REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 204 of 2009

BETWEEN

ERICK OTIENO OOLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu (Mugo, J) dated 11th July, 2008

In

H.C. Cr. A. No. 88 of 2007)
****

JUDGMENT OF THE COURT

On the 21st June, 2007, Erick Otieno Oola, the appellant herein, appeared before the Senior Resident Magistrate at Nyando charged with three offences as follows:-

> ***"COUNT 1: CREATING A DISTURBANCE IN A MANNER LIKELY TO CAUSE A BREACH OF THE PEACE CONTRARY TO SECTION 95 (1) (B) OF THE PENAL CODE:***
>
> ***On the 13th day of June, 2007 at North East Kano Location in Nyando District within Nyanza Province, created a disturbance in manner likely to cause a breach of the peace by threatening to cut BENTA AKINYI OOLA.***
>
> ***COUNT 2: BEING IN POSSESSION OF CANNABIS SATIVA (BHANG) CONTRARY TO SECTION 3 (2) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT NO. 4 OF 1994:***
>
> ***On the 14th day of June 2007 at North East Kano Location in Nyando District within Nyanza Province was found being in possession of one roll of bhang, valued at Kshs.10/-.***
>
> ***COUNT 3: BEING IN POSSESSION OF IMITATION FIREARM CONTRARY TO SECTION 34 (2) OF THE FIREARMS ACT, CAP 114 LAWS OF KENYA:***
>
> ***On the 14th day of June, 2007 at North East Kano Location in Nyando District within Nyanza Province was found being in possession of an imitation firearm."***

The magistrate read these charges to the appellant and he is recorded as having answered in Dholuo:-

> **"Count 1: It is true**
>
> **Count 2: it is true.**

Count 3: It is true."

The prosecuting police officer, Inspector Chania then narrated to the Magistrate the facts the prosecution was relying on in support of the charges. Those facts were:-

> ***"That on 12.6.07 at 10.00 a.m., accused a son of the complainant went to complainant demanding that she sells her piece of land within 3 days failure of which she would be cut into pieces. The following day he armed himself with a panga and started chasing complainant threatening to cut her. Complainant reported to the area Chief who with APS went to accused's house and arrested him. Upon a search they recovered a panga used to chase the complainant. They also recovered one roll of cannabis sativa and one imitation of a firearm under the pillow. Accused was taken to Masogo AP camp and later to Awasi where he was charged with the present offences.***
>
> ***I produce the panga exh. 1, one roll of bhang as exh. 2 and imitation firearm as exh. 3".***

On being asked about these allegations the appellant told the Magistrate:

> ***"Facts are true"***

The Magistrate took this to mean the appellant was pleading guilty to all the three charges, entered a plea of guilty against him and duly convicted him on all the three counts. After hearing what the appellant had to say in mitigation the Magistrate sentenced him to serve six months imprisonment on count one, one month on count two and ten years on count three , all the prison sentences being ordered to run concurrently. The appellant appealed against the conviction and sentences to the superior court but by its judgment dated at Nakuru on 11th July, 2008 and delivered at Kisumu on 28th July, 2008, the superior court dismissed his entire appeal against the conviction and confirmed the sentences imposed by the Magistrate. Mugo, J held as follows:-

> ***"I am of the considered view the conviction was properly arrived (sic) and the sentences, which were ordered to run concurrently, are quite appropriate in the circumstances. That the appellant would threaten his own mother with death, arm himself and chase her, under the threat of cutting her to pieces, clearly depicts him as a murderous person who deserved a severe sentence. His being found with imitation firearm and Cannabis Sativa compounded the offence of creating a disturbance and does portray him to be a person who is dangerous to society at large. He admitted before this court that the Cannabis Sativa and the imitation firearm were found in the house. That the same belonged to someone else is something he introduced at the appeal and the same shall be treated as an afterthought."***

In his memorandum of appeal in this Court the appellant says:-

> **"(2) THAT I appeal against the conviction and sentence in the High Court of Kenya at Kisumu vide criminal appeal No. 88 and the same appeal was rejected by the High Court Judge at Kisumu.**
>
> **(3) THAT Judge erred in law when he rejected my appeal without examining the grounds of my appeal."**

We do not think there can be any valid complaint against the conviction on count one and count two . The appellant first threatened to cut his mother into pieces and the following day he actually armed himself with a panga and chased his mother with it intending to cut her into pieces. When he was searched he was found with a roll of bhang and before the Magistrate he said nothing about its having been left in his house by someone else. We think the appellant

was rightly convicted on counts one and two and as the conviction was based on his own admission, he has no right to appeal for a second time to this Court on these two counts. The sentences imposed on those counts were lawful and we cannot interfere with them. We dismiss the appeal on counts one and two.

That leaves the third count involving the imitation firearm. That charge was laid under ***section 34 (2)*** of the Firearms Act. The section is in these terms:-

> "***34 (1). If any person makes or attempts to make use of a firearm or an imitation firearm with intent to commit a criminal offence he shall be guilty of an offence and liable to imprisonment for a term not less than seven but not exceeding ten years imprisonment 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.***
>
> ***(2) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code.***
>
> ***(3) In this section 'imitation firearm' means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not."***

Only ***section 34 (1)*** creates a defined offence with a prescribed penalty. The offence created in that subsection is making or attempting to make use of a firearm or an imitation firearm with intent to commit a criminal offence and the prescribed penalty for that offence is imprisonment for not less than seven and not more than ten years. Apart from the fact that count three was not laid under ***section 34 (1)*** of the Act and even if it had been laid under the section, the facts put before the Magistrate did not even remotely show that the appellant had made use of or attempted to use the imitation firearm to commit any criminal offence when he (appellant) first threatened his mother with death. He had said he would cut her into pieces, not shoot her into pieces. When he actually chased his mother so as to cut her into pieces , he used a panga not the imitation firearm. The prosecution must have been aware of these facts and hence their decision not to charge the appellant under section ***34 (1)*** of the Act. Instead they chose to charge the appellant under section ***34 (2)*** but that subsection does not create any offence at all and does not provide any penalty. All that the subsection does is to deem an imitation firearm to be a dangerous weapon for the purposes of the Penal Code, so that if an accused person be charged with robbery with violence under ***section 296 (2)*** of the Penal Code and it is alleged in the particulars of the charge that the accused person was armed with a dangerous or offensive weapon, to wit an imitation firearm, the accused person will not be allowed to say that such imitation firearm cannot be a dangerous or offensive weapon or instrument. ***Section 34 (2)*** of the Firearms Act "*deems*" such a weapon to be dangerous or offensive.

Miss Oundo, the learned Principal State Counsel, argued before us that the statement of offence should have stated that the appellant was in possession of an imitation firearm contrary to ***section 34 (2)*** as read with ***section 89*** of the Penal Code and that we should uphold the conviction on count three on that basis. We do not think such a charge would have made much sense. We set out the relevant provisions of ***section 89*** of the Penal Code:

> ***"89 (1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition,***

offensive weapon, incendiary material or explosive is intended to be used or has been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.

89 (2) Any person who consorts with, or is found in the company of, another person who, in contravention of subsection (1) is carrying or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that he intends to act or has acted with such other person in a manner or for a purpose prejudicial to public order, is guilty of an offence and is liable to imprisonment for a term not exceeding five years."

These two subsections of ***section 89*** of the Code create complete offences in themselves with prescribed penalties and we do not appreciate how another section like ***section 34 (2)*** of the Firearms Act which creates no offence at all can be added to any of those two sections. We suspect Miss Oundo had in mind a situation like ***section 203*** of the Penal Code which creates and defines the offence of murder and ***section 204*** which prescribes the penalty for the offence of murder under ***section 203***. A charge of murder is thus framed as:

"Murder contrary to section 203 as read with section 204 of the Penal Code,"

the first section creating and defining the offence and the second section referring to the sentence to be imposed. We reject Miss Oundo's contention that we read ***section 34 (2)*** of the Firearms Act in conjunction with any of the provisions of ***section 89*** of the Penal Code. It would make the charge meaningless.

The consequence of our foregoing findings must be that in count three the appellant was charged with no offence known to the law and the penalty for which is not provided. That was in contravention of ***section 77 (4)*** of the Constitution of Kenya:-

"No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

It is apparent from the record that Mugo J, in dismissing the appellant's appeal on count three, did not check the provisions of section ***34 (2)*** of the Firearms Act. Had she done so the learned Judge would have noted that the section does not create any offence known to the law. In the event, we allow the appellant's appeal on count three, quash the conviction recorded on that count and set aside the sentence of ten years imprisonment imposed thereon. It is likely that the appellant has completed serving the sentences imposed on counts one and two. If that be the position , then he must be released from prison forthwith. Those shall be the Court's orders on the appeal.

Dated and delivered at Kisumu this 18th day of June, 2010.

R.S.C. OMOLO
……..
JUDGE OF APPEAL

P.N. WAKI
…….

JUDGE OF APPEAL

J. G. NYAMU
…….
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.