



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

**Criminal Appeal 49 of 2003**

**MWANZI NDUTO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**PETER MUISYO NTHENGE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**STANLEY MULI MAKAU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The two appellants were with two others who were acquitted at the lower court, charged with two offences, the first being:- Preparation to commit a felony, Contrary to Section 308 (1) of the Penal Code, and second, Possession of an imitation firearm contrary to Section 34 (1) of the Firearms Act, Cap 114 of the Laws of Kenya. They were convicted of both counts and sentence to six years prison sentence on each count to, the two to run concurrently. They each appealed against both convictions and sentences. The summary of facts is as follows:

On 20/3/01, as the complainant in company of two others, was driving his employer’s motor vehicle, carrying shop goods for sale, he was stopped by some people along the road. The intention of the people who stopped the vehicle is not clearly evidenced but the complainant and his colleagues who later became witnesses in this case, escaped. The complainant drove his motor vehicle away and the others ran away on foot. The incident was reported to the office of Nuu District Officer who sent his administrative officers to the scene and later arrested two suspects who were acquitted at the lower court. The next day on 21/3/01, upon a tip off to the District Officer aforementioned, the two appellants herein were arrested at Mutiangombe Market bus stage, as they were about to board a matatu to Mwingi. One or two bags were recovered from the bus stage, probably being found close to the two appellants or being carried by the second appellant. Evidence on the point suggested either. The appellants on arrest were taken to the District Officer’s office where a search of the material bag yielded an imitation firearm (toy pistol), two pangas, two torches, four pairs of master keys and an instrument used to make a sound like a firearm. The district officer then suspecting that the four people could be the people who had attempted to stop the

complainant's motor vehicle the day before, delivered the appellant to Mwingi police station where they were later charged with offences aforementioned. The appellants admitted in their defences, that they were indeed arrested by the District Officer of Nuu Division on the 21/3/200a at Mutiangombe as alleged but that they were not carrying the bag that was later shown to be containing the weapons aforementioned. They also denied the two offences and stated that on being arrested and taken to the Nuu District Officer's office, they were put in cells for about 10 minutes and were not present when the alleged bag was opened. They claimed that when they were brought from the cell to the office they found the weapons on the table and on being asked whether the same belonged to them, they denied knowledge or possession thereof.

The honourable trial magistrate was satisfied that the evidence to prove the above stated charges was sufficient and convicted them.

The charge of preparation to commit a felony under Section 308 (1) is constructed as follows:

***“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony, is guilty of a felony.....”***

The charge under the Section 34 (1) of the Firearms Act Cap 114 under which the accused were charged states as follows:

***“If a person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence .....”***

It will not be difficult to observe that under Section 308 (1) the person charged, to be found guilty of the offence under the section, must be “found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony.” The evidence in the record do not show that the appellants were armed with the weapons in question. Nor does it show that they were in possession of the weapons or armed thereof with intent to commit any felony. The appellants from the prosecution evidence were about to board a matatu to Mwingi. Even if this court were to accept that the appellants were found in possession of the bag that later yielded the weapons, such possession cannot easily be interpreted to mean “armed.” The purpose for which the appellant carried the arms is not clear and cannot be easily interpreted that they were about to commit a felony. This would remain so despite the fact that we all frown at people like the appellant who are found carrying bags, in which weapons like those in this case, are hidden. Further more in this particular case, there was some conflict in the prosecution evidence as to whether it was both appellants who owned or possessed the bag which carried the weapons or not. The District Officer thought that the 2nd appellant (2nd accused in the lower court) carried and was found with the bag. Other evidence suggested that it was both appellants. There also was the suggestion from the defence that the bag was not opened in their presence since they were in cells. All in all, the evidence to prove the offence under Section 308 (1) of the Penal Code was of a doubtful nature and inadequate and the benefit of doubt should have gone to the appellants.

Moving to the offence under Section 34 (1) of the Firearms Act, it is evident from its construction that the suspect must “make or attempt to make use of the firearm or imitation firearm with intent to commit an offence.” There is no evidence in this case that either of the appellants tried to, or attempted to make use of the imitation pistol alleged to have been found in the bag allegedly being carried by the appellants. All the evidence shows, is that the weapon was carefully hidden in the bag and could not have been discovered except through a search by the District Officer of Nuu. It may be possible to think that carrying a firearm in a public place may be an offence. However, the appellants were not facing such an offence. It is the court's view therefore that the offence under Section 34 (1) of the Firearms Act, of which the appellants were charged, could not have been supported by the evidence on the record.

I have also observed the manner in which the trial magistrate arrived at his judgment. After stating that he had carefully considered the evidence adduced in the case, he immediately stated that he found the two accused persons guilty, before taking into account the accused's defence or even showing

that he analysed the evidence to justify the conclusion he arrived at. He did the same thing in respect of both counts. By the time he came to consider the appellants' defences which he lightly dismissed as false, he had already convicted the appellants and even indicated why he convicted them. It can therefore be safely concluded that the honourable trial magistrate failed to consider the appellants' defences before convicting them. Mentioning the defences for the purposes of dismissing them was tantamount to failing to take them into account. An accused person is entitled to defend himself. This entails speaking in his own defence and the defence being recorded and considered together with the rest of the evidence on the record before a final decision is made. This is a basic right, to be jealously guarded. In this case, the decision to convict the appellants in respect of both counts was arrived at without taking regard to their defences, a breach of their fundamental right. The Judgment thus reached, cannot be allowed to stand.

For the various reasons given above these appeals must succeed. The convictions against each appellant in respect of each count is accordingly quashed as the sentences are each set aside. Each appellant is hereby ordered set at liberty forthwith unless otherwise lawfully held in prison. It is so ordered.

Dated and delivered at Machakos this 14th day of November 2005.

**D.A. ONYANCHA**

**JUDGE**