



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 264 & 265 of 2010**

**JOSEPH MAINA WAMBUGU.....1<sup>ST</sup>**  
**APPELLANT**

**FRANKLIN MOTURI ONCHIRI.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPO**  
**NDENT**

**[An Appeal from original conviction and sentence in Nakuru C..M.CR.C.NO.7041 of 2009 by Hon J. G. King’ori, Senior Principal dated 1<sup>st</sup> September, 2010]**

**JUDGMENT**

The appellants were convicted by the court below on all the three (3) counts of:

- i) **being in possession of a firearm without a firearm certificate** contrary to **Section 4(2)(a)** as read with **Sub-section 3(a)** of the **Firearms Act Cap 114 Laws of Kenya;**
- ii) **being in possession of a ammunition without certificate** contrary to **Section 4(2)(a)** as read with **Section 3(a)** of the **Firearms Act Cap 114 Laws of Kenya;**
- iii) **preparing to commit a felony** contrary to **section 308(1)** of the **Penal Code**

They were sentenced to serve 7 years on each count and the sentences ordered to run concurrently.

Being aggrieved, they have brought two separate appeals challenging both the conviction and sentence. The appeals were consolidated. According to the grounds of appeal filed by the appellants in person and those filed by their learned counsel, they were aggrieved by the decision of the trial court for:

- i) relying on the evidence of a single witness without corroboration to convict;
- ii) failing to consider that the ballistic expert could not establish the ownership of the firearm and ammunition;
- iii) failing to consider the appellants’ defence;
- iv) failing to consider that there was no evidence to link the 2<sup>nd</sup> appellant with the firearm and

ammunition;

v) relying on the evidence of a witness who did not recover the firearm and ammunition;

vi) not appreciating that the evidence on how the firearm and ammunition were recovered was not consistent;

vii) failing to consider that the police did not lift the finger prints on the firearm to establish the last person to handle it.;

viii) not noting that the evidence of P.W.1 and P.W.2 with regard to the 2<sup>nd</sup> appellant and the motor cycle

Learned counsel for the respondent supported the conviction and sentence of the 1<sup>st</sup> appellant but conceded the appeal in respect of the 2<sup>nd</sup> appellant, noting that the prosecution proved the case against the former and that there was no evidence to connect the 2<sup>nd</sup> appellant with the offence.

This being the first appeal, this court must re-evaluate the evidence presented at the trial in order to arrive at its own independent conclusion bearing in mind that it has not seen or heard the witnesses.

The prosecution called evidence to the effect that on 14<sup>th</sup> August, 2009 at 5.30a.m., P.W.2 AP.C. Benjamin Waithaka together with AP.C. Munene Gikandi were patrolling Soilo-Njoro junction on the Nakuru-Eldoret road when they noticed a motor cycle registration No.KMCE 256Z travelling from Nakuru town direction. It made a turn and the rider made a call asking the person he was calling where he was. Two men emerged from the nearby bushes.

As the men mounted the motor cycle, the witness and his colleague challenged them to stop. One of the two men who had emerged from the bushes fled. Upon searching the rider the witness did not recover anything but P.C. Munene recovered the firearm, ammunition and a magazine from the other man who had joined the rider from the bush. This man was identified as the 1<sup>st</sup> appellant while the rider was identified as the 2<sup>nd</sup> appellant. The two were arrested and the recovered items submitted to the ballistic expert, P.W.4, C.I. Emmanuel Langat, who confirmed that the items were a firearm and ammunition, respectively as defined in the **Firearms Act**.

In his sworn defence, the 1<sup>st</sup> appellant stated that on the morning in question (at 5a.m.), he met a man who offered him a ride on a motor cycle to the market where he was working. As they rode, two men stopped them and the man who had offered him a ride dropped something and ran away, leaving him and the motor cycle rider. He picked it and realized that it was a firearm.

For his part, the 2<sup>nd</sup> appellant stated that he was a motor cycle boda boda operator employed by P.W.1, Andrew Nyagote Atai. He recalled that at 5a.m. on the day in question, he was called by a customer to pick him up at Soilo junction and take him to town. When he got to Soilo junction, he called him and together with 1<sup>st</sup> appellant, his customer appeared and as they were mounting the motor cycle, two police officers appeared and ordered them to stop. The 2<sup>nd</sup> appellant's customer escaped leaving him and the 1<sup>st</sup> appellant. The police searched them and recovered the firearm. He however did not specify from who or where it was recovered.

The learned trial magistrate considered the evidence presented by both sides and was convinced that it proved all the counts charged beyond reasonable doubt.

It is not in dispute that the two appellants encountered police officers early in the morning on the day in question. In that encounter, the police recovered a firearm, an AK 47 serial No.563002750, three (3) rounds of ammunition and a magazine. In that encounter, one suspect escaped. The firearm and ammunition recovered during the arrest were found upon examination by the firearms examiner, to be a

firearm and ammunition respectively as defined under the **Firearm Act** and that the firearm in question was capable of being fired.

According to the appellants, the firearm was with the third person who escaped but according to APC Waithaka, the firearm, magazine and ammunition were recovered from the 1<sup>st</sup> appellant. There is no doubt that nothing was found on the 2<sup>nd</sup> appellant. Although APC Waithaka himself did not retrieve the firearm from the 1<sup>st</sup> appellant, he saw APC Munene make the recovery.

Indeed it was the evidence of APC Waithaka that he actually saw APC Munene remove the magazine from the 1<sup>st</sup> appellant's socks. The trial magistrate correctly found that the 1<sup>st</sup> appellant was in possession of the firearm and ammunition without a firearm certificate. But he fell in error in respect of the 2<sup>nd</sup> appellant when he found that the 2<sup>nd</sup> appellant was in conspiracy with the 1<sup>st</sup> appellant for the reason that the defence was not persuasive; that it was unbelievable that the 2<sup>nd</sup> appellant could have been collecting a customer "*at such an ungodly hour.*" The trial magistrate said:

**"The 2<sup>nd</sup> accused did not have to have the firearm and ammunition in his own personal possession as in the case of the 1<sup>st</sup> accused. It is sufficient that he was together with the 1<sup>st</sup> accused at such ungodly hour in a suspicious place."**

With respect, that finding cannot be correct. One cannot be guilty by mere association. It must be shown that he shared the intent or was aware that the 1<sup>st</sup> appellant was in possession of the firearm and was privy to full details surrounding that possession. The 2<sup>nd</sup> appellant gave a plausible defence.

The 2<sup>nd</sup> appellant's appeal is allowed and he is acquitted of all the charges. The conviction is quashed and sentence set aside. He shall be set free forthwith unless lawfully detained.

While I dismiss the 1<sup>st</sup> appellant's appeal, I find no evidence to support the conviction and sentence in respect of count III – **preparation to commit a felony**. No evidence was presented to show that the 1<sup>st</sup> appellant was preparing to commit a felony or even the nature of the felony he is believed to have been preparing to commit. In respect of that count, the appeal is allowed, conviction quashed and sentence set aside.

The sentence of seven years in counts 1 and 2 to run concurrently is confirmed.

**Dated, Signed and Delivered at Nakuru this 11<sup>th</sup> day of July, 2012.**

**W. OUKO  
JUDGE**