



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 164 of 2008

(From Original Conviction and Sentence in Criminal Case No. 7190 of 2007 of the Chief Magistrate's Court at Kibera)

JAMES KIBUE NJERI.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 163 OF 2008

(From original conviction and sentence in Criminal Case No. 7190 of 2007 of the Chief Magistrate's Court at Kibera)

BERNARD ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants, James Kibue Njeri and Bernard Odhiambo, were arraigned in the Chief Magistrate's Court, Kibera, on a charge of possession of a firearm contrary to Section 4(1) of the Firearms Act. After a full trial in which 6 witnesses testified for the prosecution, and the appellants made unsworn statements in their defence, both appellants were found guilty as charged and each sentenced to 10 years imprisonment. They appealed to this court against conviction and sentence.

The prosecution case was that on 19th September, 2007, when Francis Ngumbaru Kibui (PW 3) reached home at about 8.00 p.m. his wife told him that his son, one James Kibue (PW 2) was seen in the company of the 1st appellant who was a cousin to PW 2, and that the 1st appellant had a gun. PW 2 denied that

allegation. PW3 then telephoned one P.C. Jackson Kiprotich Chemworo (PW 1) and informed him about the incident. PW 1 came with P.C. Kerocho Wachisa (PW 4) and interrogated PW 2 who took them to the house of the 1st appellant. They searched the 1st appellant's house but did not recover anything. The appellant then led them to the house of the 2nd appellant where they found the 2nd appellant and his girlfriend. They recovered a pistol which was lying on the floor and was covered with a rug. It was then that they arrested the appellants and the son of PW 3. The latter was subsequently released while the appellants were charged with the offence.

The pistol which was recovered from the house of the 2nd appellant was examined by PW 5, one Johnstone Musyoka Mwangela. That witness is attached to the firearms laboratory of the C.I.D. Headquarters, Nairobi. From his examination of the pistol, he found that it was a US colt revolver S/No. 39711.

Each appellant made an unsworn statement, but the court finally found both of them guilty as charged. In their respective appeals, each appellant alleged, inter alia, a violation of their constitutional rights under Section 72(3) (b) of the Constitution by being kept in custody for more than 24 hours before production in court, and discrepancies in the evidence tendered by prosecution witnesses.

The particulars of the charge against the appellants were that –

“1. JAMES KIBUE NJERI 2. BERNARD ODHIAMBO – On the 19th day of September 2007 at Kawangware within Nairobi Area Province, jointly without reasonable excuse had in their possession a firearm namely, a pistol .38 mm US Army Colt Serial Number not visible without a firearm certificate.”

Section 4(1) of the Firearms Act under which the appellants were charged reads as follows –

“Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.”

The first issue which the prosecution had to prove beyond reasonable doubt was that the appellants were in possession of a firearm. The term **“firearm”** is defined in Section 2 of the Firearms Act, Cap. 114 of the Laws of Kenya as follows –

“ ‘firearm’ means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile ...”

The term **“lethal weapon”** is in turn defined as –

“ a weapon capable of causing death, injury, maiming or any other bodily harm whether or not the weapon is barreled from which any shot, bolt bullet ... e.t.c can be discharge ...”

The relevant evidence of PW 5, Johnstone Musyoka Mwongela who was the firearms examiner and whose work involves examination and identification of ammunition and components thereof run as follows –

“On 26.10.2007 I received an exhibit from Corporal Jacktone Mwandomo. It was one (1) US Colt revolver S/No. 39711 ... It was accompanied by exhibit memo form to ascertain whether the exhibit was a firearm and to give the type. I did examine the exhibit and these were my findings:-

(1) Exhibit A is a US Colt revolver in caliber 4.5 inches. Visual examination of the exhibit revealed that it was of poor condition and had some missing parts i.e. its cylinder (six shot) was missing. The revolver could not hold any ammunition and therefore not capable of firing.

(2) Exhibit A was not capable of firing

ammunition. However it was a firearm in

terms of the Firearms Act ...”

The witness here engaged himself in a very singular contradiction. By definition, a firearm means ... **“a weapon ... from which any shot, bullet or other missile can be discharged ...”** The Oxford Advanced Learner’s Dictionary defines **“discharge”**, among other definitions, as **“to fire or shoot a gun.”** A firearm is therefore a weapon from which a shot or bullet can be fired. Since the pistol recovered from the 2nd appellant’s house **“could not hold any ammunition and therefore incapable of firing”** it follows that the alleged pistol was not a **“firearm”** within the definition given in the Firearms Act and therefore the appellants were not in possession of a firearm as alleged in the charge sheet.

For this reason alone, the appellants ought not to have been arrested in the first place, let alone to be charged with being in possession of a firearm which never was. This ground alone suffices to allow their appeal.

No doubt their constitutional rights were also flouted as there is no explanation as to why they were held in custody for more than 24 hours before production in court. If they so wish they can pursue their rights under Section 72 (6) of the Constitution.

Being satisfied that the pistol in question was not a firearm as charged, the appellants’ appeal is hereby allowed. Their conviction for being in possession of a firearm is hereby quashed and the sentence of imprisonment for 10 years each is hereby set aside. Each of them is accordingly set free unless otherwise lawfully held.

Dated and delivered at Nairobi this 5th day of November 2009.

L. NJAGI

JUDGE