**Mwangi v Republic**

[1974] 1 EA 108 (HCK)

**Division:** High Court of Kenya at Nyeri

**Date of judgment:** 15 August 1973

**Case Number:** 3/1973 (41/74)

**Before:** Bennett J

**Sourced by:** LawAfrica

*[1] Criminal Practice and Procedure – Charge – Duplicity – Possession of firearm and ammunition*

*without certificate – Properly charged in single count – Firearms Act* (*Cap.* 114), *s.* 4 (*K.*)*.*

*[2] Evidence – Possession – Recently stolen property – Firearm stolen thirteen months before –*

*Possession not recent.*

**Editor’s Summary**

The appellant was found in possession of a revolver and eight rounds of ammunition which had been

stolen thirteen months earlier, at a time when he was in prison.

He was convicted on a single charge of being in possession of the revolver and the ammunition

without a firearms certificate and of receiving the revolver knowing it to have been stolen. The

magistrate held that his possession of it was recent and had not been explained.

On appeal it was contended that the first charge was duplex, in that the firearm and the ammunition

should have been charged separately and that the possession could not be recent.

**Held –**

(i) the firearm and the ammunition may be charged in one count;

( ii) possession of a firearm thirteen months after its theft could not be recent possession.

Appeal allowed in part.

**No cases referred to in judgment**

**Judgment**

**Bennett J:** The appellant (who was the first accused in the court below) was convicted in the resident

magistrate’s court, Nyeri, on count 4 of the charge of being in possession of a revolver and eight rounds

of ammunition without a firearm certificate contrary to s. 4 (1) of the Firearms Act (Cap. 114) and was

sentenced to five years’ imprisonment. On count 7 he was convicted of handling the same revolver,

contrary to s. 322 (1) of the Penal Code, and sentenced to twelve years’ imprisonment with hard labour.

The sentences on both counts were ordered to run concurrently. He appeals against the convictions and

sentences.

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The revolver in question was stolen from the car of a Mr. Hancock in Nairobi on the 31 July 1971.

There was evidence that on that date the appellant was serving a term of imprisonment so that he could

not have been the thief. The facts in so far as they implicate the appellant, are set out in the following

passage from the judgment of the magistrate:

“Briefly, the facts of the prosecution case are that a result of information to the effect that a gang of robbers

was in the Mukurweini area, with rifles, a police party, consisting of five police constables, all armed under

the command of Cpl. Symon Waweru, the latter being armed with a hatchet, set out to patrol the area on the

night of 28/29 August 1972. At about 2.30 a.m. that night this police party came across two white parked

motor vehicles make 17M Taunus bearing reg. KKW 159 and a Triumph, bearing reg. KMV 115 – both

vehicles parked on the Gikondi/Gakindu Road in Kamuchuni village, Nyeri District, the Taunus having four

occupants – all men and the Triumph with three men – both vehicles being about 23/24 yards apart. The

police landrover stopped behind the Triumph. Cpl. Symon ordered the occupants of the Taunus to come out,

only to find three doors open, a shot being fired, and a man armed with a revolver standing outside near the

vehicle. The Cpl. at once hit the man’s arm with his hatchet, with the result the revolver fell down on the

ground. This man, subsequently identified as accused 1 was arrested, and the police got hold of his revolver

which was subsequently identified as being the same revolver which was stolen from the locked vehicle of

Robert Hancock. . . . Each of the four accused persons was there searched and from the first accused’s

hip-pocket of the long trousers, were recovered four live rounds of ammunition, while the revolver, which he

had earlier possession of contained three live rounds and one cartridge case.”

At his trial the appellant elected to make an unsworn statement in which he denied being a member of the

gang. He stated that on the night in question, he was drinking in a bar up till 11.30 p.m. and that on his

way home, a police landrover drove up behind him and stopped. A policeman in the vehicle told him that

he was very drunk and two policemen got out of the vehicle and ordered him to get into the landrover.

When he refused to do so, they beat him. He was forcefully put inside their landrover, after which his lost

consciousness. When he regained consciousness, he found himself at Nyeri police station. He denied that

he had any revolver in his possession on the night in question, but he did not deny being in possession of

ammunition. He did not claim to have a firearm certificate.

Both convictions have been attacked on the grounds that the magistrate erred in accepting the

evidence of the police officers which was discrepant in certain particulars. The magistrate did advert to

the discrepancies in his very careful judgment but did not consider them sufficiently material to warrant

discounting the evidence of the police witnesses. I can see no reason to suppose that the magistrate came

to a wrong conclusion in accepting the evidence of the police witnesses and in finding that the appellant

was in possession of the revolver and eight rounds of ammunition.

The conviction on the fourth count has also been attacked on the ground that the count was bad for

duplicity in that it charged the appellant with being in possession of both a firearm and ammunition. It is

contended that the words “Firearm or ammunition” in s. 4 (1) of the Act are disjunctive and that the

appellant should have been charged with being in possession of a revolver in one count and being in

possession of ammunition in another count. S. 5 (3) of the Act provides that the firearms and ammunition

belonging to the same owner are to be included in one certificate. This being so I am of opinion that

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by being in possession of a revolver and eight rounds of ammunition without a certificate the appellant

committed only one offence and that count 4 is not duplex. In my judgment, he was properly convicted

on that count. The sentence was the maximum sentence prescribed by law, but having regard of the fact

that the appellant actually used the firearm in order to resist arrest, I consider that a maximum sentence

was justified. His appeal against conviction and sentence on count 4 is dismissed.

Turning to the seventh count, the magistrate held that the appellant’s possession of the revolver was

sufficiently recent to raise a presumption that he received it knowing it to have been stolen. Since the

appellant failed to explain his possession of the revolver, the magistrate found that he had dishonestly

received it, and convicted him of handling. While I agree with the magistrate that a revolver is not an

article which passes readily from hand to hand, even so I do not consider that possession of such an

article thirteen months after the theft can be regarded as recent. It follows that no inference adverse to the

appellant could properly be drawn from his failure to account for his possession. The conviction on the

seventh count is quashed and sentence is set aside.

*Order accordingly.*

For the appellant:

*J Macharia*

For the respondent:

*BP Kubo* (State Counsel)