



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 47 OF 2018**

**ABDIFATAH ABDI MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from Judgement in Wajir Resident Magistrate Court Criminal Case No.522 of 2018 delivered by Hon. A. K. Mokeross SRM)**

**JUDGEMENT**

1. The appellant was charged with offences of:-

**COUNT I:** Being in possession of ammunitions without holding 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.

- Particulars being that on 11<sup>th</sup> day of November 2017 in Lafaley area of Tabaj Sub-County within Wajir County and with others not before court were found in possession of ammunitions namely 17 rounds of 7.62 by 39mm in contravention of the said Act.

**COUNT II:** Membership of a terrorist group contrary to section 24 of the Prevention of Terrorism Act 2012.

- Particulars being that on 6<sup>th</sup> day of October 2017 at around 1930 hours at Lafaley area in Tarbaj Sub-County within Wajir County, was found while lying on Wajir – Mandera road being a member of a terrorist group namely Al-Shabaab which is an outlawed terrorist organization by the Kenya gazette notice 12585 of 2010 which is in contravention of the said Act.

**COUNT III:** Facilitating of a terrorist act contrary to section 9 (A) of the Prevention of Terrorism Act 2012.

- Particulars being that on or about the 6<sup>th</sup> day of October 2017 in Lafaley area of Tarbaj Sub-County within Wajir County and with others not before court knowingly transported grenades and ammunitions to the said area an act which was in preparation to commission of a terrorist act in contravention of the said Act.

2. He pleaded not guilty and matter went into full trial. He was convicted in respect of Count I but Count II and II were dismissed.

3. He was aggrieved by the court decision thus filed the instant appeal setting out 9 grounds. He later during the hearing lodged handwritten submissions together with amended grounds of appeal namely:-

**1) That the pundit trial magistrate erred in law and fact to convict me without considering that I was not arrested being in possession of any explosive device or rounds of ammunitions.**

**2) That the pundit trial magistrate erred in law and fact to convict me without due consideration that there were no medical proof that the injuries he sustained were inflicted or connected with the explosive device (grenade).**

**3) That the prosecution's evidence; without doctors report and findings connected to the cause of injuries, remained unsupported and allegations, which cannot be relied upon to convict an individual.**

**4) That the pundit trial magistrate erred in law and fact to convict him without considering that the prosecution relied on the recovery made at the scene of crime to fix me with possession of ammunitions yet no evidence to prove the same beyond reasonable doubts.**

5) That the pundit trial magistrate erred in law and fact to rely to the evidence of PW5 and PW15 while their evidence were contradictory and full of inconsistencies contrary to section 163 of the Evidence Act.

6) That the learned trial magistrate erred in law and fact to convict him without the evidence of the very crucial witnesses contrary to section 150 of the C.P.C.

7) That there were vendetta between our tribe and the locals which resulted to fabrication of this case.

4. The parties agreed to canvas appeal via submissions.

#### **DUTY OF THE FIRST APPELLATE COURT:**

The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

#### **EVIDENCE ADDUCED:**

5. **Yussuf Abdille (PW1)** testified that on 6/10/2017 while he was herding his goats he found a person lying on the road and noted that the person had injuries on his head and on the left side of his body. The person asked for water and after giving him drinking water, he asked the person if he needed any help. The person replied that he needed no help and he therefore left him lying where he was and took his goats to Lafaley where he reported the matter to the chief. According to him the person did not mention his injuries at all.

6. He was not cross examined.

7. **Mohamed Omar Bare (PW2)** gave evidence in his capacity as the assistant chief of Leheley Sub-Location and merely testified to the fact that the appellant person hailed from his Sub-Location and expressed surprise that the appellant had been arrested at Lafaley which is in a different Sub-County.

8. He was also not cross examined.

9. **Idle Ahmed Abdille (PW3)** testified as the chief of Lafaley Location and stated that he had heard from members of the public that there had been an explosion and that someone had been seen lying on the road with injuries. He however did not visit the scene of the explosion or see the injured person.

10. **Abdi Mikail Jimale (PW4)** testified that on 6/10/2017 while herding his goats in Lafaley he heard people making noise and when he went to investigate the source of that noise found some women arguing with a man he did not know. Later, after he had returned to herding his goats, he heard an explosion.

11. When questioned by the court he stated that he heard the explosion after about 20 minutes of leaving the women's manyatta.

12. When cross examined by the appellant person he stated that he did not find the appellant in the manyatta. That the women were with a man but he did not recall the women roughing up the man. That the women made noise when the appellant was there. That the explosion occurred 20 minutes after he left the appellant. That the explosion occurred on the road and not on the manyatta and finally that he could not confirm that the appellant person had the explosive device.

13. **FNo. 82330 PC Ali Noor Dangicha (PW5)** testified that on 11/11/2017 he was called by his superior Inspector Waringa and when he reported to the police station he was informed that they were to accompany the appellant person herein to a scene of crime. The appellant had been picked by Red Cross officials while lying on the roadside with injuries which were later discovered to be pellet wounds. They then proceeded to Lafaley area under the direction of the appellant person and the appellant person directed them to a place about 3 Km from Tarbach where he led them to some bushes and extracted a black paper bag from under a tree.

14. **Inspector Waringa**, checked the contents of that paper bag and found that it contained 47 spent bullets as well as live ammunition in caliber 7.62mm meant for AK 47 rifle. Inspector Waringa then photographed the scene.

15. He identified 47 spent cartridges and 17 live bullets as well as a black paper bag as the ones they had recovered at the scene and they were accordingly marked for identification.

16. He also identified a grenade lever and testified that they had picked the same as they returned towards the vehicle.

17. They then returned to the police station and booked the recoveries and the following day forwarded the same to the ballistics experts for examination.

18. It was his further testimony that the scene they had visited looked like a scene of explosion with the place where they had picked the grenade lever looking like the point of impact.

19. He was not cross examined by the appellant person.

20. **Salah Bagal Ali (PW6)** introduced himself as the chief Burei and testified only because the appellant had apparently named him as his kin. He was however firm that the appellant person was not related to him.
21. **Bare Jimalle (PW7)** testified as the assistant chief of Lafaley and stated that he had heard from members of the public that there had been an explosion and that someone had been injured. He however had no direct evidence to offer.
22. **Mohamed Ahmed Mohamed (PW8)** stated that having attended a meeting on 11/11/17 at the County Commissioner's Office in his capacity as the chief of Kulaaluy, he and his colleagues were informed that someone had committed a crime and was at that time admitted in hospital. The County Commissioner instructed them to pay a visit to that man and when they proceeded to the hospital he was surprised to find that the injured man was the appellant person herein. He stated that the appellant person hailed from his location and was known to him as a herder. He noted that the appellant had injuries on his body and was informed that the injuries resulted from an explosion but the appellant person did not tell him what had happened. He then recorded his statement with the Anti-Terror Police.
23. He was not cross examined.
24. **Abbas Haile Issack (PW9)** introduced himself as a KPR officer but did not give any direct evidence. Like some of his predecessors in this matter, his testimony centered on what he had heard from third parties.
25. **Abdi Gedi Duale (PW10)** was the former employer of the appellant person and limited his testimony to that fact. He stated that the appellant had worked for him in January and February and half of March after which he left for places unknown. The next time he saw the appellant was in hospital with injuries all over his body.
26. **Baraza Keneth Khaemba (PW11)** introduced himself as a Red Cross driver. He testified that on 6/10/2017, he and a paramedic (PW12) were on a return journey from Wajir to Mandera at around 7:00 pm when they found someone lying by the road. They saw that the person was bleeding and on humanitarian grounds they gave him first aid then turned around and took him to the Wajir Referral Hospital where it was discovered that the man had blast chippings.
27. It was his further evidence that the man bled from one eye and had bruises on the whole of his frontal body. He identified the appellant person as the man they had picked on that day.
28. **Vincent Omange Michira (PW12)** gave evidence that was materially similar to that of PW1.
29. **FNo. 230245 SSP Lawrence Ndhiwa (PW13)** introduced himself as a firearms examiner of 17 years standing attached to the firearms lab at the DCI headquarters. He gave evidence on behalf of his colleague Charles Koilege and testified that their lab had received a set of 17 rounds of ammunition and 42 spent cartridges from FNo. 235270 Inspector Waringa on 20/11/2017. The 17 rounds of ammunition were marked as A1-A1 (17) whereas the 42 cartridges were marked as A3 (1) – A3 (42).
30. His colleague examined the said exhibits and found A1 – A17 to be rounds of ammunition in caliber 7.62 x 39 mm designed for use in firearms such as AK 47 rifles. 10 of those rounds were picked at random and successfully test-fired in the lab.
31. A3 (1) to A3 (42) were found to be cartridges in caliber 7.62 x 39 mm leading to the opinion the A1 (1) – A1 (17) were live ammunition in line with the firearms Act whereas the cartridges A3 (1) – A3 (42) were fired from an AK 47.
32. He produced the live ammunition as Pexh. 1-17 and the spent cartridges as Pexh. 17 – 59. He also produced the firearms report as Pexh. 64; a black paper bag as Pexh. 60; an exhibit memo as Pexh. 62.
33. **FNo. 68905 CPL Dennis Wanjala (PW14)** was from the Bomb disposal unit DCIO and he is the one who examined the alleged grenade lever. He testified that upon examining the same he found it to be component of a Chinese hand grenade.
34. His findings are contained in a report dated 4/12/2017 which he produced as Pexh. 63. He also produced the grenade lever as Pexh. 61 and the forwarding memo as Pexh. 67.
35. **FNo. 235270 Inspector Nicholas Waringa (PW15)** stated that on 6/10/2017 he had gotten a call from the Wajir Referral Hospital's administrator asking him to go to the hospital. He proceeded to the hospital and was taken to the x-ray section where he found the appellant person herein. The x-ray done on the appellant showed that he had pellets stuck to his body and it was suspected that the appellant had been a victim of an explosive device. He sought custodial orders against the appellant person so that he could investigate the matter fully and on 11/11/2018 after much persuasion, the appellant opened up and led them to the scene of explosion where they recovered the grenade lever; 17 rounds of ammunition and 42 spent cartridges. They then documented the recoveries and forwarded the same to the ballistics office in Nairobi resulting in the reports produced by PW13 and PW14.
36. He was the last prosecution witness.

#### **DEFENCE CASE:**

37. When pleaded on his defence, the appellant person elected to give a sworn defence and stated that he had been framed in this case. It was his assertion that he is Kenyan whilst the Al-Shabaab are in Somalia and asked for the courts forgiveness.
38. In cross examination he stated that he lived in Leheley before his arrest. That his employer then sacked him. That he had worked for his

employer for two months. That he thereafter came to look for work in Wajir. That from Wajir he moved to Lafeley to look for work. That he did not get work because he fell ill. That he had a headache and a stomachache. That at the time he lived with good Samaritans.

39. That he did not know the good Samaritans. That they later chased him off. That they said they did not understand his dialect. That he then ran off and they followed him while armed with clubs. That they attached him. That he does not recall where he was hit. That he lost consciousness. That he had been sick before that. That he does not recall when he regained consciousness. That he was arrested at the hospital.

40. That he was ill and had been admitted at the hospital. That when he was arrested he had regained consciousness. That at the hospital he had a headache and stomachache and leg pains. That he did not have any external injuries. That he only had rashes on his body. That the rashes looked like pimples. That he thought he was suffering from chicken pox. That he had suffered from chicken pox before hence knew the symptoms. That the rashes were on his face, chest and stomach and that he did not have rashes on his back.

41. He did not call any witness.

**ISSUES FOR DETERMINATION:**

42. After going through the submissions and evidence on record, I find the single issue is;

**Whether the prosecution proved its case beyond reasonable doubt?**

43. On the charge of being in possession of ammunitions without a firearms certificate, the prosecution only needed to prove two things. First, that the appellant had ammunitions in his possession and; secondly, that the appellant person had no firearms certificate permitting him to be in such possession.

44. Section 4 of the Penal Code, Chapter 63 of the Laws of Kenya defines possession as follows:-

**(a) "be in possession" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:**

**(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"**

45. The PW13 testified to the effect that, the ammunitions in question herein were 17 rounds of live ammunition and 42 spent cartridges. The same were subjected to a ballistics expert for examination and the said expert's report shows that the live ammunition were rounds of ammunition in caliber 7.62 x 39mm which could be used in AK 47.

46. The live rounds of ammunition were randomly selected and test fired and were found to be capable of being fired leading to the conclusion that they were rounds of ammunition as per the Firearms Act Chapter 11 Laws of Kenya. On that evidence the trial court found no difficulty holding that the ammunition in issue herein are ammunition within the Firearms Act of Kenya.

47. There was also evidence from PW5 and PW15 that the appellant person is the one who led them to the scene where the ammunitions were recovered from and that it is the appellant person who had actually extracted the same from the hiding place and handed them over. Both the said witnesses were not cross examined on that issue leaving their evidence unchallenged and having personally observed them as they testified; the trial court formed the impression that they were objective and credible witnesses.

48. The appellant also studiously avoided the subject of the ammunition in his defence and at the end trial court found that there was no doubts whatsoever that the appellant person indeed had the said ammunition in his possession.

49. This court evaluating the evidence on record it finds no fault on conclusion arrived at by the trial court.

50. The prosecution thus sufficiently proved the first count against the appellant person. Thus court finds that the appeal lacks merit and makes the following orders;

**(i) The court rejects and dismisses the appeal and affirms conviction and confirms the sentence.**

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 27<sup>TH</sup> DAY OF JUNE, 2019.**

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**CHARLES KARIUKI**

**JUDGE**