REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 170 of 2005

INNOCENT NTAKIRUTIMANA..……...…….....……..……. APPELLANT

-AND-

REPUBLIC……...RESPONDENT

***(An appeal from the Judgement by the Resident Magistrate, Mr. R.M. Oduor in Criminal Case No. 4344 of 2004 at the Kibera Law Courts dated 31st March, 2005*)**

JUDGEMENT

The appellant was the second of three persons who were jointly charged in the trial Court with the offence of being in possession of an imitation firearm, contrary to s.34(1) of the Firearms Act (Cap.114, Laws of Kenya

e appellant herein, besides, faced a second count of the charge, that of being unlawfully present in Kenya contrary to s.13(2) (c) of the Immigration Act (Cap.172, Laws of Kenya).

On 6th June, 2006 the Police, acting on information which had come to them, searched the abodes of the three accused persons (including the appellant herein), and they are said to have found therein two home-made pistols. The appellant herein, whose abode, like that of the other two, was at Kibera Laini Saba, was found to be a foreigner without valid Kenyan immigration documents.

The trial Court considered that the main issue for determination at the trial was "whether the three accused jointly committed the offence alleged in count 1, and whether the 2nd accused [the appellant herein] committed the offence in count 2."

On that question, the learned Magistrate noted that there had been certain contradictions in the prosecution evidence. PW1, APC ***Ken Mungai*** and PW4, ***APC William Kitheka*** had testified that it is they who had opened the door of the house where the 3rd accused was sleeping — PW1 averring that the said door had to be broken; PW3, APC ***Rogers Ogoti*** saying it was the appellant herein who had called the 3rd accused to open the said door.

In other respects, the trial Court found that the evidence given by PW1, PW3 and PW4 was consistent; they had said that the appellant herein is the one who led them to the house where the 3rd accused was found sleeping. It was night time, in an unlit slum area, where the 3rd accused could not have been found if the appellant herein had not led PW1, PW3 and PW4 there.

The appellant gave a sworn defence in which he testified that on 6th June, 2004 which was a Sunday, he had gone to Church, and thereafter he passed by his business premises at Ngumo, and afterwards he visited one ***Pastor Anania*** until about 6.00 p.m. He later went to look for one ***Mumo*** who was indebted to him, and he found ***Mumo's*** wife. There was a fight in that place between some two women, which led to Police Officers coming along; and ***Mrs. Mumo*** at that time took the appellant away to a place of refuge, in one ***Mama Wangare's*** house, where the 1st accused also happened to be. The police came into that place of refuge, and asked to see the identifications of those present; and the appellant herein showed his passport. A police officer arrested the 1st accused and the appellant, who were kept under guard until the 3rd accused (one ***Maina***) was brought along to join them.

The appellant testified that the Police officers did not allow him to show them his abode. He said his visa had just expired, and as it was a weekend, he had not yet been able to renew it. On the following day he was charged with the offence of possessing a toy pistol. The appellant testified that no statement had been taken from him, and that he was charged before any investigations on his involvement in crime had been conducted. He denied the charges against him.

The 3rd accused, who also gave a sworn defence statement, testified that after the Police officers broke into the house where he was sleeping (which was the house of the appellant herein), they conducted a search while the 1st accused and the appellant were kept outside; and they said they had recovered in that house a toy gun.

The learned Magistrate fixed the appellant with criminal liability on the basis of the following statement of fact which is taken from the judgement:

"***[The appellant] in his defence claimed that 1st house where he and accused 1 were found was not his house. This assertion was given to the officers who confirmed in Court that [the appellant] had said so. I believe therefore that it is very probable that he led them to that house where also according to PW1 he had taken some shoes..."***

The problem with this factual statement as an expression of identifying particulars, is that it is not clear; secondly, it makes references to different houses, the ownership or occupation of which is not intelligibly pointed out; thirdly, it is expressed in "probability" terms – which is not good enough, in the proof of a *criminal* charge.

It was the appellant's defence that the Police had found him in the house of one ***Mama Wangare***; so I would take it that this is the first house in which he was found; it is not on record that this point was taken up in cross-examination. Therefore, the basis of the Court's dismissal of the appellant's testimony that the first house in which he was found wasn't his, is unclear. The appellant testified that at the time a toy gun was said to have been recovered from his house, he had been kept outside; and he avers that no such item was recovered from his house. This point was not sufficiently demonstrated in the evidence process, and I think it would be unsafe to reach the conclusion that, indeed, the appellant was found with a toy pistol.

In addition to the doubts I have expressed on the propriety of conviction in this case, certain statements made by the learned Magistrate are significant, and they would confirm my reservations. The learned Magistrate writes in his judgement:

"***In my view, this case was badly investigated. I have reservations regarding all three accused [but] I suspect they were somehow involved in the offence in question. However, the evidence against accused 1 and accused 3 is wanting. As far [as] accused 2 [is concerned] I do not accept his evidence. I see no reasons why the officers would frame him. I believe that he knew what was inside the house where he led the Police. The recovered exhibits were produced in Court and were clearly imitation firearms."***

The doubt in the learned Magistrate's mind was remarkable. Although he convicted the appellant herein,

however, he makes reference to "imitation *firearms*", whereas the evidence adduced, and in relation to the house where the appellant is said to have lived, refers to *one* toy pistol. If there were still other pistols (more than one), how many were they? And where were they found? It is not in the testimony. It has not emerged at all.

I find that the learned Magistrate erred, by resolving clear doubts in the prosecution case in favour of the prosecution. The law on this question is abundantly clear: if there is any doubt at all in a prosecution case, it shall always be resolved in favour of the accused, and not otherwise: ***Woolmington v. DPP [***1935] A.C. 462 (at p.481); ***Okale v. Republic*** [1965] E.A. 555 (C.A.).

The trial Court's decision of the appellant's case on the first count was, I would hold, contrary to well-established principles of law, and on that account it must be set aside.

The 2nd count of the charge was that the appellant, on 6th June, 2004 at Kibera Laini Saba, being a Rwandese citizen, was found unlawfully present in Kenya. In the evidence, the appellant is recorded to have told the trial Court that his visa had expired just before the weekend, and it was not possible to renew it by the time he was arrested, during that weekend. This testimony was not contested during the cross-examination to which he was subjected. But how did the trial Court treat this point? The relevant passage in the judgement may be quoted:

"***The [appellant] faced a second count which he more or less admitted and for which evidence was clear. If he had a passport with an expired visa, as PW1 confirmed, then this can only be a mitigating factor.***

"***Otherwise I find both charges proved against [the appellant] beyond reasonable doubt. He is convicted of both counts under section 215 CPC."***

If the appellant's passport contained a visa which had just expired, even be it by one second only, then in legal technicality he would be in breach of the Immigration Act (Cap.172, Laws of Kenya), s. 13(2)(c). Bureaucracy, in those circumstances, might very well have objections to the visitor's presence in the country – but they would appear unfair if they did not consider the circumstances under which the visa expiry came to be. Courts of law are not expected to view the matter like bureaucrats – because they are Courts of *justice*, and must always take into consideration *evidence* of the surrounding circumstances. Only by determining issues judiciously, and on the basis of applicable facts and circumstances, can the Courts uphold the dignity of persons, which is a core element in the fundamental-rights guarantees of the Constitution.

So this Court is reluctant to say that the moment the applicant's visa expires, be it by the weekend, or by a public holiday, that moment he has become an illegal alien and must be punished for offences provided for under the Immigration Act (Cap.72). An inherent tenet in judicialism is the exercise of discretion, and the trial Court should have exercised this discretion by allowing the appellant some days before requiring that he be deported.

This appeal succeeds. I hereby set aside the judgement of the trial Court, with its conviction and sentence on both counts. I acquit the appellant on the first count. I set aside the sentence of fine and imprisonment in respect of the second count. I make the following specific orders:

(1) The appellant shall forthwith be set at liberty, unless he is otherwise lawfully held in a different cause.

(2) The appellants immigration documents shall be restored to him immediately.

(3) The appellant shall be at liberty to regularise his immigration status in Kenya within fourteen (14) days of the date hereof, failing which, at the end of that period, the immigration rules under the Immigration Act (Cap. 72) shall apply to him as a matter of course.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 30th day of May, 2007.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

The Appellant in person.