



REPUBLIC OF KENYA

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

Criminal Appeal 69 of 2006

JOHN NJOROGE MWANGI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From the Original Conviction and Sentence in Criminal Case No.10026 of 2004 of the Chief Magistrate's Court at Thika)*

JUDGMENT

**JOHN MWANGI NJOROGE**, the appellant, was charged before the subordinate court with four counts. Count 1 was for robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 21<sup>st</sup> October 2003 jointly with four others at Gatundu Township, Thika District of the Central Province, with others not before the court while armed with dangerous or offensive weapons namely pistols robbed **JENNIFER WAITHERA KUNGU** cash 3,781,998/=and at or immediately before or immediately after the time of such robbery used actual violence to the said **JENNIFER WAITHERA KUNGU**.

Count 2 was for preparation to commit a felony contrary to section 308(1) of the Penal Code. The particulars of offence were that on the 27<sup>th</sup> October 2003 along Thika/Nairobi road within Thika District of the Central Province jointly with others not before court was found being in possession of a weapon to wit Barreta pistol serial number 31393013 intended for use in the commission of robbery with violence.

Count 3 was for being in possession of a firearm without a firearm certificate contrary to section 4(2) of the Firearms Act (Cap 114 of the Laws of Kenya). The particulars of the offence were that on 27<sup>th</sup> October 2003 along Thika/Nairobi highway within Thika District of the Central Province was found in possession of a firearm to wit a Barreta pistol serial number 31393013 without a firearm certificate.

Count 4 was for being in possession of ammunition without a firearm certificate contrary to section 4(2) of the Firearms Act (Cap 114) Laws of Kenya. The particulars of offence were that on 27<sup>th</sup> October 2003 along Thika Nairobi Highway within Thika District of the Central Province was found being in possession of 3(three) rounds of ammunition without a firearm certificate.

After a full trial, all the accused were acquitted of count 1 and count 2. The appellant was however, convicted of count 3 and count 4, in both of which he was charged alone. He was sentenced to serve 5 years imprisonment on count 3, and 5 years imprisonment on count 4. The sentences were ordered to run concurrently.

Being dissatisfied with the decision of the learned trial magistrate, the appellant has preferred this appeal challenging both the conviction and sentence. The appellant also filed written submissions. In addition, he submitted at the hearing of the appeal that the learned trial magistrate erred in not considering that the dog handler and investigating officer were not called to testify at the trial.

Learned State Counsel, Mr. Makura, opposed the appeal. He supported the conviction and stated that the sentence was illegal.

It was counsel's submission that the prosecution proved its case beyond any reasonable doubt. Counsel submitted that the appellant was arrested by PW4, a police officer, in the company of another police officer PW7. At the time of arrest, the appellant was in possession of a firearm which had live ammunition and which were recovered near where he was arrested. The firearm was confirmed by PW9, a firearms expert, to be mechanically usable. Counsel also submitted that the defence of the appellant was considered and found not to be credible.

The State Counsel further submitted that the minimum sentence for each of the offences was 7 years imprisonment. The sentence imposed by the learned trial magistrate was therefore illegal and should be rectified, or in other words, a lawful sentence should be imposed.

This being a first appeal, I am bound to re-evaluate the evidence on record and come to my own conclusions and inferences – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The appellant was convicted of two offences. These two offences are for possession of ammunition (a pistol) without a firearms certificate; and possession of ammunition without a firearms certificate. The basis of the convictions was given by the learned trial magistrate at page J11 of the judgment thus-

**“Regarding count 3, the prosecution tendered evidence to show that the 1<sup>st</sup> accused was in possession of a pistol, Tariq manufactured in Iraq serial No.31393013 which is same as Beretta pistol manufactured in Italy. This position was well explained by PW8 Johnstone Musyoki Mwangela a ballistic expert.**

**The evidence of PW7 gave testimony on how the 1<sup>st</sup> accused entered into Mangu High School armed with a pistol. Later PW 4 arrested the accused and recovered the pistol stated herein above together with 3 rounds of ammunitions caliber 9mm”.**

The learned trial magistrate relied on the evidence of PW7 who testified that he saw the appellant ran into Mangu High School compound. PW 7 was a police officer who was in the company of others. PW4 was also a police officer, but came to the scene later. He testified that he arrested the appellant in the bush in the Mangu High School compound. This witness testified that the recovered pistol was “burret”, which I presume was Barreta. He did not state that it was a Tarik pistol, which was the pistol produce in court. The appellant was charged with being in possession of a Barreta pistol serial number 31393013. On the other hand the pistol which was taken to the ballistic expert, PW9 JOHNSON MUNYOKI MONGERA, was a Tarik pistol serial number 31393013. This was the pistol produced in court, and the charge against the appellant was not amended.

The burden is always on the prosecution to prove a charge against an accused person beyond any reasonable doubt. That burden does not shift to an accused person. See **MUIRURI – vs – REPUBLIC (1983) KLR 205**.

The prosecution alleged in the charge sheet that the appellant was found in possession of a Barreta pistol. The pistol produced in court was a Tarik pistol. These in my view, are two different types of pistols. In fact according to the evidence of PW7, it was the police driver who had a Tarik pistol. In my view a, Tarik pistol cannot be confused for a Barreta pistol. They are manufactured in Iraq and Italy respectively, and bear two different trade marks. Therefore, in my view, the prosecution did not prove that the appellant had the pistol which was produced in court, and the alleged ammunition which was in the said pistol. In my view the evidence by PW9 that a Tarif pistol is the same as a Barreta pistol is not

credible. The prosecution evidence, as presented, gives credence to the appellant's defence that he was merely arrested as he was walking to a farm after he was searched by the police near Mangu High School. It is highly probable that the Tarik Pistol carried by the police driver was planted on the appellant.

Nor is that all. Crucial evidence was not tendered and crucial witnesses did not testify. The dog handler whose dog is alleged to have led to the arrest of the appellant in a bush at Mangu High School did not testify. The investigating officer of the case was also not called to testify. The appellant was also said to have thrown away his shirt, when he ran into the bush of Mangu High School. That shirt was not produced in evidence. The trial court gave the prosecution ample time from November 2004 to December 2005 to call witnesses and tender relevant evidence. However, the prosecution failed to honour its undertaking to call material witnesses after being granted several adjournments.

The dog handler would have corroborated the evidence of the circumstances of the arrest of the appellant and the recovery of the firearm and ammunition and whether the appellant had removed his shirt when he was arrested. He would also have been able to clarify the make of the pistol, if any was recovered from the appellant during the arrest. The investigating officer would have tied the loose ends in the evidence. In the absence of these two crucial witnesses, I cannot say that the evidence on record is watertight. It leaves me to speculate. There is no room for speculation in criminal cases. It also means that the evidence on record is bare and lacks corroboration. Weighing both the prosecution and defence case on record, I find that it will not be safe to found a conviction on the evidence on record, in view of the absence of the evidence of crucial and important witnesses – see **BUKENYA – vs – UGANDA [1972] EA 549**. I draw the inference that if the evidence of these crucial witnesses was tendered, it would have been adverse to the prosecution case. The conviction cannot therefore stand, and I will allow the appeal.

For the above reasons, I allow the appeal, quash the conviction of the appellant on both counts and set aside the sentences imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 24<sup>th</sup> September 2007.

**George Dulu**

**Judge**

**In the presence of –**

Appellant in person

Mr. Makura for State

Eric - court clerk.