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

Criminal Appeal 1068 of 2003

PETER WEMBUNDI WEPUKHULU …….....…….……..APPELLANT

VERSUS

REPUBLIC……..…….....….….RESPONDENT

JUDGMENT

The Appellant ***PETER WAMBUNDI WEPUKHULU*** was charged with four counts of being in possession of a firearm without a Firearm Certificate contrary to Section 4 (2) (a) of the Firearm Act. However from the particulars given in respect of count IV, it would appear that the charge ought to have been being in possession of ammunition without a Firearm Certificate contrary to 4 (2) (a) of the Firearm Act. Be that as it may the Appellant was convicted and sentenced in respect of all the four counts to ten years imprisonment. The sentences were ordered to run concurrently however

The Appellant was aggrieved by the conviction and sentence. He therefore lodged this Appeal in which he set forthwith – three grounds of Appeal to wit:-

(i). **THAT** the Learned trial Magistrate erred in law and facts to convict the Appellant on the alleged possession of firearms, grenades and ammunitions when it wasn't proved that the said items were recovered whilst in the exclusive possession of the Appellant and or that they were examined by a ballistic expert.

(ii). **THAT** the Learned trial Magistrate erred in law and fact, in concluding that the prosecution case was proved beyond reasonable doubts, in the absence of essential witnesses such as village elders, or sub-chief besides police officers.

(iii). **THAT** the Appellant's defence was rejected on insufficient grounds.

The Prosecution case was that on or about 20th June, 2002 PW1 and PW2 and I.P. Wahome together with P. C. driver Koech were called by their boss at special crime prevention unit Nairobi and told that there were persons selling firearms in Chepchoina area of Kitale. On 21st June, 2002 they left for Kitale and were able to contact one of the persons in the trade. Pretending to be buyers, they placed an order for 5 AK47 rifles and 4 grenades. On 23rd June, 2002 the would be seller contacted them about the merchandise and they agreed to meet the following day i.e. on 24th June, 2002.

On the appointed date they proceeded to Chepchoina and met the seller who turned out to be the

Appellant offered to sell then 2 hand grenades at Kshs.2,000/= each, 4 rifles at Kshs.4,000/= each. The Appellant also had a home made gun and 6 rounds of ammunition. The Appellant demonstrated to PW1 and PW2 (the would be buyers) how the home made gun worked. It is at this point that PW1 and PW2 blew their cover and introduced themselves as Police officers and arrested the Appellant. They then brought him to Nairobi where he was subsequently charged with the various counts in the charge sheet.

In his defence, the Appellant stated that he is a resident of Chepchoina where he is a farmer. That on the day of his arrest which would be 24th June, 2002 he left his house to go to Chepchoina market intending to sell his goats. On the way he found a motor vehicle packed with three people inside including a lady. He was stopped and asked to identify himself. When he failed to do so, he was accused of stealing the goats, and was then bundled into the motor vehicle. In the meantime, the lady in the vehicle left abandoning her red bag. Whilst in the vehicle the two people then claimed that the red bag was his. He was then driven to Nairobi where he was subsequently charged.

In support of the Appeal, the Appellant with the permission of the Court tendered written submissions that I have carefully read and considered.

The State through Mrs. Kagiri, Learned State Counsel vehemently opposed the Appeal. Counsel submitted that the evidence against the Appellant was straight forward. That PW1 and PW2 posed as buyers of the firearms and ammunition. That the Appellant was cooperative regarding the price. It was upon receipt of the illicit firearms and ammunition that PW1 and PW2 disclosed themselves as Police officers. The Appellant was thus caught red handed with the firearms and ammunition. Counsel pointed out that in his defence, the Appellant did not give any explanation regarding the firearms. That his defence did not shake the solid evidence tendered by the prosecution. On sentence, Counsel submitted that the sentence imposed was lawful and considering the seriousness of the offence, the sentence of ten years imprisonment on each count was merited.

This being the first Appellate Court to consider this Appeal, I am expected to subject the evidence tendered in the subordinate 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 must be alive to the fact that I did not have the opportunity or privilege of hearing and watching the witnesses as they testified ***(OKENO VS REPUBLIC (1972) EA 32).***

The evidence connecting the Appellant to the crime was given by PW1 and PW2. In my view the evidence was consistent and corroborative. The Appellants did not know the Appellant before. They had been sent on a mission in Chepchoina area of Kitale where trade in illicit gun and ammunition was rampant. Posing as buyers of guns and ammunition they got in touch with the Appellant who was only too willing to sell them the guns and ammunition. He must have had the arms and ammunition in his possession then.

The Appellant in one of his grievances states that the prosecution should have at least brought the witness who pointed out the Appellants to PW1 and PW2 as a gun dealer. However I note from the testimony of these two witnesses that at no time did they state that they were led to the Appellant by any person or informer who could then have been called as a witness. What emerges from the evidence, is that somehow, these witnesses had on their own managed to get round to the Appellant. In his testimony PW1 merely said:-

"…….***On 22. 6. 2002, one CPL Wanjala and PC Koech went to Chepchoina. We met with the person selling the firearms. We ordered for AK 47 rifle, and 4 grenades…"***

As for PW2, he testified on the issue in the following terms:-

"……***On 22. 6. 2002 me, P. C. Ndambuki and PC Koech went to Chepchoina area. We arrived. I got to meet a seller of firearms who was the accused. I introduced myself as a worker for a farm. I ordered for 4 grenades which he said would be 2,000/= each and 4 rifles for Kshs,4,000/- each. He told me if given a chance he would cross-over to Uganda and get me……."***

Even if they had been led to the Appellant by another person or informer it would not have been necessary to summon such person to testify. In my view I do not see what this person would have said in evidence that would have assisted the Appellant's case.

In a bid to show that these witnesses were not truthful, the Appellant pointed out the contradictions regarding the number of rifles that were ordered by both PW1 and PW2. According to the Appellant whereas PW1 stated that they ordered 5 AK 47 rifles and 4 grenades, PW2 testified that they infact ordered 4 grenades and 4 rifles. I do not think that this contradiction is major. It does not go to the core of the prosecution case. The issue is whether the Appellant was found in possession of the firearm and ammunition and not the number. In my view and based on the evidence record, I have no doubt at all that the Appellant at the time he was offering to sell the same to PW1 and PW2 was already in possession of the firearms and the ammunition.

The Appellant laments that the prosecution did not prove that the firearms and ammunitions were in the exclusive possession of the Appellant. From what I can gather from the recorded evidence, once the deal was struck between the Appellant, PW1 and PW2 for the supply of the arms and ammunitions, PW1 and PW2 retreated to wait for the Appellant to contact them. The deal having been struck on 22. 6. 2002, it was not until the following day that the contacted them. He contacted them through a number these witnesses had left him with. There is nothing in evidence to show that where the Appellant was dealing with PW1 and PW2, there were other people. Nor does it emerge in evidence that the transaction was conducted in a house where perhaps there could have been other occupants apart from the Appellant. In the absence of any other evidence regarding the presence of other people during the transaction, I am prepared to hold that indeed the firearms and ammunition were found in the exclusive possession of the Appellant. PW1 and PW2 further testified that the Appellant did even demonstrate to them how the grenades and the home made gun works. There is no suggestion that during this demonstration there were other people in the neighbourhood. The fact that there was even a home made guard in the arsenal goes further to demonstrate that the Appellant must have had exclusive possession of the same.

The Appellant has also raised the issue that the ballistic report was made by an unqualified person. That PW3 being a mere Inspector of Police lacked the necessary qualifications to act as a ballistic expert. Nothing can be further from the truth. In his evidence, PW3 stated that he was:-

"……***A firearms examiner attached to forces headquarters CID Nairobi. My work is to examine and identify firearms and ammunition used or not used……"***

In my view this witness was well qualified to contact ballistic test and submit the report. The Appellant submits that this witness and not testify that he recovered and examined the exhibits recovered by both PW1 and PW2. My reading of the evidence cannot support this contention by the Appellant. PW3 clearly states in his evidence that he did receive on 25. 6. 2002 exhibits form P. C. Ndambulki, one home made gun, 6 ammunitions which he examined and made a report.

This is sufficient to dispose off this issue.

Finally the Appellant contends that certain crucial witnesses were not called to testify such as local leaders like the area elder, the sub-chief and the informer. According to the Appellant, these were very essential witness who would have testified as to his arrest and recovery of the exhibits. Since they were not summoned, the prosecution case remained unproved according to the Appellant. The Appellant relied on the celebrated case of ***BUKENYA VS UGANDA (1972) EA 549*** in which it was held that:-

"…..***The evidence from essential witnesses should be called by the prosecution in compliance with the duty placed upon them to make available all witnesses necessary not only to establish their case but even if, it may be inconsistent with their case….."***

I do not think that this witnesses were really essential witnesses as the Appellant wishes it to appear. They were not party to the operation. They were not present when the Appellant was arrested. In the premises they would not have added any value to the testimony of PW1 and PW2 already tendered.

As for evidence of an informer, I am aware of the Court of Appeal decision in ***PATRICK KABUI MAINA & ANOTHER VS REPUBLIC (1986) KCA 889*** wherein it was held:-

"….***If any accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief and be cross-examined, such evidence should be disregarded …….***"**

However as already pointed out, PW1 and PW2 were not led to the Appellant or told about him by an informer. They had their own way of accessing the Appellant. Consequently this authority does not advance the Appellant's case.

The Appellant's last complaint is that his defence was not given due consideration and was dismissed without any reasons being given. In my view the trial Magistrate did consider the Appellant's defence. She could have done a better job though. Regarding the defence, the trial Magistrate stated:-

"….***The accused could not say why the two officers who were never earlier known to him could frame him up. I believe there was never a frame up…."***

On the evidence on record the Learned trial Magistrate was perfectly entitled to reach that conclusion. The two police officers had been dispatched from Nairobi. They were not residents of Chepchoina. They were there on a special assignment. This was first time they were getting in contact with the Appellant according to the evidence on record. What would be the reason for the witnesses to set up the appellant? None whatsoever in my view.

All said and done, I am in agreement with the Learned State Counsel, that there was overwhelming evidence to convict the Appellant on the charges preferred. The conviction cannot therefore be faulted.

As regards sentence, the law is clear. Upon conviction, the accused is to suffer a minimum jail term of seven years. In the instant case, the Appellant was sentenced to ten years imprisonment. Considering the seriousness of the offence and the firearms involved, I think the sentence imposed was well deserved and merited. I therefore see no need to interfere with the same.

The upshot of this appeal is that it is dismissed. The conviction and sentence imposed is confirmed.

Dated at Nairobi this 3rd day of April, 2006.

……..

MAKHANDIA

JUDGE