



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 1074 of 2003**

**MUKOROTO KANDONYE .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***MUKOROTO KANDONYE***, the Appellant herein was charged with three counts. In count 1, the Appellant was charged with being in possession of a firearm without a Firearm Certificate contrary to Section 4 (2) (a) of the Firearm Act. The second count which faced the Appellant was being in possession of Ammunition without Firearm Certificate contrary to Section 4 (2) (a) of the Firearm Act. Finally, the Appellant was also charged with being unlawfully present in Kenya contrary to Section 13 (2) of the Immigration Act. He was upon full trial found guilty and convicted on all the counts. He was thereafter sentenced to 10 years imprisonment in respect of count I, 8 years imprisonment in respect of count II and one year in respect of count III. Upon completion of the jail term, the Appellant was to be repatriated to Tanzania. The Appellant was aggrieved by the conviction and sentence and hence lodged this Appeal.

He advanced forth the following grounds of Appeal in his petition of Appeal:-

- (i). **THAT** the Learned trial Magistrate erred in both law and fact in failing to appreciate that the Appellant was a good Samaritan who after seeing the firearm reported the matter to the concerned authorities.
- (ii). **THAT** the trial Magistrate further erred in law and facts by convicting the Appellant on unproved prosecution case.
- (ii). **THAT** the trial Magistrate grossly erred in both facts and law by rejecting the Appellant's defence without giving cogent reasons as required by Section 169 (1) of the Criminal Procedure Code.

The brief facts of the prosecution case are that on 8<sup>th</sup> July, 2003 at about 11.30 a. m. one Corporal Henry Kaunda (PW1) received information that there were Tanzania citizens who had crossed over into Kenya whilst armed. He organized a search team consisting of Administration Police officers and proceeded to the area where the said Tanzanians were alleged to be. They found the Appellant who upon interrogation led them to a place where a firearm was recovered. The Appellant was asked to produce documents allowing him to be in Kenya. He did not have any. He was then arrested and charged with three counts in the charge sheet.

When the Appeal came up for hearing, Mrs. Obuo, learned State Counsel conceded to the same. The concession was on the basis that the evidence on record could not have sustained a conviction on the 1<sup>st</sup> and 2<sup>nd</sup> counts. According to the Learned State Counsel it was the evidence of PW2 and PW4 that Appellant led them to the recovery of the rifle. Counsel submitted that with the repeal of Section 31 of the evidence Act, the evidence leading to the discovery of the facts is inadmissible. As regards the count of being in Kenya unlawfully, Counsel submitted that the offence was proved. According to the Learned State Counsel, there was the evidence of PW5 that was not challenged and or controverted at all. This witness confirmed that the Appellant was a Tanzanian and had been arrested in Kenya. When arrested he did not have any documents allowing him to be present in Kenya. Counsel pointed out that the Appellant was sentenced to serve 1 year imprisonment which he has already served. Should the Appeal succeed Counsel submitted that the Appellant should be repatriated to Tanzania.

This being the first Appellate Court, I am expected to subject the evidence tendered in the Lower Court to fresh and exhaustive evaluation so as to reach my own findings and conclusion as to the guilt or otherwise of the Appellant. In doing so I have to bear in mind that I did not have the opportunity or privilege of hearing and observing the witnesses as they testified (*OKENO VS REPUBLIC (1972) EA 32.*)

The evidence regarding Appellants possession of the firearm and ammunition was given by PW1, 2 and 4. In his evidence PW1 stated:-

***“.....I work with KWS Guniveni Outpost. On 8. 7. 2003 at about 11.30 a. m. the Manager of Shampole group came. One Michale Leonardo came to our camp and told me that he had got a report from Game Scout that a letter had come from Tanzania showing that there were criminals that had crossed to Kenya. It was a group of 8 men. This is a letter dated 11. 6. 2003. It was signed by one Julius Ole Mirai of Ngorongoro National Park Tanzania.....”***

The impression being created by this testimony is that PW1 was acting on the basis of information passed to him through the said letter. However the question that requires an answer is who gave PW1 the said letter? According to the recorded evidence there was nobody who came forth and claimed to have given PW1 the said letter. Further a perusal of the said letter clearly reveals that the name of the Appellant is not featured therein. Had the Appellant's name been among those in the letter, the prosecution would have easily proved that the Appellant was among the gang that had allegedly crossed into Kenya from Tanzania.

PW1 further testified that after reading the letter he learned that the leader of the gang was at a place called Pakase. PW1 further alleged that he was told that the group was armed. If it is true that PW1 received information or a report that there was a gang leader at Pakase as he wanted the Court to believe, then was any person arrested at Pakase? It would appear that indeed the gang leader was arrested. However what became of him. He was never charged alongside the Appellant. PW1 testified as follows:-

***“.....When I arrived I went where he was and got him. I asked for his ID or documents. He gave me his documents belonging to Tanzania. I arrested him at 2 a. m.....”***

It is clear from the foregoing that the gang leader was arrested. However for reasons that I am unable to fathom, the said gang leader was never charged.

The Appellant was arrested at 6 p. m. It is clear that when arrested, he was not in possession of the firearm and or ammunition. Although the prosecution claimed that upon interrogation, the Appellant led them to a place where they recovered the gun and ammunition, the evidence is not credible. PW1, PW2 and PW4 testified in this regard. However there are several material contradictions in their evidence as to render the same incredible. PW2 stated that at 3 p. m. they went to the camp rested for a while and got back to the market. That then a member of the Public told them that one of the persons they were looking for had come to the market to buy food. They proceeded to have the person arrested. This testimony is in sharp contrast with evidence of PW1. PW1 stated that when he went to the market, he learned that there were two people in the market but not armed. He then caused them to be arrested. That the accused and

one girl were arrested at 6 p. m. If these two witnesses were talking about the same event, how come their evidence is contradictory? On the alleged recovery of the gun, PW2stated:-

***“.....We took a vehicle and he led us 7KM from the market the place called Ngoswa where there are reds.....”***

As for PW4, he testified as follows on the issue:-

***“.....The route he led us was towards Pakase.....”***

If it is true as claimed by the Prosecution that the Appellant led these witnesses to the recovery of the said gun and they were all the time together, why should there be contradictions regarding the area from where the gun was allegedly recovered.

Considering these contradictions alongside the defence advanced by the Appellant, I am of the considered view that the Appellants defence was plausible. He claimed that he came across a gun and chose to alert those in authority. Instead of those in authority appreciating the effort of the Appellant in alerting them about the gun, they chose instead to charge him with possession of the gun and ammunition. In my view this was rather callous to the extreme and an abuse of the Criminal process.

Mrs. Obuo was right therefore in conceding to the Appeal. That being my view of the matter, I would allow the Appeal, quash the conviction and set aside the sentence imposed on the two counts of being in possession of a firearm and ammunition.

As regards being unlawfully present in Kenya, I have no doubt at all that the prosecution proved its case against the Appellant to the required standard. Indeed the Appellant in his unsworn statement does admit that he is from Tanzania. He stated thus:-

***“.....I live at Nyworeni in Tanzania....”***

He was arrested in Kenya and had no documents permitting him to be in Kenya. His conviction on this count cannot be faulted at all. He was properly convicted. The Appellant was sentenced to 1 year imprisonment in respect to this count. He has already served the period.

The Appeal succeeds to the extent that the conviction on count I and II is quashed. However since the Appellant has already served the prison term with regard to count III, I order that the Appellant be released forthwith from prison unless otherwise lawfully held. Upon his release the Appellant should be repatriated to Tanzania.

Orders accordingly.

Dated at Nairobi this 3<sup>rd</sup> day of April, 2006.

.....

**MAKHANDIA**

**JUDGE**