



**Okwach v Republic (Criminal Appeal E044 of 2022)  
[2023] KEHC 2199 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E044 OF 2022  
TA ODERA, J  
MARCH 15, 2023**

**BETWEEN**

**FRANCIS OKETCH OKWACH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon J. Munguti (SPM) delivered at Migori in Chief Magistrate's Court in Criminal Case No E170 of 2021 on 14th April 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of being in possession of a firearm without a Firearm Certificate contrary to Section 4A (1) (a) of the Firearm Act Chapter 114 Laws of Kenya.
2. He was tried and convicted by Hon J. Munguti (SPM) and sentenced to serve twenty four (24) years imprisonment for the offence of being in possession of firearm without certificate.
3. Being dissatisfied with the said Judgement, on 4<sup>th</sup> May 2022, he lodged the Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.
4. His Written Submissions were undated and filed on 19<sup>th</sup> January 2023. The Respondent's Written Submissions were dated 5<sup>th</sup> January 2023 and filed on 6<sup>th</sup> January 2023.
5. This Judgment is based on the said Written Submissions and the Appellant's Grounds of Appeal.



## Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
8. Having looked at the Appellant's and Respondent's Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution had proved its case beyond reasonable doubt; and
  - b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.
9. The court dealt with the two (2) issues under the following distinct and separate heads.

## Fair Trial

10. The Appellant added two (2) supplementary grounds of appeal in his Written Submissions. He argued that his constitutional rights to fair trial were grossly violated and that the Trial Court failed to comply with Article 50(2)(g) and (h) of *the Constitution* of Kenya. He added that he was detained for fourteen (14) days before being presented to court which action violated his rights under Article 49 (1) (f) and (g) of *the Constitution*. He pointed out that he was arrested on 31<sup>st</sup> January 2021 but arraigned in court on 15<sup>th</sup> February 2021. He also complained of having not been supplied with witness statements.
11. On its part, the Respondent submitted that a reading of the provisions of *the Constitution* on the right to legal representation reveals that an accused persons entitlement to legal representation at the expense of the State is not automatic but qualified. It pointed out that therefore an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur. It invoked Article 50(2)(h) of *the Constitution* of Kenya 2010 and relied on the case of *David Njoroge Macharia vs Republic* [2011]eKLR and *Republic vs Karisa Chengo & 2 Others* [2017]eKLR where the common thread was that a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically as there are instances in which legal representation at the expense of the state will not be accorded.
12. Article 50(2)(h) of *the Constitution* of Kenya stipulates that:-

“Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”
13. Notably, the proceedings showed that the Appellant proceeded with the hearing of all the witnesses and in fact cross-examined all of them except. There was nothing on record to suggest that he demonstrated to the Trial Court that he was likely to suffer substantial injustice if the trial proceeded without him



- being provided legal representation. He could not therefore be said to have suffered any prejudice when the case proceeded.
14. Going further, there was nothing on record that showed that he requested the Trial Court to be provided with legal representation when the Prosecution witnesses were tendering their evidence and the Trial Court declined to accede to his request. It was therefore not an issue that could have been considered on appeal.
  15. Be that as it may, this court found it necessary to pronounce itself as the issue had been raised on appeal. It took judicial notice that provision of legal representation to accused persons at the State's expense as enshrined in [the Constitution](#) of Kenya is progressive in nature. Indeed, currently, only persons who have been charged with murder and robbery with violence have been accorded such facilities. This court was thus not persuaded that the Appellant's constitutional and fundamental rights had been breached by not having been provided any legal representation.
  16. Going further, the Appellant also did not raise the issue of having been detained for fourteen (14) days before arraignment at the Trial Court. Therefore the same issue could not now be addressed on appeal as a first instance as it would be prejudicial to the Respondent. On the issue of witness statements, this court noted that Appellant did not pray that he be supplied with the same at the beginning of trial. Later on, before his defence, he requested to be supplied with the same and the court granted him enough time to obtain the same. This court therefore did not find any infringement of the Appellant's constitutional rights on the part of the Trial Court.

#### **Proof of Prosecution's Case**

17. On its part, the Respondent opposed the Appellant's appeal and submitted that there was need for the court to alter the conviction under Section 4A and replace it with a conviction and prescribed sentence under the relevant section. It pointed out the duty of an appellate court as set out in the case of *Okeno vs Republic* (1973) EA 32 which was to re-evaluate the evidence and make its own finding.
18. It asserted that Section 4A of the [Firearms Act](#) deals with offences relating to specified firearms whilst Section 4A (2) lists the G3, MP5 and the AK 47 as specified firearms. It explained that it was therefore imperative that at this stage the Trial Court proceeded on charges that were hinged on the wrong Section of the Law. It pointed out that the correct Section of the law ought to be Section 4(2) (a) as read with Section 4 (3) (b) of the [Firearms Act](#).
19. It further submitted that however, such defect on the charges as filed was not fatal and could be cured by application of the provisions of Section 382 of the Criminal Procedure Code as was held in the case of *Eappyton Mutuku Ngui vs Republic* [2014]eKLR.
20. It argued that to prove the offence of Possession be it of a specified firearm or any other firearm for that matter, it is the onus of the prosecution to demonstrate all the three (3) ingredients of the offence being firstly that the accused was in actual or constructive possession of the firearm secondly, that the item recovered was indeed a firearm and that thirdly, the accused did not have a valid permit or license as was held in the case of *Abdullahi Salat Adan vs Republic* [2021]eKLR.
21. It invoked the definition of Possession under the Section 4 of the Penal Code, Section 2 of the [Firearms Act](#) and in Stephen's Digest of Criminal Law, Macmillan and Company 1887 where the common definition was that it includes not only having in one's own personal possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not ) for the use of benefit of oneself or of any other person and the expressions "be in possession" or "have in possession" shall be construed accordingly.



22. It placed reliance on the case of Hussein vs R (1980) KLR 159 where the court of Appeal held that it does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that a person in possession must have such access to and physical control over the thing that he is in a possession to deal with it as an owner to the exclusion of strangers.
23. It reproduced the evidence tendered at the Trial Court and submitted that No 224343 Stg Jared Onyancha (hereinafter referred to as “PW 1”) and No 231055 PC Daniel Olo (hereinafter referred to as “PW 2”) together with one PC Joel Koin did lay ambush and upon the Appellant attempting to escape he was arrested, subdued and the pistol retrieved from him and he was later handed over to Migori Police Station for further investigations. It was its contention that the Police Officers did recover the Firearm from the Appellant. It added that PW 1 who was a new Officer at the Post having fifteen (15) days before the incident had no reason to frame the Appellant as alleged in his defence.
24. It contended that once the firearm was recovered on the Appellant, the evidentiary burden shifted and it was now upon him to give an explanation as to how he came to be in possession of the firearm and whether he had a permit and/or authorisation for the same. It added that even though it failed to call the officer who participated in the recovery, one Joel Koin, there was no specific number of witnesses required to prove a particular fact and that the evidence of the two (2) officers who testified was sufficient to prove possession. It submitted that that was in line with the provisions of Section 143 of the *Evidence Act*.
25. It invoked Section 2 of the *Firearms Act* which defines a firearm and argued that the report which was produced dated 10<sup>th</sup> February 2021 confirmed that the exhibits as forwarded were indeed a firearm Ceska Pistol Serial Number A908083 and two (2) rounds of ammunitions as described in the Act. It added that it was documented that the particular firearm was also used in the commission of a criminal offence in Kiambu County.
26. It further submitted that the Investigating Officer did explain that the Appellant said that he picked the pistol in Eastleigh at a building under construction which depicted that he did not have any permit or authorisation and thus was in possession illegally and unlawfully. It asserted that the question was then whether the production thereof was procedural noting that leave was not sought for such production.
27. In that respect, it relied on the case of Kenneth Mwenda Mutugi vs Republic [2019]eKLR where it was held that evidence touching on expert opinion should be tendered by experts as provided under Section 48 of the *Evidence Act* and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under Section 33 of the *Evidence Act* and such evidence are admissible and by dint of Section 77(1) of the *Evidence Act*, the evidence is presumed genuine and authentic.
28. It was therefore the Respondent’s contention that the expert report by the Firearms Examiner even though irregularly admitted was to be of persuasive value and that the officers who recovered the Firearm are their own right experts having used such firearms, as the same can be said of the Investigating Officer. It urged the court to deem the expert report as in the peculiar circumstances as only merely persuasive and that the report was only coming to confirm the obvious.
29. On his part, the Appellant submitted that the allegation by PW3 that the subject pistol had been involved in a crime at Kiambu was hearsay and that he was not given an opportunity to cross-examine the complainants and the documents presented to court as exhibit were not subjected to scrutiny to confirm their genuineness. He argued that PW 3 tabled a report from the ballistic expert whereby there was no evidence from the said ballistic expert indicating that he would not be able to attend court. He



added that the failure of dusting the subject pistol raised so many doubts on the correct owner of the subject pistol and that he was not photographed at the scene nor the alleged home scene photographed.

30. He asserted that none of the citizens wrote a statement at the Police even after PW 1 indicating that he was escorted by citizens to the Police Station in joy of arresting a robber. He pointed out that there were no handing over notes indicating how the subject pistol moved from PW 1 to PW 3 and that he did not sign any exhibit memo at the Police post of Police Station at Migori. He added that there were no OB reports indicating that he was a dangerous person in the village and that his case was only fabricated by the police.
31. As conceded by the Respondent, section 4A (1) (a) of the *Firearms Act* was not the correct section for charge of being in possession of a firearm as the subject firearm herein, in the circumstance of the particulars of this case. Section 4A (1) (a) of the Act is in the following terms:

“4A. Offences relating to specified firearms

(1) Notwithstanding section 4, any person who—

- (a) Is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or
- (b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence under this Act and is liable to imprisonment for life.

(2) For the purposes of this section, “specified firearm” means any of the following firearms—

- (a) AK 47;
- (b) G3;
- (c) MP 5; and
- (d) Such other similar firearms as may be specified by the Minister by order published in the Gazette.

(3) A court before which an offence under subsection (1) is found to have been committed may order the forfeiture to the State of any firearms, ammunition or other parts produced as exhibits in the trial. [Act No. 6 of 2010, s. 26.]”

32. Notably, Section 4A provides for “offences relating to specified firearms” and not generally other firearms.



33. The correct provision under which the Appellant ought to have been charged is Section 4(2)(a) as read with Section 4(3)(b) as contended by the State. The prosecution, on the evidence presented before the court, ought to have been under the offence created under section 4 (2)(a) as read with 4 (3) (b) of the Firearms Act.

34. Section 4(2)(a) and 4(3)(b) of the Act is set out below:

“(2) If any person—

(a) Purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized.

(3) Any person who is convicted of an offence under subsection (2) shall—

(b) If the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years”

35. Section 134 of the Criminal Procedure Code gives the object of a charge as being to give to the accused information of the offence that he is charged with as follows:

“Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

36. Having said so, it is this court’s considered view that the charge sheet in this case did not fail to communicate to the Appellant the precise charge that he was facing and its likely consequences upon finding of guilt so as to enable him to adequately prepare his defence.

37. The question becomes one as to whether, pursuant to Section 382 of the Criminal Procedure Code, the Appellant was prejudiced by the defective charge sheet. The defect is of course conceded by the State, but was the Appellant prejudiced by the misstatement of the provision of law under which he was charged?

38. I do not think so, because the statement of the particulars of the charge clearly informed the Appellant of the allegations of which it was alleged he was guilty of the offence of being in possession of firearm without a certificate.

39. Turning to the merit of the case, PW 1, a Police Officer based at God Jope as the OCPP testified that he received intelligence from the former OCPP that there was somebody who was staying with his relatives in the area armed with a gun which was not licensed and that the Police had tried to get the said gun twice without success. He stated that there was an outcry among the citizens who gave information that the Appellant would go to chang’aa dens and when he was drunk he would show off the pistol. He further testified that they started looking for the Appellant with the assistance of the area Chief. He explained that PW 2 together with one other and himself did lay ambush on 31<sup>st</sup>



January 2021 at Samuel Muku's home where the Appellant had gone to drink chang'aa and upon the Appellant attempting to escape he was arrested, subdued and the pistol retrieved from him and he was later handed over to Migori Police Station for further investigations

40. PW 2's and No 87935 CP Luke Rotich (hereinafter referred to as "PW 3")'s evidence corroborated that of PW 1. This court was persuaded that the Appellant was actually found in possession of the pistol, Ceska A 908 C 083 which was loaded with two (2) bullets. On his defence, the Appellant denied having been arrested of the alleged offence and stated that he was arrested because of bhang. Further, as his evidence was simply a denial as it did not displace the overwhelming evidence adduced by prosecution. It was therefore proved that the appellant was found in possession of the subject pistol without any authorisation and/or certificate.

### **Sentence**

41. The Appellant submitted that the sentence was contrary to the Law of Firearm Act.
42. On its part, the Respondent submitted that Section 4(2)(a) as read with Section 4 (3)(b) provides that upon conviction for an offence herein a person shall be liable to imprisonment for a term of not less than five, but not exceeding ten years. It was its contention that the implication of that Section was that upon conviction, courts are enjoined to pass a sentence within the confines as set and that it therefore follows that the term of twenty four (24) years as meted by the Trial Court was excessive as it was illegal.
43. Respondent urged the court to reverse the sentence meted on the Appellant by the Trial Court and impose a proper sentence as per the aforesaid Section.
44. This court finds it prudent to convict the Appellant under Section 4 (2)(a) as read with 4 (3) (b) of the *Firearms Act* pursuant to Section 382 of the Criminal Procedure Code and his sentenced be and is hereby set aside and be substituted by imprisonment for seven (7) years. The sentence will run from 31.1.21 when appellant was arrested and remanded till completion.
45. The appeal has thus partially succeeded on the issue of sentencing.
46. Orders accordingly.

**T. A. ODERA - JUDGE**

**15.3.2023**

**DELIVERED THIS 15<sup>TH</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS PLATFORM**

Appellant Present,

Owour for Respondent,

Court Assistant; Nyaoke.

Language: English

**T.A ODERA - JUDGE**

**15.3.2023**

