



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA
Criminal Appeal 71 of 2002

Arising from Bungoma SPM'S Court Cr.No. 1750/97

HENRY WAWIRE MANYASI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant herein, Henry Wawire Manyasi, was tried on a charge containing two counts. The first count relate to the offence of being in possession of a fire arm without a fire arm certificate contrary to section 4(3) (a) of the Fire Arms Act Cap 114 Laws of Kenya, as amended by Act no.8 of 1989. The particulars of this Count are that on the 3rd day of September, 1997 at Bulangasi village, in Bungoma District, within Western Province, was found in possession of a baretta pistol serial number C.54021 without a fire arm certificate.

The second Count is in respect of a charge of being in possession of a firearm without a firearm certificate contrary to section 4(3) (a) of the Firearm Act Cap 114 Laws of Kenya as amended by Act no.8 of 1989. The particulars of this charge are that on the 3rd day of September, 1997 at Bulangasi village, in Bungoma District, of the Western Province was found in possession of 5 rounds of 9 mm calibre ammunicions without a fire arm certificate.

At the end of the trial the appellant was convicted on both counts and sentenced to serve seven (7) years imprisonment on each count and the sentences were ordered to run concurrently. Being aggrieved he now appeals against both the convictions and the sentences.

The facts leading to this appeal are brief and straightforward. The prosecution's case before the trial Court was backed by the evidence of 3 witnesses. On the 3rd day of September 1997 police received information from a police informer that the appellant had a firearm in his possession. Acting on that tip, Corporal Michael Kimelu (P.W.1) and P.C. James Kangwai (P.W.2) and one P. C. Waweru visited the house of the appellant situate at Bulangasi village. A search was conducted and a fire arm loaded with 5 rounds of ammunition was found in the right hand pocket of the appellant's pair of trousers. The appellant was then arrested and placed in police cells. The police took the firearm and the five rounds of ammunition to the ballistic expert for examination. The exhibit memo form was prepared by P.W.1 and produced as an exhibit in evidence. Corporal Thomas Munene (P.W.3) escorted the firearm and the five rounds of ammunition to the ballistic expert.

The firearms examiner's report dated 6th October 1997 was produced in evidence. The report concluded that the firearm was a baretta pistol in calibre 9 mm short serial no. C54021. It was found to be in good general and mechanical condition and capable of being fired and not prone to accidental discharge.

The five rounds of ammunition were found to be suitable for use in firearms such as the baretta pistol. The same were found to be in good working order.

When placed on his defence the appellant said that on 2nd September 1997 he had gone to Nasianda village where his step mother lived. He spent the night in that village and on 3rd September 1997 he went to tend his cane on a nearby land which he had leased. He said while resting at 1.00 p.m. that day five people came. One was his wife Rose Nambuye and the other were men. He said they claimed that Rose Nambuye was the wife of James Kagwai (P.W.2) and they questioned him as to why he had married her. He said he was arrested and handcuffed when he denied. He also claimed that the police refused to release him when he failed to produce a bribe which they had demanded. He further claimed that he was framed up by P.W.1 and one Musa Amakuto. He said he differed with the duo over Rose Nambuye.

On appeal, the appellant argued three main grounds of appeal. The first ground was to the effect that S.M. Mungai, the learned Senior Resident Magistrate took over the case midstream from one S.M. Mukabi, Resident magistrate without complying with section 200(3) of the Criminal Procedure Code. The learned Principal State Counsel did not address this Court over this ground. I have perused the record of appeal. It is not in dispute that one S.M. Mukabi, Resident Magistrate received the evidence of the 3 prosecutions witnesses before leaving the station. It is also not disputed that S.M. Mungai, the learned Senior Resident magistrate proceeded to hear the defence case, convicted the appellant and slapped the sentences upon the appellant. It is clear from the record that the learned Senior Resident Magistrate explained to the appellant the provisions of section 200 of the Criminal Procedure code on the 26th day of February 2002. the appellant raised no objection. In fact the appellant proceeded to seek for typed proceedings which request was granted. In my view this ground must fail for it lacks merit.

The second ground argued was to the effect that there were contradictory evidence in the testimonies of P.W.1 and P.W.2. The appellant pointed out that it was not clear where the baretta pistol was recovered from. P.W.1 said it was recovered at Bulangasi village whereas P.W.2 said the same was recovered at Kimatuni village. Again the learned Principle state counsel did not address me on this issue.

The record shows that the contradictions pointed out are apparent. According to the appellant, the contradictions created doubt. I have considered his submission over the contradictions. The view I take is that the contradictions did not cause any miscarriage of justice on the part of the appellant. Consequently, I see no merit in the objection.

The third ground argued relate to the fact that the prosecution's case was not proved to the required standard of beyond reasonable doubt. The principal state counsel argued that the prosecution's case was established to the required standards of beyond reasonable doubt.

I have taken into account these arguments. I have also reconsidered the evidence tendered by the prosecution in support of the charge and the defence raised by the appellant to counter the prosecution's case. It is clear that the appellant was found in possession of a firearm with 5 rounds of ammunition by P.W.1 and P.W.2. The said firearm and rounds of ammunition were examined and confirmed to be so by the firearms examiner in his report dated 6th October 1997. It is also clear from the evidence of P.W.1 and P.W.2 that the appellant did not possess the firearms certificate as required by law. Accordingly, I am of the view that the prosecution's case was established to the required standards in criminal cases. I therefore see no merits in this ground.

The trial magistrate did not believe the defence raised by the appellant in his trial. The appellant has not complained that his defence was unfairly rejected. I have reconsidered the defence raised by the appellant. Basically the appellant has complained that he was framed up by P.W.1 and P.W.2 over a woman called Rose Nambuye whom he claimed was his wife. The record shows that the appellant did not lodge any complaint with the police over the said dispute over Rose Nambuye. Of course the trial magistrate must have observed the demeanor of the appellant as he testified and he did not believe him. After anxiously reconsidering the appellant's defence, I am not impressed by it either. I am of the view that it was manufactured to taint the credibility of the evidence of P.W.1 and P.W.2. I am satisfied that the learned senior Resident Magistrate correctly disbelieved the appellant's defence.

The learned principal state counsel pointed out that there was a mistake in the 2nd count in that it was supposed to mention ammunition instead of a firearm. I have perused the record and I agree that the learned principal state counsel was correct to point out the defect. I also agree with him that the mistake is not fatal. The same is anticipated and curable under the provisions of section 382 of the criminal procedure code. In any case it did not cause any injustice to either party.

The upshot therefore is that the appeal has no merit. It is dismissed in its entirety.

Dated and delivered this 31st day of May 2005.

J. K. SERGON

JUDGE

In the Presence of Mr. Onderi for the state and the appellant.