in the lower court, for reasons given herein, I find that the conviction was unsafe and should not be allowed to stand. I quash the conviction, set aside the sentence and order that the Appellant’s bond pending appeal is cancelled and securities or cash deposited be released or refunded to depositors whichever is applicable.

The upshot of this appeal is that the same succeeds in total.

Dated at Nairobi this 8<sup>th</sup> day of March 2007.

.....

**LESIIT, J.**

**JUDGE**

Judgment read and delivered in presence of;

Appellant present

Mr. Naikuni for the Appellant

Miss Gateru holding brief for Mrs. Gakobo for State

CC: Tabitha

.....

**LESIIT, J.**

**JUDGE**