REPUBLIC OF KENYA

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

CRIMINAL APPEAL NO. 249 OF 2004

DAUGLAS SANYA OBWANYO……....………….. ………..APPELLANT

VERSUS

REPUBLIC…………………… ………………... …………....RESPONDENT

J U D G M E N T

The Appellant**, DAUGLAS SANYA OBWANYO** was charged with two counts. In the first count he was charged with **BEING IN POSSESSION OF NARCOTIC DRUGS** contrary to **Section 3 (1) (a)** of the **Narcotic Drugs & Psychotropic Substances Control Act**. In the second count he was charged with **BEING IN POSSESSION OF AN IMITATION FIREARM** contrary to **Section 34(1)** of the **Firearms Act**.

The Appellant is appealing only against the sentence. He had pleaded guilty to both counts during the plea. In the first count, he was sentenced to 2½ years imprisonment and in the second count to 8 years imprisonment. The Appellant has raised 5 grounds. First that the sentence was excessive on grounds that he had pleaded guilty to the charge. Secondly that he was remorseful for the offence and since going to prison had reformed from his bad behaviour.

Thirdly that he was the sole breadwinner for his younger orphaned siblings and of his own family. Finally that the toy pistol for which he had been charged with was not intended for use in robbery or any law breaking. The appeal against sentence was opposed by **MRS. OBUO** basically on the grounds that the maximum sentence for the second offence was 10 years and therefore 8 years imprisonment was neither illegal nor excessive.

I will begin with the last ground of appeal in the Appellant's petition. That ground of appeal challenges not only the sentence but also the conviction. I will consider it because it raises a point of law. That point of law is what constitutes an offence under **Section 34(1)** of the **Firearms Act?**

That section provides in part where relevant thus;

"***34(1) if any person makes or attempts to make any use of a firearms or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment for a term not exceeding 14 years and …"***

The reading of this section is very clear that the person charged should be proved not only to have been in actual possession of the imitation firearm but must have made or attempted to make any use of it with intent to commit any criminal offence. The prosecution must prove not only that the accused person had the imitation firearm in his possession but that he used or tried to make use of it with a criminal intent. In the Appellant's instant ground of appeal he states that the imitation firearm was not for use in any robbery

or any law breaking.

From the facts led by the prosecution during the Appellant's plea. In regard to the possession and recovery of the imitation firearm, it read as follows: -

"…***police also learnt that they knew a person who earlier assist (sic) them to arrest the prime suspect. They went to accused's house, the officers suspected the accused as one of the culprits. They conducted a search in accused's house and recovered:***

- ***3 stones of cannabis sativa – exhibit 1***

- ***a toy pistol – exhibit 2***

- ***23 rolls of cannabis sativa – exhibit 3 inside the cover.***

They escorted accused to Ongata Rongai Police Station where he was charged with this (sic) offences."

The facts of the prosecution case are clear that the police officers who recovered the toy pistol in question did so in the Appellant's house. The Appellant was not shown to have had the toy pistol in his actual personal possession at the time of its recovery. The prosecution needed to show not only actual possession of the toy pistol but in addition that the Appellant used or tried to make use of it with intent to commit <u>any</u> offence. The act of possession must be proved to have been contemporaneous to that of use or attempt to use the toy pistol. The Appellant's intention in the possession and the use or attempt to use the toy pistol must also have been demonstrated by the prosecution to have been to commit a crime. In the instant case the prosecution was able to prove only the possession of the pistol but not the 'use or attempt to use it for criminal intent'. That was not what the legislature intended by **Section 34(1)** of the **Firearms Act**. The prosecution case fell far too short of proving the charge that the conviction on a plea of guilty was not only illegal but prejudicial to the Appellant. The learned trial magistrate ought to have satisfied herself that the facts as led by the prosecution satisfied the ingredients of the charge sufficient to prove it and therefore, sustain a conviction. That burden is greater on the trial court especially where the accused person is unrepresented and is himself a layman as in this case. Despite the fact that the Appellant pleaded guilty to the offence charged in the second count, the charge could not be sustained even if evidence was to be called to prove it in a formal hearing. The plea of guilty was equivocal in the circumstances. Consequently I quash the conviction entered against the Appellant in count two and set aside the sentence of 8 years imprisonment imposed. On the other count, the appeal against the sentence is without merit. The offence of possession of narcotic drugs is serious. The amount involved is substantive as to show that the Appellant may have been in possession of the drug as a peddler. Two and half year's imprisonment is lenient and I agree with the learned state counsels' submission to that effect in respect of count 1. I disallow the Appellant's appeal against sentence in regard to count 1 and dismiss the same accordingly.

The upshot of this appeal is that the Appellant's appeal against sentence in count 1 is rejected and consequently dismissed. The conviction in count two is quashed and sentence set aside.

To that extent the Appellant's appeal succeeds.

Dated at Nairobi this 8th day of March 2006.

LESIIT, J.

<u>JUDGE</u>

Read, signed and delivered in the presence of;

Appellant in person – present

Mrs. Obuo for State

CC: Huka

LESIIT, J.

JUDGE