



**REPUBLIC OF KENYA**

**Rotich v Republic**

**Court of Appeal, at Nairobi June 10, 1985**

**Hancox JA Platt & Gachuhi Ag JJA**

Criminal Appeal No 23 of 1985

(Appeal from the High Court at Nairobi, Aganyanya J)

**June 10, 1985, Hancox JA, Platt & Gachuhi Ag JJA delivered the following Judgment.**

The appellant was at the material time on retirement leave from the Kenya Army after 15 years' service. He was charged with, and, according to the record, purported to plead guilty to, the offence of possessing a total of 988 rounds of assorted ammunition without a valid certificate under section 4(1) of the Firearms Act (cap 114) of the Laws of Kenya.

He did not at that time claim to be covered by any exemption, nor do any of the exemptions listed in section 7 of that Act apply to him.

His first appeal to the High Court was summarily rejected notwithstanding that the petition of appeal to that court contained at least two points of law, namely that appellant was still subject only to military law, and that the proceedings were not held in open court. Whether either of those grounds would have succeeded does not concern us on the second appeal, because, as learned state counsel concedes, the appeal should have been properly heard and determined by the first appellate court as it does not fall within the provisions of section 352(2) of the Criminal Procedure Code (cap 75).

In the course of his submissions Major Rotich produced a letter from the Army Headquarters, his certificate of service and his testimonial, all of which support the dates between which he claimed that he was on retirement leave. He also stated that the issue voucher covering the ammunition in question, which presumably would provide him with the necessary authority to possess it, inter alia under section 26 of the Firearms Act, were taken from him by Inspector Opondo of the Kenya Police and not returned. Clearly this is a most material document which should be before the court, though it would not of course authorize him to possess the other items of ammunition which he said in his mitigation to the magistrate that he had found hidden in a training area at Kajiado.

We would observe that although a court martial has jurisdiction to try a person subject to military law, for any civil offence under section 69 of the Armed Forces Act (cap 199), the question of whether this affects the jurisdiction of the civilian criminal courts to deal with such offences, to which all persons in Kenya normally are subject depends on the provisions of the Armed Forces Act and in particular sections 141 to 143 notably section 143, thereof. In this connection we would draw attention to the concluding words of section 133(1) of the United Kingdom Army Act 1955, which states :

133 jurisdiction of civil courts

(1) Where a person subject to military law –

(a) has been tried for an offence by a court-martial or has had an offence committed by him taken into consideration by a court-martial in sentencing, him, or

(b) has been charged with an offence under this Act and has had the charge dealt with summarily by his commanding officer or the appropriate authority,

a civil court shall be debarred from trying him subsequently for an offence substantially the same as that offence; but except as aforesaid nothing in this Act shall be construed as restricting the jurisdiction of any civil court to try a person subject to this Act for an offence.

In the recent English case of *R v Garth* [1985], *Law Society's Gazette* February 13, page 437, the court martial appeals court considered the reverse situation in which the appellant was tried by court martial for the offences of theft and using a false credit card.

They held that despite this appellant's transfer to the reserve he was still subject to air force law and that his plea to the jurisdiction of that court had been rightly rejected. For these reasons we allow the appeal, quash the summary rejection of the first appeal by the High Court and return the case to the High Court with a direction to admit it to hearing and to determine it according to law.

In view of the lapse of time this should take place as soon as possible.