



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 246 OF 2004**

(From Original Conviction and Sentence of the Resident  
Magistrate's Court at Sotik in Criminal Case No. 1599 of 2004  
–J. M. Nduna SRM

**DAVID DOTO MLOLWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, David Doto Mlolwa, was charged with the offence of being in possession of a firearm without a certificate contrary to **Section 4(1) as read with Section 4(3) of the Firearms Act (Cap 114 Laws of Kenya)**. The Appellant was further charged with being in possession of ammunition contrary to the said Act. The particulars of the offence were that on the 29th of August 2004 along Kisii-Sotik road at Sotik Road block in Bureti District the Appellant was found in possession of a Glock Pistol Serial No. FHZ 337 and nine rounds of 9mm calibre ammunition without a firearm certificate. When the Appellant was arraigned before the Magistrate's Court, he pleaded guilty to both counts. He was sentenced to serve nine years imprisonment on each of the two counts. The sentences were ordered to run concurrently. The pistol that was found in possession of the Appellant was ordered forfeited to the Commissioner of Police. The Appellant was aggrieved by the said conviction and sentence. He has appealed against the said conviction and sentence to this Court.

In his Petition of Appeal the Appellant has faulted the trial Magistrate for convicting him on a plea of guilty that was equivocal. The Appellant was further aggrieved that he had been convicted on a defective charge. The Appellant further faulted the trial magistrate for convicting him after failing to appreciate that being a foreigner, the Appellant had not understood the charge facing him and the consequences of making such an admission of guilt. The Appellant was aggrieved that the trial magistrate did not consider the fact that the Appellant was licenced to carry a firearm in his country of origin and therefore in the Appellant's view this fact ought to have mitigated the sentence imposed on the him. The Appellant was finally aggrieved that the trial magistrate imposed upon him a harsh custodial sentence.

At the hearing of the Appeal, Mr Moturi Learned Counsel for the Appellant submitted that the plea that was taken was equivocal. It was the Appellant's submission that, being a Tanzanian, he had opted the plea to be taken in Kiswahili. Learned Counsel argued that the trial magistrate did not indicate the language that was used to take the plea. It was the Appellant's submission that he had a valid certificate issued by the Tanzanian Government which licenced him to carry the firearm in question. The Appellant further submitted that he was lawfully in Kenya having passed through the Immigration at the border. The Appellant submitted that he was not informed at the border that to carry the firearm in question would be illegal in Kenya. The Appellant complained that the trial Court appeared to be in haste to order for the

forfeiture of the said firearm even before the period granted for Appeal had expired. The Appellant submitted that he would be required to account for the firearm by the Tanzanian Government which issued the licence to him to be in possession of the said firearm. Learned Counsel for the Appellant submitted that the sentence meted upon the Appellant was harsh considering the circumstances of this case. The Appellant further submitted that no ballistics report was presented to the Court before the trial magistrate convicted the Appellant. He urged the Court to allow the Appeal.

Mr Koech, Learned State Counsel in response to the arguments of the Appellant submitted that the plea that was taken was unequivocal. It was his submission that the Appellant appeared to have understood the charge facing him. Mr Koech further submitted that the facts of the case clearly proved the offence which the Appellant had been charged, the Appellant having been found in possession of the firearm and ammunition contrary to the law. On the issue of sentence Learned State Counsel submitted that the fact that the Appellant had mentioned the licence issued by the Tanzanian Government would necessitate that this Court orders that the Appellant be retried.

I have considered the rival arguments made by the Counsel for the Appellant and the State Counsel. The issue for determination by this Court is whether the plea that was taken by the Appellant was unequivocal. The other issue for determination is whether the sentence meted upon the Appellant was legal and therefore ought to be upheld. I have perused the proceedings of the trial Magistrate's Court. The Appellant indicated to the Court that he required the charge to be read to him in the Kiswahili language. This request by the Appellant was acceded to by the trial magistrate. The charge was read to the Appellant in Kiswahili. He pleaded guilty to the charge. The Appellant stated:

***“I have a firearm certificate in Tanzania. I don't have a Kenyan Firearm Licence***

.” When the facts were read to him, the Appellant answered

***“It is correct. I was found with the firearm. I did not have a certificate.”***

From the above proceedings it is clear that the Appellant understood the charge and pleaded guilty to the same. The facts were explained to him and he confirmed the facts to be correct. The plea taken was therefore unequivocal. I therefore find no merit in the grounds of Appeal by the Appellant challenging his conviction. The trial magistrate followed the procedure for the taking of plea of guilty as enunciated in **Adan –versus- Republic [1973] E.A. 445.**

On the issue of sentence, I have read the **Firearms Act (Cap 114)**. The proviso to Section 4(3) of the said Act states that

*“provided that when the offence for which the person is convicted  
( not being an offence in relation to a prohibited weapon or to any  
ammunition therefore) is failure or neglect to renew a firearm certificate  
such person shall be liable to pay a fine at the rate of five hundred  
shillings per day for every day or part thereof during which his default  
but so that no person shall be liable to pay a fine greater than the maximum  
provided by this subsection and if such fine is not paid then to imprisonment  
for a term not exceeding two years.”*

The Firearm Act provides for a stiff penalty for a person who is convicted for being in possession of a firearm or ammunition without a certificate. The punishment for a person convicted of being in

possession of a firearm without a firearm certificate is a minimum of seven years imprisonment and a maximum of fifteen years imprisonment. In the event that a person is convicted of being in possession of ammunition without a firearm certificate the minimum sentence is five years imprisonment whilst the maximum sentence is ten years imprisonment. An exception is provided for those who may have been issued with a certificate to be in possession of a firearm and those who were never issued with any certificate in the first place. For the former, the sentence less severe.

In the instant case, the Appellant, a Tanzanian citizen, was issued with a firearm certificate by the Tanzanian Government on the 29th of July 2004. The certificate gave the Appellant authority to be in possession of a Glock Pistol No. FHZ 337 with its 9mm ammunition. The certificate was to be valid for a period of one year. It appears that the Appellant came to Kenya under a misapprehension that having been issued with a firearm certificate in Tanzania, the said certificate would be valid in Kenya. The Appellant argued in this Appeal that when he entered Kenya and had his passport stamped by the Immigration Officers at the border he was not notified that it would be illegal to be in possession of a firearm in Kenya without a certificate issued by the Kenyan Authorities.

I have considered the argument made by the Appellant and the provisions of the **Firearm Act** quoted herein above. The Appellant is allowed to own a firearm in his country of origin, Tanzania. When he was arrested by the Police and later arraigned before the trial magistrate's court he admitted that he was in possession of the firearm and the ammunition. His explanation for having the said firearm and ammunition was simple; He had a certificate issued for the said firearm and ammunition by the Tanzanian Government. His intention is having the said firearm and ammunition were, apparently, for his own protection and not for any sinister motive. The Appellant produced the said certificate, including the receipt that was issued to him when he purchased the firearm and ammunition from the Tanzanian Government. It is the finding of this Court that the explanation given by the Appellant is such that the Appellant falls into the proviso of **Section 4(3) of the Firearm Act** when it comes to punishment. The Appellant shall be treated like a person who was issued with a firearm certificate but failed to renew it.

For the above reasons, I therefore set aside the two sentences imposed by the trial magistrate of nine years imprisonment each for the two counts of being found in possession of a firearm and ammunition without a firearm certificate. I substitute the said sentence with the sentence of this Court and order that the Appellant pays a fine of Kshs 20,000/= in default of which he shall serve six months imprisonment. The Firearm and ammunition shall be forfeited to the State as ordered by the trial magistrate.

It is so ordered.

**DATED at NAKURU this 8th day of October 2004.**

**L. KIMARU**

**AG. JUDGE**