



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 127 OF 2019

EDWARD DAVID BOLOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Vincent Adet, Senior Resident Magistrate, delivered on 19th September 2019 in Mombasa Chief Magistrate's Court Criminal Case No. 1557 of 2019).

J U D G M E N T

1. The Appellant Edward David Bolo lodged the appeal herein against the judgment conviction and sentence meted out by Hon. Vincent Adet (Mr) SRM on 19th September 2019 on the following grounds:-

- i. That the learned trial Magistrate erred in both law and fact in convicting and sentencing the Appellant to serve 7 years imprisonment when the charge and particulars of the charge was fatally and incurably defective.
- ii. That the learned trial Magistrate erred in both law and fact in convicting and sentencing the appellant on a charge before the subordinate court that did not disclose the proper and correct provision/section of the Law to wit the Firearms Act No.25 of 2015.
- iii. That the learned trial Magistrate erred in both law and fact in failing to apprehend that the plea was NOT unequivocal in the circumstances and as can be discerned from the proceedings it is clear not all the ingredients and facts of the offence were properly read out to the Accused persons and admitted.
- iv. That the learned Trial Magistrate erred both in law and fact in failing to warn the Appellant of the vast, severe implications of the plea of guilty to establish if the Appellant had understood the plea.
- v. That the learned trial Magistrate erred in both law and fact in failing to take cognizance of the absence of an inventory form that would have underscored the recovery of the alleged ammunition of 7.62mm.
- vi. That the learned Trial Magistrate erred in both law and fact in NOT considering the mitigation offered by the Appellant the admission by the prosecution that the Appellant was first offender and proceeding to impose maximum sentence thereof.
- vii. The Appellant prayed that the appeal be allowed:

2. Respondents in their submissions relied in the authority of **Adan vs Republic (1973) E.A. 445** at 446 to submit that the trial Magistrate followed the law on recording plea of guilty and the exhibits produced supported the offence charged. It was argued that it was not time that facts of the case supported the offence.

3. It was also argued that the trial court took into consideration the appellants mitigation and proceeded to sentence appellant to 7 years imprisonment and the sentence was lawful. The holding in **CR. Appeal No. 36 of 2018 – Joannas Nyamiri Kerario vs Republic [2019] eKLR** was relied upon by the respondent.

4. I have considered the proceedings in the trial court where appellant pleaded guilty to the offence of being in possession of firearms and the sentence. The proceedings were conducted in the English language which appellant understood. He in fact gave his mitigation in English.

5. *Section 89(1) of penal code provides that any person who without reasonable excuse carries or has in his possession or under his control any firearms or other offensive weapon or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm.....is intended to be used or has recently been used in a manner or for a purpose pre-judicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than 7 years and not more than 15 years.*

6. On the other-hand *Section 4 of the Firearms Act provides: 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, [Rev. 2015] Firearms CAP. 114 9 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.

7. It is apparent that the Section of the penal code under which the appellant was charged provides for a different offence than the offences provided for under the Firearms Act and it cannot be said that the offence for which the appellant was charged was defective merely because he was not charged under the Firearms Act which provide for totally different offences. In the circumstances, the Appellant Grounds of Appeal no. 1 & 2 cannot succeed. The Firearms Act infact defines what an ammunition is and the definition is consistence with the provision of Section of 89(1) of the penal code.

8. Whether the plea was not unequivocal I have perused the trial Magistrate records and it is indicated that the substance of the charge was read over to the appellant in English and pleaded guilty. The facts were also read over and explained to him and he responded in English that the facts are correct. The appellant gave his mitigation in English and in fact says that he came in Mombasa for an interview. It cannot be said that he did not understand the facts that were read to him in English. The only thing that I can deduce from his mitigation and which the trial court ought to have inquired into is that the appellant mental capacity is questionable. In that regard therefore and in consideration that the appellant was a first offender the trial Magistrate ought to have exercised his discretion pursuant to the judgment in supreme court petition nos. 15 & 16 of 2015 **Francis Muruatetu & Anor vs Republic** to pass a more lenient sentence other-than the seven years imprisonment meted out.

9. While reading out the facts of the case to the appellant before he pleaded guilty the prosecution produced exhibits including the 7.62mm, ballistic experts report and the appellant did not deny that he was found in possession of the said ammunition. Claims that the prosecution ought to have produce an inventory to underscore the recovery of the ammunition cannot arise now as the appellant is only entitled to challenge his sentence on appeal having pleaded guilty. In oral submission in court, the appellant advocate claimed that the ammunition in the typed proceedings was different from the one in the charge-sheet for reasons it is described as 7.6.2mm. I have perused the handwritten proceedings and established that the description in the typed proceedings is a typographical error as the ammunition is indicated as 7.62mm.

10. The appellant's appeal cannot therefore succeeds on account of grounds 1, 2, 3, 4 & 5. This court finds that the appellants appeal succeeds on a count of the fact that the appellant was a first offender and therefore ought to have been treated with leniency by the trial court. In the circumstances, I find that the sentence served since 19/09/2019 i.e one year and five months is sufficient punishment for the offence for which he was convicted. The appellant is hereby set at liberty forthwith unless lawfully detained.

Dated, signed and delivered at Mombasa this 25th day of February, 2021 by Microsoft Teams/Open Court

HON. LADY JUSTICE A. ONG'INJO

JUDGE