



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CRIMINAL APPEALS NOS 40 “B”, 63 – 66 OF 1993**

**ALI & 4 OTHERS .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Having regard for the record of the pleas, the facts outlined by the prosecution, and the response thereto by each accused, the Court considers that the pleas of guilty were correctly entered, and the conviction of each accused following thereon was proper. There is nothing to suggest any misunderstanding of the counts charged, and there is nothing to suggest that the trial magistrate misunderstood the accused. The facts outlined fairly brought to the fore the salient aspects of each count. Each accused was under no misapprehension of what he was answering to.

The Court upholds the convictions.

There were facts outlined by the prosecution and the accused, affecting sentence. Although the prosecution did not present to the Court any record of previous convictions related to the charges in the case, and the accused were treated as first offenders, the prosecution urged the Court not to turn its eye away from “the bandits which have affected Isiolo area”. The prosecution stated that the offences are prevalent. Banditry in Isiolo might have been there. But it may be that it was not caused by the accused. There was no evidence or suggestion that any weapon found in the possession of the accused had been used in the perpetration of any lawlessness or murder, or any acts of gangsterism. Nor was the assertion on the prevalence of the offences supported by any date. Nevertheless, while the trial magistrate treated the accused as first offenders, he was of the unsupported opinion that the offence of possessing firearms without relevant certificates is prevalent within this part of the country. That conclusion should have been arrived at on facts placed before the Court. There were no facts in this regard, and that conclusion should not have been considered by the trial court.

On the other hand, if it was true as the trial magistrate thought it to be the case, that the possession of firearms without certificates was prevalent within the area in question, and if it was true as the prosecution stated, that bandits have affected the Isiolo area, these considerations, should have been taken in the light of the mitigating statements made by the accused. The accused variously stated that their fathers, mothers and brothers had been killed by bandits, and the accused kept the firearms for self-protection and defence of their property, and that the accused could not walk from Komu to Isiolo without being armed. The accused, for example, the third and fourth ones, in fact called upon the Government to protect them against bandits, and they said their intention was not to fight anybody with the firearms. One of the accused said he had handed in some firearms to the authorities and retained others with which to protect himself. In the absence of contradicting matter, and in the light of the Court having believed that banditry is prevalent in the area, and no sinister plan having been suggested against the accused, the extenuating circumstances surrounding the possession of the firearms without the relevant certificates, should have ameliorated the penalties imposed. Each accused seemed to realize his wrongous act and asked for forgiveness. None of them seemed defiant.

Being first offenders, committing offences related to the maintenance and preservation of their own personal and property security and safety, in an area where the accused felt the need for governmental

protection and have sought that protection, and as the swift and able performance of our security personal had fortunately and commendably retrieved the weapons before they were put to bad use, it being shown to these accused persons by their arrest, prosecution and conviction, that it is not good or safe to take the law and security measures in your own hands, it was sufficient to imprison the accused for short terms of imprisonment on this first occasion. The sentences of imprisonment ranging from one year to five years, were, in the circumstances of the offences, excessive and punitive out of all reasonable proportions.

While punishing offenders may often be retributive, as appears to have been the only objective of the sentences in the instant case, let it not be forgotten that raving vengeance meted out in excess may destroy an otherwise good citizen, turn an accidental offender into a revengeful hardcore criminal expensive to the state. First offenders, warning and corrective sentences would have sufficed in this case.

For these reasons I quash each sentence of imprisonment passed against each appellant, and substitute therefore the sentences of imprisonment of each appellant for seven months and three weeks on each count, except on count one on which I confirm the sentence of imprisonment for one month, all the sentences to run concurrently, from the date on which each appellant was sentenced b y the trial court, lending to-day.

The Court finds nothing to justify interference with the sentence of forfeiture. The forfeiture of the firearms and others is upheld.

Accordingly, the appeals against conviction are dismissed; the appeals against the sentences are allowed in part as aforesaid. Orders accordingly.

Dated and delivered at Meru this 26<sup>th</sup> day of October, 1993

**R.C.N KULOBA**

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**JUDGE**