

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, BOSIRE & KEIWUA, J.J.A.)
CRIMINAL APPEAL NO. 11 OF 1999

BETWEEN

GEOFFREY NJENGA KANGOTHO APPELLANT
AND
REPUBLIC RESPONDENT

REASONS FOR THE JUDGMENT OF THE COURT

On 14th January, 2000, we allowed the appellant's appeal and set aside the convictions and sentences that had been made against, and passed on, him. We now give our reasons for doing so.

The grounds of the appellant's appeal were, in summary, that the charges upon which he had been convicted namely, being in possession of firearms and being in possession of ammunition without a firearm certificate, were not only, defective in that they were bad for duplicity but also, that the evidence given at the trial, did not establish the guilt of the appellant on those charges. He further urged that the sentence of two strokes of the cane imposed on him in respect of his conviction on the charge of being in possession of ammunition, was illegal. Mr. Okumu appearing for the respondent did not support the convictions on the two charges and also conceded that the sentence of two strokes of the cane passed on the appellant, was, having regard to the fact that the related charge had been brought under S.4(2) of the Firearms Act and not under S.4(1) of that Act, illegal.

As regards the charge of being in possession of firearms, the particulars were that the appellant was found without reasonable excuse, in possession of two firearms namely, a Beretta pistol, which was misspelt in the charge sheet as a "berelta", serial number 1060179 and a Smith and Wesson revolver, serial number 56K1462. But the evidence of the prosecution witnesses who recovered these firearms namely, Police Constables Juma Kisela and Richard Kamuhia, show clearly that the only firearm that can be said to have been found in the possession of the appellant, was a Beretta pistol. There was no evidence given by anyone that the Smith and Wesson revolver was found in the possession of the appellant. If anything, it was in the possession of the person who was in the company of the appellant and who, was shot dead by Juma Kisela as he aimed the Smith and Wesson revolver at him. All this notwithstanding, the learned Principal Magistrate, found the appellant guilty not only, of possessing the Beretta pistol but also, of the Smith and Wesson revolver.

The inclusion of both firearms in the charge, led to this confusion and to duplicity in the charge. This would have been otherwise, if it was shown, which was not the case, that the possession of the two firearms constituted one single and indivisible act on the part of the appellant. The charge against the appellant of being in possession of firearms, was thus, bad for duplicity. See *R v De Commarmond* (1959) E.A. 64.

Matters were even made worse when, according to the evidence of Mbogo Donald, the firearm expert, the serial number of the Beretta pistol which he examined and which presumably was the one alleged to have been found in the possession of the appellant, was 868179 and not 1060179 as contained in the particulars of the charge. The Police Constable John Namhundu, from whom Mbogo Donald said he had obtained the pistol, did not even give evidence as to how he came into possession of the pistol in the first place, or the connection of the appellant with it or the Smith and Wesson.

The same duplicity evidenced in the charge of the appellant being in possession of firearms, was also exhibited in the particulars of the charge of being in possession of ammunition. Here, the appellant was charged with being in possession not only, of the three rounds of ammunition that were in the Beretta

pistol, but also, with the six rounds of .38 inch calibre bullets which were found in the Smith and Wesson pistol which the appellant's companion had, and which obviously, would not have fitted the appellant's Beretta pistol. Here again, the appellant even on the facts, was wrongly convicted of being in possession of all the nine rounds of ammunition. Furthermore, whether these were the rounds of ammunition that were found in the Beretta pistol which the appellant had in his possession or those that were in the Smith and Wesson pistol, is doubtful because these again, were obtained by the firearm expert from John Namhundu who was not called to establish any connection of the appellant with the ammunition.

It is for all these reasons that we allowed the appellant's appeal and set aside his convictions on the two charges and the sentences passed on him on those charges.

Dated and delivered at Nairobi this 4th day of February, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.