REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBERS 55 OF 2018

SAMUEL MBUGUA MUNYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an Appeal against both the conviction and the sentence of Resident Magistrate*

Hon. B. Mararo delivered on 11th June 2018 in Nakuru Criminal Case No.382 of 2017

Republic v Samuel Mbugua Munyi***)***

JUDGMENT

1. The Appellant was charged with three counts. In count 1 he was charged with the offence of **being in possession of a firearm without a firearm certificate contrary to section 4 (1)** as read with **section 4 (3) of the firearm Act Chapter 114 Laws of Kenya**. Particulars of the offence are tat on 29th day of October 2014 at workers area in Nakuru East District within Nakuru County the appellant was fond being in possession of a star pistol serial number filed off without the firearm certificate.

2. Count 2 is the offence of **being in possession of ammunitions without firearm certificate contrary to section 4 (1)** as read with **section 4 (3) of the the firearm Act Chapter 114 Laws of Kenya.** Particulars are that on the 29th day of October 2014 at workers area in Nakuru East District within Nakuru County, the appellant was found being in possession of eight (8) rounds of 22 calibre ammunition without firearm certificate.

3. Count 3 is the offence of **being in possession of imitation of a gun without a certificate contrary to section 21 (1)** as read with **section 21 (2) of the firearm Act Chapter 114 Laws of Kenya**. Particulars are that on the 29th day of October 2014 at Workers area in Nakuru East District within Nakuru County the appellant was found in possession of imitation of firearm without firearm certificate.

4. The appellant denied the charge and after full hearing, he was convicted of the 3 counts and sentence to 10 years imprisonment for count 1 and 7 years imprisonment for count 2 and 3.

5. The appellant being aggrieved by the decision of the trial magistrate, filed this appeal on the following grounds:-

i. That the learned trial magistrate erred both in law and in facts by holding that the offences which the appellant had been charged with had been proved beyond any reasonable doubt.

ii. That the learned trial magistrate erred both in law and in facts by failing to comply with section 14 of the Criminal Procedure Code.

iii. That the learned trial magistrate erred both in law and in fact by failing to appreciate that the sentences imposed were excessive and against the weight of the prosecution case.

iv. That the learned trial magistrate erred both in law and in fact by shifting the burden of prove from the prosecution to the appellant contrary to the law.

v. That the learned trial magistrate erred both in law and in fact by failing to comply with the clear provisions of section 333 of the Criminal Procedure Code.

vi. That the learned trial magistrate erred both in law and in fact by failing to consider and to give reasons for dismissing the appellant's plausible defence without offering any cogent reasons.

vii. That the learned trial magistrate erred both in law and in fact by failing to appreciate that crucial witnesses were not called up by the prosecution thus the prosecution case was not proved.

6. In respect to ground 1, the appellant stated that the prosecution failed to prove that the firearm was found in his possession. He submitted that known of the neighed recorded statement that the firearm was found in the appellant's rented house neither was any of them nor the landlord or caretaker were called to adduce independent evidence; and that the document signed by 3 police officers should not be believed.

7. He further submitted that PW3 was not an expert witness under the meaning of **section 48 of the evidence Act**. He added that the investigation officer did not explain how the exhibits were handled or labelled and what is alleged to have been recovered may not be the same exhibit examined by ballistic expert. He added that the ballistic expert was not heard. He stated that PW3's evidence should not be admissible in law as he has not recorded anywhere that he trained in ballistic as working as police officer does not qualify him to be ballistic expert.

8. Appellant further submitted that there no indication of language used during the trial and he was not therefore accorded right to fair trial.

RESPONSE BY THE STATE

9. In response, Mr. Limo for the state submitted that the prosecution called three witnesses who were all police officers and that all the three witnesses were crucial as per the prosecution case. He submitted that the said officers are the ones who recovered the the firearm from the appellant and they did not require any other witness; therefore that ground of appeal should not stand.

10. On the ground that the trial court did not consider his defence, the learned state counsel that from the judgment, it is very clear that the trial magistrate analysed evidence of the appellant while making decision; that the ground of appeal should not therefore stand.

ANALYSIS AND DETERMINATION

11. This being the first appellate court, my duty is to re-evaluate evidence adduced in the trial court and arrive at an independent determination. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

12. On perusal of the lower court record, I note that on the issue of language used, two language English and Kiswahili were used. Record show that the appellant fully participated in the proceedings. He cross-examined all the witnesses. He never complained of language barrier. The fact that he was able to ask questions show that he was able to understand what the witnesses said in court. That ground of appeal cannot therefore stand.

13. I now wish to consider whether the the three counts were sufficiently proved. PW1 testified that together with PW2 and PW3, they were doing investigations on offence of robbery with violence when they were tipped that the appellant was armed with a firearm. He said that, on entering appellant's house, they handcuffed him and did a quick search and in the process, they found firearm, imitation of firearm and ammunitions. He said the appellant was in the house with his family.

14. The appellant testified his defence was not considered; however on perusal of the judgment, I note that the trial magistrate noted that the appellant did not raise any questions to the three police officers who arrested him which would have shed light on his line of defence. No question in respect raid of his shop was raised; further, he never adduced any evidence of having engaged in the business of boutique and that his arrest related to him selling stolen items. No business permit or licence was produced to lay credibility on his allegation in his defence. That ground of defence therefore fail.

15. On the issue of failure to avail landlord or caretaker, I note from evidence adduced that the 3 police officers were present during recovery of firearm and ammunitions. They testified that following tip off they searched appellant's house for stolen items in respect to other cases; that they were not looking for the firearms but in the process of the search, they recovered the firearms and ammunitions. Record show that the three witnesses adduced consistent evidence in respect to recovery. On the other hand, the appellant upon being placed on his defence never availed any of his family members to dispute occupancy of the house the items were recovered. In my view, failure to call a family member, neighbour or property owner did not create any gap in evidence adduced.

16. In so far as sentence is concerned, I note prosecution never produced any records to prove any previous record. He was therefore treated as a first offender; in mitigation, he prayed for a non-custodial sentence. He was sentence to 10 years imprisonment for count one and 7 years each for count two and three. Noting that the appellant was a first offender and was remorseful. I find sentence imposed as harsh and reduce as follows:-

i. Count 1 is reduced to 7 years imprisonment

ii. Count 2 and 3 each reduced to 5 years imprisonment each.

17. **FINAL ORDERS**

1. **Appeal on conviction in respect of the 3 counts is dismissed.**

2. **Appeal on sentence is allowed. Sentence imposed by trial court is set aside and replaced with sentence as follows:-**

i. **Count 1 appellant sentence to 7 years imprisonment.**

ii. **Count 2 & 3 appellant sentence to 5 years imprisonment each.**

3. **Sentences in the three counts to run concurrently from the time he was sentenced by the trial court.**

Judgment dated, signed and delivered at Nakuru this 4th day of December, 2019

……

RACHEL NGETICH

JUDGE

In the presence of:

Schola /Jeniffer – Court Assistant

Appellant in person

Nyakira counsel the for State