REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO.11 OF 2019

CALISTUS NANDEKE EGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **CALISTUS NANDEKE,** was charged with the following counts:-

> ***Count 1* – Abducting in order to subject to grievous ham or slavery contrary to Section 260 of the Penal Code.**

The particulars are that:-

> ***"On the night of 7th and 8th day of June 2015 at unknown place in Voi district within Taita Taveta County, jointly with others not before court abducted EAO in order that the said EAO may be disposed of as to be put in danger of being subjected to grevious harm or slavery or knowing it to be likely that the said EAO will be so disposed of".***

> ***Count II* – Theft of motor vehicle contrary to Section 278 (a)** of the ***Penal Code.***

The particulars of the offence are that:-

> ***"On the night of 7th and 8th day of June 2015 at unknown place in Voi district within Taita Taveta County, jointly with others not before court stole a motor vehicle, make Toyota Wish registration No.KBL xxxx valued at Shs.700,000/= the property of EAO".***

> ***Count III* – Being in possession of ammunition without a firearm certificate contrary to Section 4(1) as red with Section 4(3) of the Firearm Act Cap 114 Laws of Kenya.**

The particulars of the offence are that:-

> ***"On the 28th day of June 2015 at Okatikoko village in Nambale ared within Busia County was fund in possession of 2 rounds of 9mm live ammunition without a firearm certificate".***

2. After a full trial, the Appellant was convicted and sentenced to serve a period of seven (7) years imprisonment for count I, five (5) years imprisonment for Count II and five (5) years imprisonment for Count III. The sentences were to ordered run concurrently.

3. The Appellant was aggrieved by the conviction and sentence hence this appeal, which he initially filed vide a **Memorandum of Appeal on 12th September, 2019** citing the following grounds:-

> ***a) That the learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the exhibit in this case termed ammunition was not proved to be in my possession by the ballistic expert.***

> ***b) That the learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the inventory was prepared by an officer below the rank of an inspector which is unconstitutional under Section 29 of Criminal Procedure Code.***

c) That the learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the prosecution witness was marred with contradictions.

d) That the learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the evidence was un-corroborated full of cheating.

e) That the learned trial Magistrate erred in law and face by finding my conviction and sentence without considering my reasonable defence stated by me and my defence witnesses.

However, on **9th July, 2021**, he filed **amended Grounds of Appeal** together with written submission, wherein the Appellant has requested the court to determine whether;

a) The charge sheet presented to court was defective in relation to Count I and II;

b) The learned Magistrate erred in both law and fact by concluding that the alleged victim went missing and was actually dead;

c) The learned Magistrate erred in both law and fact to conclude that there existed enough evidence to prove the second count;

d) The learned Magistrate erred in both law and act by misapplication and misdirection that there existed circumstantial evidence to prove count I and II;

e) The learned Magistrate erred in both law and fact that the Appellant was in possession of ammunition contrary to firearm act;

f) The learned Magistrate erred in both law and fact by convicting the Appellant despite glaring inconsistencies, contradictions and mistakes by the prosecution witnesses;

g) The learned Magistrate erred in both law and fact in concluding that all the three counts were proved beyond reasonable doubt hence shifted the burden to the Appellant;

h) The learned Magistrate erred in failing to and selectively analyze the plausible defense mounted by the Appellant.

4. At the hearing, both the Appellant and the respondent chose to rely entirely on their written submissions.

APPELLANT'S SUBMISSIONS

5. In his oral submissions, the Appellant submitted that he was charged vide a defective charge sheet with regard to Count I. He states that the prosecution relied on circumstantial evidence to argue their case against him in the other two Counts. In respect of Count III, the Appellant argues that the circumstances under which two ammunitions were recovered from his house raised doubts, as he did not sign the inventory of the evidence collected from his house and neither was the finger print analysis on the ammunitions to determine if he indeed handled them.

6. It is the Appellant's submission that his right to a fair trial was violated since the trial ought to have taken place in Busia where he was arrested and not Voi. Additionally, that under the Wildlife Act he ought to have been charged internally through KWS disciplinary process and not in court, which was a breach of law. He further submits that as a serving officer of KWS, he had the powers and privileges of carrying a firearm or ammunitions without certificate.

RESPONDENT'S SUBMISSIONS

7. In response, the learned counsel for the State, **Mr. Chirchir** conceded to the Appeal with regard to the conviction in both Counts I and II, on the ground that, Count I contravened the provisions of **Section 135(2)** of the **Criminal Procedure Code** which is not curable under **Section 382** of the **Criminal Procedure Code**. Further, there was not sufficient evidence to sustain Count II.

8. **Mr. Chirchir** opposed the appeal with regard to count III stating that the evidence was water tight hence the prosecution proved the offence therein beyond reasonable doubt.

9. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22***:*

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

10. I will briefly outline the evidence that was presented before the trial court with a view of treating it to fresh and exhaustive analysis as required of a first appellate court.

11. The prosecution adduced evidence of twelve (12) witnesses while the Appellant, who is the first accused person, opted to give unsworn defence and called seven (7) witnesses.

12. PW1- **CM** is wife to **EAO**, the victim in Count 1 who she told court was a taxi driver, driving **Motor Vehicle Registration No.KBN xxx** make Toyota Wish pale white in colour. PW1 testified that on **7th June, 2015**, **E** left for work at 7.00am and she saw him again at 3.30pm near the Bata Shop in Voi town. He told her that he had a customer and was proceeding to Mwatate. PW1 went home and E called her at around 5.30pm to check on how they were and assured her that he would be home as usual, which was always between 8.30 – 9.00pm. PW1 said that by 9.30am **E** had not come back home and she started calling him on his phone No.0712 xxxxxx but it did not go through until the following day at 3.00am when she went to Pine Breeze in Voi where he used to park his vehicle. There she met his colleagues and they told her that they had seen him last the previous day. They also gave him a telephone number of their colleagues at Taveta stage who she called and they told her that they had not seen her husband the previous day. She then went and reported the matter to Uri Police Station. As at the time PW1 was testifying, she had not seen nor talked to her husband.

13. PW2, **Julius Okumu**, a pump attendant at Rhino Petrol Station near the Total Petrol in Voi town where he had worked for 3 years. He identified the 1st accused person to court and stated that he had known him for about one (1) year but did not know he was a KWS Officer since he had always gone to their place of work in civilian clothing. PW2 testified that on **6th June, 2015**, the 1st accused person went to the said Petrol Station while dressed in full KWS uniform and found him and a colleague by the name **Albert** (hereinafter referred to as PW3) on night duty. That the 1st accused told them that he had come from the mines where he had bought gemstones which he wanted to transport to the wife of **JM** in Nairobi. The following day on **7th June, 2015**, he also told them that he had no money but needed fuel worth Kshs.2000/= which he indicated he would send to them before the close of shift.

14. Further evidence was that on **7th June, 2015**, at about 7.30pm, the 1st accused person went to the Petrol Station where PW2 and PW3 worked with a vehicle Registration **KBN** make Toyota Wish which was being driven by owner by the name **EO** and they agreed to fuel the same for him. That the 1st accused person did not send the money until **12th June, 2015**.

15. PW2's evidence was corroborated by that of PW3, **Albert Sibwechi Wamalwa** who also confirmed that the 1st accused person and **EO** were well known to him.

16. PW4, **235213, IP David Mwasia** testified as to how he acted on a request vide **Exhibit Memo Form** dated **28th July, 2015 (Exhibit P1)** that he extracts messages in a mobile phone paired with Safaricom Sim Card and Airtel Sim Card for **4th June, 2015** to **26th June 2015**. He stated that from the extraction process, he observed that there were different communications showing messages and other service providers numbers which shows the messages from service providers to the exhibits. He prepared the report which he produced as **Exhibit P7**.

17. PW5, **No.231710 CIP Alex Chirchir**, a Firearm Examiner told court that on **28th July, 2015**, he received two (2) rounds of ammunition marked **A1** and **A2** which were accompanied by a fully filed **Exhibit Memo Form** requiring him to:-

a) Ascertain if the exhibits marked A1 and A2 were live ammunition;

b) Ascertain the caliber and type of weapon firearm that can use Exhibit A1 and A2.

18. That he examined the two **Exhibits A1** and **A2** and found they were two rounds of ammunition of 9 x 19 mm caliber and were appropriate for use in appropriate caliber firearm such as the *Belgium Browing Pistol and Germany Heckler and Coch MPS Submachine guns* among others. He also randomly successfully test-fired in appropriate caliber firearm and formed an opinion that the two were live and capable of being fired as they were ammunition in terms of **Firearm and Ammunition Act**. He prepared a report to this effect which he signed and produced as **Exhibit P8**.

19. PW6, **No.70455 Corporal Feisah Njamal** attached to Safaricom Ltd Liason Officer testified that he is trained on data extraction and analysis by Safaricom, hence authorized to extract data and Mpesa records. He told court that on **20th July, 2015**, they received a letter from the DCIO, Taveta requesting for call records of three Safaricom Nos.0720 xxxxxx, 0712 xxxxxx and 0711 xxxxxx. He said that No.0720 xxxxxx belonged to one **Mohamed Guyo** of ID No.xxxx while No.0711 xxxxxx belonged to **Calistus Egesa** of ID No.xxxxxx. He was also requested Mpesa accounts for No.0720 xxxxxx, 0711 xxxxx, 0723 xxxxxx, 0712xxxxxx, 0714 xxxxxx, 0704 xxxxxx, 0712 xxxxxx and 0728 xxxxxx.

20. He obtained call data for the three numbers and they indicated that there had been communication between **Mohamed Guyo** and one **Leo Gerald** and **Mohamed Guyo** and **Callistus Egesa** in the month of **June, 2015**. He also testified that he obtained Mpesa records for the eight numbers but only five were relevant to this case.

21. According to PW6, with regard to **EA**, they only received a request for Mpesa statements but not call data. They could not deal with a request they had not been brought. He stated that from the Mpesa records for **E**, there is no transaction between **EA** and the accused person.

22. PW7 - **No.101032 PC MacMillan Shigumba**, testified that on **26th June, 2015**, he accompanied **Corporal Momanyi, PC Nyetich** and **APC Onyango** to arrest **Callistus Egesa**, the 1st accused person who was wanted for having committed an offence at Voi town.

23. PW8 - **No.83845**, **Corporal James Kyalo** told court that on 6th August, 2015, they received a Nokia Mobile phone 110 IMEI No.354xxxxxxxxxxx a dual Sim with another No. 354xxxxxxxxxxx paid with two Sim cards one a Vodafone with the following ICCID 892xxxxxxxxxxxxx; a second one had ICCID No. 892xxxxxxxxxxxxx;, an Airtel Sim card, together with an Exhibit Memo requiring them to extract and print all the messages between **4th June, 2015** and **26th June, 2015**. The exhibit was subjected to forensic examination using

celibrite universal forensic examination device serial number 5905844 licenced to DCI. That the extraction was done on **25th August, 2015** and 157 messages were extracted, with six of them lying within the period required. She preferred the report and signed the same on **25th August, 2015** which she produced as Ex.23.

24. PW9 – **Vincent Babu** a Security Liason Officer with Airtel Kenya Ltd, also testified that on **28th July, 2015**, he received a request from police CIC signed by **Shem Asha** requiring the MSISDN and IMEI history, call data records from **1st June, 2015** to **28th July, 2015** and subscriber details of registered for No.0738xxxxxx. He obtained the call data record and subscriber details. He established that the owner of that number was **Leo Gerald** and that he had communicated with all the numbers in the call data.

25. He also testified that on **11th June, 2015**, he got another request from **Corporal Mariam** of DCIO Taita Taveta for call data relating to a missing person requiring him to furnish the IMEI number paired to above MSISD number 0734xxxxxx, the call data record of all incoming calls from **1st March, 2015** to **10th June, 2015** and details of location and current users number. He found the person registered under the

IMEI No.357xxxxxxxxxxx was **EO** of ID No.xxxxxxx.

26. Pw9 went on to state he received another request from **Shem Asher** of DCIO Voi requiring the MSISDN and IMEI history, call data record as from **1st June, 2015** to **28th July, 2015** and subscribe detail if registered. He retrieved the IMEI number form 0738 xxxxxx to be xxxxxxx and subscriber to be **Leu Gerald** of ID No.xxxx. The number 0735xxxxx was registered in the name of **Mohamed Tusi Guyo** of ID No.xxxxx.

27. The last request was with regard to MSISDN 0750 xxxxx, which is a Yu number whose IMEI was xxxx and details of user is **Callisters Nendeke** of ID No.xxxxx.

28. PW10 – **No.93081 PC Shem Asher** was the Investigating Officer in this case and he managed to trace the 1st accused and his co-accused person using a gadget in their office which is used to trace phone numbers. He said that they managed to trace and arrest the 1st accused person in Busia where he claimed he had gone for his leave. He also gave evidence with regard to the items they collected and recovered from the 1st accused person's house, the various communications with regard to investigations in the matter, call data from the mobile phone providers, involving the accused persons' numbers, the missing person's number and one **Mohamed Guyo**.

29. PW11 – **Dominic Wambua** is a retired Senior Warden in charge of Tsavo East National Park and he gave evidence to the effect that he knew the 1st accused person as a Ranger in D.Koy, Company part of KWS and denied that they issued him any 9mm caliber ammunition. He produced letters dated **1st July, 2015** and **3rd July, 2015** to this effect. He also gave further evidence that the 1st accused person had been given annual leave of 60 days from **8th April, 2015** to **1st July, 2015**.

30. PW12 – **No.7912 Antony Juma Ochuli** gave evidence that on **6th and 7th June, 2015**, he was manning the main gate on night duty and confirmed that only one car, registration **No.KBT xxxx** got into the Senior Officer's compound and purpose of visit was that it was a guest to **Madam Tisa**. He also said that according to the records, **Motor Vehicle No.KBL xxx** never entered the Law Enforcement Academy on 7th June, 2015 and neither did he see **Mr. Egesa** who he knew. The Appellant who was 1st accused person at trial. **Calistus Nendeke Egesa** was placed on defence. He opted to give a sworn statement in defence and called seven (7) witness in support of his case.

31. The Appellant person admitted working at Tsavo East National Park and being in Voi on 7th June, 2015. He also admitted knowing EO, a taxi driver. He said that he wanted to go to Manyani KWS to look for money to facilitate an operation on his ailing mother so he called E to come and take him using his vehicle. That E agreed to his request on condition that he fueled the said vehicle. The Appellant then requested the attendants at Rhino Petrol Station in Voi to fuel the vehicle for him on credit and they agreed. E had a passenger in the vehicle who they dropped before proceeding to Manyani.

32. According to the Appellant, **E's** phone kept ringing and he would tell the caller that he was going back so that when they got to the gate to the training school, the Appellant noted that he was in a rush to get back and alighted some 200 metres from the gate. He walked to the gate where he found a lady and two young boys who he later learnt were I and M. He even stopped the vehicle for them to be lifted. He identified himself and was let in.

33. The Appellant indicated that he had agreed with E that he would call him to come for him once done. But when he did, E phones were not going through. He, however managed to get to his house at 9.00pm where he stayed for four (4) days before travelling upcountry. He said that he never heard about the disappearance of E during the four days and denied kidnapping him. He also told court that there was no search which was conducted in his house at Busia as he did not get out of the police vehicle. As for his house at Voi, the Appellant stated that it was searched but nothing was recovered there. Further, the Appellant denied having been found in possession of the bullets and that the alleged recovered bullets were not dusted for finger prints to confirm that he handled them.

34. DW2 – **Hellen Amera** testified that she was a neighbour to accused person at his home in Busia, Polakoko Village. She stated that she was present when a police landrover arrived at accused person's home with accused seating at the driver's cabin between two officers and did not alight. That one officer called accused's younger brother who got the keys from his mother's house and opened accused brother's house. The young boy got in with one officer and they got out holding a briefcase.

35. DW3, a minor namely **RW** gave sworn evidence and indicated that he is accused's brother. He testified how a police vehicle got home with accused 1 on board. That an officer called him and asked for keys to accused 1's house and he indicated that they were in his mother's house. He stated that he got into his mother's house through the window and got the keys and that the officer opened and got into the bedroom.

36. DW4 - **Corporal Andrew Kitonyi** of KWS Oldonyo Sabuk National park testified that on **2nd July 2015** he was called by his Senior and told to accompany police officers to accused's house to pick KWS items. He stated that he accompanied them to the house whereat they did a search and picked every item that belonged to KWS. He produced the same as **Dexb 1.** Further, he stated that accused 1 was interdicted hence it was important that they pick all KWS items. He confirmed that while on leave KWS officers do not wear uniforms and that the firearms and ammunitions were supposed to be returned when proceeding on leave.

37. DW5 – **George Otieno Ambinja** worked at KWS Training School as a driver. He testified that he is the treasurer of a Welfare Group composed of KWS Rangers. That accused person was brought in by a member in 2014 wanting a loan of Kshs.20,000/=. That they gave him the loan payable with interest and he left a logbook to a **Motor Vehicle Registration No.KAK xxxx** as security, which logbook was released to him after he paid the loan. DW5 indicated that there was a time he had met accused person in Voi town and he had indicated to him that his mother was sick and was requesting for release of the logbook to enable him sell the vehicle. He indicated that he did not meet accused on **7th June, 2015** and could not tell if accused went to Manyani Training School to look for him.

38. DW6 –**MA** aged 14 years at the time testified on **23rd January 2018** and stated that on **7th June, 2015** he and his twin brother **IA** were at Manyani KWS Camp where they had travelled on **6th June, 2015** to visit their aunt. That at about 7.00pm they were at the gate waiting for a vehicle leaving the camp, when a saloon vehicle stopped near the gate and they got in. The driver enquired where they were going and they informed him that they were going to Voi and had Kshs.200/= fare. The driver agreed to ferry them. He testified that when they got to Manyani Prison gate, a lady stopped the vehicle and got in with her child and they all alighted at Caltex area. He stated that when they walked away, he saw two people of Somali origin board the vehicle which was driven towards Mombasa direction.

39. DW7 – **Ekisa Ojuma Samson**, was a student at Kisii University. He testified that in **June 2015** he was residing with a cousin brother one **Boniface Anunda** at Manyani Training School and was working as a mess attendant. That on **7th June, 2017** at about 7.00pm, he was outside the gate waiting for his girlfriend when he saw a vehicle Toyota Wish about 50 metres from the gate. That he paid attention as he was waiting for someone. That he saw a person alight and the vehicle turned. He testified that the person who had alighted got into the camp and when he approached he realized the face was familiar and recognized him as accused 1 herein. That accused 1 enquired where **George** stayed. He directed him and he went and came back indicating that he had not found **George**. That he also tried to call **George** but his phone was not going through. He indicated that accused 1 left at about 8.00pm. DW7 confirmed having seen accused before in the mess. He indicated that he saw PW12 at the gate in the morning hours but he was not at the gate when accused 1 came.

40. DW8 – **Ranger Justus Mureithi Muthike** confirmed knowing accused 1 well and that they were employed together in **2011**. He testified that on **7th June, 2015**, he was at Manyani Law Enforcement Academy at 7.00pm when he proceeded to other officers mess and found accused 1 outside the mess. That he inquired what he was doing at the academy at 7.00pm and he said he was looking for **George**. DW8 told accused 1 that **George** had moved and was then residing at a newly constructed flats within the camp. He left accused 1 at the mess after about 20 minutes. Accused 1 closed his case.

41. Accused 2 on his part gave unsworn defence and did not call any witnesses. He testified how on **30th July, 2015** he woke up in the morning and went to his place of work where he burns charcoal. That he loaded the charcoal into a motorcycle and took same to Taveta town to a hotel where he delivers. He stated that while there he saw a police officer who enquired where he resides and demanded that he accompany him to his house. That he accompanied the officer to his house where they conducted search. He said that they took his wife's phone, looked at its call log and returned it to her. That they brought him to Voi Police Station where he was booked at about 6.00pm. He stated that PW10 interrogated him the following day, and brought a person whom he indicated he did not know and that he was told he was to be charged with car theft. That the officers demanded Kshs.50,000/= to withdraw the case but he declined to give as he knew nothing about the case. That they tried persuading him to be a witness even promising Kshs.50,000/= but he declined witnessing something he had no idea about. He stated that he was charged with charges that he did not know about and denied the offence. Both the prosecution and the accused persons tendered their final submissions.

42. In his Judgment, having considered all the evidence that was rendered before the court, the trial Magistrate held that:-

> ***"Consequently, and in the light of my finding as aforesaid, I do find that the prosecution has established the charges of abduction in order to subject to grevious harm contrary to Section 260 of the Penal Code. Theft of motor vehicle contrary to Section 278A of the Penal Code and being in***
>
> ***possession of ammunition without a firearm certificate contrary to Section 4(1) as read with Section 4(3) of Firearm Act as against the 1st accused person on the required standard and convict him accordingly***".

43. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the Appellant and the Respondent. I have also read the Judgment of the learned trial Magistrate.

44. Having done so, I find that three main issues emerge for my determination. These are:

> ***i. Whether the Appellant was convicted on the basis of a defective charge sheet;***
>
> ***ii. Whether the evidence on record proved the charges preferred against the Appellant beyond any reasonable doubt;***
>
> ***iii. Whether the sentence imposed on the Appellant was lawful.***

45. Before delving into these issues, I will briefly address the Appellant's grievance that his right to fair trial was violated when his trial took place in Voi instead of Busia where he was arrested.

46. **Part IV** of the **Criminal Procedure Code** provides for the place of trial relating to all criminal investigations. **Section 66** of the **Criminal Procedure Code** grants the general authority to courts to deal with persons charged with offences committed within Kenya within their local limits. Specifically, at **Section 67,** an accused person is required to be sent to the district where the offence was committed.

47. Then there is **Section 71** of the **Criminal Procedure Code** which lays the law thus:-

> ***"Subject to the provisions of Section 69, and to the powers of transfer conferred by Sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence."***

48. In the ordinary course of business, the Judiciary has demarcated courts with geographical jurisdictions so as to ensure access to justice for persons within those jurisdictions. Jurisdiction is therefore not just the power to conduct judicial proceedings but the power to conduct those proceedings within the jurisdiction of that court. Hence, it is for the above reason that the trial was conducted in the local limits of the court where the offences were allegedly committed.

49. Now, turning to the first issue as to whether the charge sheet was defective. **Section 134** of the **Criminal Procedure Code** directs how charges should be drafted. It reads:-

> ***"Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged***
>
> ***together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".***

50. In the case of **Yongo –vs- Republic, Criminal Appeal No.1 of 1993**

where the Court of Appeal held inter alia that:-

> ***"A charge is defective under Section 214 (1) of the Criminal***
>
> ***Procedure Code (Cap 75) where:***
>
> > ***(a) It does not accord with the evidence in committal, proceedings because of in accuracies or deficiencies or the charge because it charges offence in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings disclose; or***
> >
> > ***(b) It does not for such reason accord with the evidence given at the trial or***
> >
> > ***(c) It gives a mis-description of the alleged offence in the particulars.***

51. In my view, looking at the charge sheet in the instant case, while considering the same in light of the Appellant's complaint that he was convicted on a defective charge and also giving consideration to the cited case, it did not fully comply with the above provisions in all Counts.

52. According to the charge sheet in count I, it is not clear what exactly the Appellant was charged with. Further, a reading of **Section 278 A** under which the Appellant was charged reveals that this is the penal provision and not the Section prescribing the offence. It therefore follows that the Appellant was charged with the offence of committing the penalty. In my opinion, this was irregular. The correct offence that the Appellant should have been charged with is the one prescribed under **Section 268 (1)** of the **Penal Code**, which is the offence of stealing.

53. In Count III, the Appellant was charged under **Section 4 (1) as read with Section 4 (3)** of the **Firearms Act**. In my view, the Appellant ought to have been charged under **Section 4 (1) as read with Section 4(2)(a) and (3)(a)** of the **Firearms Act**.

54. The entire **Section 4** of the **Firearms Act** is set out below:-

> ***"4. 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 armored 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***

<u>at the time,</u> 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 armored 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. [G.N. 1566/1955, L.N. 172/1960, Act No. 13 of 1972, Sch., Act No. 10 of 1981, Sch., Act No. 8 of 1988, s. 4, Act No. 11 of 1993, Sch., Act No. 2 of 2002, Sch., Act No. 19 of 2014, S. 36.]"

55. In light of the above provision, my view is that the charge sheet in this case failed to communicate to the accused the precise charge that he was facing and its likely consequences upon a finding of guilt so as to enable him adequately prepare his defence. While the statement of the Particulars of the charge clearly informed the accused of the allegations for which it was alleged he was guilty of being in possession of ammunitions namely 9 mm ammunition without certificate, it did not state the offence.

56. The trial court convicted the Appellant *"for being in possession of ammunitions without a firearms certificate contrary to* ***Section 4 (1) as read with Section 4(3)*** *of the* ***Firearms Act****.*

57. The trial court did not order for the amendment of the charges which ought to have done before closure of the prosecution's case under **Section 214** of the **Criminal Procedure Act**. Yet, upon conviction the court proceeded to sentence the Appellant under a provision of law for which he had not been charged. For this, the trial court, with respect, fell into error.

58. In such circumstances, it is safe to assume that the Appellant was not subjected to a fair trial pursuant to **Article 50** of the **Constitution.** An accused person should be tried for a specific offence. A charge sheet whether amended or not should contain sufficient detail to enable an accused person to adequately prepare and answer to it. In my view, I agree with the Appellant's grounds of appeal in respect of a defective charge sheet. Therefore, by failing to detect the anomaly, the learned Magistrate appeared to have fell into error.

59. However, while agreeing with the prosecution that the defects in the charge sheet are curable, it is worth-noting that the Appellant has served a substantial portion of the sentence imposed by the trial court out of proceedings based on a defective charge which outweighs the interest in a retrial for the prosecution, hence prejudicial to him.

60. As to whether the prosecution established the case against the Appellant on the charges brought to the required standard of proof beyond any reasonable doubt, I have carefully read through the prosecution's evidence and that of the Appellant and witnesses, analyzed and re-evaluated the same.

61. From the evidence adduced before the trial court, E was last seen on **7th June, 2015** at various times by his wife and others, the last one being PW2 and PW3 at the petrol station. He was last seen with the 1st accused person when they went to fuel the vehicle registration **No.KBN xxx** which he was driving himself. This evidence was confirmed by the 1st accused person in his sworn defence. According to the Investigating Officer (PW10), E was abducted and killed by the Appellant and one **Guyo** so as to steal his vehicle. At the time of the hearing, neither E nor his body had been found. His motor vehicle had also not been recovered while he is alleged to have been abducted, there was no conclusive evidence to that effect or that he had been assaulted. The Investigating Officer himself confirmed that, that did not investigate the whereabouts of the missing person or any motives such as debts and other issues which came out in cross-examination of witnesses that raised doubts in the prosecution's evidence. The forensic evidence relied on was not full-proof especially considering that there was no indication that it involved the missing person **E**. The Appellant's defence was corroborated by his witnesses that he indeed arrived at Manyani KWS Training College where he was taken by the missing person, who he had hired. Further, it is worth-noting that even though the 2nd accused person was presented to implicate the Appellant, in cross-examination, he dislodged this by making the Investigating Officer admit that he was illiterate and could not read or write. His statement was written by the Investigating Officer.

62. Clearly, it cannot be said with confidence that the actions *reus* and *mens rea* were established and proved on the part of the Appellant with regard to Counts I and II. The evidence against the Appellant was purely circumstantial and based on suspicion that the Appellant possibly lured and abducted the missing person, **E** to Manyani where he had him killed and his motor vehicle stolen and driven to Tanzania. There is no room for suspicion in a criminal trial.

63. In the case of **<u>R –vs- Kipkering Arap Koske & Another 16 EACA 135,</u>** the court held that:-

"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

64. Having re-evaluated all the evidence on record I am not convinced that there is sufficient evidence that any abduction, killing or theft took place in regard to the missing person **E**, and neither do I agree with the Magistrate's findings that the prosecution proved that the offences in Counts I and II were committed.

65. Suspicion of itself, no matter how strong, is not enough to find a person guilty in a criminal trial. In this case there were important aspects of the case that in my view were not investigated.

66. From the foregoing, I find the Appellant's conviction was unsafe and should not be upheld. I proceed to find the appeal has merit, quash the

Appellant's conviction and set aside the sentences that were meted against him in all Counts.

67. The Appellant be and is hereby set at liberty unless otherwise lawfully held.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Chirchir counsel for the State

Appellant –in person

Court Assistant – Bancy