



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 703 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 9976 of 1999 of the Senior Principal Magistrate’s Court at Kibera).

GODFREY KITHEKA MULWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.855 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 9976 of 1999 of the Senior Resident Magistrate’s Court at Kibera).

JACKSON MUNYASIA MWANGANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.790 OF 2000

(From Original Conviction and Sentence in Criminal Case No.9976 of 1999 of the Senior Principal Magistrate’s Court at Kibera).

JACKSON MUNYASIA.....PPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Godfrey Kithuka Mulwa (the appellant) has appealed against his conviction for the offence of preparation to commit a felony contrary to section 308(2) of the Penal Code, particulars of which were that on the 28th August, 1999, jointly with another and along Takere Crescent in Kileleshwa, Nairobi not being at their place of abode had with them an article for use in the course of or in connection with

robbery, namely a pistol make US Army Colt Serial No.1084321 with seven rounds of ammunitions with an intent to commit a felony. He was sentenced to serve three years imprisonment.

The facts which were accepted by the lower court were that on the 28th August, 1999 a company known as SCRATCHIT COMPANY LTD based both at PIONEER HOUSE and Kileleshwa was carrying out construction work at the Kileleshwa site. The supervisor and site engineer was SIMON MWANGI MUREBU (PW1). It happened that the same 28th August, 1999 was the pay day for the employees of the company.

At 12.30 pm of that pay day PW1 left the construction site at Kileleshwa for another construction site through the main gate. As he did so he noticed the appellant and another standing near the gate. He suspected them to be upto no good. So he proceeded instead to Kileleshwa Police Station nearby and made a report, as a result of which four policemen were sent to the site. These policemen included P.C. Onesmus Mwangi (PW2) and P.C. William Macharia (PW3). They rushed to the site and indeed found the appellant and his companion sitting at the same gate. According to PW2 and PW3 they were in police uniforms and when the appellant and his companion saw them, they started walking away from the gate. On being challenged to stop and surrender, the appellant straight away stopped and raised his hands up. He was arrested. But the appellant 's companion jumped over the road and lay at the foot of a nearby tree and when he was arrested from there, a pistol and ammunitions, were allegedly recovered. It was on the basis of the alleged possession of that pistol and ammunition by the appellant's companion that this appellant was charged with preparation to commit a felony.

In my view the evidence adduced did not support the charge laid before the court against this appellant. The fact that the appellant may have been found standing at the construction site in the company of another person who was later found to be in possession of firearm and ammunition is no evidence that he was preparing to commit a felony. The construction site was next to a public road. There was a watchman at the gate who was not called to testify. There was also no evidence to show that the appellant had any knowledge that the other person who was with him had a firearm and ammunition. In fact the appellant was not jointly charged with his companion with unlawful possession of that firearm and ammunition.

The appellant's explanation to the lower court was quite reasonable and possible.

I therefore allow this appeal, quash the conviction and set aside the sentence of three years imprisonment. The appellant is to be released unless he is lawfully being held.

It is so ordered.

Dated this 4th July, 2001.

A.G.A. ETYANG

JUDGE

Delivered this 4th July, 2001 in the presence of Miss Nyamosi for the Republic and the appellant in person.

A.G.A. EYTANG

JUDGE

4/7/2001