Ngamini v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 17232 (KLR) (10 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E014 OF 2022

AK NDUNG'U, J

MAY 10, 2023

BETWEEN

JOSEPH MWAI NGAMINI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 1494 of 2018 – V.M Masivo SRM)

JUDGMENT

1. The appellant herein, Joseph Mwai Ngamini was convicted after trial of being in possession of ammunition without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) (a) of the *Firearms Act*. The particulars were that on the October 26, 2018 at Likii village in Nanyuki Township, Laikipia East within Laikipia County, he was found in possession of twenty nine rounds of 7.62mm of blank cartridges without a firearm certificate. He was tried and convicted and on 28/01/2022, sentenced to seven (7) years imprisonment.

2. The appellant has now appealed against both the conviction and the sentence. He filed a petition of appeal which he later amended and filed amended grounds of appeal. The conviction and sentence are being challenged on the following grounds;

    i. The trial magistrate erred by failing to appreciate that the case was not proved beyond reasonable doubt.

    ii. The trial magistrate failed to note that scene of crime photographs were not produced which was a requisite to prove possession.

    iii. That no finger prints were taken to connect the appellant with the exhibits.

    iv. That the trial magistrate failed to note that the inventory was not signed by the appellant.

v. The trial magistrate erred by quashing the defence which was not displaced by the prosecution evidence.

vi. The trial magistrate erred by applying the wrong principles in sentencing the appellant to mandatory minimum sentence which was harsh and excessive.

vii. That the appellant's rights under article 50 of *the Constitution* were violated.

3. The appeal was canvassed by way of written submissions. The appellant argued that the prosecution failed to prove their case to the required standard for reasons that photographs of scene of crime were not produced, the alleged transparent paper bag with the ammunition was not dusted and his finger prints were not taken and that he did not sign the inventory. He submitted that DW2 did not sign an inventory and DW2's ID card was not produced as exhibit hence it was improperly admitted as evidence. That the prosecution's case was riddled with contradictions and inconsistencies. He further submitted that there were gaps in prosecution case for it is not clear the reasons why the appellant was arrested in that, it is not clear whether he was arrested for assaulting his wife or because an informer informed the police that he had ammunition. He submitted that there was no evidence on ownership of the house where the exhibits were recovered and that there were no independent witnesses. On the sentence, he urged the court to consider the decision in Muruatetu case on mandatory sentences.

4. The Respondent through the state counsel opposed the appeal. The counsel submitted that the case against the appellant was proved beyond reasonable doubt. The counsel submitted that the evidence before the trial court did not reveal that there were other witnesses present during the recovery of the ammunition. That the ammunition were availed in court hence there was no need of photographs and that there was no need of dusting the exhibits since they were recovered in the appellant's house which qualifies as possession. That the appellant did not challenge the inventory which he had signed during cross examination of the prosecution witnesses. The counsel submitted that DW2, the appellant's wife confirmed that the Identification number that was on the inventory was hers. That PW1 PW3 and PW4 were independent witnesses whose testimony was corroborative, consistent and reliable enough. On the sentence, the counsel submitted that the same was lawful since the trial court properly considered the appellant's mitigation and aggravating circumstances hence, the sentence was appropriate.

5. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

6. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court. I have borne in mind, however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

7. Having considered the grounds of appeal, submissions thereon and evidence adduced before the trial court, the issue for determination crystalizes to whether the prosecution proved the offence of possession of ammunition against the appellant beyond any reasonable doubt.

8. The starting point is section 4(2) (a) of the *Firearms Act* under which the appellant was charged. The said section provides as follows;

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; or

(b) ...

(c) ...

he shall, subject to this Act, be guilty of an offence.

9. The ingredients of the charges as per the above section are as follows;Purchases, acquires or has in his possession firearm, or ammunitionand without a firearm certificate.

10. In the instant case evidence led need to prove that the appellant was found in possession of the ammunition that was tendered as exhibit in court. As per the record, the prosecution called a total of four (4) witnesses to prove their case.

11. PW1, PC Josephat Kirui testified that on the material day, he was on patrol together with his colleague. They got information from a member of the public that someone who was residing in Likii was in possession of ammunition in his house. They visited his house which was a one-bedroom house made of timber. They found the appellant standing by the door and he confirmed that the house belonged to him. Upon conducting a search, they recovered 29 rounds of ammunition within the bedroom which were in a transparent polythene paper. The appellant did not have a certificate permitting him to possess the said ammunition. He testified that the ammunition were forwarded for ballistic examination and a test was conducted on five blank to ascertain whether they were blank ammunition. He produced 24 blank rounds of ammunition as Pexhibit1 (a) 1-24 and tested/spent bullet as Pexhibit1 (b) 1-5. He produced the inventory of the recovered ammunition as Pexhibit4.

12. On cross examination, he testified that the appellant confirmed that he was the owner of the house where the ammunition were recovered.

13. PW2, CIP Kenneth Chomba was the firearm examiner. He testified that he received 29 rounds of ammunition marked as exhibit A1-A29 to ascertain whether they were ammunitions. His findings were that A1-A29 were ammunition in caliber 7.62x51mm each designed to be chambered in caliber 7.62mm firearms such as G3 rifle and FN rifles. Five ammunition were picked randomly and they were tested in a G3 rifle and his opinion was that the exhibits A1-A29 were ammunition capable of being fired. He produced the report as Pexhibit5.

14. PW3, PC George Mungai testified that they were on patrol at Likii area and they were informed that there was a person who had ammunition in his house. They were led to the said house where they met the appellant in the compound. He testified that there was a club and several houses behind the club and they were informed that the appellant was the owner of the house with ammunition. He allowed them in and they commenced a search and under the bed, there was a suit case which thy opened and found 29 cartridges wrapped in a transparent polythene paper. An inventory was prepared. The recovery was done in presence of the appellant's wife who had earlier made a report of assault. He testified that the appellant acknowledged that the house belonged to him. On cross examination, he testified that they found the appellant at the door.

15. PW4, IP Victor Kiptoo testified that while at the station, he saw the appellant's wife who was crying and upon inquiring, she reported that her husband had assaulted her. He told her to come the next day to have the P3 form filled. He testified that he was informed that cartridges/bullets were in the appellant's house. Accompanied by other officers, they proceeded to the appellant's house. They conducted a search and under the bed, they found a suitcase with 29 rounds of cartridges/bullets. The appellant

did not have a certificate. He signed the inventory. PC Kirui, PC Isaac Nyile and Eunice Wanjiru also signed the inventory.

16. That was the totality of the prosecution's evidence.

17. The appellant in his sworn testimony testified that on the material day, he returned home and he had an argument with his wife, DW2. He slapped her and she run to the police station. At first, he did not know where she had gone. He testified that he noted that she had stayed for long and he decided to look for her at the back where he met the police and his wife. He was arrested and at the station, they agreed and the assault charges were withdrawn. He testified that he was not informed of this charge at the police station.

18. On cross examination, he testified that on the material day, the police visited their plot and he questioned PC Kirui whether he had a search warrant.

19. DW2, Eunice Wanjiru was the appellant's wife. She testified that on the material day, the appellant had left her manning his business. He got home at 6:30 pm and he assaulted her. She rushed to the police station where she reported the matter. She returned home accompanied by police officers where they found the appellant at the door of the business premises and he was arrested. She testified that her mother in law begged her to withdraw the charges and they agreed that she will withdraw the charges the next day. She went to the police station the next day to withdraw the charges but the police insisted that he should be charged. She testified that the police did not enter her house to conduct a search as it was alleged.

20. On cross examination, she testified that she was the one who took the police officers to the gate. She confirmed that the identification number on Pexhibit4 was indeed her identification number.

21. That was the totality of evidence before the trial court.

22. Possession is defined under section 2 of the of the *Firearms Act* as follows;

> " possession"—
>
> (a) includes not only having in one's own personal possession, but also knowingly having anything in the actual 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; and
>
> (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them".

23. In addition to that definition the issue of possession has been determined in various cases by the courts. The view has been that a person can either be in direct possessions where the person is found in physical or actual possession of the thing or constructive possession where though the person is not in direct and physical possession nonetheless has control or retains control over the thing wherever it is.

24. It was observed by Mbaluto and Kubo JJ in *Nsembe v Republic* [2003] KLR 521 for someone to be in possession, that person has to have knowledge of such possession.

25. What can be gathered from the evidence of PW1, PW3 and PW4 is that the appellant was found at the door of his house. PW1 testified that they found the appellant at the door of the house and

he confirmed that he was the owner of the said house. They recovered the ammunition inside the house. PW3 testified that there was a bar and behind the bar there were houses. The appellant was in the compound and he allowed them to access the house. He acknowledged that the house belonged to him. On cross examination, he testified that the appellant was at the door. PW4 testified that the ammunition were recovered inside the appellant's house under the bed and that they were inside a suitcase. They all testified that an inventory was prepared, Pexhibit4.

26. The appellant in his defence testified that the charges he was aware of was that of assault of his wife and he did not hear about this charge at the police station. On cross examination however, he admitted that the police visited his plot and he questioned PC Kirui whether he had a search warrant. This means that even though the appellant denied the charges and even the knowledge of the charges, his house was searched by the police officers.

27. DW2 also denied that their house was searched. She however signed the inventory and confirmed to the trial court that the identification number 32224419 was her correct identification number. This identification number is reflected on the inventory together with her signature.

28. The appellant in his submissions claimed that he did not sign the inventory. This is a lie since the inventory bears his name and his signature. The appellant and his wife did not allude that they were coerced to sign the said inventory. Furthermore, they did not deny that the house where the ammunition were recovered belonged to them.

29. The appellant claimed that PW4 contradicted the testimony of PW1 and PW3 in that PW4 testified that he was informed of the ammunition by the appellant's wife whereas PW1 and PW3 testified that an informer informed them about the ammunition. Looking at the PW4 testimony, he did not allude that DW2 informed her about the ammunition. He testified that he got information that cartridges/ bullets were in the appellant's house. He did not state who was the informer. The appellant further submitted that dusting was not done and that photographs of the scene were not taken. This assertion does not aid the defence case since the absence of such dusting and photographs does little or nothing at all in challenging the corroborated evidence of recovery of the ammunition in the house which is undisputedly the appellant's.

30. My analysis of the evidence leads me to only one conclusion; that the prosecution's evidence completely displaces the defence mounted by the appellant at trial. The belated attempt by DW2 who is his wife to safe him from the consequences of the act by denying the recovery even after witnessing it and confirming as much by signing the inventory fails miserably in light of the evidence on record.

31. From the foregoing, it is my finding that the appellant's house was searched, a fact that he admitted on cross examination and that Pexhibit1a 1-24 and Pexhibit 1b 1-5 were recovered from his house.

32. The upshot of this is that the offence of being in possession of ammunition was proved to the required standard.

33. On the sentence, the appellant submitted that the term liable in section 4(3) (a) of the *Firearms Act* does not mean that a mandatory minimum sentence should be imposed and that the court still retains the discretion to mete out a lesser sentence. He called upon this court to reconsider the sentence in line with the decision in Muruatetu case.

34. Section 4(3) (a) provides;

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

(a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years

35. The above section uses the term 'not less than' and 'not more than'. The use of such phrase creates a mandatory minimum sentence and a maximum sentence. The Sentencing Guideline Policy paragraph 7.17 provides that;

> Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed.

36. That said, It is trite law that sentencing is at the discretion of the trial court and the appellate court cannot easily interfere with this discretion. It is however apparent that courts have discretion to interfere with mandatory sentences. This is in line with the now notorious case known as Muruatetu, the Supreme Court of Kenya declared that the mandatory nature of the death sentence for murder (sections 203 and 204 of the *Penal Code*) is unconstitutional for interfering with the court's discretion in sentencing. The same has been applied to mandatory sentences in other offences.

37. The record of the trial court shows that the court considered that the appellant was a first offender and it took into account his mitigation. On the flip side of the coin, the court considered the aggravating circumstances of the offence being the number of ammunitions recovered. The court sentenced the appellant to 7 years imprisonment ''as prescribed by law ''clearly showing that the court restricted itself to the minimum sentence. It must be borne in mind, however, that even in the application of the Muruatetu case, the mischief targeted was the fetter of the court's discretion in meting out appropriate sentences based on circumstances of each case. Where the court in its discretion is satisfied that a minimum sentence is deserved, nothing stops the court from meting it out.

38. I have considered the sentence of 7 years imprisonment . It is trite that sentencing is the discretion of trial Judge. An appellate court will not interfere with the exercise of such discretion unless it is proved that the trial Magistrate acted on some wrong principles, overlooked some relevant factors or failed to consider some relevant matters or the sentence is manifestly excessive.

Each case must be treated on its set of facts and circumstances. In *Ogalo S/o Owoura v R* [1954] E. A CA 270 the court stated;

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R [1950] 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case....."

39. I find no plausible ground upon which to interfere with the sentence herein. With the result that the Appeal herein lacks merit and is dismissed in its entirety.

Dated signed and delivered at Nanyuki this 10th day of May 2023

A. K. NDUNG'U

JUDGE