REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 104 OF 2017

JOHN KARIUKI WARUTA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from original Conviction & Sentence dated 30/10/2017 in Nanyuki CM Criminal Case No 1363 of 2015 – L Mutai, CM)

JUDGMENT

1. The Appellant herein, **JOHN KARIUKI WARUTA**, was convicted after trial of ***being in unlawful possession of a firearm*** contrary to ***section 4(1)*** as read with ***subsection (2) (d)*** of the ***Firearms act, Cap 114***. He was also convicted in count II of ***being in unlawful possession of ammunition*** contrary to ***section 4(1)*** as ready with ***section 4A (b)*** of the same statute. It was alleged in the charge sheet that on 16/12/2015 at Solio Village IV in Nyeri County, he was found in possession of an F.N. rifle Serial Number 5206527 and ten (10) rounds of 7.62 mm calibre ammunition without a firearm certificate.

2. The Appellant was on 30/10/2017 sentenced to three (3) years imprisonment on each count, the sentences to run concurrently. He has appealed against both conviction and sentence. The grounds of appeal appearing in the amended petition filed on 20/03/2019 are –

i) That the trial court erred in relying upon "untrustworthy evidence of the prosecution witnesses".

ii) That the trial court erred in failing to resolve the inconsistencies in the evidence presented by the prosecution witnesses.

iii) That the trial court erred in "peremptorily dismissing the Appellant's defence".

iv) That the trial court erred in basing the convictions upon "insufficient and doubtful evidence of recovery".

v) That the sentence was "harsh and excessive".

3. Learned prosecution counsel for the Respondent did not support the conviction in count I upon the ground that the serial number of the rifle in the charge was different from the serial number of the rifle examined by the ballistics expert (PW3), which appeared in his report (Exhibit 5(a)), and was produced in evidence by PW4 as Exhibit 2. Learned prosecution counsel supported the conviction in Count II.

4. I have read through the record of the trial court (including the judgment) in order to appraise the evidence tendered and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I never heard or saw the witnesses myself, and I have given due allowance for that fact.

5. Indeed the serial number of the F.N. rifle in the charge sheet is **5206527**. The serial number of the rifle examined by PW3 and produced in evidence by PW4 was, however **5306527**. The charge sheet was never amended. This may well have been a handwriting error in the charge sheet (which was in long hand); nevertheless it was a fatal error. Firearms will ordinarily be identified by their serial numbers. A different serial number will ordinarily point to a different firearm. Because of this fundamental error there is no way the conviction in count I can stand.

6. What about the conviction in Count II? The defence of the Appellant throughout the trial was that the firearm and the ten rounds of ammunition were never recovered from his house, but planted in a cupboard by the police from whence they purported to recover them after they had taken the Appellant and his wife from the house to their motor vehicle. The Appellant gave sworn evidence in his defence and called his 13 year old son as witness. The boy gave unsworn evidence. Their story was that the police initially searched the sitting room and the bedroom and recovered nothing. They then took the Appellant and his wife out to the police vehicle, leaving the boy and other children in the sitting room. One policeman then came back, carrying a sack which had something inside. He placed it in the cupboard in the sitting room. The police later purported to "recover" the rifle and ammunition from the sack.

7. Despite recovery of the rifle and ammunition being a hotly contested issue, the trial court nevertheless stated as follows in its judgment –

> ***"From the evidence on record, it is not in dispute that the accused was arrested by police officers from his house. It is also not in dispute that exhibit 1, a sack; exhibit 2, a rifle; exhibit 3, ten (10) rounds of ammunition; and exhibit 4, a magazine…were indeed recovered from the Accused's house…."***

8. This, with the greatest respect to the trial court, was an entirely erroneous and prejudicial approach to the evidence of the all important recovery of the firearm and ammunition. It was an approach that coloured the learned trial court's appraisal of the evidence to the prejudice of the Appellant. It was an approach that prevented the trial court form more critically analyzing the evidence of recovery, including the Appellant's defence. In the circumstances, the conviction in Count II also cannot be allowed to stand.

9. In the result, the Appellant's appeal is allowed in its entirety. Both convictions are hereby quashed and the sentences imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF NOVEMBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 21ST DAY OF NOVEMBER 2019