



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

CRIMINAL APPEAL 35 OF 2004

JACKSON ASIAKO NDIANGUNGU APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

**(Being An Appeal from the Judgement and Sentence of Solomon Wamwayi Esq. Chief Magistrate
in Eldoret CMC. Criminal Case No. 3851 of 2002,**

Delivered on 30th October 2003)

JUDGEMENT

The appellant was convicted of an offence of preparation to commit a felony contrary to section 308(1) of the Penal Code, one count of being in possession of a firearm contrary to section 4(A) of the Firearms Act (Cap.114); and one count of being in possession of ammunition contrary to section 4(2)(a) of the Firearms Act (Cap.114). He was sentenced on 10th October 2003 to serve 3 years imprisonment on the first count, 10 years imprisonment on the second count, and 10 years imprisonment on the third count.

He has preferred an appeal to this court against both the convictions and the sentences.

The learned State Counsel Ms. Oundo conceded to the appeals. She submitted that the appellant had already been acquitted of both the counts on being in possession of a firearm, and being in possession of ammunition in Eldoret High Court Criminal Appeal No.13 of 2004. That acquittal was on 6th April 2005. The evidence in the current appeal and the witnesses supporting the two counts were the same as in Criminal Appeal No. 13 of 2004.

She submitted also that in Criminal Appeal No. 13 of 2004, the court found that the appellant was not armed. As the facts and evidence was the same as in the current appeal, the appellant could not be convicted for the offence of preparation to commit a felony.

I have perused the judgement in Eldoret High Court Criminal Appeal No.13 of 2004. It was delivered on 6th April 2005. It was a two judge judgment of Hon. Justice Gacheche and myself. The appellant herein had appealed against conviction and sentences for three charges of robbery with violence contrary to section 296 (2) of the Penal Code; being in possession of a firearm contrary to section 4(A) of the Firearms Act (Cap.114); and being in possession of ammunition contrary to section 4(2) of the Firearms Act (Cap.114). In that appeal the appellant was acquitted of all the three counts by the High Court.

The particulars of the offences in that appeal with the charge of being in possession of a firearm and being in possession of ammunition were that, on the 8th April 2002 at Nyalenda Estate in Kisumu District of the

Nyanza Province, he had in his possession a weapon namely Barreta Pistol serial number 744910 without holding a Firearms Certificate in force at the time; while the particulars of the offence for possession of ammunition was that on 8th April 2002 at Nyalenda Estate in Kisumu District of the Nyanza Province, he had in his possession prohibited ammunition namely eight rounds of caliber 9mm without holding a Firearms Certificate in force at the time.

In our present appeal, the particulars of the second and third count are that on 8th April 2002 at Kisumu Police Station while being searched by PC. James Agurilo was found in possession of a firearm namely Baretta pistol serial number 744910 without a Firearms Certificate in force at the time; and that on 8th April 2002 at Kisumu Police Station while being searched by PC. James Agurilo was found in possession of 4 rounds of 1mm special Baretta ammunition without a licence or Firearms Certificate in force at the time.

I have perused the proceedings before the learned magistrate. It is obvious from the evidence of PW3 PC. Jacob Mogeni and PW2 PC. Benson Osume that the pistol and the ammunition in counts two and three herein, are the same as those in Eldoret High Court Criminal Appeal No.13 of 2004. In that appeal that, the court held that -

“Having disregarded the appellant’s statement, taken under inquiry, the trial magistrate was left with no evidence to corroborate the evidence of the single identifying witness (PW1) especially in view of the fact that the mode of recovery of the pistol and ammunition was doubtful, as the evidence was not only contradictory, but that the gun and ammunition which were subject matter of the 2nd and 3rd counts were never dusted for finger prints

In our present appeal the prosecution withdrew the evidence before the magistrate of PW5 who took the statement of the appellant under caution. The other evidence before the magistrate is the same or similar to the appeal No. 13/2004. It is evidence of a single identifying witness.

I agree with the learned State Counsel that just as in Eldoret High Court Criminal Appeal No. 13 of 2004 the two charges of possession of a firearm and possession of ammunition without a certificate, were not proved against the appellant to the standards required by law. The convictions have to be quashed and sentences set aside.

On the first count of preparation to commit a felony, the charge specifically stated that the appellant was armed with a Baretta pistol serial number 744910 in circumstances that indicated that he was armed with intent to commit a felony. Since I have already held that it was not proved that he was in fact armed with or in possession of the said pistol, this count cannot also stand. The conviction therefore has to be quashed and sentence set aside. I respectfully also agree with the learned State Counsel on this.

For the above reasons, I allow the appeal, quash the convictions and set aside the sentences.

The appellant should be released forthwith unless otherwise lawfully held in custody.

Dated and delivered at Eldoret this 13th day of October 2005.

George Dulu

Ag. Judge

In the Presence of: Appellant present in person.

Mr. Omutelema for the State.