



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 67 OF 2017

IBRAHIM HARET ABDILLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1085 of 2012 - H. N. Ndung'u Chief Magistrate)

JUDGMENT

BACKGROUND

1. This appeal has a history which explains its delay. The appellant Ibrahim Haret Abdille was charged alone in the Chief Magistrate's Court at Garissa In Criminal Case No. 1085 of 2012 with three counts on 26th July 2012.

2. **Count I:** was for possession of a specified firearm without a certificate contrary to section 4 A (1) (a) of the Firearm Act Cap 114 Laws of Kenya.

The Particulars of the offence were that on the 24th July, 2012 at IFO Refugee Camp area in Dadaab District within Garissa County was found in possession of a specified firearm namely AK 47 Serial number, 1974-6P 9550 without a valid certificate

3. **Count 11:** was for possession of ammunition without a certificate contrary to section 4 (2) (a) of the Firearm Act Cap 114 Laws of Kenya. The particulars of the offence were that on the same day and place was found in possession of 6 rounds of 7.62 by 39 millimeters ammunition without a valid certificate.

4. **Count 111:** on the other hand was for was possession of a firearm accessory contrary to section 26 (1) (e) as read with section 26 (2) (b) of the Firearm Act. The particulars of the offence were that on the same day and place was found in possession of a firearm accessory namely: 1 firearm AK 47 rifle magazine without a valid certificate.

5. He pleaded not guilty to all the three counts. After a full trial, he was convicted on all three counts and sentenced to serve 7 years imprisonment on each of the three counts, the sentences to run concurrently which meant a total prison sentence of 7 years from the date of sentence which was 3rd October, 2013. The trial court also ordered that, after service of the sentence he be escorted to the Department of Refugee Affairs for refugee status determination.

6. A day earlier, on the 25th of July, 2012, the appellant together with three others was brought before the High Court at Garissa Lady Justice Stella Mutuku and charged with the murder of Mohamud Baasi Mohammed allegedly committed on 19th July, 2012. The appellant was the 4th accused in the murder case. The two cases proceeded to hearing parallel, and the appellant was represented in the High Court by Mr. Onono but was not represented in the magistrate's court.

7. In the trial before the magistrate's court which is the subject of this appeal, the appellant was convicted of the three counts in a Judgment delivered on 3rd October 2013, and was sentenced to 7 years imprisonment on each of the three counts, sentences to run concurrently. In the trial before the High Court whose judgment was delivered later on 17th March, 2014 the other 3 accused were acquitted. The Appellant was however found guilty and convicted by the High Court not for the original charge of murder but for lesser offences of being in possession of a firearm, and possession of ammunition without a certificate. The firearm serial number is the same as the one under the charges in the magistrate's court.

He was sentenced by the High Court to 10 years imprisonment on the two offences, same to run concurrently, which was a total sentence of 10 years imprisonment from 17th March, 2014.

8. After the delivery judgment in the magistrate's court, the appellant appealed against the decision of the magistrate in Criminal Case number. 1085 of 2012 through High Court Criminal Appeal 150 of 2013, on 9th October 2013, However, the appeal file remained in the Court Registry unattended until it was placed before the Judge on 11th February, 2014 when the High Court admitted the appeal to hearing.

9. Thereafter the appeal was mentioned before the Deputy Registrar on 23rd June, 2014, and then before the Judge on 1st July, 2014 when the advocate for the appellant Mr. Onono withdrew the appeal by stating as follows:-

“I am on record for the appellant. The Appellant was in a group of other accused persons, but the case was finalized. In this case he was charged before Chief Magistrate. Having verified evidence, the Appellant wishes to withdraw the petition of appeal filed in this matter filed on 14th November, 2013.”

10. The Prosecuting Counsel present Mr. Mulama did not object to the request of Mr. Onono, and the Court thus ordered as follows:-

“The appellant is allowed to withdraw appeal number. 150 of 2013, this file is therefore stands as closed.”

11. It is worth to note that on that day when the appeal was withdrawn, the record does not show that the appellant was present in court. Only his advocate Mr. Onono was in court together with the Prosecuting Counsel Mr. Mulama. This withdrawal of the appeal was after Judgment in the High Court had been delivered on 17th March, 2014 convicting the appellant for possession of the same items.

12. It is not clear, however whether the appellant was informed about the withdrawal of his appeal, as even on 9th of April 2015, the appellant wrote a letter to the Deputy Registrar of this court asking for a hearing date of Criminal Appeal Number 150 of 2013. He also complained in the letter that this was one of the old cases, and that the delay to determine the same was causing him injustice. That letter was received on the 14th April, 2015 and though on 20th April, 2015 the Deputy Registrar wrote to him telling him that the appeal had been withdrawn on 1st July, 2014 the fact that the appellant wrote to ask for a hearing date of that appeal and complained about the undue delay in determining the appeal showed in my view, that he did not know or was not aware about the withdrawal of his appeal.

13. Thereafter, It appears that out of desperation the appellant on 13th October, 2016 filed an application against the decision in High Court Criminal Case number 25 of 2012 complaining that he had been he convicted twice for the same offence, and sentenced to seven (7) years imprisonment in one case and then sentenced to serve 10 years imprisonment in another case in July, 2014 without any cogent reasons. He asked this Court to review the matter, because he was not satisfied and felt that Justice had not been done to him.

14. After hearing and considering that application, on 14th November, 2017 this Court declined to review the decision in High Court Criminal Case number. 25 of 2012 and advised that if the applicant/appellant was dissatisfied with the said decision of the High Court decision then his only avenue was to approach the Court of Appeal. This court also advised him to revive Criminal Appeal No.150 of 2013 or file a fresh appeal against the decision of the Magistrate's Court in Garissa in Criminal Case Number 1085 of 2012.

THE APPEAL

15. Ultimately, the appellant filed the present appeal in Garissa High Court Criminal Appeal 67 of 2017 appealing against the decision in Garissa Chief Magistrate's Criminal Case 1085 of 2012 on the following grounds:-

1. The trial magistrate erred in convicting him without putting into consideration that no ballistic report was produced in court to support the allegation that he was in possession of the alleged firearm and ammunition.

2. The trial magistrate failed by not considering that he was sentenced at the High Court with the same offence having the same facts hence causing him prejudice.

3. The trial magistrate, erred in law and fact in convicting him without considering that the prosecution failed to prove their case beyond reasonable doubt, contrary to Section 109 and 110 of the Evidence Act.

4. The trial magistrate erred in law and fact to convict him without considering that there was gross contradiction in the evidence adduced by the prosecution witnesses contrary to Section 163 of the Evidence Act.

5. The Trial magistrate erred in law and fact to convict him without considering that the evidence relied upon by the prosecution had neither his identical mark nor his finger prints to reveal whether he had prior possession of the same items nor was it proved to be harmful or dangerous.

6. The trial magistrate erred in convicting him without considering that no investigation were done to ascertain the truth of the prosecution allegations.

7. The trial magistrate erred in convicting him without considering that the mode of arrest was poorly conducted.”

16. During the hearing of the appeal, the appellant stated that he had undergone a lot of suffering and that he had been sentenced twice in the same case which was wrong, and that though he denied the charges he was sentenced by both the High Court and the Magistrate's Court in the same case.

17. Mr. Okemwa the learned Principal Prosecuting Counsel submitted in response that this was an appeal brought after a previous appeal by the appellant was withdrawn by Mr. Onono advocate for the appellant.

18. Counsel submitted that in the High Court Criminal Case number 25 of 2012 the appellant was charged with three others for the offence of murder. The other three accused were acquitted by the High Court and the appellant though acquitted of the offence of murder was convicted of possession of a firearm, possession of ammunition, and possession of firearm accessories, and sentenced to 10 years imprisonment on each count, sentences to run concurrently.

19. Counsel submitted further that in the magistrate's court Criminal Case No. 1085 of 2012 the appellant was charged alone with three counts of possession of firearm, possession of ammunition, and possession of firearm accessories, and convicted on all three counts and sentenced, and that though Mr. Onono represented the appellant in both cases, did not mention in either court the existence of the other criminal proceedings.

20. Counsel submitted that this being a first appeal, the court should re-consider the issue of possession especially the evidence of the father of appellant who testified as PW3. Secondly, the court should consider whether the items were indeed a firearm, ammunition, and a firearm accessory as a report from the ballistic expert was produced by Pw4. Counsel concluded by stating that, the court should especially consider whether the appellant had a license or permission to possess the items.

21. In response, the appellant stated that said he would await the decision of this court.

CONSIDERATIONS

22. This is first appeal. As a first appellate court, I am required to examine all the evidence on record afresh and come to my own independent conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact. I rely on the case of: **OKENO -VS- REPUBLIC [1972 E.A. 32]**.

23. I have re-considered the evidence on record and the Judgment, I have also considered the submissions on both sides and the grounds of appeal.

24. I have to start by saying that through the appellant has raised a ground of appeal that the magistrate did not take into account that he had been sentenced by the High Court, the position is that the magistrate's case was determined before the High Court decision. Secondly, though Mr. Okemwa submitted that Mr. Onono represented the appellant in both cases, the record shows that he did not participate in the trial before the magistrate. Mr. Onono only filed and withdrew an appeal there from

25. The criminal proceedings against the appellant were mishandled by the prosecution. The appellant should not have been charged and tried by two different courts on the same facts. The prosecution made a mistake of splitting the charges and filing them in different courts based on the same facts, the only difference being that the High Court was handling the charge of murder, while the magistrate's court handled the three other charges of possession of a firearm, possession of ammunition and possession of firearm accessory.

26. Though Mr. Okemwa submitted that the High court was not aware of the proceedings in the magistrate's court, that was not the true position. This position clearly comes out in a ruling on bail delivered by Hon Lady Justice Mutuku on 17th July, 2013, wherein the High Court stated as follows:

“ I have noted that the state counsel, did not address the Court on the alleged Criminal case, the applicant is said to be facing in the lower court. The file in Criminal case No. 1085 of 2012, was placed before the court and it was noted that the accused person in that file is totally different from the applicant. I am not able to state whether the officer got his facts wrong, or it is an error in citing the case. Whatever the case may be, each case ought to be treated on its peculiar facts, and it is not in order to state that an applicant charged jointly with others cannot be released on bail, because this is prejudicial to the prosecution. It is this court's view that granting bail to accused person who has been charged with others is not treating such an applicant preferentially.”

27. The High Court went on to grant bail to the applicant therein who was Sadiq Ahmed Hassan who had been charged with murder with the appellant herein.

28. In my view the State should have charged all offences, herein with respect to the appellant, in the same court, the High Court, which had jurisdiction to hear and determine matters related to all the charges, under section 135 of the Criminal Procedure Code (Cap 75), as they relate to the same person and same items and events. It is apparent also that Mr. Onono did not ask for consolidation of the two cases which was a mistake, as I am sure that he was aware of the proceedings in the Magistrate's Court. The result was double parallel trials against the same person on same facts.

29. Be that as it may, the charges against the appellant before the magistrate's court were three counts, possession of a firearm, possession of ammunition and possession of firearm accessory without a permit.

30. The evidence of the father of the appellant PW3 Haret Abdille was that he learnt from a certain woman that his son had been arrested in possession of a firearm belonging to another person. He also stated that when he later saw the appellant, the appellant said that he had been given a gun by another to keep and that the appellant actually produced the said gun and that he took him to the Block Chairman where the firearm which was covered in clothes was handed over. He stated also that he did not see the gun himself. He was not cross-examined.

31. Pw4 Chief Inspector William Ekasi stated that on 23rd July, 2012 at 10.00a.m, he was called on mobile phone by the leader of the community Block D1 who told him that he had arrested someone with a firearm and were taking him to Dadaab Police Station. He rushed

there and met the people at the gate of the police station, and took possession of the firearm and magazine with six rounds of ammunition. This witness also produced the ballistic expert report. These were the two witnesses who connected the appellant to the items.

32. The appellant gave sworn testimony in his defence. He said that he went to the police station to take food to a suspect when he was arrested. He denied possession of a firearm. He was briefly cross-examined by the prosecutor, and confirmed that he was aware that his father had testified in court.

33. From the above evidence the trial court found that the three offences had been proved, convicted and sentenced the appellant.

34. Is the evidence on record herein adequate establish possession of the items ? In my view the evidence tendered by the prosecution before the magistrate was so scanty that one could not say that possession of a firearm and other items by the appellant was proved. The people who arrested the appellant with the firearm did not come to court to testify on the circumstances that led them to think that he had possession of a firearm, ammunition and accessories. Only the father of the appellant stated that the appellant admitted that he had been given the firearm by somebody else. However, what the father of the appellant saw was something wrapped in pieces of clothes but he did not see the firearm.

35. The people who took the firearm and handed it over to the police, did not testify, to give details on how the firearm was recovered and how it was handed over.

36. It is a cardinal Principle of criminal law that the prosecution is required to prove beyond reasonable doubt, all the elements of a criminal offence. See the case of **LEONARD ANISETH -VS- REPUBLIC (1963) EA 206**. In the present case, possession was to be proved by the prosecution beyond any reasonable doubt, which was not done due to gaps left in the Prosecution evidence tendered before the trial magistrate.

37. Since the prosecution did not bother to prove that element beyond reasonable doubt, the benefit of that doubt should thus have been given to the appellant by the trial court.

40. The prosecution also did not tender evidence to show that what was recovered was a firearm and establish the chain of handling it from the point of recovery till the point of submitting it to the ballistic expert and bringing it back to court to produce it as exhibit together with the technical report. They seem to have glossed over the matter and made a lot of assumptions. Again the benefit of doubt still goes to the appellant, because unless an accused person admits an offence the prosecution is not allowed to take shortcuts but it is required to prove their case beyond reasonable doubt.

41. Even if I am wrong on the above finding, I am of the view that because of the way this case was handled, the appellant actually suffered double jeopardy. A person cannot be tried, convicted and sentenced twice on the same facts. This violates Article 50 of the Constitution. He was tried twice for the same items, that is firearm namely AK 47 Serial number 1974 -6P 9550 together with the same six rounds of ammunition and the AK 47 rifle magazine. That should not have happened.

42. In my view, the effect of the High Court's later decision finding him guilty and convicting him of same offences was to quash the orders of the magistrate's court. The appellant cannot be convicted of possession of a firearm, and ammunition and a magazine in a magistrate's court and then be convicted of possession of a firearm, ammunition and a magazine in the High Court for the same incident and items. Counsel for the appellant in the High Court Mr. Onono should have informed the High Court even after judgment that there was another matter where the same person, had been convicted on the same lesser charges on the same facts, which the High Court had convicted him, for the High Court to make appropriate orders on how the conviction and sentence the High Court should not operate as a double order against the same person for same offences. That was not done.

43. In my view, therefore, even if the prosecution had proved the offences in the magistrate's court, the High Court's conviction and sentence had the effect of superseding the conviction and sentence of the magistrate's court, and the conviction and sentence to be served would only be that of the High Court, not both of them.

DETERMINATION

44. I thus find that the appeal has merit. I allow the appeal quash the conviction, and set aside the sentences imposed by the magistrate's court. I order that the appellant be set at liberty subject to the orders for him to be dealt with by Department of Refugee Affairs, and I am aware that the conviction and sentence in High Court Criminal case number 25 of 2012 still stands.

Dated, signed and delivered at Garissa this 14th day of March, 2018

George Dulu

JUDGE

In Presence of:

Court Assistant: Martin/ Mohammed

Appellant in person

State Counsel: Mr. Okemwa