REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 78 OF 2019

MUHUTHU MACHARIA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against conviction and sentence in Nakuru Chief Magistrate's Criminal case no 3733 of 2019 by Hon E K Usui Chief Magistrate)

J U D G M E N T

Muhuthu Macharia was charged with three counts under the Firearms Act Cap 114 Laws of Kenya.

Count I & II, being in possession of an imitation of a firearm under section 34(1) of the Firearms Act bear same particulars.

> That on 15/11/19 at Jua Kali area of Mau Narok trading centre Njoro Sub County he was found in possession of an imitation firearm with intention to commit a felony.

Count III, being in possession of live ammunition Under Section 492) (a) as read with Section 4(3) (b) of the same Act.

> That on the same date, time and place he was found with three live ammunition without holding a firearm certificate.

Plea was taken on 18/11/2019. He pleaded guilty. The facts were taken on 13/12/2018.

The facts were that police from Njoro police station received information that the appellant was in possession of a firearm. They proceeded to his home, conducted search and recovered 2 imitations of firearms and three live ammunitions.

These recoveries were taken for ballistic examination vide the exhibit memo PEX 2. The ballistic report produced as PEX 1 described them as *homemade guns*.

Each of them was tested and found to be a firearm sunder the Firearms Act.

The applicant pleaded guilty to the facts as well.

He offered that the guns and the ammunition were for his own defence, and that he obtained them during the 2007 skirmishes.

He pleased for a lenient sentence.

The trial court sentenced him to serve 7 years' imprisonment on each count. The sentences were to run concurrently.

The appellant filed this appeal on 30/12/2019 on the grounds: -

> **1. THAT the learned trial magistrate erred in law and in fact by failing to note that he was not served with witness's statements.**
>
> **2. THAT the learned trial magistrate erred in law and in fact by note the contradictory nature of the evidence adduced by**

the prosecution.

3. THAT the learned trial magistrate erred in law and in fact by failing to note that the prosecution case was not proved beyond any reasonable doubt.

4. THAT the learned trial magistrate erred in law and in fact by failing to accord the appellant a chance to raise his defence.

During the hearing of the appeal he made oral submissions. He was cognizant of the fact that he had pleaded guilty. He offered mitigation that he was remorseful, that the guns were for his own protection and he was not found committing any crime, that there were insecurity issues in his place of residence and he needed to protect himself.

He also submitted on the difficulties his family was going through due to the Covid 19 pandemic especially due to his absence as the bread winner.

M.s Wambui for the state relied on **Section 348 of the Criminal Procedure Code**. She submitted that the appellant could only raise an appeal against the sentence only if it was unlawful. She urged the court to look at the penalties provided by the law and note that appellant was meted a lenient sentence.

The issue is whether the appeal is tenable.

On legality of the sentence: the conviction and sentence on the first and second counts were not lawful**.**

Section 34(1) of the Firearms Act provides; <u>that if any person makes/attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence</u> he shall be guilty of an offence and liable to imprisonment of not less than seven and not exceeding 15 years.

Section 4(2) (a) provides;

> **"If any person purchases, acquires or has in possession any firearm or ammunition without holding a firearm certificate in force at the time….."**

Section 4 (3) (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 and not exceeding 10 years".**

The facts of the case as read to the appellant were that he was found in possession of the 2 firearms and 3 rounds of ammunition.

Section 34(1) speaks of a person making use/attempting to make use with intent to commit a felony.

There was nothing in the facts as read to the appellant to prove to establish that he was found *attempting to make use/making use of the firearms to commit a felony*. There were no facts read to establish any intention on his part to commit a felony. The facts as read simply established that the firearms were found in his house.

There were no facts read that police officers conducted further investigations to establish whether there had been use of the said firearms to commit any felony or whether the appellant had attempted to use them to commit any offence. The only thing they had on him was possession.

While it is dangerous for any person to arm themselves with unauthorized firearms, it is also not right to create offences where none exist even if the intention is to send a warning to others bent on breaking the law.

In this case the police and prosecution split the facts and created THREE charges. By so doing they were saying that for each of the imitation firearm the appellant faced a separate charge of use or attempt to use to commit a felony yet they had no such evidence and the firearms were found on the same date, same place, same time. These ought to have fallen into the same count.

In any event, the description part of Section 34(1) does not speak of possession but of USE and these are 2 different things.

So clearly the facts as read to the appellant with regard to the first two counts did not support the charges.

In **<u>Wandete David Munyoki vs R [2015] eKLR</u>** – Court of Appeal stated;

> **"It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground.''**

The Court of Appeal made reference to **<u>Ndede vs R [1991] KLR</u>** 567 where it had held that;

> **"the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed. It has long been settled that section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent of legality of the sentence is not an absolute bar to challenging such a conviction on any other ground".**

It is on the wisdom of that decision that I now proceed to consider the appellants appeal ***on its own merit.***

Clearly, the prosecution did not consider the fact that the facts were split to create 2 counts that they did not support the 1st and 2nd counts. Those are legal issues not factual issues and the appellant did not deny being in possession of the firearms. The prosecution ought not to have been allowed to proceed on the 'use' with 'intent to commit a felony' without the facts.

So on the 1st and 2nd count, I find that the facts upon which the same were based did not establish the offences.

I have explained herein above why the appellant ought not to have been charged with the first two counts and why only the third count was tenable. I have also demonstrated that the facts revealed one offence, possession. Hence it is in Count three where the appellant ought to have been charged with possession of all the firearms, the two homemade guns and the ammunition.

On that basis, on count 1 and 2 the conviction is quashed, and the sentences set aside.

Count 3 is substituted to include in the particulars the 2 homemade guns and the ammunition.

The Sentence

Section 4(3) (b) provides a minimum sentence of 5 years and maximum of 15 years imprisonment. The appellant was a 1st offender, though the offence is serious. In light of *Muruatetu* should the learned magistrate have considered a lesser sentence?

In sentencing the court proceeded to sentence appellant to 7 years on each count after making the observation;

> **"Mitigation noted. The offence is however serious and it is a threat to security and peace in the country"**

There being no evidence of intent to commit a felony, there being evidence only of possession, there was no explanation why he was sentenced to more than the minimum of 5 years.

I set aside the 7 imprisonment years sentence and substitute it with 5 years' imprisonment with effect from 13th December 2018.

Right of Appeal 14 days.

Delivered, Dated and Signed at Nakuru this 9th Day of October 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant

For state

Appellant