REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 38 OF 2019

YUSSUF HULBALE IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. A. K. Mokoross – PM in Criminal Case No. 553 of 2017 at the Senior Resident Magistrate's Court at Wajir delivered on 16th October 2019)

JUDGMENT

1. On Count I the Appellant was charged with being in possession of a firearm without a firearms license contrary to section 4 A(1) (a) of the Firearms Act.

2. The particulars being that on the 3rd day of December 2017 at Dodha area within Eldas Sub-County in Wajir County, he was found in possession of a firearm namely Caribbean body serial number 10419 in contravention of the said Act.

3. On County II he was charged with being in possession of ammunitions without a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4(3) (a) of the Firearms Act.

4. The particulars being that on the 3rd day of December 2017 at Dodha Location within Eldas Sub-County in Wajir County, he was found while in possession of ammunitions namely 14 rounds of 7.62mm by 39 in contravention of the said Act.

5. On Count III he was charged of being in possession of wildlife trophy contrary to section 98 of the Wildlife Conservatory and Management Act, 2013.

6. The particulars were that on 3rd day of December 2017 at Dodha Location within Eldas Sub-County in Wajir County, he was found in possession of a wildlife trophy namely game meat without a permit.

7. He pleaded not guilty and after trial he was convicted and sentenced to; Count I and II – serve 7 years imprisonment each and acquitted in Count III.

8. Being aggrieved he lodged instant appeal and set out 14 grounds of appeal he compressed in submissions as follows:-

I. That the learned trial Magistrate erred in Law and fact in convicting the Appellant without considering that the charge sheet was defective.

II. That the learned, Hon. Magistrate erred in both law and fact by convicting the Appellant after the prosecution failed to prove their case beyond reasonable doubt, and more so in proving that the appellant was found to be in "possession of the exhibits in question.

III. That the trial Magistrate erroneously convicted the Appellant without considering that the prosecution case was not proved beyond reasonable doubt due to failure to summon some of the crucial and essential witnesses.

IV. That the trial Magistrate erred in Law and in fact while convicting the Appellant by failing to consider the contradictory statements made by the prosecution witnesses.

V. That the trial Magistrate erred in Law and in fact by failing to consider the defence evidence which was not given due consideration.

VI. <u>That the Appellant was not granted a fair trial and the learned Magistrate in issuing the verdict / sentencing never exercised his discretion and thus disregarded mitigation and thus the sentence was excessive and the mandatory sentence was unconstitutional.</u>

9. Parties agreed to canvass appeal via submissions but only Appellant filed the same.

<u>APPELLANT'S SUBMISSIONS</u>

10. It is submitted that,the charge sheet was defective, in as far as the serial number of the firearm in question was concerned. The charge sheet initially illustrated that the serial number of the alleged recovered gun was a Caribbean body Serial number 10419. However, that was different from the serial number which was taken by PW4 the ballistic expert which was Serial number 22010419.

11. There are clear inconsistencies because the gun that was produced in court bore a different serial number 22010419 and 14 ammunitions. Hence it is not clear how many guns were recovered and which one exactly was found in the appellant's possession. Errors and omissions cannot be regarded as minor irregularities but substantial errors.

12. The appellant relied on **Yongo vs. R (1983) KLR** where it was held that a charge is defective under **Section 214 (1) of the Criminal Procedure Code** where it does not accord with the evidence given at the trial. It is therefore submitted that the charge sheet was defective and the Appellant should be given the benefit of doubt.

13. There is a possibility that the chief and the police officers replaced the gun allegedly recovered from the appellant as the appellant testified on oath that there was a grudge between the appellant and PW-1 (Chief) founded on political grounds, the appellant person was the chairman of the group that supported the sitting M.P. Ahmed Bashane while the PW-1 being the chief campaigned for Idris Abdi. That could suggest that PW-1 had the motive to plant evidence on the appellant.

14. DW-2 also testified that PW – 1 allegedly threatened the appellant that he would fix him and that even if he was acquitted in this case he would be charged of another offence.

15. On the issue of whether the prosecution proved its case on the charges brought against the appellants to the required standard of proof beyond reasonable doubt it was contended that no one ever indicated to court whether what they had allegedly recovered from the appellant was recorded as ever having been recovered and no inventory was ever produced and signed by the appellant.

16. PW 1 & PW 2 said that the appellant person gave up the gun before the search was conducted while according to PW 3 the appellant person's house was searched and a gun was recovered and that the appellant did not retrieve the gun from his compound on his own volition. The trial court still went on and made an erroneous determination of the issue of being in possession of the gun and ammunition.

17. My Lordship the only way this court can be certain as to what was found in the appellant person's possession is by having the appellant person or an independent witness sign the inventory of the items recovered.

18. In addition, apart from the testimony of the officers and the chief there was no independent witness who confirmed the appellant was in possession of the firearm and ammunition and also there were no forensics done to prove that indeed the finger prints of the appellant were on the gun. More so the ballistic Expert report which was very crucial in the instant charge that the Appellant was charged with, was in contrary with what the prosecution was charging the Appellant being in possession of as there are different fire arm serial numbers.

19. Article 50(2)(j) of the Constitution stipulates that the appellant has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. The appellant herein wasn't informed what was recovered from him and no inventory was signed.

20. In ***CR. A. NO. 384 OF 2009; JOHN MUTURA MURAYA vs REPUBLIC,*** the court observed the following regarding evidence of recovery;

> ***"In this case the prosecution did not prove that the torch in question was recovered in the appellant's house. This is because APC David admitted that he did not take an inventory of the items recovered from the appellant's house. Therefore, the doctrine of recent possession could not be invoked. The two courts below misdirected themselves in terms of the evidence of the alleged recovery of the torch and concluded erroneously that the appellant failed to give an explanation of being in possession of the torch. It was incumbent for the prosecution to first establish that the appellant was in possession of the stolen torch before the burden could shift to the appellant to explain his possession".***

21. The trial Court erroneously convicted the appellant in the absence of proof of the Prosecution's case beyond reasonable doubt in that some of the crucial and essential witnesses did not testify, the appellant submitted that there was no independent witnesses to corroborate allegations by the Police over recovery of the firearm and that nobody was summoned to come and testify over the alleged recovered gun yet the Appellant was not alone in his homestead.

22. It was alleged that members of the media press and neighbours accompanied the appellant to the KWS offices yet none of them was summoned to testify on behalf of the prosecution

23. In addition, PW-1, PW-2 and PW-3 stated that they were guided into the appellant's home by the cart tracks. No evidence in terms of photography was produced showing how visible the cart tracks were considering that the giraffe was allegedly killed the previous night.

24. In addition, it was stated that the appellant had no neighbours nearby which evidence was contradicted by PW-1 who said he was the neighbour of the appellant and rebutted by DW-2 and DW-3 who said that he had neighbours.

25. The Appellant claims that the Police did not summon his wife, brother or anybody else to ascertain what transpired on that night. Reliance was placed on **Bukenya another Vs Uganda. Cr. A 6811972 EACA** where it was held that the Court has a right and duty to call witnesses whose evidence appear essential in making a just decision of the case.

26. On cross – examination PW 2 said that the appellant had no immediate neighbour yet the PW 1 the Chief stated that the appellant was his neighbour and that they had lived together for so long.

27. PW1, PW2, PW3 and PW5 testified that the KWS officers and the Chief went to the scene whereby they saw cart tracks which they followed up to the appellant's home. No evidence was tendered in terms of photographs showing that the cart tracks that were being trailed.

28. PW1 had information that the giraffe was allegedly killed but chose to call the police the following date. PW2 on cross-examination said that the actual killings might have been around 11:00 p.m. PW1 and PW3 however stated that the killings allegedly occurred the previous night.

29. It is still unclear from the evidence the motive of possession of the ammunition. Since the alleged cart that was used to carry the game meat was never recovered and no cart was recovered and in fact the appellant was acquitted of the offence of being in possession of game meat.

30. Reliance is to be placed on **Ndege Maragwa Vs. R (1964) EACA 156** where the Court held that in Criminal cases, the burden of proof is on the prosecution throughout and that it is the duty of the trial Court to look at the evidence as a whole and establish whether the burden was discharged, which, according to the Appellant, was not done in this case. The Appellant therefore urged this Court to overturn the conviction and acquit him of the offence because he was convicted on insufficient evidence.

31. On the last ground that the Appellant's defence was not considered. Despite giving his sworn defence it was not considered. Despite giving his sworn defence validly explaining what transpired on the fateful day, and called two other witnesses a defence witnesses who were present when the search was done and when the officer came to his home, exonerating him from the alleged recovery of the gun and ammunition, the trial Court relied on mere assertions without proof.

32. DW1, DW2 and DW3 gave consistent sworn evidence that no firearm or ammunition was recovered from the appellant. DW-2 went ahead to collaborate the evidence of DW-1 by stating that PW-1 the chief had a political grudge with him because he was the chairman of the group that supported Ahmed Bashane while PW-1 supported Idris Abdi.

33. The Issue of vengeance by PW-1 was constantly raised on cross examination of the prosecution witnesses by the defence but it was not considered by the lower court on reaching its decision being a surrounding factor for consideration before reaching the verdict.

34. That DW1 went ahead and testified that he signed no inventory of the items allegedly recovered from him and that no photos of him with the recovered items were taken.

35. In addition, the defence witnesses all said that the appellant had neighbours and that the road he was using was used by many people from the neighbourhood around. There is a possibility that the cart tracks they were allegedly tracing were used by the neighbours neighbour.

36. In addition, PW-1 said in his testimony that he was the appellant's neighbour the testimony was rebutted by the evidence of DW-2 and DW-3 who stated that PW-1 did not live in Dodha.

37. The trial court therefore relied on the mere assertions of the prosecutions without proof.

38. On the sentence the trial court sentenced the appellant without considering his mitigation of his old age and his health condition. Its sentence was the minimum mandatory sentence which tied courts hands in sentencing and thus could not consider a lesser sentence but to award any number of years from 7 years and above.

39. The issue of sentencing, especially when it comes to the mandatory minimum sentence was discussed by the Supreme Court of Kenya in the case of *Francis* ***Karioko Muruatetu & Another vs. Republic [2017] eKLR*** in which the court held that the death penalty prescribed for capital offences though still lawful, was unconstitutional. The Court of Appeal has since followed the Supreme Court decision. In the case of ***William Okungu Kittiny v Republic [2018] eKLR,*** the Court of Appeal sitting in Kisumu declared that the ***Muruatetu decision*** broadly considered the constitutionality of the sentence in general.

40. Being the first appellate court, this court is obliged to consider and re-look into the evidence adduced as it was stated in the case of **OKENO VS. REPUBLIC 1972 EA 32** where the Court of Appeal stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See PANDYA VS. 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 conclusions. (See SHANTILAL M. RUWALA VS. REPUBLIC (1957) EA 570).***
>
> ***"……It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to***

support the lower court's findings and conclusions; 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 also PETER vs. SUNDAY POST (1958) EA 424."

ISSUES

The issues emerging from record and submissions tendered are that; **whether the charge was defective? whether the prosecution case was proved beyond reasonable doubt? whether defence was considered? and whether trial court was bound to consider mitigations?**

ANALYSIS AND DETERMINATION

41. On first ground, the courts refer to the charge of being in possession of a firearm, which is the first count herein, as set out in section 4(1) of the Firearms Act which, in the relevant part, reads:

> **"No person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate…"**

42. The prosecution was thus tasked, on that first count, to show that the appellant person had a firearm in his possession and that he had no certificate permitting such possession.

43. The term "*firearm*" is defined in section 2 of the Firearms Act as *"a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged…."*

44. In this instance, the ballistics expert (PW4) informed the court that what we are dealing with is a carbine riffle designed to chamber 7.62 x 39mm ammunition. He further informed the court that he had successfully fired three bullets from the same and concluded, in his professional opinion, that the same was a firearm within the meaning of the Firearms Act. There can thus be no doubt that what was presented to court as Pexh 3 answers to the description of a firearm and I find so.

45. The issue then becomes whether the same was found in the possession of the appellant person and as I delve into that issue I find it expedient to point out that the term "*possession*" is defined in the Firearms Act to include; "not only having in one's personal possession, but also knowingly having anything in the actual possession or custody of another person, or having anything in any place (whether belonging to or occupied by oneself or not).

46. As seen from the summary, the assertion in this case is that the gun was hidden in the appellant's compound and that when asked for it the appellant person went out and produced it.

47. The proponents of that evidence, as shown by the summary of evidence, were PW1 (the Area Chief), PW2 (Cpl. Ahmed attached to KWS) and PW3 (Ranger Ali Barasa) who all gave consistent and corroborative evidence that upon receiving information that the appellant had killed a giraffe they proceeded to the appellant's home and demanded that the appellant person produced the gun he had used to kill the giraffe and the appellant produced a gun from his compound.

48. The trial court noted that the three witnesses, that is to say the Chief (PW1), Cpl. Ahmed (PW2) and Ranger Barasa (PW3) came from different departments and were thus independent of each other who came together only because of the incident that happened. They gave evidence that was consistence and corroborative and having observed them as they testified, the trial court was inclined to believe their testimonies.

49. This court has no doubt that their evidence, given in one accord, that they asked the appellant for the gun and that the appellant person led them to his compound and retrieved it.

50. It is apparent that the defence sustained a narrative throughout their cross examination that amnesty had been offered to the appellant in return for the gun and continually made reference to the statement of PW2 (Cpl. Ahmed) but all the witnesses completely denied that assertion and stated that the gun had been produced voluntarily. The referenced statement was produced and indeed contains a paragraph that the appellant was offered amnesty by the Chief.

51. The paragraph reads:

> **"After further interrogation and telling him to tell us the truth and give us the riffle he had used to kill the giraffe as per out intelligence report he denied but when the assistant chief talked to him he accepted that he was the one who had killed the giraffe and he would surrender the riffle he used in exchange of amnesty from us as previously he had did(sic)."**

52. The trial court found it completely unclear as to what the defence intended to make of the captioned paragraph. In the defence submissions, it appears that the defence was alleging that the production of the gun stemmed from a confession which was not procedurally recorded.

53. However, no intimation of a confession was made by the prosecution and as there was no evidence of either coercion or force used on the appellant thus the trial court took it that his production of the gun was voluntary. That finding is justified in the circumstances.

54. The trial court also observed that even if the offer of "amnesty" was made, there was nothing binding or forcing the appellant person to

produce the gun and thus the assertion of amnesty cannot take away the fact that he did produce the gun.

55. The other key issue that emerges from the defence is the contention that the gun recovered is different from the one forwarded for examination.

56. The appellant relied on **Yongo vs. R (1983) KLR** where it was held that a charge is defective under Section 214 (1) of the Criminal Procedure Code where it does not accord with the evidence given at the trial. It is therefore submitted that the charge sheet was defective and the Appellant should be given the benefit of doubt.

57. The contention is captured in the defence submissions in trial court was as follows:

> **"The report (ballistics) is full of glaring inconsistencies in that the riffle that was forwarded for examination as indicated in the exhibit memo was serial number 10419 and the one that was examined was serial number 22010419 thus the riffle exhibit that was being examined was not the same that had been forwarded thus there is no possibility that an examination was conducted to confirm whether the alleged riffle/exhibit that was allegedly recovered from the appellant was a riffle/firearm."**

58. As already indicated, they referred to the court to the decision in **Republic vs Edward Kirui [2010] eKLR** wherein the High Court essentially ruled that a mis-match in a gun's serialization raised reasonable doubts in favour of an appellant.

59. At the conclusion of the said decision, Justice Ochieng, when presented with two different serial numbers asked himself the following questions: Did any police officer replace the gun which had been recovered from the appellant with another one? If not, where did the riffle serial number came from? And if there was a change of guns, who did it, as what stage, and for what reason? And lastly if there was no change of guns, why were there two different serial numbers?

60. The trial court held quote;

> "**Those same questions are not reverberating in my mind and I will return to them shortly.But first I must point out that the decision in Republic vs Edward Kirui [2010] eKLR was challenged and overturned on appeal in Republic vs Edward Kirui [2014] eKLR and one of the aspects faulted by the Court of Appeal is the trial court's analysis of the mis-match in serial numbers visa vis the totality of the evidence.The other case pointed out to the court is Eric Okeyo Otieno vs Republic which had similar issues of different serial numbers but that case is distinguishable from the present one in that the appellant, in that case, was a group of other persons armed with guns thus making the difference in serial numbers substantially more material."**

61. The facts in this case show that only one gun was recovered and the cogent evidence presented to court was that the same was recovered from the compound of the appellant by the appellant person himself; and that, the gun was immediately taken into police custody and thereafter forwarded to the ballistics experts for analysis.

62. That ballistics expert explained that although there was a difference in the serial number as indicated in the memo and as per his findings, he was the expert and thus the one best placed to read and determine what the serial number was. According to him the differences in the serial number occurred from the omission of the first three digits of the gun's serial number.

63. The investigating officer was also firm that the gun he received as exhibit in this matter was the same one he forwarded to the ballistics expert along with the cartridge recovered from the scene of the giraffe's killing and it is noteworthy that upon analysis that cartridge was found to have been fired from the gun produced as Pexh 3.

64. The above evidence when put together supports the supposition by the ballistics expert.

65. But even in absence of the ballistics expert and the investigating officer explanations, the trial court would still have to ask itself the questions hitherto placed aside to wit; Did any police officer replace the gun which had been recovered from the appellant with another? If not, where did the riffle serial number 10419 come from? And if there was a change of guns, who did it, at what stage, and for what reason? And lastly if there was no change of guns, why were there two different serial numbers?

66. The question whether a police officer substituted the gun recovered from the appellant with another attracts a follow up question; To what end?

67. In other words, what would be the motive or motivation for such substitution and the answer was apparently none.

68. It was not shown that the appellant was known to any police officer involved in this matter and there would thus be no motivation by any of the said officers to substitute the gun. The trial court held;

> "***Having thus concluded that there is no plausible motivation for such substitution then the court must look for more mundane possibilities for the discrepancy and the one that most adheres itself to me is the explanation given by the ballistics expert namely, that there was an error in the recording of the said serial number. I have personally looked at Pexh 3 and note that the serial numbers are very faint. I could also only see 5 digits as opposed to the 8 digits given by the ballistics expert thus giving credence to the said expert's assertion that he as the expert was best placed to read the serial number of the riffle."***

69. Thus, the defective noted on charges vis avis the evidence tendered and explanations aforesaid, renders the same immaterial to vitiate the

charges. The net result is that I have no doubts whatsoever that Pexh 3 is the gun recovered from the appellant and thus that the appellant person had possession of the same.

70. From analysis of evidence aforesaid it is apparent that the defnce tendered was considered and not to displace prosecution case.

71. No certificate was produced by the appellant to show that his possession of the gun was legal and as such it was inevitable finding that all the ingredients necessary were proved. The first and second count had been proved beyond reasonable doubt.

72. On County II he was charged with being in possession of ammunitions without a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4(3) (a) of the Firearms Act.

73. The court of appeal in **MWANGI VS R CRI APPEAL 3 OF 1973 AS RELIED ON IN NRB HC CRI A 18 0F 2012** held that possession of firearms and ammunition should be contained in single count as firearm certificate is always issued to cover both firearm and ammunition thus this court sets aside sentence on count 2 above .

74. As regards the sentence in count 1, the court held that the firearms act provides that the minimum sentence is 7 years imprisonment and court was bound by the provisions thus sentenced him to 7 years imprisonment without regard to the mitigations.

75. The issue of sentencing, especially when it comes to the mandatory minimum sentence was discussed by the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the court held that the death penalty prescribed for capital offences though still lawful, was unconstitutional.

76. The Court of Appeal has since followed the Supreme Court decision. In the case of **William Okungu Kittiny v Republic [2018] eKLR**, the Court of Appeal sitting in Kisumu declared that the **Muruatetu** decision broadly considered the constitutionality of the sentence in general.

77. The Supreme Court also urged courts to take into account the following factors before deciding on the appropriate sentence to mete out.

(a) age of the offender;

(b) the fact of being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

78. Guided by the foregoing celebrated Supreme Court of Kenya Case holding in the case of **Muruatetu** and subsequent decisions that all the mandatory aspect of minimum sentences are unconstitutional.

79. Thus, the court makes the following orders;

i) The appeal on conviction on count1 fails but succeeds in count II.

ii) The sentences in counts I and II are set aside and appellant is referred to trial court in Wajir for sentence in respect of count I after considering mitigations, and period spent in custody.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JUNE, 2020.

…….……

C. KARIUKI

JUDGE