



## **Oyuga v Republic**

**Court of Appeal, at Kisumu June 21, 1985**

**Nyarangi JA, Platt & Gachuhi Ag JJA**

**Criminal Appeal No 15 of 1985**

**(Appeal from a judgment of the High Court of Kenya at Nairobi, Schofield J)**

**June 21, 1985, Nyarangi JA, Platt & Gachuhi Ag JJA delivered the following Judgment.**

This is a second appeal from the appellants Conviction for being in possession of a firearm without a firearm certificate on the first count, and for being in possession of ammunition without a firearm certificate on the second count, both counts being contrary to the provisions of Section 4(2) (a) of the Firearms Act (Cap 114). The appellant was sentenced by the Resident Magistrate to serve concurrent terms of 4 years imprisonment on each count. The gun and ammunition exhibited were ordered to be forfeited to the Republic of Kenya under the provision of Section 36(1) (b) (;) of the Act (Cap 114) and it was further ordered that the exhibits should be handed to the OCS, Kisumu Police Station for further transmission to a lawful custody as required by law within 14 days of the date of the order.

The High Court on first appeal dismissed the appeal against conviction but reduced the terms of imprisonment, to concurrent terms of two years imprisonment. The forfeiture order was allowed to stand.

On appeal to this court, the Appellant has raised the following issues:-

- 1) that the ballistic expert's evidence was contradictory concerning the adaptation of the gun for firing;
- 2) that it was not a misdirection that the defence was not accepted as raising at least a doubt the reliability of the prosecution case;
- 3) the sentence is still excessive

On the first point, it is difficult to appreciate that there was any contradiction in the expert's evidence. Apparently the home-made shot-gun was not test fired. It was understood that the gun could accommodate, but not fire, the seven rounds of ammunition found with the gun. It may be that this was one reason why the sentence was reduced, because the gun could not be used in other criminal offences. It was not the gun that was tested fired, but two of the seven bullets. Perhaps, the Appellant is of the view that a firearm must be able to fire ammunition. A firearm is defined, of course, with that action as the first part of the definition in the Firearm Act Section 2; but there are subsidiary definitions as follows:-

“or which can be adapted for the discharge of any shot, bullet or other missile.”

It was on this part of the definition that the charge was framed and evidence led, and the lower courts both accepted the evidence of adaptation. No point of law arises on this evidence.

On the second point, the Appellant urges this court to overturn the concurrent findings of fact, that the appellant had possession of the gun and ammunition as the prosecution witnesses alleged. This court, it is said, should find that that was not proved, because of the defence of the Appellant borne out by the witnesses, one of whom was an Assistant Chief that the gun and ammunition had been dropped down at the Appellant's door. It was later picked up by the police, who were chasing other people who had dropped it near the appellant's door.

The prosecution case had been that the gun and ammunition had been found by the police under a

mattress on a bed in the Appellant's house. The learned trial magistrate had this issue very clearly in mind. The learned trial magistrate had this issue very clearly in mind. He set out all the evidence. He recognised that other people had been arrested at about the same time, and that three people did escape from custody. Nevertheless he accepted the evidence of the Police witnesses that they had found the gun and ammunition in the clear custody of the appellant, and not outside his house as alleged by the defence. From the evidence as a whole it is clear that the defence did not raise a doubt as to the possession of the Appellant. He had no firearm certificate for either the gun or ammunition. Consequently he was properly convicted on both counts as indeed the High Court found on first appeal. No issue of law arises on this appeal, for this court to deal with.

On the third point, this court has no jurisdiction to deal with severity of sentence on second appeal (see Sec 361 of the Criminal Procedure Code). But the order for forfeiture and disposal seems to be unusual. If it is true that the order was made under section 36(1) (b) (i) of the Firearms Act, that provisions would not be appropriate. It should have been section 36 C1) (a) (;) the appellant having been convicted and sentenced to imprisonment.

There is no doubt that the gun should be destroyed as it was home-made and not serviceable. The ammunition may be found for them.

Except for the variation of the order of forfeiture, the appeals against conviction and sentence are dismissed.