



**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 122 OF 2012**

**Appeal from the conviction and sentence by the Senior Resident Magistrate at Mwingi in Senior Resident Magistrate’s Court Criminal Case No. 53 of 2012 (Mr. H.M. Nyaberi)**

PETER KARANJA

MURIGI.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

**JUDGEMENT**

**Background**

Peter Karanja Murigi, the appellant in this judgment, was charged with two counts of handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The charges were unusual in that the “goods” allegedly handled were a Ceska pistol serial number F9938 and 3 rounds of ammunition of calibre 9mm. The two offences are alleged to have been committed on 5<sup>th</sup> October 2011 at Kilimambogo Farm within Kiambu County.

The appellant pleaded guilty to the first count and after admitting the facts was convicted and sentenced to serve 10 years in jail. He denied the second count and the case was subjected to full trial after which he was found guilty and convicted. He was sentenced to another 10 years in jail. Both sentences were to run concurrently.

**Petition of Appeal**

By his amended petition of appeal, with leave of the court, filed on 28<sup>th</sup> January 2014, the appellant has raised and submitted on the following grounds:

- i. That the charge is defective in that he was charged with handling stolen goods under section 322 (1) and (2) of the Penal Code instead of an offence under section 4(a) of the Firearms Act and that a firearm and ammunition cannot be classified as goods.
- ii. That the evidence of the prosecution witnesses was contradictory. He pointed out on the areas of contradictions that the witnesses’ evidence did not agree on how he was arrested and the number of shots fired during his arrest.
- iii. That he was not identified as the owner of the house where the pistol was recovered from or the person who escaped from the alleged house. He submitted further that nothing belonging to him was found in the alleged house to connect him with this offence.

- iv. That none of the arresting officers knew him before and that they were not among the officers who allegedly recovered the pistol. He further submitted that the chief did not accompany the arresting officers to point him out to them.

Learned state counsel conceded the appeal. He briefly submitted that he had been instructed not to oppose the appeal because the charge is defective *ab initio*.

### **Facts of the case**

SP Mohamed Omar Gedi, PW3, was at the District Commissioner's Office at Thika on 4<sup>th</sup> October 2011 when one Peter Wainaina (not a witness) Chief of Gatunyaga Location and Sergeant Peter Ndo, PW4, presented to him a note left at the suggestion box that the appellant was in possession of a gun. PW3 mobilized police officers to visit the appellant who is said to reside at Kilimambogo town. While approaching the house, someone came out of it and ran away. Attempts to shoot in the air with a bid to arrest him failed. A search was conducted in the house and a Ceska pistol Serial Number F9938 with three rounds of ammunition was recovered.

On 25<sup>th</sup> January 2012 police received information that the appellant had been spotted at Kilimambogo trading centre. Police were sent to the place to arrest him. Among those sent were AP Corporal Abdi Ahmed Hassan, PW1 and APC Geoffrey Mwangi Maina, PW2. They found the appellant at a miraa kiosk and arrested him. He was later handed over to PC John Kipchoge, PW5, of Mwingi CID Office and charged with this offence. It is alleged that the pistol, which had been lost, belonged to one IP Peter Kihara of Mwingi East District.

In his defence the appellant told the lower court that he had found the pistol by the roadside near a school known as Kolping and taken it to his house. He said he stayed with the pistol for three days and was afraid to hand it over to the police. He said he did not inform the chief and that when he spotted police approaching his house he sensed danger and fled and that although police fired in the air to stop him he did not stop. He said he did not know how to use a gun and did not open it.

### **Determination**

After completing the investigations, the appellant was charged with two counts of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code. The 'stolen' goods are the Ceska Pistol and 3 rounds of ammunition. The manner the charge is drawn is the bone of contention in this appeal and the reason the learned state counsel conceded the appeal.

I have examined the evidence tendered in the lower court in support of this charge. Obviously the charges were wrongly drawn and the investigations, if any, poorly conducted. The background was not laid as to how the gun was lost in the first instance; the officer who allegedly lost it did not testify and the gun and the ammunition were not taken to the ballistic expert to confirm they were firearm and ammunition respectively as defined under the Firearms Act.

Coming back to the appeal, it is true that there is no evidence to show how the appellant and his alleged house were identified. This court however finds that the person who ran away from that house is the appellant by virtue of his admission. I have no doubt therefore that the pistol was found in that house as admitted by the appellant. Further, after considering the appellant's admission that he had found the gun and kept it, I have no doubt that this evidence is true. What is lacking is evidence confirming that this is the gun allegedly stolen from IP Peter Kihara.

The issue I want to address is the manner in which the police chose to charge the appellant. I cannot imagine what led police to charge the appellant with handling stolen goods instead of an offence under section 4 (1) (a) of the Firearms Act.

I have considered the evidence carefully and the admission by the appellant that he collected the gun by the roadside and that he feared to surrender it to the police and kept it in his house. I have no doubt

in my mind that an offence under section 4(1) (a) of the Firearms Act was committed. With no evidence to the contrary, it is the view of this court that the appellant found this gun and kept it in his house. It was foolhardy for the appellant to keep a gun in his house knowing very well that it was wrong. He admits he was advised by his step father to surrender the gun to the police but he did not do so. A gun is not any item to be kept at home unless someone intends to either use it or sell it.

I have read the Criminal Procedure Code, specifically sections 179 to 190 all inclusive. These sections deal with convictions for offences other than those charged. This is because in my considered view, an offence was committed but it is different from what the appellant was charged with. These sections provide for situations when an accused person can be convicted with an offence other than the one he is charged with. In my view, this court is not able to convict the appellant for an offence under section 4 (1) (a) of the Firearms Act because an offence under this section of the law is not minor or cognate to the charge he was tried for. Therefore, on that legal technicality, this court has no option but to allow this appeal, which is hereby allowed. The appellant shall be set a liberty forthwith unless for any other lawful course he is held in custody. It is so ordered.

**Dated, signed and delivered this 17<sup>th</sup> June 2014.**

**S.N.MUTUKU**

**JUDGE**