REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 149 OF 2017

ABDIAZIZ ABDULLAHI ABDI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Chief Magistrate's Court (Mombasa) in Criminal Case No. 561 of 2014 by J. Kituku Principal Magistrate on 28th May 2015.)

JUDGMENT

1. ABDIAZIZ ABDULLAHI ABDI the appellant was charged with various counts totaling nine (9) in number. After a full trial he was convicted on the following counts 2, 4, 5, 6, 7 & 9 namely:

2. COUNT 2

HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE.

Particulars being that the appellant on the 11th day of March 2014 at around 1200 hrs at Changamwe division within Mombasa county, jointly with others not before court were found in possession of uncustomed vehicle chasis number KZNI 30-2066080 a Toyota Surf dark green in colour which was reasonably suspected to have been stolen or unlawfully obtained valued at One Million , six hundred and forty one shillings and thirty cents (kshs 1,646,242.30)

COUNT 4 PREPARATION TO COMMIT A FELONY CONTRARY TO SECTION 308(1) OF THE PENAL CODE.

Particulars being that on the 11th March 2014 at around 12.00 hrs at Changamwe division within Mombasa county the appellant was found in possession of six hand grenades, one AK 47 rifle serial number BR26237, five AK 47 rifle magazines and two hundred and seventy rounds of ammunition of 7.62mm special caliber in circumstances that indicate he was so armed with intent to commit a felony namely murder.

COUNT 5

BEING IN POSSESION OF EXPLOSIVES CONTRARY TO SECTION 6(1) OF EXPLOSIVES ACT CAP 115 LAWS OF KENYA

Particulars being that on the 11th Mach 2014 at around 12.00 hrs at Changamwe Division within Mombasa county, the appellant was found in possession of six hand grenades without the authority from an explosive licensing officer.

COUNT 6

BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (20(A) AS READ WITH SECTION 4(3) OF THE FIREARM ACT

Particulars being that on the 11th Mach 2014 at around 12.00 hrs at Changamwe Division within Mombasa county, the appellant was found in possession of one AK 47 rifle serial number BR 26237 without a firearm certificate.

C7 BEING IN POSSESSION OF AMMUNITION WITHOUT A FIRARM CETIFICATE CONTRRY TO SECTION 4(2) (A) AS READ WITH SECTION 493) OF THE FIREARM ACT

Particulars being that on the 11th Mach 2014 at around 12.00 hrs at Changamwe Division within Mombasa county, the appellant was found

in possession of two hundred and seventy (270) rounds of ammunition of 7.62mm special caliber without a firearm certificate.

C9 BEING IN POSSESSION OF A TERRORIST PROPERTY IN COMMISSION OF TERRORIST ACT C/S 6 OF THE PREVENTION OF THE TERRORIST ACT NO 30 OF 2012.

Particulars being that on the 11th day of March 2014 at around 1200hrs at Changamwe, accused was found in possession of motor vehicle registration No. KAN 410E chasis No KZZ1 30 2066080 a Toyota Surf green dark in colour used to carry and conceal an improvised explosive device for commission of a Terrorism act.

3. Upon conviction he was sentenced as follows:

C2- Nil

C4 – 4 years Imprisonment

C5- Nil

C6 – 4 years imprisonment

C7 4 years imprisonment

C9 10 years imprisonment

The sentences were to run concurrently.

4. Being aggrieved by the whole judgment he filed this Appeal citing the following grounds:

i. That the learned magistrate erred in law and in fact in convicting him when the ingredients of the offences charged were missing, inadequate and/or not proved.

ii. That the learned magistrate erred in law and in fact in convicting him when the offences charged were not proved to the standard required by law.

iii. That the learned magistrate erred in law and in fact in convicting him by failing to take into account and to give due weight to evidence exonerating him given by prosecution witnesses thus rendering the trial an unfair trial.

iv. That the learned magistrate erred in law and in fact in convicting him by taking into account irrelevant and extraneous matters, unsubstantiated personal insinuations, assumptions, analysis and conclusions that were not adduced by any witness nor canvassed during trial not supported by the applicable law in the case.

v. That the learned magistrate erred in law and in fact in convicting him by relying on inadmissible, unreliable, improperly adduced, contradictory and inconsistent evidence of the prosecution witnesses.

vi. That the learned magistrate erred in law and in fact in convicting him by failing to critically evaluate the record of evidence that in all the circumstances did not support any inference of guilt on him.

vii. That the learned magistrate erred in law and in fact in convicting him by shifting the burden of proof.

viii. That the learned magistrate erred in law and in fact in convicting him without according his defence a fair, open-minded and objective analysis and/or appraisal.

ix. That the learned magistrate erred in law and in fact in convicting him against the weight of evidence.

x. That the learned magistrate erred in law and in fact in meting out harsh and excessive sentences in the whole circumstances of the case.

5. The prosecution called a total of twelve (12) witnesses. The case facing the appellant was that an intelligence information was received by PW1 **Inspector Daniel Makau** of Anti Terrorism Police Unit Moi Airport Department on 11th March 2014 around 11am. The information was in respect of a suspicious motor vehicle registration no KAN 410E a Toyota Surf which was parked at a certain garage in Changamwe.

6. He proceeded to the said garage with **Cpl Abubakar** (PW12) the investigating officer plus Cpl Mbogo. They found the said vehicle and the watchman (PW3) and they identified themselves as police officers. They learnt that the vehicle had been driven to the garage by one Isaak Noor Ibrahim who was the Appellant's co accused but was acquitted under section 215 of the Criminal Procedure Code.

7. The officers called the said Isaak Noor who came with the appellant. A search was conducted on him and recovered from him were: ID card, two coloured photos of the ID card, brown wallet, Nokia phone, biro model 1616, three Safaricom sim cards. At the station PW1

prepared an inventory for the said items.

8. PW2 is the owner of the garage and who testified as a protected witness. He explained how police came to the garage and found the suspicious vehicle. The manager PW6 informed him that it was Isaak Noor who had parked it there. Isaak in turn mentioned the appellant as the motor vehicle owner.

9. PW3 and PW5 are employees of PW2 and testified as protected witnesses. They confirmed that the motor vehicle KAN 410E was parked at the garage by Isaak Noor. PW6 (protected witness) and manager of the garage witnessed the arrest of the appellant and co accused on 11th March 2014.

10. PW7 **Samuel Ouma** a scenes of crimes officer was on 11th March 2014 called to the scene at Changamwe. He took twelve photos of the suspect vehicle reg. no KAN 410E and the general view of the yard. On 17th March 2014 5 pm he went with a FBI agent to the scene. The agent was to carry out a detailed search of the vehicle.

11. The witness took photos of the vehicle in question at the parking, passenger compartment back seat view raised, metallic pipes fitted into a mobile phone and wiring connections covered with a black tape. On 18th March 2014 he accompanied a bomb expert to the vehicle and took more photographs (EXB14-50). He also took photos of 6 hand grenades concealed in a pink cloth, ammunitions in a cloth, an AK 47 rifle recovered in the driver's seat.

12. PW8 **Florence Kariuki** the firearms examiner from the Criminal Investigations department received an exhibit memo from Anti Terrorist Police Unit Mombasa forwarding an AK 47 rifle, 5 magazines and 270 rounds of ammunition. After a full examination she found that the AK 47 was a 7-62 mm caliber assault rifle s/No 26237 and was in good condition. She successfully test fired it by using 15 out of the 270 rounds of ammunition. The 5AK Magazines had a capacity of 30 rounds of ammunition caliber 7-62 mmx39MM. She produced her signed report as EXB 55.

13. PW9 **Eliud Langat** is a senior superintendent of Police and a bomb disposal expert. He was in Mombasa on 18th March 2014 for purposes of examining a motor vehicle KAN 410E parked outside CID headquarters Mombasa. He found the following:

- Two visible cylinders beneath the rear seat wighing 22 Kgs each and filled with a yellowish substance. Each had a detonating code and was connected to a cell phone.
- A robot deployed underneath the seat showed a Nokia cell phone attached to some wiring underneath eh seat.
- Metals concealed in the rear front seat connected to a detonating code tapped into a cellphone.
- A 288X 6 inches cylinder weighing 52 kgs beneath the dashboard with a detonating code.
- Tore the drivers seat and found an AK 47 rifle, 270 rounds of ammunition wrapped in a piece of clothes and 6 hand grenades.
- Two plastic cups (detonators) concealed in a plastic pipe.
- Jungle jacket and military magazines.
- Total sum of the weight of devices was 173 kgs.
- The explosives were serviceable and could cause extensive damage and injury.

14. This witness confirmed that the court visited the scene on 19th March 2014 and upon application by the prosecution an order for the destruction of the explosives was issued by the court. The destruction was done on 20th March 2014 at a quarry in Kiunga through central ignition. He prepared a certificate to that effect EXB 58. This report was produced as EXB57.

15. PW10 **Catherine Serah Mwambi** is a gazetted forensic criminologist and has worked at Government chemist Nairobi for 12 years. She does forensic examination and testing of documents, exhibits and samples submitted by the Kenya Police. She was given a sample of powder for examination vide exhibit memo form (EXB 57 dated 18/3/2014. She was to determine whether the powder contained explosives. She did a scientific analysis of mass chemography and found that they contained rinitrotoluene (TNT) which is a military high explosive. She said they have a high velocity of 690ON per second. She produced the report as (EXB58).

16. PW11 **Moses Mjomba** works with Kenya Revenue Authority (KRA) department of motor vehicle registration and licencing since 1995. He referred to a letter asking them details of a motor vehicle chasis MG KZN 130-266080. The said details were not in their system, (EXB62).

17. PW12 **Barissa Bubakar Abdalla** is a former officer with anti Terrorist Police Unit Mombasa and was the investigating officer of this case. He confirmed visiting the scene with PW1 Daniel Makau and Cpl Mbogo. He gave similar evidence as that of PW1 on the happenings of 11th March 2014. They arrested the appellant and another and took them to court the next day but requested for more time to complete investigations. They wrote to the registrar motor vehicles giving the chasis no. and the result was that the said chasis was not in their records.

18. On further inquiry about the real owner of KAN 410E, they were told it was in the name of Barnabas Kiprono Box 14 Eldoret. He said during investigations the appellant and another were taken to CID Headquarters Mombasa. A bomb was found at the back seat and back arm rest of the vehicle. Other items found were as stated by PW9. Charges were then prepared against the appellant. The witness denied that the motor vehicle was under repair. He confirmed that the Appellant gave them the telephone number of the alleged owner of the vehicle.

19. The appellant gave a sworn statement of defence. He said he was a livestock dealer in Changamwe- Mombasa. He testified that on 3rd March 2014 1 pm he was at Ehiopian restaurant Changamwe when he met Abdi Gurhan Adan whom he had known since 2006. Adan told

him he was travelling to Tanzania and would be away for 13 days. He wanted to leave him with his car but the appellant did not know how to drive.

20. They finally agreed that the appellant would get a driver of his choice to drive the said car. He introduced Adan to his co accused whom he had met at the restaurant and was willing to drive the car.

21. Arrangements were made and Adan came with the car which he handed to him together with the keys. The Appellant in turn handed over the vehicle to his co accused who drove it to the garage for parking. On 11th March 2014 9.30 am he was called by his co accused and informed that the police were looking for the car. He called the owner of the car but he did not pick the call. He was in Mariakani at that time and left for the garage arriving there at 10.10 am. Later him and the co-accused were arrested and searched by the police. He did not sign the inventory (DEXB1).

22. He informed the Police about Adan and even gave them his number and told them where he stayed in Garsen. The vehicle was searched but nothing was recovered. Later he was shown explosives that had been allegedly recovered from the said car. He produced the statement he recorded with the Police as DEXB2.

23. The Appellant's co- accused in his sworn evidence testified that he had been approached by the Appellant who told him to park for him a friend's vehicle. They talked and agreed. This was on 3rd March 2014. They exchanged contact and at around 6.45p.m the appellant informed him the vehicle which was a Toyota Surf had been brought.

24. They took the vehicle to the garage where he used to park the lorry he drove, as the garage owner knew him. Payment was to be made when the vehicle was being released after about two weeks. They left the car keys at the garage. On 11th March 2014 8a.m he was called by the garage watchman who informed him that the police had an issue with the vehicle he had parked for the appellant.

25. He called the appellant and informed him of the report. Both of them went to the garage and the police also came there. They were searched by the police and a few items recovered from them. The Police searched the vehicle and recovered nothing. The appellant informed the police who the owner of the vehicle was, his contact and what he does.

26. Isaak drove the vehicle to Changamwe Police Station as directed. The vehicle was again searched and nothing was recovered from it. While in the company of three(3) police officers he was directed to drive the vehicle to the APTU Headquarters. The vehicle was again searched a 3rd time and nothing was recovered. Both him and the appellant were present.

27. Both counsel filed written submissions which were highlighted during the hearing of the appeal. Mr Mbugua for the appellant submitted that the charge in the 2nd count was defective as the ingredients of the offence were not indicated in the charge sheet or evidence. See **Wycliff Karis Charo V R [1982]eKLR**. He added that the learned trial Magistrate did not interrogate the ingredients of possession of explosives.

29. He submitted that the conviction on possession offences was based on the possession of the motor vehicle. That the concerned offensive items were heavily concealed in the motor vehicle, and even the police never discovered these items until seven (7) days later in the absence of the appellant.

29. Counsel went on to submit that the appellant could only have been convicted if he was shown to have had knowledge of the concealed items. He argued that the motor vehicle was never marked or sealed. Further that the trial court disposed of the exhibits in the absence of the appellant or any witnesses. See **Greek Mwanyasi Munyaka Vs R [2002] Eklr** & **R Vs Hassan Shaban Mshana V R [2014] Eklr**. That the motor vehicle was never identified by any witness.

30. Mr Mbugua contended that the FBI agent who allegedly discovered the items did not testify. Further that material evidence like the safaricom data, report from the registrar of motor vehicles on the search, and even the log book were not availed.

31. M/s Maina appearing for the respondent opposed the Appeal. She submitted that failure to indicate the penalty section in the charge sheet was curable under section 382 Criminal Procedure Code and therefore not fatal. On the destruction of exhibits she said this was done, after the prosecution obtained orders from the court. That the destruction was done in the presence of the Appellant and co accused and none of them objected. Further, that photos showing the registration number of the vehicle were taken.

32. It was her further submission that the destruction of the exhibits was necessary for security reasons. She argued that the recovery of explosives was by PW9 and not the FBI agent. There was therefore no need for the FBI agent to come and testify. Further that the court has power to summon any witness to come and testify and should have summoned the said agent if there was need.

33. This is a first appeal and this court has the duty to reevaluate and reconsider the evidence on record and arrive at its own conclusion. It should bear in mind that it never saw nor heard the witnesses and give an allowance for that. In the case of **Okeno v Republic 1972 EA 32** the Court of Appeal stated this:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R,)[1957] E.A 570). It is not the function of a 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 Peters v Sunday Post, [1958] E.A 424."**

34. Later in **Kiilu & Another [2005] 1 KLR 174** the Court of Appeal further stated:

> **2. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **3. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it smut 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 witness."**

35. I have duly considered the evidence on record, the grounds of appeal, the submissions by both counsel and the cited authorities. As I read through the judgment by the trial court I found that he made a finding in count **2** that the Appellant was found in possession of the motor vehicle chasis no KZN 130-2066000 a Toyota surf. Thereafter at every count and in particular counts 4, 5, 6, 7, & 9 he made reference to his finding in count **2** and so convicted him. I therefore find the issue of possession to be very critical in this case.

36. The appellant has raised several grounds of appeal and upon considering all the material before me I will first of all wish to address two issues namely:

i. Whether the Appellant was found in possession of the motor vehicle in issue.

ii. Whether the items mentioned in counts 5, 6 & 7 were recovered from the said motor vehicle.

37. These two issues are tied together and I shall consider them as such. The appellant was charged under various provisions of the Law for being in possession namely: Section 323 Penal Code, section 200 (d) (iii) of the East Africa Community Customs Management Act 2004; section 6(1) of the Explosives Act Cap 115 Laws of Kenya; section 4(2) as read with section 4 (3) of the Firearms Act: and section 6 of the Prevention of Terrorism Act No 30 of 2012.

38. "Possession" is defined under section 4 of the Penal Code as follows:

> **(a)"be in possession of" 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;**

The Black's law dictionary defines possession as :

i. That fact of having or holding property in one's power; the exercise of dominion over property.

ii. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.

iii. Something that a person owns or controls.

39. From these definitions what is brought out clearly is the element of physical control of the item and secondly knowledge of having the item. These two elements must be clearly proved by the prosecution. We start from the known principle in criminal law that the burden of proof in criminal cases lies on the prosecution. This burden must be beyond reasonable doubt and nothing less. See **Viscount Sankey L.C** in the case of **H.L. C WOOLMINGTON V DPP [1935] A.C.D 462pp 481; R.T. Bhatt v R [1957] EA 332-335** .

40. The evidence on record is clear that the vehicle was driven to the garage by Isaak who was a co-accused to the appellant and who was acquitted under section 210 Criminal Procedure Code (CPC) but later placed on his defence and again acquitted under section 215 CPC. It is the said Isaak who gave the police the name of the appellant. They called him(appellant) and he immediately came to the said garage, just as Isaak had done. Isaak had been informed by the watchman that it is the Police who were looking for the motor vehicle in issue.

41. He in turn passed the said information to the appellant. If indeed these two people had in their possession a stolen vehicle or a vehicle they knew had installed explosives as submitted by the respondent's counsel would they have dared to respond to the call to go to the garage? Upto this point the person who was in actual possession and control of the vehicle was the garage owner since the keys and vehicle had been left in his custody.

42. The motor vehicle garage owner explained the circumstances under which he came to possess the vehicle. He was allowed by the police to call the person who had parked the vehicle there. When this person (Isaak) came he explained how he had found himself in possession.

43. Again the police allowed him (Isaak) to call the person who had requested him to bring the vehicle to the garage. The person happened to be the appellant and he quickly went.

44. The appellant explained to them how he had come to be in possession. He gave them the name of the owner as Adan Gurrow Abdi. He gave them his telephone number and even told them what he does, and where he operates from. It is on record that though the Police were given this information they did not act on it at all. The Investigating Officer (PW12) confirmed when asked by the court that indeed the appellant gave them the number of the alleged owner of the vehicle.

45. The question that one quickly asks is why the police did not contact the alleged owner of the vehicle whose details were given by the appellant. The other persons (PW2, and appellant's co-accused) were clearly given a chance to explain the possession. According to PW12 this vehicle had changed ownership from Julius Idambo to David Kimaiyo Kipkini to Oyode none of whom was called to testify. So who was the owner? No answer was given to the court on this. The prosecution never explained why Adan Gurrow Abdi was not investigated.

46. PW9 mentioned some Safaricom scratch card which had been found on the dash board, and the same had been loaded into a certain number. The owner of this number was the owner of the vehicle but he switched off the phone after the appellant and co-accused were arrested. The witness did not avail the number, the reply from safaricom or the report with the name of the owner of the vehicle. Was it such a difficult task for the Police to trace the person using this number?

47. Why did he as the investigating officer not avail this information to the court? The answer is in this statement at pg 117 of the Record of Appeal where PW12 states:

> **"The investigations were led by seniority and I had to follow their instructions. I was prevailed upon to charge them. If I was left alone, I would have conducted further investigations."**

This is a very loaded statement.

48. PW1 **Daniel Makau** and PW 12 **Barisa Abubakar Abdalla** who were at the garage have confirmed that a search was conducted on the persons of the appellant and co- accused plus the vehicle. There is nothing to show that anything explosive was found during any of the searches. PW1 is the one who prepared the inventory but he never signed it. He however confirmed that the search of the vehicle yielded nothing not even the AK47 Rifle.

49. It was also confirmed that the motor vehicle in issue was parked at the garage from 3rd March 2014 to 11th March 2014 when it was driven to Changamwe. It was kept in an open place and the keys were with the garage attendant. During this period of confinement the said vehicle was never moved at all.

50. The search that allegedly unearthed the firearms, hand grenades and explosives is very key in this case. The appellant and co accused were arrested on 11th march 2014 and placed in police custody. They were first arraigned in court on 17th March 2014 having been charged with two(2) counts of offences which they denied. They were further remanded at Kilindini Police Station up to 24th March 2014 when they were to be availed for mention.

51. The record however shows that on 19th March 2014 they were arraigned in court with an amended charge sheet with 9 counts. Further an application was made for the destruction of certain items allegedly found in the motor vehicle in issue. The court *suo moto* decided to visit the scene at Portland Police Headquarters. This is what the record shows as having transpired:

Later at 4.30 pm at Portland Police Headquarters

Coram as before

Accused both present

Court- the following are seen

1. A back Toyota Surf Reg KAN 410E
2. A bid cylindrical lfD
3. 2 smaller cylindrical ied's attached to rear seat covered with cusions
4. 3 small glts attached to back rest
5. 6 grenades
6. 2 Nokia 1208 phones with 2 simcards
7. 4 detonators (plastic caps)
8. About 10m detonating cord
9. 2 electric tapes

10. One AK 47 riffle serial NO. Br 26237

11. 270 rounds of ammunition

12. 4 porches

13. 5 magazines

14. 4 syringes

15. Spanners and screws

16. 2 pieces of clothes

17. A CD

Court- All the 17 items shown to court to be destroyed under police supervision except which may be necessary for further forensic examinations."

52. I find this procedure to have been strange. For one the matter was not for hearing; there was no single witness present to explain anything to the suspects and even for the suspects to ask any questions. It is not indicated who was showing the trial magistrate the items he ordered to be destroyed; there was therefore no participation by the suspects. It was a real show between the court and the prosecution. The suspects were never given a chance to respond to the application for destruction before the learned trial magistrate made the orders.

53. Justice Onyango Otieno J, dealt with a similar issue in the case of **Greek Mwanyasi Munyaka v R [2002 eKLR** and this is what he stated:

> **"The third aspect of the judgment which is again worrying is the procedure adopted in visiting the scene of the alleged crime. The learned Magistrate in his judgment relied so much on the evidence adduced during the same visit and the conduct of the complainant during the same visit. However, in the proceedings, this visit seems to have taken place after the complainant had given evidence and had completed his evidence and the second Prosecution witness also had given evidence. No application was made for such visit and the record shows the same visit was possibly done through the court's own motion. That was not improper, but having visited the same, the complainant is shown to have given evidence without his having been recalled to do so and even worse, his evidence at that time was not subjected to any cross examination by the accused. This was not proper and that meant that the judgment proceeded on an aspect of evidence in which the Appellant never participated. If the court wanted to visit the scene, it should have ideally done so when the complainant was still giving evidence in chief. The complainant should have then at the scene shown the court whatever the court wanted to see. The hearing should have been adjourned to court room where the accused should have been afforded opportunity to cross-examine the complainant in his evidence as a whole including the visit aspect. If however the court conceived that idea later after the re-examination of the complainant, then the complainant should have been formally recalled (in which case the Appellant given opportunity to object or not to object the recall) and having been recalled, a visit to the scene should have taken place but the complainant should have been subjected to cross-examination after the visit to the scene on his evidence at the scene."**

This authority stresses the need for an accused person to participate in the proceedings at a scene visit.

54. It is noted that following the order of destruction of exhibits without the participation of the appellant and co accused, the motor vehicle the subject of this case was destroyed. It was never identified and produced in court as an exhibit. The known procedure is for the item to be produced in court as an exhibit before an order for destruction is made. What was done here is unprocedural and it denied the defence an opportunity to participate in this process which I find to be a violation to the right to a fair hearing as envisaged under Article 50(1) of the Constitution.

55. PW 7 **Cpl Samuel Ouma** a trained scenes of crime officer testified that he was instructed to visit a scene of crime officer at Barikira parking yard Changamwe. He was further instructed by Cpl Abaruta to take photographs of a dark blue Toyota Surf vehicle KAM 410P. This was on 11th March 2014 and he took 12 photos.

56. On 17th March 2014 5 p.m he accompanied an FBI agent to the CID parking yard where the said vehicle was parked. He took several photos of different views of the vehicle. He produced the photos as EXB14-49 plus the certificate as EXB50. Besides the photo taking session the witness did not tell the court what the FBI agent did there. Secondly it is not clear how the witness accessed the interior of the vehicle or who was guiding him in this photo session. No evidence was led on this.

57. PW9 **No 230681 Eliud Langat (SSP)** a bomb expert was in Mombasa to examine the motor vehicle in issue. His findings which could have been revealed during the first searches if PW1 and PW12 were serious are:

- Two visible cylinders beneath the rear seat of the vehicle.
- A Cylinder under the dashboard.
- AK47 rifle with 270 rounds of ammunition in a piece of cloth

- 6 hand grenades wrapped in clothes.
- Jungle material jacket
- Military magazines and their vouchers

58. It is obvious that when the FBI agent, PW7 and P W9 visited the parking yard to do "further" searches the suspects were not there. The first searches by the police were done in the presence of the suspects and there was nothing recovered from the said vehicle. In fact according to the appellant's acquitted co-accused it is **3** searches which were done and they revealed nothing.

59. At what point did the Police now decide to call experts in the absence of the suspects to recover things that were never recovered in the earlier searches? Are Cylinders and AK 47, hand grenades items that could not have been seen with the naked eye?

On 18th March 2014 when these items were allegedly unearthed by PW9 the suspects were still in Police custody. Why then were they not allowed to witness this major recovery and even given an opportutiny to ask questions?

60. All these anomalies identified by this court were never addressed by the trial court. Had he analysed the evidence well he would not have convicted the appellant based on the assumption that he was found in possession and/or had knowledge of the presence of these items in the car if at all they were there.

61. The defence of the appellant was not an afterthought as found by the learned trial magistrate. It came out well in the evidence of PW12 who saw the need to carry out further investigations to establish a few things before charging the suspects. He was denied that opportunity. He confirmed that the appellant had given details of the motor vehicle owner. In the case of **Kipsaina v R 1975 EA 253** the Court of Appeal held thus:

> **"A charge of receiving stolen property is not established if the explanation given by the accused is reasonable and might possibly be true even if the court is not convinced that it is true.**

This has been applied in later cases like **John Nderitu Mwangi v R [1983] eKLR; Nganga v R [1985] eKLR; Lucas Ochieng Warinda v R ; Elijah M Mwashumke vR [2004] eKLR** (Maraga J as he then was)

62. If the prosecution felt that the appellants' defence which was supported by that of his co-accused was an afterthought, and they had evidence to rebut it there was nothing that stopped them from applying for leave to adduce rebuttal evidence under section 150 CPC. I take it that the application was not made because they had an opportunity to establish the ownership of the vehicle and they failed to utilize it.

63. The above analysis reveals that possession pointing at the appellant alone was not proved by the prosecution. It was not proved that he was the owner of the vehicle. Knowledge of the presence of those items was also not proved. The Police appeared to be in a hurry to pin down the appellant as there is no reason why no action was taken to establish who Abdi Gurrow Adan was and his relationship with the motor vehicle in issue. That would have confirmed or rebutted the appellant's assertions.

64. The exercise of recovery of the items in respect of counts 5, 6, 7 and 9 is clouded with a lot of mystery. This is in consideration of the fact that all the searches conducted in the presence of the suspects were unfruitful save for the one conducted in their absence.

65. All along from the date the motor vehicle was impounded on 11th March 2014 the vehicle remained with the Police and that's when the alleged firearms and explosives are said to have been discovered. More needed to be explained by the State.

66. The appellant's defence should have been weighed alongside the prosecution evidence and in particular that of the investigating officer PW12 and not dismissed as an afterthought.

67. Having come to the above conclusion and considering that all the counts the appellant was convicted of were founded on the issue of possession and recovery, my finding is that the prosecution failed to prove its case beyond reasonable doubt on all counts. The appellant ought to have been acquitted alongside his co accused.

68. I find merit in the appeal which I hereby allow. The convictions are all quashed and sentence on each set aside.

69. The Appellant shall be set free unless otherwise lawfully held under a separate warrant.

Signed, dated and delivered this 26th day of October 2018 in open court at Mombasa.

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HEDWIG I. ONG'UDI

JUDGE