



REPUBLIC OF KENYA



KENYA LAW
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**Noor v Republic (Criminal Appeal E030 of 2021)
[2022] KEHC 11873 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E030 OF 2021
A ALI-ARONI, J
JUNE 23, 2022**

BETWEEN

OMAR MOHAMMED NOOR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of by Hon M Kimani (SRM) i n
SRM CR CASE NO E088 of 2020 Mandera delivered on August 13, 2021)*

JUDGMENT

1. Omar Mohammed Noor the appellant herein was charged with three counts namely;
Count 1: Being in possession of ammunition without a license contrary to section 4 A (1) of the *Fire arms Act*.
Count 2: Preparation to commit a felony contrary to section 308 (1) of the *Penal Code*.
Count 3: Giving False information to a person employed in the public service contrary to section 129 (a) of the *Penal Code*.
2. The appellant was convicted on the 1st count , acquitted on 2nd and 3rd count and sentenced to fifteen (15) years imprisonment for being in possession of ammunition without a license contrary to section 4 (a) (1) of the *Firearms Act* No 40 of 1953.
The particulars of the said offence were that on November 10, 2020 at around 1000 Hrs at Jabibar location in Mandera North sub county within Mandera County without lawful justification the appellant was found illegally in possession of fifteen (15) live ammunition of 7.62 special without a license.



3. Aggrieved by the judgement the appellant preferred this appeal on twelve (12) grounds summarized as follows;
 - (i) That the trial magistrate erred in law and in fact in failing to consider the conflicting evidence of the prosecution witnesses.
 - (ii) That the trial magistrate erred by relying on extraneous matters in arriving at his determination.
 - (iii) That the trial magistrate failed to consider the appellant's mitigation in arriving at the excessive sentence.
 - (iv) That the sentence of 15 years' imprisonment is harsh and excessive.
4. The appeal was canvassed by way of written submissions. Both parties filed their respective submissions as follows; -

Appellant's submissions

5. On his part the appellant submitted that PW1 & PW2's testimonies were contradictory. PW1 did not tell the court where they were when he received the information from members of the general public. He did not also inform the court how long the officer who helped him in identification had known the appellant. Further the military short with side pockets the witnesses allege to have seen the appellant wearing was not produced as an exhibit.
6. Further it was submitted that though the appellant signed the inventory he did so under duress occasioned by the police officers who were beating him and did not know what was in the inventory that he had signed.
7. The appellant also took issue with the evidence of PW3 and stated that the said witness did not say the exact pocket of the shorts he found the alleged 15 rounds of ammunition. Further no finger prints were taken to determine whether that the appellant had the said ammunition in his possession.
8. On PW4's evidence the appellant was submitted that Pw4 did not tell the court whether he read the inventory and translated the same to the appellant before the appellant signed or appended his thumbprint. That whereas PW4 informed the court that the ammunitions belong to Kenya police and originating from the Kenya police armory the same only served to prove the framing of the appellant with the offence.

Further, the appellant reiterated that he had been framed because of issues he had with one, Adan Salat.

Respondent's submissions

9. On his part the respondent submitted that the evidence of all the five (5) witnesses was corroborative, consistent, reliable and sufficient to return a verdict of conviction.
10. As for the sentence imposed by the trial magistrate, the same is legal and appropriate bearing the circumstance of the case and the same should be upheld.

Analysis and determination

11. This is a first appellate court and it has a duty to consider, analyze and evaluate afresh all the evidence adduced before the trial court and draw its own independent conclusion bearing in mind that it neither



saw nor heard any of the witnesses testify. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* ([1957] EA (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”

12. Briefly, the prosecution case is that on the material day November 10, 2020 at around 1 p m. Police officers received a tip off from the public that the appellant who was wearing camouflaged shorts, standing near the manyattas at Jabi trading Centre was in possession of ammunitions which he was selling. 5 police officers were tasked to track and arrest him. The 5 went to the area and found the Appellant whom they arrested. On searching him they found him with rounds of 15 ammunitions without a license.
13. PW1 PC Dennis Saleki attached to Quick Response Unit at Jabi Camp testified that on 10th November 2020 at around 2 p m he got information from their officer in charge that a person had been cited around Jabi centre with rounds of ammunition. The said officer informed them that he received the information from members of the public. The town is a few meters from the police camp and they moved swiftly to the center and arrested the appellant. They were five officers. They went with the officer in charge who identified the appellant. The officers found the appellant near a dash/manyatta, they arrested him and took him near the camp where PC Golgalo conducted the search. The witness further testified that he was a meter away when the search was being conducted. The suspect was at the time wearing military fatigue short and the 15 rounds of ammunitions recovered from his left side pocket. Also recovered were 3 mobile phones. He identified the 15 rounds of ammunitions and the three mobile phones in court.
14. It was his further testimony that after the search they took the appellant to Rhamu police station where he was charged. An inventory was prepared at the time of recovery. The inventory is dated November 10, 2020 and documented the recoveries and the appellant acknowledged by placing a thumb print on the inventory form. He did not contest the recoveries. He identified the appellant in court stating that he did not know him before the offence.
15. PW2 PC Galgalo corroborated the testimony of PW1 that on November 10, 2020 while at a Jabi camp they were summoned by Inspector Tugen about 2 p m who acting on a tip off informed them there was some one selling ammunition at Jabi trading centre. Together with five other officers they went to the scene.
16. The information they received was that the suspect was donning military shorts and that’s how they were able to identify him, standing outside a dash. They arrested him and took him near the camp to conduct a search on him. He performed the search, recovered 15 rounds of ammunition on the suspect’s left pocket and 3 mobile phones; 2 Nokia phones and 1 techno. The suspect spoke in a dialect they did not understand. They took the suspect to Rhamu police station and the following day they recorded their statements. He identified the 15 rounds of ammunition and the three mobile phones in court.



17. PW3 PC Martin Wafula attached to the Quick Response Unit at Jabi in his testimony corroborated the testimonies of PW1 and PW2. He informed the court that they were summoned by their in charge inspector Caleb, who informed them that someone was selling ammunition at Jabi Centre near the manyattas.

Together with five other colleagues i.e. PC Dennis Saleri, PC Galgalo, PC Matisi and PC Gerald they went to the scene and arrested the appellant. For their security they took the appellant near the camp and searched him. PW2 conducted the search and recovered 15 rounds of ammunition and 3 mobile phones. The appellant did not bear a national I D but claimed to be a Kenyan. He did not also bear a license for the ammunitions. The witness also stated that the Appellant spoke a dialect they did not understand. They escorted the suspect to Rhamu police station.

Further the witness identified the and identified the appellant as the person they arrested, together with 15 rounds of ammunition and the 3 mobile phones in court. He did not know the appellant prior to his arrest.

18. PW4 PC Wilson Nyaga who works with DCI and is attached to ATPU, was the investigation officer herein. He testified that the appellant was found in possession of 15 rounds of ammunition and 3 mobile phones on November 10, 2020. An inventory was prepared by the arresting officer. Where the appellant appended his left hand thumbprint on the inventory form. The witness forwarded the ammunition to DCI ballistics. The same were examined by a firearms expert James Onyango and a ballistic report made on December 3, 2020.

19. Further he testified that the firearms examiner tested the fifteen rounds of ammunition. The same were found to be in good condition and capable of being fired. He produced the 15 rounds of ammunition as Exhibit 1. 3 test fired bullets as exhibits 1 (a) (b) & (c), 3 mobile phones as exhibit 2,3 and 4, inventory as exhibit 5 and exhibit memo as exhibit 6.

He informed the court further that he also sought to establish whether the thumb print on the inventory form matched the thumb print of the appellant. A comparison done and concluded arrived at that the exhibit marked “B” and “C24” were of the same person; the appellant. He marked the exhibit memo as exhibit 8, thumb print mark as exhibit 9 and report as exhibit 10. In cross-examination he testified that the ammunitions belong to Kenya police. In re-examination he testified that the bullets have no markings issued by government.

20. PW5 C I James Onyango works at the DCI as a firearms examiner. He testified that he received 15 rounds of ammunition that bore markings A1-A15 accompanied by an Exhibit memo from PW4. His findings were that A1-A15 are 15 rounds of ammunition caliber 7.62 manufactured in China. The rounds of ammunition were complete. The propellant charger cartridge case, the bullet and their finger prints were intact. Inner circle has priming agent sensitive to shock initiating process of burning of gun powder/combustion.

He picked 3 rounds at random and test, fired them in their lab after which he formed the opinion that the said rounds of ammunition are suitable for use in 7.62mm. Firearms such as Ak-47 rifle.

Exhibits A1-A15 are capable of being fired and are ammunitions under *Firearms Act*. He produced a report as exhibit 7.

21. At the close of the prosecution case. the appellant was found to have a case to answer and placed on his defence. The appellant called one witness. His defence was as follows; -
22. DW1, the appellant herein testified that he is a goat herder. He had bought clothes from one Adan Salah for his wife and had promised to pay for them at a later date. On the material day Adan Salah



demanded for his money and since the appellant had been paid kshs 6,000 being half his wages for the casual work he was engaged in he paid Adan Salat kshs 4,000/= and promised to pay the balance at a later date but Adan was not happy and promised that if he did not pay the remaining money he would be in trouble.

While conversing Adan put some ammunitions in a box and then rang the police who came and arrested the appellant and escorted him to the police camp. It was his further testimony that the ammunitions were planted on him. He was taken to Rhamu police station. The next day he was taken to Mandera police station where he was incarcerated for three (3) days. He was briefly returned to Jabibar to enable him identify the person who had framed him. In the company of the police they went arrested Adan Salah and the two were taken to Mandera police station where they were incarcerated for two days but Adan Salah was thereafter released and he arraigned in court and incarcerated for two weeks, thereafter charged and remanded at Prison. After 4-5 months Adan Salah found him at remand having been charged with an offence on the same ammunitions. He admitted putting his thumb print on the inventory form but stated that he was not familiar with the same because he is illiterate.

23. DW2 Adan Mohammed Noor testified that he is a brother to the appellant. That on November 10, 2020 he was at the farm at Kubi at about 9:30 a m the appellant came from herding and left to buy miraa at Jabibar. After 30 minutes the witness joined the appellant at the trading center, he found the appellant waiting at Adan Salah's shop which was nearby. The witness went to the opposite side of the road near the shop while waiting for the miraa delivery vehicle after awhile he received information from one boys that the appellant had been arrested.
24. After considering the evidence on record, the court forms the view that prosecution evidence was water tight against the appellant. The same pointed to the appellant as the person who was found with the 15 rounds of ammunition. Admittedly there are minor contradictions, but the same do not go to the core of the prosecution evidence.

The High Court in *Philip Nzaka Watu v Republic* (2016) eKLR CR APP 29 of 2015, had this to say:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

25. From the prosecution's evidence it is clear that the arresting officers were all within the camp when they were informed about the Appellant. They all gave the same description of the appellant. They were all present during the time of the arrest and during the search and when the ammunition was recovered.



26. Further the trial court convicted on the evidence placed before it. The inventory was taken upon recovery of the ammunitions and the Appellant imprinted his thumb print in acknowledgment. The Appellant alleged duress on the part of the police he did not give any details of the alleged duress.

27. All in all this court finds the convictions were safe.

28. Section 4 (1) of the [Firearms Act](#) provides as follows;

Penalty for purchasing, etc., firearms or ammunition without firearm certificate

(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.

(1A) No person shall manufacture, assemble, purchase, acquire or have in his possession an armoured vehicle unless he holds a certificate of approval issued under this Act.

(2) If any person—

(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or

(b) fails to comply with any condition subject to which a firearm certificate is held by him; or

(c) manufactures, assembles, purchases, acquires or has in his possession an armoured vehicle without approval under subsection (1A), he shall, subject to this Act, be guilty of an offence.

(3) Any person who is convicted of an offence under subsection (2) shall—

(a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or

(b) if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years:

Provided that, when the offence for which the person is convicted (not being an offence in relation to a prohibited weapon or to any ammunition therefor) is failure by neglect to renew a firearms certificate such person shall be liable to pay a fine at the rate of five hundred shillings per day for every day or part hereof during which his default continues but so that no person shall be liable to pay a fine greater than the maximum provided by this subsection and if such fine is not paid then to imprisonment for a term not exceeding two years.

29. As for the sentence. From the provisions of section 4 (3) of the [Firearms Act](#) if a person is found in possession of ammunition without a license he shall be liable to a minimum term of imprisonment of seven (7) years or a maximum of fifteen (15) years. The trial court sentenced the appellant to fifteen years' imprisonment.



30. The appellate court ought not to interfere with the sentence meted out by a trial court unless it forms the opinion that the sentence is too low or excessive, or where the sentence unlawful. Further, Sentences ought to be commensurate to the offence. This court taking due consideration of the circumstance of the case, the fact that the Appellant was a first offender and the time the appellant had spent in custody finds the sentence too harsh and excessive. The same is therefore set aside and substituted with a reduced sentence of Seven years' imprisonment commencing November 19, 2020.
31. The appeal herein therefore succeeds only on account of sentence.

DATED SIGNED AND DELIVERED IN GARISSA ON 23RD DAY OF JUNE 2022

ALI-ARONI

JUDGE

