



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 25 OF 2019**

**BETWEEN**

**BONIFACE WRIGHT OKENYE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. M. Nafula, SRM*

*dated 19<sup>th</sup> February 2019 in Criminal Case No. 2134 of 2016*

*at the Magistrate's Court at Ogembo)*

**JUDGMENT**

1. Before the subordinate court, the appellant, **BONIFACE WRIGHT OKENYE**, faced the following charges:

**Count 1: Being in possession of a fire arm without firearm certificate contrary to section 4 (2) (a) as read with section 4(3) (a) of the Firearms Act Cap 114 Laws of Kenya.**

The particulars being that on 9<sup>th</sup> November 2016, at around 5:00pm, at Kisii Criminal Investigation Department parking yard at Kisii Central, he was found in possession of a firearm make Hawk serial No. T2841-14A00015 without a firearm certificate.

**Count 2: Being in possession of ammunition without firearm certificate contrary to section 4 (2) (a) as read with section 4(3) (a) of the Firearms Act Cap 114 Laws of Kenya.**

The particulars being that on 9<sup>th</sup> November 2016, at around 5:00pm, at Kisii Criminal Investigation Department parking yard at Kisii Central, he was found in possession of 9 rounds of 9mm caliber ammunition without a firearm certificate.

**Count 3: Making a document without authority contrary to section 357 (a) of the Penal Code.**

The particulars being that on the 8<sup>th</sup> day of January 2015, at unknown place within the Republic of Kenya, with intent to deceive and without lawful authority or excuse with others not before this court, he made a firearm certificate, serial number 9450 purporting it be genuine firearm certificate issued by Chief Licensing Officer Central Firearms Bureau a fact which he knew to be untrue.

**Count 4: Uttering false document with intend to deceive/defraud contrary to section 353 of the Penal Code.**

The particulars being that on 24<sup>th</sup> November 2016 at Ogembo law courts within Kisii County, with intend to deceive, knowingly and fraudulently uttered firearm certificate, serial number 9450 to the chief inspector Peter Gitonga a forged firearm certificate purporting it be genuine firearm certificate issued by Chief Licensing Officer Central Firearms Bureau a fact he knew to be untrue.

**Count 5: Uttering a false document with intend to deceive/defraud contrary to section 353 of the Penal Code.**

On the 8<sup>th</sup> January 2015 at Kenya Bunduki Limited in Nairobi County, with intent to deceive, knowingly and fraudulently uttered to one Christine Wachira, an administrator at the Kenya Bunduki Limited, a forged firearm certificate purporting to be a genuine firearm issued by the Chief Licensing Officer at Central Firearms Bureau.

**Charge 6: Obtaining a firearm with false pretence contrary to section 33 of the Penal Code.**

On the 8<sup>th</sup> January 2015 at Kenya Bunduki Limited in Nairobi county with intent to defraud or deceive obtained a firearm (pistol) make Hawk serial number T2841-14A00015 by falsely pretending that he was genuinely authorized to purchase a firearm by Chief Licensing Officer Central Firearms Bureau, a fact he knew to be false.

**Count 7: Obtaining ammunition by false pretences contrary to section 313 of the Penal Code.**

On 8<sup>th</sup> January 2015 at Kenya Bunduki Limited in Nairobi County with intent to deceive and receive 50 rounds of 9mm caliber ammunition by falsely pretending that he was genuinely authorized to purchase ammunitions by Chief Licensing Officer, a fact he knew to be false.

**Count 8: Being in possession of ammunitions without firearm certificate contrary to section 4(a) as read with section 4(3) (a) of the Firearms Act Cap 114 Laws of Kenya**

On 16<sup>th</sup> January 2017 at around 5:30pm at Kisii County Criminal Investigation Officer's office in Kisii Central within Kisii County, he was found in possession of 15 rounds of 9mm caliber ammunition without firearm certificate.

**Count 9: Forging stamps contrary to section 352 (a) of the Penal Code**

On the 21<sup>st</sup> May 2014 at unknown place within Republic of Kenya, with others not before court, he made a false impression of the Chief Licensing Officer Central Firearms Bureau stamp seal used for purposes of acquiring a civilian firearm at the Bureau government department with an intent to deceive.

**Count 10: Forging stamps contrary to section 352 (a) of the Penal Code**

On 21<sup>st</sup> May 2014 at unknown place within Republic of Kenya, with others not before court made a false chief licensing officer instructions stamp used for purposes of acquiring a civilian firearm at the Bureau, a government department, with intent to deceive.

**Count 11: Forging stamps contrary to section 352 (a) of the Penal Code**

On 21<sup>st</sup> May 2014 at unknown place within the Republic of Kenya, with others not before court, he made a false Firearms Bureau stamp used for purposes of acquiring a civilian firearm at the Bureau, a government department, with intent to deceive.

2. The trial court found the appellant guilty and convicted him on count 1, 2, 3, 4, 5, 6, 7 and 9. He has now appealed against the conviction and sentence on the following grounds set out in his petition of appeal;

*1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offences charged when the prosecution had not established his guilt beyond the required standard of proof.*

*2. The learned trial magistrate erred in law and in fact in analyzing and/ or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principles in criminal law, which casts the burden of proof upon the Respondent.*

*3. The learned trial magistrate erred in law and in fact in failing to take judicial notice of the fact that the issuance of firearm in Kenya has been riddled with massive fraud and that the appellant acted in good faith at all material times.*

*4. That the learned trial magistrate erred in law and in fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondent's evidence was riddled with massive contradictions that could not sustain a conviction.*

*5. The sentence of the learned trial magistrate is illegal.*

3. The grounds of appeal I have set out above raise questions of fact and this being the first appellate court I am mandated to review the evidence on record and come to an independent conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (*see: Okeno v Republic [1972] EA 32*). In order to proceed with this task, it is necessary to set out the evidence as it emerged before the trial court.

4. The prosecution called 7 witnesses in support of its case. The Investigating officer, David Kipkoros (PW 2) testified that he conducted investigations on 26<sup>th</sup> January 2016 after receiving information of a shooting at Mochengo Polling Station during the by-election in Nyacheki Ward. He testified that he proceeded to the scene and found that the appellant had shot 3 rounds of ammunition in the air. He started by inquiring whether the appellant was a licenced civilian gun holder. The appellant produced a firearm certificate ("the Certificate") while at Nyangusu Police Station but not the firearm. He wrote a letter to the Chief Licensing Officer of the Firearms Bureau ("the Bureau") in

Nairobi to confirm authenticity of the Certificate who responded that the firearm certificate was not genuine. He testified that the serial number was not reflected in the database held by the Bureau. PW 2 arrested the appellant who informed him that the firearm was in his house in Nairobi. He searched the appellant's car and found that a Hawk pistol serial number T2841-74A0015 together with a magazine. He thereafter prepared a memo dated 11<sup>th</sup> November 2016 forwarding the exhibits for ballistic examination.

5. Japhet Musyimi (PW 4) testified that on 26<sup>th</sup> October 2016, while on patrol during a by-election, he received information about a shooting and upon arriving at the scene he was informed that the appellant had discharged a firearm. He testified that he assisted PW 2 in investigations and confirmed that when the appellant brought his Certificate 9140, it was forwarded to the Bureau for authentication and found not genuine. He confirmed that the accused was arrested and found with a gun, rounds of ammunition and magazine.

6. A forensic document examiner, Ivy Akinyi (PW 1), testified that on 23<sup>rd</sup> December 2016 she received an exhibit memo from DCIO Nyamache together with the following exhibits; Exhibit A (a firearm certificate number 9546), Exhibit B (a standard seal impression for Kenya Police Firearms Bureau), Exhibit C (stamp impression from the Kenya Police Bureau) and Exhibit D (Stamp impression for the Chief Licensing Officer central firearm bureau). She testified that she was required to ascertain that the seal impression on Exhibit A was made by the same instrument when with Exhibit D and whether the stamp impression on Exhibit A were made the same instrument when compared with Exhibit D. She was also required to confirm whether the stamp impression on Exhibit A was made by the same instrument on Exhibit C.

7. PW 1 subjected the seal impression on the Certificate (Exhibit A) and as against the seals marked as Exhibits B, C and D by comparing the stamp impressions and concluded that the stamp impressions on the Certificate were made by different instruments. She told court that she subjected the seal and stamp impression to superimposition procedures using visual spectral comparator and found that the stamps and seals on the Certificate did not match.

8. The Secretary to the Bureau, Supt. Salim Nyongesa (PW 3), testified that on 30<sup>th</sup> October 2016 he received a letter from the DCIO Nyamache to verify the authenticity of firearm licensed as number T2841-14A0015 issued to the appellant on 21<sup>st</sup> May 2015. PW 2 told court that he found that the Certificate was not genuine as it was not reflected in their systems as serial numbers issued in the year 2014 started with 95. He also testified that according to their records licence number 9540 was issued to a Member of Parliament, Stephen Ole Ntutu on 2<sup>nd</sup> July 2014.

9. Christian Wachira (PW 5), an employee of Kenya Bunduki Limited, confirmed that the appellant purchased a firearm from Kenya Bunduki Ltd as he had a valid certificate. John Ondiko (PW 6) of the Press Department of the Ministry of Interior and Co-ordination of National Government recalled that on 16<sup>th</sup> December 2016 he received a letter from the DCIO Nyamache requesting the Government Printer confirm authenticity of Certificate number 9540. He examined the document and concluded that it was not printed from their office.

10. A firearms examiner, Lawrence Nthiwa (PW 7) produced the firearm examination report on behalf of Reuben Bett, a firearm examiner who examined the pistol serial number T2841-14A0015, a magazine and 9 rounds of ammunition. After conducting the examination, he concluded that the pistol produced was a firearm within the meaning of the *Firearms Act* and was capable of firing the ammunition.

11. When put on his defence, the appellant (DW 1) denied the charges against him and called a Senior Superintendent of Police, Paul Wambugu (DW 2) as his witness. The appellant testified that he applied for a firearm at the Provincial headquarters in Nairobi and met the former Commanding Officer of Embakasi called Karima and filled the requisite form. The Embakasi OCPD inquired why he needed the firearm and he explained he was a Member of the County Assembly. He confirmed that 6 police officers came to his house and confirmed that he had a safe. He also provided his postal address to which the Certificate was sent. He collected the firearm about a year later after paying Kshs 130,000/- at Kenya Bunduki and was issued with a receipt. He further testified that when he presented the Certificate for renewal, it was renewed on 21<sup>st</sup> May 2015. He denied that he forged the documents as they were obtained from the Government. He testified that he did not know that the Certificate was not genuine as he had dealt with the Chief Licensing Officer. He also testified that he was protected by the 2016-2017 amnesty which was in force.

12. DW 2 testified that he had opened an inquiry and confiscated the appellant's firearm after a complaint from members of the public. He told court that he communicated to the Chief Licensing Officer and the file was taken to the DPP to give his report. The inquiry was closed and the firearm returned to the appellant. He told court that he did not know whether the accused person was a licensed firearm owner.

13. The thrust of the appeal which was urged by counsel for the appellant both orally and in his written submission was that the prosecution had failed to prove its case beyond reasonable doubt. On whether the prosecution proved non-compliance with **section 4(2) (a)** as read with **section 4(3)(a)** of the *Firearms Act (Chapter 114 of the Laws of Kenya)* ("the FA"), the appellant urged court that he followed the laid down procedure under **section 5** of the FA and was issued with the Certificate by the Bureau. The appellant also contended that the prosecution failed to prove forgery on the part of the appellant as it was clear that the stamps and Certificate were made by a person who the prosecution failed to pursue and who were the real culprits. Counsel submitted that there was no evidence that the forgery was committed by the appellant

14. Counsel for the respondent supported the conviction and urged that the prosecution had proved its case beyond reasonable doubt as there was sufficient evidence to support the charge. He pointed to the fact that the prosecution proved that the stamps and seals used were forgeries and that the serial number of the Certificate was not genuine. Counsel however conceded that Counts 6 and 7 were not proved by the evidence.

15. It was not in dispute that the appellant was in possession of a firearm which PW 5 confirmed that he purchased from Kenya Bunduki. While I accept the totality of the evidence of PW 1 and PW 3 that the Certificate held by the appellant and purportedly issued by the Chief Licensing Officer was forged and was not genuine, the question raised by the appellant in this appeal is whether the prosecution proved the appellant's involvement in the forgery.

16. The appellant position is that at all material times he was under the impression that his documents were genuine. He told court that he

complied with **section 5** of the *FA* when he applied for his license. PW 5, in cross examination, testified that they conducted checks before selling the firearm to the appellant. She explained that she called the Bureau and was assured that everything was authentic. She proceeded with the sale of the firearm and ammunition to the appellant. Moreover, PW 5 complied with **section 16 (2)** of the *FA* by forwarding to the Bureau a disposal form indicating that Hawk Case Box Holster, 50 rounds of 9mm ammunition were transferred to the appellant who was the holder of Certificate number 9540. The purpose of **section 16 (2)** is not only for the Bureau to monitor movement of firearms, but also to confirm that the firearms and ammunition are sold to authorized persons, that is persons who possess a valid firearm certificate. It is at this point that the Bureau ought to have raised an alarm in the event of any irregularity with the Certificate.

17. The appellant also testified that he presented the Certificate for renewal and it was surprisingly renewed on 21<sup>st</sup> May 2015. No reasons were advanced by the prosecution why the initial inquiry by DW 1 was closed and the firearm returned to the appellant. I further note that the prosecution did not furnish evidence showing the appellant's involvement in the forgery of the Certificate.

18. For the prosecution to prove the offence of uttering a false document with intent to deceive or defraud, it must prove that the appellant presented the Certificate to PW 5 and Inspector Peter Githonge knowing that it was false and with intent to defraud. Unfortunately, no evidence was adduced to show that the appellant had the intent to deceive or defraud. It appears that the appellant was under the impression that the Certificate issued to him, posted to his postal address 197 Kisii and subsequently renewed on 21<sup>st</sup> May 2016 was genuine.

19. "False pretence" has been defined by **section 312** of the *Penal Code* to mean, "any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true". At the time of the sale the appellant had a Certificate which he believed to be genuine and the Bureau did not question the authenticity of the Certificate despite having all the relevant information in their database thus the 6<sup>th</sup> and 7<sup>th</sup> counts fail.

20. I now turn to whether the prosecution proved beyond reasonable doubt that the accused was in possession of a firearm and ammunitions without a Certificate contrary to **section 4 (2) (a)** as read with **section 4 (3) (a)** of the *FA*. Though the appellant had a Certificate, the same is not a firearm certificate prescribed under **section 5 (3)** of the *FA*, a *firearm certificate granted in the prescribed form*. That said, it is a cardinal principle of criminal law that *mens rea* of the accused persons is an essential ingredient to prove the guilt against the accused. Having found that the accused was not engaged in the forgery of the Certificate and believed that at all times he held a valid Certificate, the appellant could not be convicted on Counts 1, 2 and 8.

21. The trial magistrate found that the defence was a mere denial despite evidence the appellants evidence that he applied for the Certificate through a police officer who was named and the licence renewed for another year. Further DW 2 testified that an inquiry had been done which did not disclose any offence. These facts raised reasonable doubt against the prosecution case. The prosecution was entitled to invoke **section 309** of the *Criminal Procedure Act (Chapter 75 of the Laws of Kenya)* to rebut the defence case but it did not. The provision states as follows:

*If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."*

22. Before I close the judgment, I wish to draw attention to the fact that a perusal of the judgment reveals that the trial magistrate did not comply with the requirements of **section 169 particularly subsections (2) and (3) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** as she did not state or specify the counts on which the appellant was either convicted or acquitted. The provision states as follows:

*169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

*(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*

*(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

23. The counts on which the appellant was convicted is only evident in the sentencing notes and although it is necessary to comply with the requirements, this is not necessarily fatal to the prosecution case (see *James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR*).

24. For the reasons I have set out, I allow the appeal, set aside the conviction and sentence and acquit the appellant on all counts. The fines imposed on the appellant and paid by him shall be refunded to him.

**DATED and DELIVERED at KISII this 19<sup>th</sup> day of JULY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochoki, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.