



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 92 OF 2014

(FORMERLY KISII HCCRA NO. 120 OF 2013)

BETWEEN

ALLAN OMONDI OGOLLA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 142 of 2013 at Senior Principal Magistrates Court at Migori, Hon. E. M. Nyagah, Ag PM dated on 15th April 2013)

JUDGMENT

1. The appellant **ALLAN OMONDI OGOLA** was charged with the offence of possession of an imitation firearm contrary to **section 34(1)** of the *Firearms Act (Chapter 114 of the Laws of Kenya)*. The particulars of the charge were that on 14th April 2013 at God Jope Village in Migori County he was found in possession of an imitation firearm namely a pistol with the intent to commit a felony namely robbery with violence.
2. He was arraigned in court on 15th April 2013 and after the charge was read to him, he pleaded guilty. The facts as read by the prosecutor were as follows;

On 14th April 2013 at around 10am police officers on patrol received information from members of the public that someone had been spotted with a pistol. The members identified the accused person to the police. The accused was found with an imitation firearm which I wish to produce as an exhibit.

3. The appellant admitted to the facts and the conviction was entered. In his mitigation the appellant stated as follows;

I had no intention of committing a crime. The gadget is a lighter and I work with Panafric Hotel where the gadget is used but finished work late and left with it.

4. The learned magistrate sentenced the appellant to 7 years imprisonment. He now appeals against the conviction and sentence.
5. Ms Owenga, learned counsel for the State, concedes the appeal on the ground that the appellant's mitigation suggested a change of plea which the learned magistrate failed to consider. She however urged the court to order a re-trial.

6. I agree with the concession as the mitigation amounted to a denial of the offence. Moreover, the facts as narrated did not disclose an offence under **section 34(1)** of the **Firearms Act** which provides as follows;

If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence. [Emphasis mine]

7. An essential part of the offence is “*makes or attempts to make any use of an imitation firearm*” and “*intent to commit a felony.*” The facts outlined by the prosecutor do not disclose any overt act that shows that the appellant attempted to make use of the imitation firearm or that he had the intention to commit a felony. The mitigation suggested that the appellant lacked such an intention.
8. As the plea was equivocal, the appeal succeeds. I have considered the possibility of a re-trial but in light of the facts, which do not point to the commission of the offence, and the mitigation offered, I think a re-trial would not serve the interests of justice particularly since the appellant has been in custody for over a year and a half.
9. I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 10th day of November 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga instructed by the Office of the Director of Public Prosecutions, for the respondent.