



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL REVISION NO.25 OF 2019

NO.45140PC DAVID YATOR.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. This is a ruling on application dated 4th October 2019. It seeks an order calling the file of **Nakuru CMCC No.957 of 2014 Republic Vs No.45140 PC David Yator** from the Chief Magistrate's Court and revise the ruling dated 28th March 2019 and quash the said ruling which held that the prosecution had established a *prima facie* case for accused to be placed on his defence.

2. Grounds on the face of the application are that the accused was arrested and charged with the offence of **loss of firearms contrary to Section 22 of the Firearm Act Cap 114**. Particulars are that on 10th October 2017, at Nakuru Township, the accused lost firearm make *Ceska* Pistol Serial No.8274 loaded with a magazine of fifteen rounds of ammunition all valued at kshs 131,200 the property of the Government of Kenya.

3. The applicant aver that 4 prosecution witnesses testified and after close of prosecution case, the defence counsel filed submission; that the Court ruled that the accused has a case to answer and fixed defence hearing date.

4. The applicant avers that under **Section 22 of the Firearm Act Cap 114**, the only offence provided is failing to report the loss, theft or destruction of firearm or ammunition; and all the witnesses including the officer in charge of station testified that the applicant did report the loss of firearm but the trial Court did place the accused on his defence.

5. He averred that the ruling of the trial magistrate is an infringement of the applicant's right to fair trial since he has been put on his defence for a crime that is not an offence in Kenya; and the High Court has powers to exercise supervisory and revisionary jurisdiction over subordinate courts.

6. He further averred that this case has been pending since 2014 and the applicant has been interdicted; that his salary is therefore withheld yet he is a bread winner in his family.

7. The applicant urged this Court to call the lower court file and quash the ruling.

8. The applicant is supported by the applicant's application dated 4th June 2014 where he restated ground of the application. He further averred that the charge sheet only highlights that he allegedly lost the firearm and there is no mention that if he did lose the firearm, he failed to report.

9. He further averred that PW3 testified when he was told the firearm was lost, the matter was booked in OB No.11/13/10/2012 and that is the OB number that appear in the charge sheet; he averred that he reported the loss of firearm in the presence of officer commanding station(OCS); and this is supported by evidence of PW4 who was the acting OCS at the time he reported; that all the witnesses including officer in charge of station testified that he reported loss of firearm.

10. In response, the state counsel submitted that the applicant was charged with the offence of the **loss of a firearm contrary to Section 22 of the Fire Arm Act Cap 114**. That the fire arm was loaded with a magazine of 15 rounds of 9mm ammunition all valued at the total sum of Kshs131,200 and he failed to report the loss of the firearm and ammunition.

11. She quoted **Section 22 of the Firearm Act** as follows: -

“Loss of firearms or ammunition to be reported. Any person having possession of a firearm or ammunition, whether or not

he holds a firearm certificate therefore or is entitled to have possession thereof without holding a firearm certificate, shall, if the firearm or ammunition is lost, stolen or destroyed, report the loss, theft or destruction as soon as possible after its occurrence to the police officer in charge of the nearest police station, and if he fails to do so, shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both.

12. She submitted that **PW2 Corporal Mutema** testified that at the material time he was attached to Railways Police Station and was in charge of the armory where he was tasked with issuing firearms to officers. He identified the accused as a colleague he had known for two years and stated that he had issued firearms to him on several occasions and the accused had always returned them.

13. She submitted that on the 10th October, 2012 he had issued a firearm make *Ceska* pistol serial number 8274 G with 15 rounds of ammunition to the accused which he recorded in the firearms movement register and that the accused signed the arms movement registrar upon receiving the firearm.

14. She submitted that the accused failed to turn in his firearm at the end of the day but went to his quarters instead; that he further stated that the following day on the 11th October 2012, PW2 met the accused and requested the accused to accompany him to the armory to return the firearm but the accused stated he was the only driver on duty that day and assured PW2 that he would bring the firearm later on in the course of the day.

15. She further submitted that the accused did not show up and the following day, PW2 went to inquire from the accused when he would return the firearm and the accused insisted he had been sent to town and would return it when he returned back to the station. She submitted that PW2 stated he was alarmed by the accused's elusive behavior over the request to turn in his firearm and reported to his supervisor, PW3.

16. PW3 **Inspector Owour** stated that on the 13th October 2012 he received a report from PW2 that the accused had not returned his firearm to the armory and upon receiving the report from PW2, he called the accused who did not pick his call. He thereafter reported to the OCS who instructed that he conduct a search in the house of the accused and PW3 was accompanied by PW2, PW1 and PW4.

ANALYSIS AND DETERMINATION

17. I have considered submissions by both parties herein. The argument by defence counsel is that the trial magistrate erred in finding that the prosecution had established *prima facie* case to warrant the applicant be placed on his defence.

18. The basis of the applicant's argument is that the section under which the applicant is charged describe the offence as failing to report the loss of firearm whereas the 5 witness availed by the prosecution testified that the applicant reported loss of firearm.

19. It is clear that the offence under **Section 22 of Firearm Act** is failing to report loss of firearm. I have perused the court proceedings. I note from evidence adduced that the prosecution led evidence to prove failure of the applicant to report loss of firearm. The evidence adduced tally with the charge against the appellant. From my reading of the particulars the offence is failing to report the loss and contrary to submissions by the applicant's counsel, the witnesses did not indicate that he reported the reason for failure to return the firearm the same day he was issued but he reported on 13th after being asked severally by PW1 who issued him with the firearm to return it.

20. No sufficient grounds have been advanced by the applicant to warrant exercise of supervisory powers by this Court, I see no reason to interfere with the lower courts proceedings. The case to proceed to its logical conclusion.

21. FINAL ORDER

1. Application dated 4th October 2019 is hereby dismissed.

2. The lower court file be set for mention for directions on further progress of the criminal hearing.

Judgment dated, signed and delivered via zoom at Nakuru

This 3rd day of February, 2021.

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Kipngetich counsel for Applicant

Ms. Rita Rotich for state