REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 12 OF 2018

YATTANI MAMO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case no.215 of 2017 of the Principal Magistrate's Court at Marsabit)

JUDGMENT

The appellant was charged with the offence of being in possession of a firearm without a firearms certificate Contrary to Section 4 (2) (a) and 4 (3) (b) of The Firearms Act. The particulars of the offence are that the appellant on the 26th of April 2017 in Qorka sub location, North Horr sub county within Marsabit County was arrested for being in possession of firearm make AK 47 of serial number UK4481 without a firearm certificate.

The appellant faced a second charge of being in possession of ammunition without a firearms certificate Contrary to Section 4 (2) (a) and 4(3) (b) of The Firearms Act. The particulars of the offence are that the accused on the 26th of April 2017 in Qorka sub location, North Horr sub county within Marsabit County was found being in possession of 29 rounds of ammunition (7.62 special) without a firearm certificate.

The trial court convicted the appellant on both counts and was sentenced him to serve 7 years imprisonment for each count. The sentence is running concurrently. The grounds of appeal are: -

1) That the Learned Trial Magistrate erred in Law and in fact by failing to make a finding that the Appellant was not provided with documents that the prosecution intended to rely on including Prosecution Witness Statements, Exhibits, Reports and other evidence in advance and/or at all before continuing with the trial thereby occasioning miscarriage of justice, mistrial and violation of right to fair trial of being informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

2) That the Learned Trial Magistrate erred in law and in fact by failing to inform the Appellant of his right to legal representation at the expense of the state to prevent substantial injustice from occurring to the Appellant at his trial.

3) That the Learned Trial Magistrate erred in law and in fact by failing to make preliminary inquiry at the earliest opportunity possible and make a determination on the question whether or not the Appellant would require legal representation at the state expense before embarking on the criminal trial of the Appellant.

4) That the Learned Trial Magistrate erred in law and in fact by failing to hold that the Charge Sheet was fatally and incurably defective as the Charges against the Appellant of possession of firearm without a firearm certificate and ammunitions were brought under wrong and/or incorrect provisions of the law and they did not disclose the particulars of the Offences.

5) That the Learned Trial Magistrate erred in law and in fact by relying on inadmissible evidence to convict the Appellant.

6) That the Learned Trial Magistrate erred in law and in fact by failing to make a finding that the Prosecution failed to summon crucial witnesses whose evidence would have proved the Appellant's innocence.

7) That the Learned Trial Magistrate erred in law and in fact by failing to inform the Appellant of his lawful right to call or summon the crucial witnesses to prove his case.

8) That the Learned Trial Magistrate erred in law and in fact by failing to vindicate and uphold the majesty of the law in that he did not exercise the Court's inherent power under the law *suo motu* to call or summon crucial witnesses for fair and just decision of the case.

9) That the Learned Trial Magistrate erred in law and in fact by failing to hold that the there was miscarriage of justice as the entire Prosecution case against the Appellant was founded upon the testimony of one police officer who adduced contradictory, weak, uncorroborated and shaky testimony.

10) That the Learned Trial Magistrate erred in law and in fact by failing to hold that the Appellant was not given an opportunity to call his witnesses and/or adduce evidence to defend himself.

11) That the Learned Trial Magistrate erred in law and in fact by relying on inconsistent, contradictory, uncorroborated, weak evidence to make a finding of guilt against the Appellant.

12) That the Learned Trial Magistrate's judgement is not based on law or fact.

13) That the Learned Trial Magistrate erred in fact in holding that the Appellant was actually found in possession of the alleged firearm and ammunitions when in fact the Appellant only had a grazing stick and he was just looking after his animals at the time of his arrest.

14) That the Learned Trial Magistrate erred in law and in fact in advancing theories and speculations to fill glaring loopholes in the Prosecution case.

15) That the Learned Trial Magistrate erred in law and in fact by failing to hold that the Prosecution did not prove its case against the Appellant beyond reasonable doubt.

16) That the Learned Trial Magistrate erred in law and in fact that the entire criminal trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee the illimitable right to fair trial as the Appellant was completely in the dark on what was going on at his trial due to language barrier and illiteracy and could not therefore properly conduct his defence.

MR. HUKA appeared for the appellant. Counsel consolidated the 16 grounds of appeal into five grounds. It is submitted that the trial was not fair. The constitution calls for afair trial which is necessary to instill fairness on the process. Article 50 of the constitution provides for afair trial which right cannot be limited. Justice should be done and seen to be done. It is submitted that during the hearing the appellant's right were violated. He was not informed of the prosecution evidence in advance. The trial court directed the prosecution to provide the copies of witness statements to the appellants but the same were never provided. Being illiterate, the appellant did not understand his right to refuse to continue with the trial before being supplied with those statements. The right to be provided with the evidence is not only limited to witness statements but also all other evidence. The trial court therefore erred by failing to insure that the appellant had all the evidence to enable him prepare adequately for his defense. Counsel relies on the case of **THOMAS PATRICK GILBERT CHOLOMONDELY V REPUBLIC** (**2008)eKLR** where the Court of Appeal held that the prosecution is under a duty to provide an accused person in advance of the trial with all the relevant material such as copies of statement of witnesses who will testify and copies of documentary exhibits to be produced at the trial. Counsel also relies on the case of **JONATHAN MJOMBA MWACHOFI VS REPUBLIC (2018)eKLR** where the court held as follows:

Where an accused person is a lay man on issues pertaining to law and procedures on courts, the trial court is charged with a higher burden to satisfy itself that such a person has been supplied with witness statements".

In the absence of any evidence that the appellant had access to the said documentary evidence before and during trial, the whole trial was anullity and a mistrial and that the omission by the learned trial magistrate to establish if the accused had been furnished with the said documentary evidence before the trial commenced occasioned the accused person great injustice and prejudice and was a gross violation of his fundamental right to a fair trial guaranteed under the constitution of Kenya 2010. Counsel also relies on the case of **JOSEPH NDUNGU KAGIRI Vs REPUBLIC (2016)eKLR** where the High Court held that "**failure to provide the prosecution evidence and witnesses is a legality and violation of right to fair trial"**

It is also submitted that the trial court erred in law and fact by failing to inform the appellant of his right to legal representation at the expenses of the state in order to prevent substantial injustice from occurring to the appellant at his trial. Article 50(2)(h) of the constitution provides for the right of every accused to have an advocate assigned to him by the state at the state expense if substantial injustice would otherwise result and to be informed of this right promptly. The duty to give such information falls on the prosecution and the judicial officer handling the case. Counsel relies on the United Nations Principles and guidelines on access to legal aid in criminal justice system, the LILONGWE declaration on accessing legal aid in the criminal justice system in Africa and the JOURNESBURG Declaration on the implementation of the United Nations Principles and guidelines on access to legal aid in criminal justice system. Section 43 of the Legal Aid Act 2016 calls upon the courts to promptly inform an accused of the right to legal aid. Section 36 of the same Act sets out some of the criteria guiding the provision of legal aid to an accused person. Counsel relies on the case of **REPUBLIC VS KARISA CHENGO** and **TWO OTHERS (2017) eKLR** where the Supreme Court of Kenya held as follows:

"it is clear that with regard to criminal matter, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include: the seriousness of the offence; the severity of the sentence, the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the literacy of the accused and the complexity of the charge against the accused."

It is also contended that the trial court ought to have conducted an inquiry at the earliest opportunity so as to determine on the question whether or not the appellant would require legal representation at the expense of the state.

MR. HUKA further contend that the charge sheet was fatally and incurable defective as the charges were brought under the wrong or incorrect provision of the law. Article 50 of the constitution states that the right to fair trial include the right to be informed of the charge with sufficient detail to answer it. Section 134 of the Criminal Procedure Code provides for what should be contained on the charge sheet. Section 214 of the Criminal Procedure Act provides for alteration of a defective charge sheet. The appellant was facing a charge of being in possession of a firearm and ammunition without a firearm certificate. The section setting out the offence is section 4 (1) and not section 4(2) (a) and section 3 (b) of the Firearms Act. The latter section do not establish the offence of possession of firearm or ammunitions. They merely explain them and provide for sentence. Therefore, the charge sheet was incurably defective. Counsel relies on the case of **ELIJAH KIPKENEI KIMAGAL VS REP 2018 eKLR** where an accused who faced similar charges was acquitted for having been charged under incorrect provisions of the law.

It is also submitted that the prosecution alleged that the appellant was found in possession of an AK47 SERIAL NUMBER UK4481. An AK 47 is a specified firearm within the meaning of a specified firearm under section 4 A (2) of the Firearms Act. The Act distinguishes between specified firearms, prohibited firearms and other firearms. The sentence for being in possession of a specified firearm is severe than possession of other firearms. If the appellant was found in possession of specified firearm he ought to have been charged under section 4(1) as read with section 4 A (1) (a) and 4 A (2) which sections provide for an offence of possession of a specified firearm and the sentence for that is life imprisonment. Counsel relies on the case of **JASON AKUMU YONGO VS REPUBLIC (1983) eKLR** where the Court of Appeal held as follows:

> "***a charge is defective under Section 214(1) of the Criminal Procedure Code where: it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or it does not, for such reasons, accord with the evidence given at the trial; or it gives a misdescription of the alleged offence in its particulars''***

MR. HUKA further maintains that the charge of being in possession of ammunition without a firearm certificate was also incurably defective as it was brought under incorrect provision of the law. Neither the charge nor the particulars specified the type of firearm and alleged ammunitions that were to be used. The correct provisions ought to have been section 4 (1) as read with section 4(2) (a) and 3 (b) of the Firearms Act. Every ammunition Is intended or designed to be used in or for a specific firearm. This is in line with section 4 (2) of the Firearm Act. The need to disclose the type of firearm the ammunition is to be used in is fundamental because the Firearms Act specifies different sentence for different types of ammunitions. The prosecution failed to specify the type of firearm the alleged ammunitions were to be used in both the statements of the offence and the particulars of the offence.

Counsel for the appellant submit that the trial magistrate erred in law and in fact by relying in on inadmissible evidence to convict the appellant. Article 50 (4) of the Constitution provides that any evidence that is obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair. The appellant was allegedly found in possession of the firearm and ammunition by PW1. However, the alleged firearm and ammunitions were adduced in evidence by PW4 HASSAN ARES. PW 4 also produced an undated inventory of items allegedly recovered from the appellant which does not show who prepared it. The inventory is handwritten and does not have the police stamp. The appellant is illiterate and no one explained to him the nature of the inventory and the effect of his signature. This violated the appellant's right not to give incriminating evidence under the constitution. The inventory amounted to illegally obtained admission in violation of Article 49 (d), Article 50 of the Constitution and section 25 A of the Evidence Act. Counsel relies on the case of **NJUGUNA S/O KIMANI AND OTHER VS REGINA (1954) E.A (316)** where it was held that:

> "***the trial court has discretion to exclude a statement which has been obtained by improper questioning or other improper means and that objection to admissibility of such statement was not confined to the circumstances enumerated in the present section 26 of the Evidence Act***"

The appellant further contend that crucial witnesses were not summoned. PW1 stated that he was in the company of PW2, Chief GUYO BORU of Darathe sub location, chief Omar and three Kenya Police Reservists. PW4 expressly admitted that he did not see the appellant in possession of the alleged firearm and ammunitions. The appellant made reference to one BOYA ABUDHO MAMO. This witness was not called yet he was privy to the circumstances leading to the arrest. The chiefs were also not called to testify. Counsel relies on the case of **BUKENYE and OTHERS VS REPUBLIC (1972) E.A 549** where the former East Africa Court of Appeal held as follows:

> "**While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have tendered to be adverse to the prosecution case".**

It is also submitted that the trial court erred by failing to inform the appellant of his lawful right to call or summon crucial witnesses to support his case. The appellant's defence was hurriedly conducted. He was only given one week from the time the prosecution closed its case for him to prepare for his defense. He was not informed of the right to call witnesses. It is further submitted that the trial court erred by failing not to exercise its inherent powers and call crucial witnesses for fair and just decision of the case. Section 150 of the Criminal Procedure Code empowers the court to call other witnesses. The trial magistrate erred in law and in fact by failing to hold that there was miscarriage of justice as the entire prosecution case was founded on the testimony of one police officer (PW1) whose evidence is contradictory, weak, shaky and uncorroborated. The judgment of the trial court Is not based on law or facts. It does not comply with section 169 (2) of the Criminal Procedure Code. The appellant was just found grazing goats while having a stick. PW4 confirmed that he did not see the appellant carrying the rifle or with the ammunitions. The prosecution did not prove its case beyond reasonable doubt.

It is also contended that section 200 (3) of the Criminal Procedure Code was not complied with. The case against the appellant proceeded

before Hon. B.M Ombewa until the point of judgment. However, the judgment itself was written and delivered by Hon. T.M. WAFULA who did not hear the witnesses or record any evidence or conduct the case. Counsel relies on the case of **ADBI ADAN MOHAMMED VS REPUBLIC (2017)eKLR** where the Court of appeal states as follows:

> "***the resummoning of witnesses and rehearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witnesses and to weight their evidence accordingly".***

It is submitted that it is mandatory for the trial court to explain to the appellant his rights under section 200(3) of Criminal Procedure Code. Failure to do so renders the subsequent proceedings and conviction a nullity as was held by the High Court in the case of **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS VS PETER ONYANGO ODONGO and 2 OTHERS (2015)eKLR**

MR. OCHIENG, prosecution counsel, opposed the appeal. Counsel submit that the appellant was provided with the witness statements. He proceeded with the case and actively participated in the trial. At no given time did the appellant object to the continuation of the case on the basis of lack of witness statements. The appellant did not inform the court that he wanted to be represented by a counsel during the trial. The offences facing the appellant do not fall within the ones that mandates the states to provide legal representation. The appellant had his own rights to appoint his own advocate and he chose to appear in person. The charge sheet is proper and all the relevant particulars were captured. The prosecution evidence is cogent, direct and admissible. It provides a picture on how the events unfolded and how the appellant was arrested. The evidence is sufficient to sustain the conviction. The appellant was placed on his defence and Section 211 of Criminal Procedure Code was explained to the appellant. The appellant opted to give his defence and not to call a witness. The witnesses who testified were sufficient and proved the case beyond reasonable doubt. The judgment is based on law and the facts provided by the prosecution proved that the appellant committed the offence. There was Borana translation which the accused confirmed to understand.

This is a first appeal and this court is duty bound to evaluate the evidence afresh and make its own conclusion. Five witnesses testified for the prosecution. **PW1 PC MACHONGA MOGAKA** was based at the North Horr police station. On the 26th of April 2017 they got a report that there was a raid at MANYATTA SARIMO together with the other officers including **PW2, Chief OMAR** and three Kenya police reservists they went to the area and met the village elders. They were told that one of the attackers had gone with gunshot wounds. They were told that the attackers' footsteps went to DARATHE SUB LOCATION. On their way they met people shifting with their livestock because of insecurity. They inquired whether they had seen someone with gun shots wounds and they were told that SHAMO WATO GODANA had bullet wound. They were shown the route which Shamo had taken. They went for a bout 10km and found the said SHAMO WATO GODANA with his father. The chief knew him and identified him. He had a fresh wound on the right shoulder. They arrested him. SHAMO led them to the appellant's place. They found the appellant herding goats. He had an AK47 Rifle Serial Number UK4481. It had magazine with 19 rounds of ammunition caliber 7.62mm. They escorted him to his house where they recovered a bag which had another 10 rounds of ammunition. PW1 prepared an inventory of the recovered items and the appellant signed it.

PW2 APC EDWIN OKUMU was attached at the North Horr Sub County Headquarters. He was with PW1 when they went to look for the raiders who had attacked Manyatta Sarima. Their search led to the arrest of **SHAMO WAKO GODANA** who was the second accused before the trial court. Shamo led them to the appellant's place. Shamo told them that the appellant was the one keeping guns. They decided to look for the appellant. One KPR knew the appellant's homestead. At around 5-6pm the appellant was arrested. It is PW1 who went in with KPR to arrest the appellant. A rifle and 29 rounds of ammunition were recovered. The appellant was taken to the police station.

PW3 BOYA ABUDHO testified that on the 26th of April 2017 he was with the police officers when they went to look for the raiders. They found one person with a wound on the shoulder. The person mentioned the appellant as one of them. They went to look for the appellant. The police arrested the appellant. He was not present during the arrest. **PW4 CORPORAL HASSAN ARES** was attached at the North Horr police station. He took over the investigations from the North Horr OCS. He was given two prisoners, a fire arm **AK 47 SERIAL NUMBER 4481** and 29 rounds of ammunition. He charged the appellant with being in possession of firearm and ammunition without a certificate. He forwarded the firearm and ammunition to the ballistic experts in Nairobi and got the result. There was also an inventory giving the list of items that were recovered from the appellant.

PW5 INPSECTOR KENNETH CHOMBA works with the Forensic department ballistic section in Nairobi. He received from PC GAITHO the rifle, one magazine, 29 rounds of ammunition and 8 fired cartridges on 8th of May 2017. Upon examination of the exhibits on 7th June 2017 he concluded that the AK 47 Rifle serial number UK4481, used 7.62MM by 39MM ammunition and was in good physical and mechanical condition. He successfully testified four rounds of ammunition out of the 29 rounds using the rifle. He also examined the magazine and found that it has a capacity of 30 rounds of ammunition when fully loaded of 7.62mm by 39mm calibre. He also examined the 29 rounds of ammunition and found them suitable for use and can be fired. He also concluded that the eight cartridges were in 7.62mm by 39mm and microscopic examination revealed that they were fired from two different firearms. His further examination revealed that the eight cartilages were not fired from the AK 47 which he tested.

The appellant tendered sworn defence. On the material day he was herding goats in the evening when police officers in the company of BOYA ABUDHO MAMO and GODANA BOYA went to arrest him. He only had a stick and not a gun. While at the police station the gun was brought and it was alleged that he was found in possession of a gun. He denied being in possession of the gun or ammunition. He does not know SHAMO WATO

The appellant has raised several issues for consideration by the Court. The first issue relates to witness statements and/or evidence of the prosecution. It is contended that the appellant was not provided with the prosecution evidence in advance to enable him prepare adequately for his defence.

The record of trial Court shows that the plea was taken on 11.5.2017. Part of the record of that date states as follows:-

> "***Each accused is granted bond for Ksh.200,000 with similar surety amount or cash bail of similar amount. Copies of witness***

statement to issue".

On the same date two sureties were examined for both accused and approved. The appellant was subsequently released on bond**.** The case was partly heard at North Horr through the mobile Court system. On 2.8.2017 the case was to be heard but was adjourned. Again on 24.8.2017 the case was adjourned. The appellant did not object to the adjournment. The case was fixed for hearing on 28.9.2017. The appellant informed the court that he was ready to proceed. Two witnesses testified.

The record therefore shows that the plea was taken on 11.5.2017 and the first witness was heard on 28.9.2017, a period of over four (4) months. The appellant was out on bond. He told the court that he was ready to proceed with the case.

Article 50(f) provides for the right of an accused to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. My view on the above Article is that it does not specifically call upon trial courts to put it in writing that on a specific date the presiding Judicial officer witnessed the handing over of witness statements and documentary evidence to the accused. Good practice calls upon trial courts to indicate that the defence confirms that such evidence has been supplied and the case can proceed. However, failure to do so does not render the proceedings a nullity leading to an acquittal on appeal. The fact that an accused informed the trial court that he/she was ready to proceed with the case does confirm that the prosecution evidence was availed to the accused or defence counsel unless it is proved otherwise. Even if the accused is not represented by counsel, it should not be interpreted that lack of indication that witness statements were supplied does confirm that they were not. Mr. Huka did not participate in the trial. The court cannot hold that the prosecution evidence was not supplied to the accused. Doing so is tantamount to engaging in speculation. Given the fact that the trial Court ordered that witness statements were to be supplied to the accused and in the absence of any complainant by the accused or evidence on record to the contrary, I do find that this ground of appeal is purely speculative and the same must fail.

There is the issue that the trial Court failed to inform the appellant that he was entitled to legal representation at the expense of the state. The contention is tied with the submission that the trial Court erred by failing to conduct an inquiry at the earliest opportunity in order to find out whether the appellant required legal representation at the expense of the state. Mr. Huka maintains that failure to comply with the above requirement led to substantial injustice.

Article 50(1) (g) and (h) states as follows:

> **(g)** ***to choose, and be represented by an advocate, and to be informed of this right promptly.***
>
> ***(h) to have an advocate assigned to the accused person by the State and at state expense, if substantial injustice would otherwise result, and to be informed of this right*** **promptly**;

Section 40 of the Legal Aid Act No.6 of 2016 provides for the right to apply for Legal Aid. Section 43(1) of the same Act states as follows:

43(1) A court before which an unrepresented accused person is presented shall-

> **(a) Promptly inform the accused of his or her right to legal representation;**
>
> **(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her, and**
>
> **(c) Inform the service to provide legal aid to the accused person.**

(1A) in determining whether substantial injustice referred to in paragraph (1)(b) is likely to occur, the court shall take into consideration –

> **(a) the severity of the charge and sentence**
>
> **(b) the complexity of the case; and**
>
> **(c) the capacity of the accused to defend themselves**

What then is the effect of the Courts failure to inform an accused person of the right to legal aid. It should be noted that the request for legal aid does not mean that it will automatically be granted. The provisions of Article 50(2)(h) contain the rider that legal aid be provided if substantial injustice would otherwise result. Section 43 (4) and (h) (6) of the Legal Aid Act states as follows:

> **43(4) Where the accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.**
>
> **(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.**

What is substantial injustice? Can a conviction be held to be substantial injustice? Article 50(h) makes reference to substantial injustice. Section 43(1A) provides for the procedure of determining whether substantial injustice will occur. Three parameters are provided. The charge facing the appellant herein provides for a minimum sentence of seven years. The prosecution evidence is that the appellant was found in possession of a firearm and ammunition. I do find that the case was not complex or complicated. The appellant's position was that he

only had a stick and was not found with the firearm or ammunition. On the issue of the appellant's capacity to defend himself, I am satisfied that the appellant was capable of defending himself. He told the court that he was ready to proceed with the case. The record of the trial court shows that all the witnesses were subjected to cross examination by the appellant.

The appellant was released on bond. His surety, Guyo Yattani Tocha is a businessman in Marsabit County. The surety is a cousin to the appellant. The appellant had over four (4) months to choose an advocate as provided under Article 50(2)(h). The conviction seems to have awoken him and has now engaged the services of an advocate. In my view failure to be provided with an advocate for an offence of being in possession of a firearm and ammunition which offence does not carry a death sentence punishment cannot amount to miscarriage of Justice. Similarly, a conviction of an accused facing such an offence and imposition of seven (7) years imprisonment sentence does not amount to miscarriage of Justice. Lack of Legal representation does not lead to automatic acquittal in a criminal case. The appellant could have still been convicted even if legal representation was accorded to him. There was no miscarriage of justice. The case was properly prosecuted and the appellant duly participated. This ground of appeal also fails.

The next issue concerns the charge sheet. According to Mr. Huka the appellant ought to have been charged under Section 4(1) as read with section 4(2) of the Firearms Act. Section 4 of the Firearms Act states as follows:-

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 armoured vehicle unless he holds a certificate of approval issued under this Act.

2 (2)If any person—

(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or

(b) fails to comply with any condition subject to which a firearm certificate is held by him; or

(c) manufactures, assembles, purchases, acquires or has in his possession an armoured vehicle without approval under subsection (1A), he shall, subject to this Act, be guilty of an offence.

Similarly, Section 4A of the same Act states as follows:-

4 4A.Offences relating to specified firearms

(1) Notwithstanding section 4, any person who—

(a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or

(b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence under this Act and is liable to imprisonment for life.

(2) For the purposes of this section, "specified firearm" means any of the following firearms—

(a) AK 47;

b) G3;

(c) MP 5; and

(d) such other similar firearms as may be specified by the Minister by order published in the Gazette.

(3) A court before which an offence under subsection (1) is found to have been committed may order the forfeiture to the State of any firearms, ammunition or other parts produced as exhibits in the trial.

Section 4(1) prohibits possession of firearm or ammunition without firearm certificate. Section 4(2) also prohibits the purchase, acquisition or possession of any firearm or ammunition without a licence. At the bottom of Section 4(2) there is the words "**he shall, subject to this Act, be guilty of an offence".** These words cover both Sections 4(1) and 4(2) and are not limited to section 4(2) only. Section 4(IA) prohibits the manufacture, assemble, purchase or acquisition of an armoured vehicle without approval certificate. The fact that section 3 makes reference to section 4(2) only does not mean that an offence cannot be committed under section 4(1) or 4(lA).

The charge sheet reads as follows: -

Count 1:

CHARGE: Being in Possession of firearm without a firearm certificate Contrary to Section 4 (2) (a) and 4 (3) (b) of The Firearms Act Cap 114 Laws of Kenya.

PARTICULARS OF OFFENCE:

Yattan Mamo: On 26th day of April 2017 in Qorka sub location, North Horr sub-county within Marsabit County was arrested for being in possession of firearm make AK 47 of serial number UK4481 without a firearm certificate.

Count II:

CHARGE: Being in possession of ammunitions without a firearm certificate contrary to section 4(2)(a) and (3)(b) of Firearms Act Cap. 117 Laws of Kenya.

The appellant was therefore charged under section 4(2)(a) and (3) (b) of the Firearm Act in count I and the same sections for the 2nd count. It is submitted that section 4(2) of the Firearm Act does not establish the offence of being in possession of firearm or ammunition. This contention is not true in my view. Section 4(1) prohibits the purchasing or possession of firearm or ammunition without holding a firearm certificate. Section 4(2) states that if one proceeds and purchase, acquire or have in his possession any firearm or ammunition without a licence, he/she shall be guilty of an offence. I do not see any problem with the charge sheet in relation to both the Firearm (count 1) or the ammunition (count II).

There is the contention that an AK 47 is a specified firearm under the Firearms Act and therefore falls within specified Firearms under sections 4(A)(2) of the Firearms Act. This contention is true. Section 4A(2) explains the meaning of a specified firearm. The explaination includes AK 47 under section 4(2)(a). Under Section 4A(b) anyone found in possession of a specified firearms without a licence is liable to imprisonment for life. The appellant was charged under section 4(3) which provides for a minimum period of Seven (7) years and maximum of fifteen years.

In essence therefore the appellant is contending that he should be acquitted because it was alledged that he had in his possession an AK 47 which is a prohibited firearm and carries a penalty of life imprisonment yet he was charged under a section which provides for a minimum sentence of seven (7) years and maximum of fifteen years. Is this argument helpful to the accused? Would the accused have been happy if he was sentenced to life imprisonment or a sentence above 15 years? There is frailty in this contention. Is the appellant asking the Court to enhance the sentence because he was charged under a section which provides for a sentence lower than life imprisonment?

Tied to this ground of appeal is the contention that the particulars of the offence for count II ought to have indicated the type of weapon the ammunition was to be used. Counsel submit that every ammunition is intended or designed to be used in or for a specific firearm as per the wording of Section 4(3)(a) and (b) of the Firearms Act. It is contended that the particulars of the offence ought to have disclosed that the ammunition is an ammunition for use in a particular type of firearm. This is so because the Act provides for different sentence for different types of ammunitions for use in different firearms.

The charge sheet for Count II in relation to the 29 rounds of ammunition was brought under Section 4(2(a) and 4(3)(b) of the Firearms Act. The particulars of the offence are that the appellant was found with 29 rounds of ammunitions of 7.62 by 39mm caliber without a firearm certificate. Section 4(3)(b) provides for **"any other type**" of firearm or ammunition for any weapon not being a prohibited weapon. The appellant currently asserts that if he was found with ammunitions that were meant to be used in a prohibited weapon like an AK 47, why was he not charged under section 4(3)(a) which provides for a minimum sentence of seven years and maximum of ten years.

It is submitted that the failure not to specify the type of firearm the alleged ammunitions were to be used in the particulars of the offence in Count II is an incurable defect in the charge sheet which prejudiced the appellant. The appellant did not know the charge and what sentence awaited him upon conviction.

According to the Firearms Act, there are several categories of firearms and ammunitions. Part of these include specified Firearms, prohibited firearms and any other type of firearm. Ammunition is interpreted under Section 2 to include several other items. At Section 2 under the definition of prohibited weapon there is mention of 7.62mm or 5.56mm calibre automatic or semi-automatic self-loading military assault rifle.

It is important to note that the offence the accused was facing was that of possession of a firearm and ammunition without a licence. The particulars of the offence indicate that he was found in possession of 29 rounds of ammunitions of 7.62 by 39mm caliber. From the provisions of Section 2 under the definition of "**prohibited weapon**", it is clear to me that the 7.62mm calibres of ammunition are not manufactured exclusively for AK47 rifles. They can also be used in any automatic or semi-automatic self-loading military assault rifles. It will be mere speculation for the Police to assume that the ammunition was going to be used in an AK 47 rifle or an automatic rifle. The main ingredient of the charge is the aspect of possessing the ammunition without a licence. The Police have the leeway to decide whether to charge under Section 4(3) (a) or 4(3)(b) of the Firearms Act. One section provides for a minimum sentence of seven years with a maximum of fifteen while the other provides for minimum sentence of five years with a maximum of ten years. The Court has the discretion of imposing the sentence within the parametres of the Act. It is not fatal if the particulars of the offence do not indicate the type of weapon the ammunition are likely to be used. It is even possible that a suspect might have been in the business of selling ammunition only and does not know what firearm the buyers use. The appellant is alleged to have been in possession of an AK 47 rifle. It cannot be concluded that the ammunition was meant for use in that rifle. In my opinion it is not necessary to include the type of weapon the ammunition is likely to be used with. Whether one is charged under Section 4(3)(a) or 4(3)(b) it does not matter. The accused will be in a position to know that he can

either be sentenced to five upto ten years imprisonment when charged under section 4(3)(a) or five upto fifteen years imprisonment when charged under section 4(3)(b). This ground of appeal equally fails. I do find that the charge sheet is properly drafted.

The appellant further maintains that the conviction was based on inadmissible evidence and crucial witnesses were not summoned. The accused was not informed of his right to call witnesses. Further, the court itself did not exercise its right to call witnesses so as to arrive at a just decision. The issue of inadmissible evidence is grounded on the contention that the alleged firearm and ammunition were produced by PW4, Corporal Hassan Ares instead of PW1 who was at the scene and that a handwritten inventory was produced by PW5. It does not bear a Police stamp or the name of the person who drew the document. It is contended that the appellant did not sign the inventory and even if he signed he didn't sign out of his own volition knowingly. No one explained to him the nature and effect of his signature. Mr. Huka maintain that the inventory amounts to illegally obtained admission contrary to Articles 49(d), 50(2)(c), 50(4) of the Constitution and Section 25A of the Evidence Act.

PW1 testified that he was the one who prepared the inventory. The inventory was marked for identification (PMI 5). PW1 also identified both the firearm and the ammunition. The inventory reads as follows: -

INVENTORY LIST OF ITEMS RECOVERED FROM A SUSPECT JATTA MAMO

ON THE 26TH DAY OF APRIL 2017 AT ABUT 1730 HOURS AT MALALBA GRAZING FIELD, WE RECOVERED THE FOLLOWING:

1 AK 48 RIFLE SERIAL NO. UK 4481 WITH A MAGAZINE

2. NINETEEN (19) ROUNDS OF AMMUNITION OF 7.62MM SPECIAL UPON ARRESTING HIM JATTAN MAMO AND HAVING POSSESSED THE ABOVE, HE FURTHER LED US TO HIS FORA WHERE WE AGAIN RECOVERED;

3. TEN (10) ROUNDS OF AMMUNITION OF 7.62MM SPECIAL

THIS WAS DONE IN THE PRESENCE OF THE FOLLOWING WHO WITNESSED AND SIGNED

1. KPR BOYA ABUDHO SIGNATURE WITNESS

2. KPR GODANA MOYE

3. NO 101707 PC MACHOGU MOGAKA WITNESS

4. JATTAN MAMO SUSPECT

It is clear to me that the Inventory was not prepared at the scene. The two other witnesses who are KPR officers did not sign the Inventory. The appellant did not talk about the Inventory in his defence. The evidence of PW1 in relation to the inventory is only intended to confirm what items were recovered. There is no evidence that the appellant was tortured or forced by the Police to sign the inventory. The conviction is not grounded on the inventory, but on the entire prosecution evidence. The inventory by PW1 was meant to itemize the items that were recovered at the scene. There is no requirement that the inventory must be in the Police letter head or take a particular form. I do not find that the inventory amounts to illegally obtained evidence. PW1 testified that the appellant signed the inventory. The presumption is that the appellant was following the proceedings in court and heard all the witness evidence. Asking a suspect to sign a document such as an inventory, suspect's own statement or identification parade form cannot amount to obtaining evidence illegally. The inventory is admissible evidence. It is not a confession under Section 25 of the Evidence Act. The appellant did not confess that he had the firearms and ammunition requiring the application of Section 25A of the Evidence Act.

Criminal Procedure provides for identification of exhibits by witnesses and the ultimate production of the exhibit. What is marked for identification is normally returned to the prosecution and until the identified items are ultimately produced as exhibits, they are of no help to the prosecution. It is important that witnesses identity the items or exhibits they are conversant with in a given case. PW1 went to the scene and recovered the rifle and ammunition. He identified these items.

Since PW1 had identified the inventory, there is nothing wrong with PW4 producing the inventory. PW4 took over the investigations and was the investigation officer. Ordinarily, the investigation officer would produce all the exhibits which came into his possession during his investigations. I do find that all the exhibits were properly produced.

PW1, PW2 and PW3 went to the scene. PW1 and PW2 are Police officers. PW3 is a civilian witness. When the ammunition and firearm were recovered he was not at the exact place where PW1 was. Even PW2 did not go to the exact place where the rifle and ammunition were recovered. According to PW2 it was PW1, PC Machogo Mugaka and PW3 who went to arrest the appellant.

According to PW3 they found the appellant's co-accused and they arrested him. The co-accused mentioned the appellant. The Police went to look for the appellant and arrested him. It is PW3's evidence that the appellant was not arrested in his presence.

Since PW1, PW2 and PW2 were part of the team that was looking for those who had raided a village, I am satisfied that these were crucial witnesses. The fact that the chief or chiefs or the Kenya Police Reservist did not testify cannot lead to a negative reference as held in the **BUKENYA Case** (**Supra)**. The court is meant to be a neutral arbiter and seciton150 of the Criminal Procedure Code should only be invoked when the Court believes that a specific witness is crucial in order to explain certain matters. There is likelihood of the Court being accused of having been partisan should it summon a witness who adduce evidence incriminating the accused. The appellant was out on bond. He

knew the chief as well as the KPR officers. If he thought that they were crucial witnesses and having been put on his defence, he was at liberty to summon them. I do hold that all the crucial witnesses testified. The appellant objected to the production of the firearms examiner's report by PW4. This necessitated the summoning of PW5. It is clear that the appellant is quite conversant with the court process.

The other ground of appeal revolves around the issue whether the prosecution proved its case beyond reasonable doubt. It is submitted that the evidence is uncorroborated, shaky, inconsistent, weak and contradictory. The appellant also maintain that the judgement of the trial Court is not based on the law and that the trial Court came up with its own theories in its judgement.

The prosecution case is that there was a raid at manyatta Sarimo. Police officers went to the area in search of the raiders. They were told that one of the raiders had a gunshot wound. They arrested the appellant's co-accused whose case was subsequently terminated. The co-accused mentioned the appellant as the one who keeps weapons. The Police went out looking for the appellant. They found him grazing goats. They arrested him and recovered an AK 47 rifle and 29 rounds of ammunition. The Police were given some eight (8) cartilages by the villagers but the ballistic expert report revealed that these cartilages were not fired from the AK 47 produced in court.

The appellant's defence is that he was found with a stick while grazing and just found the rifle and ammunition at the Police station. The issue is whether the prosecution proved its case beyond reasonable doubt. PW1 and PW2 did not know the appellant. PW3 testified that after the appellant was arrested he saw the Police with a gun. The appellant did not have a rifle as it had already been taken by the Police. Why would PW1 and PW2 frame the appellant? The prosecution evidence does prove that indeed PW1 recovered a firearm and ammunition from the appellant. Why didn't the Police allege that they recovered the items from Shamo Wato Godana, the co-accused. The appellant was not charged with the offence of raiding manyatta Sarimo. The Police simply found him in possession of a firearm and ammunition without a licence. The defence evidence does not raise any doubt on the prosecution evidence. I am satisfied that the trial court properly evaluated the evidence and arrived at the proper conclusion. The conviction is proper and is based on the evidence. There are no theories advanced by the trial court.

The appellant contends that Section 200(3) of the criminal Procedure Code was not complied with. Section 200 of the Criminal Procedure Act states as follows:

> **200**. (1) ***subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the*** **evidence** ***in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –***
>
> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor, or***
> >
> > ***(b) where judgement has not been written and signed by his predecessor, act on the evidence recorded by the predecessor, or resummons the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgement.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

The record of the trial court shows that the prosecution closed its case on 28.8.2018. The appellant testified on 6.9.2018 and closed his case. Hon. B.M. Ombewa, Principal Magistrate heard all the witnesses as well as the appellant. The learned magistrate fixed the date for judgment on 3.10.2018. There is no indication as to what happened on that day. The record has a typed judgment that was delivered on 24th October, 2018 by Hon T.M. Wafula, Resident Magistrate. The typed judgement is signed at the bottom of the last page.

There is no indication that it is Mr. Wafula who wrote the judgement. The signature at the end of the judgement is similar to the ones appearing in the entire proceedings. The only logical conclusion I can make is that Hon Ombewa wrote the judgment and the same was delivered by Hon. Wafula. Be that as it may and assuming that the judgment was delivered by Hon. Wafula, it is clear that the appellant had already closed his case. Section 200(1) (b) allows a succeeding magistrate who has not heard the witnesses to act on the evidence recorded by the predecessor **OR** resummons the witness and recommence the trial. If I go by the submission by Mr. Huka, Mr. Wafula could have acted on the recorded evidence and write the judgement or start the case afresh.

My understanding of Section 200(3) is that it relates to a situation where the matter is part heard and the accused is given an opportunity to have the witnesses who have already testified recalled. It is the succeeding magistrate who gives that opportunity and the section also enables the succeeding magistrate to hear the evidence afresh. The current situation is that both the prosecution and the appellant had closed their respective cases. All what remained was the judgment. Even if I was to find that Hon Wafula wrote the judgement, the record is clear in that parties were told on 6.9.2018 to go for the judgement on 3.10.2018. There was no room for recalling of witnesses. Its Hon Ombewa who heard the matter and he is the one who gave the judgment date. The only thing Hon. Wafula did was to read the judgement which judgement I am satisfied was written by Hon Ombewa. Hon Wafula does not indicate on the record that he has taken over the matter from Hon Ombewa and he is going to write a judgement. Once the accused closes his case the presumption is that he does not wish to call any witness. Further, once both parties close their respective cases and a judgement date is given, there is no mandatory requirement for the trial court, be it the predecessor or succeeding magistrate, to ask the parties if they would wish to adduce further evidence. A party may apply to

arrest the judgment in the event that any new important issue has arisen. A good example for this situation is where the case is entirely based on DNA test and there is new evidence that the DNA results were mixed up and those produced in court implicating the accused do not belong to the accused. This situation can lead to re-opening of the case and taking of more evidence.

Given the record of the trial Court, I do find that there was no violation of section 200(3) of the Criminal Procedure Code. Further, violation of Section 200(3) of the Criminal Procedure Code does not lead to automatic acquittal. The Court has to be convinced that the non-compliance with Section 200 of the Criminal Procedure Code resulted into miscarriage of justice. There was no miscarriage of justice since the applicant closed his case, ably cross examined all the witnesses and opted not to call any witness. The entire trial was fair and non of the appellant's constitutional rights were violated.

Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The conviction is proper.

None of the grounds of appeal complains about the sentence. The trial Court imposed the minimum sentence which sentence is running concurrently. There is no good reason to interfere with the sentence.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated, Signed and Delivered at Marsabit this 26th day of June 2019

S. CHITEMBWE

JUDGE