



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL NO.7 OF 2016

(An Appeal arising out of the conviction and sentence of COURT MARTIAL delivered on 10th August 2015 in Moi Airbase Eastleigh Court Martial Case No.4 of 2015)

CORPORAL THOMAS KATIKU.....
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Corporal Thomas Munyao Katiku, then an officer of the Kenya Defence Forces was charged before the Court Martial with **committing a civil offence** contrary to **Section 133 (1) (b)** of the **Kenya Defence Forces Act** that is to say, the offence of being in **possession of ammunition** contrary to **Section 89(1)** of the **Penal Code**. The particulars of the offence were that on 10th January 2015 at about 1900 hours within Huruma area in Nairobi, the Appellant, without reasonable cause, had in his possession ten (10) rounds of 9 mm ammunition in circumstances that raised reasonable presumption that the said ammunition were intended to be used in a manner prejudicial to public order. When he was arraigned before the trial court, the Appellant pleaded not guilty to the charge. At the conclusion of the trial, he was convicted of the offence. He was sentenced to serve seven (7) years imprisonment. The trial court further ordered that the Appellant be dismissed from service and that his rank be reduced to that of a private. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court relied on evidence that was unlawfully obtained. He faulted the trial court for failing to find that prosecution did not prove the case against him to the required standard of proof beyond any reasonable doubt. According to the Appellant, there was insufficient evidence to convict him on the charge. He further claimed the prosecution failed to adduce evidence connecting him to the offence. The Appellant further averred that the prosecution witnesses' evidence was contradictory and not corroborated and could not therefore form the basis for his conviction. He faulted the trial court for shifting the burden of proof thereby occasioning him miscarriage of justice. He further pointed out that there were shortcomings and/or inconsistencies in the prosecution's case. The Appellant was also aggrieved that the trial court failed to properly analyze the evidence on record hence reached the erroneous decision to convict him. He complained that his fundamental rights and freedoms as guaranteed under **Articles 47 (1)** and **50 (4)** of the **Constitution** had been infringed. He was also concerned that the trial court ignored his defence. Finally, he was of the view that the sentence imposed by the trial court was harsh and excessive. In the premises therefore, the Appellant urged the court to

allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant was represented by Learned Counsel, Ms. Loko whereas the Respondent was represented by the Learned State Counsel, Ms. Sigei. Both parties made oral submission in support of their respective positions. The Respondent further relied on its written submissions in support of its case. Counsel for the Appellant submitted that the evidence of PW1 and PW3 relating to the analyzed cell phone communications between the deceased and other parties was procured unlawfully as it was obtained without a warrant from the court. She argued that the right to privacy protected under the **Constitution** was also violated. Learned counsel also took issue with the propriety of the Appellant's entrapment and the evidence derived therefrom. In so far as the entrapment is concerned, counsel was of the view that the same was illegal as it sought to induce the Appellant to commit the offence which he would otherwise not have committed. She submitted that, without the evidence from the police trap, the prosecution's case against the Appellant would fail. To support her submission, she cited the case of **Mohamed Koriow Nur -versus- The Attorney General [2011] eKLR**. She further questioned the manner in which the trap was set. According to the learned counsel, the fact that the Appellant was arrested and searched at night, there was a possibility that the exhibits were planted to implicate him. She therefore urged the court to find the Appellant's defence to that effect as being possibly true. She further questioned the prosecution's failure to lead evidence to prove that the alleged robbery indeed took place given that the charge against the Appellant was linked to the said robbery incident. In view of the foregoing, she was of the view that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt.

On her part, Ms. Sigei opposed the appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the evidence of the arresting officers proved that the Appellant was in possession of the ammunition. Further, that the prosecution produced a ballistics report to prove that the bullets were ammunition as so defined in law. She submitted that the prosecution relied on circumstantial evidence to link the Appellant to the offence. With respect to the alleged violation of the Appellant's right to privacy under the Constitution, the Learned State Counsel submitted that although the **Constitution** guarantees everyone the right to privacy, the right is qualified under **Article 24 (1)** of the **Constitution**. In submitting on the question of the legality of the evidence of the cell phone records procured by the prosecution, it was submitted on behalf of the Respondent that the same was obtained pursuant to **Sections 57 (1) (a)** and **60** of the **National Police Service Act**. According to the Learned State Counsel, the Appellant failed to give a plausible explanation why he was in possession of the ammunition. She submitted that his defence was a mere denial and the Appellant's evidence was full of inconsistencies. She contended that prosecution evidence was corroborated, cogent, credible and consistent evidence. She therefore urged the court to disallow the Appellants' appeal.

The facts of the case as presented by the prosecution witnesses are as follows. A home invasion robbery took place on 5th January 2015 at the home of Alex Kiambati. He lived in Ruai area. During the incident, Mr. Kiambati was fatally shot. His wife and their house help sustained gunshot injuries from the attack. One of the armed robbers was also said to have been shot and injured in the incident. The robbers escaped leaving behind their injured colleague. The injured were taken to Kenyatta National Hospital for treatment. The incident was reported at Kayole Police Station. A team lead by PW1 Corporal Isaac Sang of the Flying Squad Unit comprising of PW3 Police Constable James Chebor, Police Constable Luseno and Police Constable driver Mageni were assigned to investigate the case. The case was also reported to the Criminal Investigation Department headquarters where another team lead by PW2 Samuel Macharia of the Special Crime Prevention Unit comprising of Police Constable Munyao, Police Constable Karani and Police Constable Mande was put together to join forces with their counterparts at Kayole Police Station. The two teams were briefed on the case on 6th January 2015 by Mr. Kioko at the Criminal Investigation Department headquarters. They were informed that one of the assailants was injured during the incident and that he had succumbed to the injuries at the hospital. They were also informed that a cell phone with SIM card and a national identity card were recovered from the deceased assailant. PW1 and PW3 testified that they obtained a record of the analysis of the seized cellphone's communication in documentary form from the said Mr. Kioko before they commenced their investigation. The said analysis revealed particular cell phone numbers that had been in contact with the seized cellphone number.

In the course of their investigations, it established that a cell phone number subscribed to one Rebecca Kathini Muthee had been in frequent contact with the deceased. They managed to trace her on 9th January 2015 at Kosovo area in Mathare slums. Upon interrogating her, she disclosed that she was the deceased's girlfriend. She also disclosed that she had been with the deceased prior to his death at Dallas bar located in Mathare area. This bar was owned by his friend Joseph Musyoka Mbithi. She further disclosed that the deceased had gone to the said bar to meet other people whom she did not know. She did not also know what discussion had taken place. She took the officers to the said bar on the same day. They met with said Joseph Musyoka Mbithi. He confirmed that the deceased was at the bar together with several people amongst the one Maurice Muoki Lengutai alias Mavolo whom he knew very well. He gave the officers his cellphone number being 07xxxxxxx. They managed to trace him at Mathare slums on 10th January 2015 and arrested him. They seized his cell phone to analyze his phone records. They noted that he had been in frequent contact with two phone numbers which they established were subscribed to Augustus Kimanzi Kavii and Samson Masai Muthengi who was said to be deceased. The said Augustus Kimanzi Kavii was also arrested on the same day at Tea Room within Nairobi Central Business District.

The suspects were taken to Pangani Police Station. PW1, PW2 and PW3 testified that when Augustus Kimanzi Kavii was interrogated, he disclosed that he was an ex-military police officer. They testified that he admitted to being main supplier of ammunition within the group and that his main client was Maurice Muoki Lengutai *alias* Mavolo. He also admitted to procuring the ammunition from a friend in the military based at Kahawa Barracks. They testified that Augustus Kimanzi Kavii had the friend's cellphone number. They therefore asked him to confirm his claims. The evidence of PW1, PW2 and PW3 was that Augustus Kimanzi Kavii made the call to the said friend and they put the phone on speaker. When the phone call was connected, he told his friend (the Appellant in this appeal) that he had a client who needed ammunition and asked him to bring ten (10) of them. They testified that the friend said he was in town before he hung up. They testified that they tracked the call and established that the call was connected within Kahawa barracks. The said friend called back after a short while to ask whether the client had money. Augustus Kimanzi Kavii convinced him that he did and they agreed to meet in Huruma Ngei area for the business.

After about an hour, the friend called again to arrange the meeting at Starehe Bar within Huruma. After about an hour, PW1, PW2, PW3, PC Mathia and PC Gacheru therefore proceed to Huruma and laid an ambush for the said friend at the bar. They testified that when the friend (the Appellant) arrived at the bar between 7.00pm and 8.00 p.m, he called Augustus Kimanzi Kavii to inform him that he was within the bar. At this time PW2 was with Kavii. Kavii spotted the Appellant at the entrance of the bar and he pointed him out to PW2 as the person he was meeting. The Appellant also spotted Kavii and he came to greet him. It was at this point that they arrested the Appellant. They searched him and found ten (10) rounds of ammunition and some money in his back pockets. The suspects were taken to Pangani Police Station and were later handed over to Kayole Police Station. They also conducted a search at the Appellant's house on 11th January 2015 and recovered several military kits and a chemical substance which they could not identify. The items were forwarded to the government chemist for analysis.

PW5 Chief Inspector Alex Chirchir, a firearm examiner at Directorate of Criminal Investigations testified that he received an Exhibit Memo Form (***Prosecution Exhibit No.7***) on 30th January 2015 from Corporal Weldon Rotich containing 10 rounds of ammunition which were marked exhibits C1-C10 for ballistic examination. He testified that he examined the exhibits and established that were ammunition of caliber 9.9mm. He testified that he randomly tested three (3) them and established that they were suitable for use in appropriate caliber forum such as pistols and sub machine guns. He recorded his findings in a report which he produced into evidence. The evidence of PW6 Inspector Simon Bitok of the Police Service attached to Safaricom Limited was to the effect that he received a court order dated 28th February 2015 from Kibera Chief Magistrate's Court authorizing him to investigate communication data in respect of SIM Nos. 07xxxxxxx and 07xxxxxxx between the periods 1st November 2014 and 10th January 2015. He testified that he retrieved the information on 10th March 2015. He produced the same into evidence as ***Prosecution's Exhibit No.10***. He prepared a certificate in respect of the report which he also produced into evidence as ***Prosecution's Exhibit No.11***.

PW4 No. Captain Mutiso, an investigator at Military Police Headquarters, Department of Defence testified that a request to investigate was received at the Military Police Headquarters on 14th January 2015. The Commanding Officer was requested to investigate the Appellant's case. He testified that he was tasked investigate the case. He testified that in the course of his investigation, he obtained statements from the arresting officers and the ballistic report prepared by PW5. He also obtained 3 spent cartridges of ammunition and 7 rounds of ammunition of 9mm caliber. He testified that he also filed an application in court seeking to access communication details on phone number 07xxxxxxx which request was granted by the court as per the court order produced into evidence as **Prosecution's Exhibit No.8**. From his investigations, he established that the Appellant was employed as a store man at Kahawa Barracks. His work did not involve handling ammunition. He also confirmed that the ammunition recovered from the Appellant did not belong to Kenya Defence Forces. The evidence of the arresting officers was further corroborated by the communication data from Safaricom Limited. He prepared a report on his findings which he produced into evidence as **Prosecution's Exhibit No. 13**.

When the Appellant was put on his defence, he denied committing the offence. He testified he was at Kahawa Baracks in the afternoon of the day he was arrested. He testified that he was called by Augustus Kavii through his mobile number 07xxxxxxxx. He knew him as they had previously worked together for 5 years at the KDF stores. He testified that Kavii told him that he had been arrested by the police in Huruma and that he needed someone to identify him as he did not have a civilian identification card. The Appellant testified that he boarded a vehicle to Huruma at about 5.30 p.m and arrived in Huruma at about 6.00 p.m. He called Kavii to ask him where exactly he was. He told him that he was at a place called Woodland. He testified that he took a motorbike to the place. When he reached there, he called Kavii to tell him he had arrived at the place. He testified that the place was crowded. He spotted Kavii and went to greet him. He testified that he found Kavii was with someone in civilian clothes. The person held his right hand and handcuffed him. He took him to a vehicle that was parked a few meters away and placed him inside the boot.

The Appellant testified that he saw about seven (7) policemen. They searched him and recovered a phone and wallet. He testified that he saw Kavii was in the car behind him. He heard the policemen say that he did not have anything on him. He testified that one of the policemen sat him on the back seat and brought Kavii to sit next to him while the two police officers sat at the front. He testified that he saw one policeman behind with him and Kavii. The one who sat with them made him lean on the front seat. He then put his hands inside his pockets and told the rest that he had found some bullets in his pockets. The Appellant testified that he saw the police with several bullets. He testified that he was taken to the police station where he wrote his statement on 13th January 2015. He produced the same into evidence as **Defence Exhibit No.1** The Appellant testified that he communicated with Kavii on the phone communicating in Kamba language. He denied any involvement in the robbery that happened on 5th January 2015.

DW2 Augustus Kimanzi Kavii testified that he was in the business of refilling toners. His evidence was that he was in Nairobi Central Business District on 10th January 2015 along Sava road. He was called by someone at around 11.00 a.m. He identified himself as Samuel Mureithi. He testified that the caller asked him to assist him in refilling toners. As he stood on the road, a person approached him and introduced himself as an officer of the CID attached to the flying squad. He took him to CID Pangani Police Station and thereafter to Mathare. He testified that he was not told why he was being arrested. He was later taken to the police station and asked whether he knew someone by the name Masai and he confirmed that he did. He was told that he was arrested in connection to something that Masai did. He was tortured so as to give information to the police. They asked him whether he was working with KDF and whether there was anyone who could identify him. He showed him his payslip and copy of identity card. He told them that he worked with the military at Kahawa Barracks. By then they had taken away his phone. They went through his phone and asked him to give them contacts of a person who could identify him. He asked for his phone to find the contact but they refused to give him. He testified that he gave the contacts of a friend he worked with at the military called Evans Mulei Mutua, 07xxxxxxx but his call did not go through. He therefore gave them the Appellants contacts 07xxxxxxx. They dialed the number and placed the phone on his ears and told him to tell the Appellant to come to Huruma.

DW2 therefore told the Appellant that he had been arrested and that he needed someone to identify him as an employee of KDF. He testified that they spoke in Kikamba. He testified that the officer who was holding the phone on his ear understood Kikamba. The phone did not have enough credit and it disconnected. The Appellant called him back and asked him where he was. He told him that he was in Nairobi. The conversation was not on loud speaker. Thereafter, he was bundled into a car. His head was covered with a polythene bag and he was taken to Huruma. On the way, an officer who sat next to him spoke in Kiswahili and said *“Mpaka hii kitu iingiane huyu jamaa mpaka apatikane na kitu”*. When they reached Huruma, he was asked to call the Appellant and direct him to where they were. He alighted from the car and called the Appellant. He told him that that he was at Woodland. The Appellant told him that he had alighted from the motorbike. He testified that he went near the butchery to wait for him with another officer who waited with him. It was going to 7.00 p.m.

When the Appellant arrived, he called him and told him that he was at the butchery’s gate. DW2 spotted him and proceeded to greet him but the officer who was with him got hold of the Appellant before the other officers joined him. They took him to the vehicle and placed him inside the boot. They searched him and said that he did not have anything. He overheard another officer say that they will fix him. They were then made to sit together with the appellant at the back of the car. Another officer came and sat on him while the officer who had said that he would fix the Appellant sat behind them. This officer lifted the Appellant and beat him up. He then moved to where they were seated and made them to bend their heads down. He saw that he was holding something in his hands. He put it inside the Appellant’s back pocket and said in Kiswahili *“Mlikua mnasema huyu jamaa hana kitu na ndiyo hii kwa mkono”*. When he removed his hands, he saw that he was holding bullets. He forced the Appellant to hold them but he refused. It was at that point that DW2 was moved to another vehicle and taken to Pangani CID. At the police station he could hear the Appellant groaning and shouting after he was beaten. He testified that he was made to sign four documents at the police station before he was taken to the cell. He found the Appellant there but they did not speak to each other According to DW2, the Appellant was framed with the offences.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellant. The court has also considered the grounds of appeal that the Appellant relied on in support of his appeal and the submission made by both the Appellant and the State. This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See Njoroge –vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **committing a civil offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act** that is to say, the offence of being in **possession of ammunition** contrary to **Section 89(1)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, there are several issues that came to the fore for determination by this court. The first issue is whether the entrapment of the Appellant by the police rendered the charge brought against him untenable in law. According to the Appellant, the police set out to entrap him and in the process planted the offending ammunition in his pocket. It was his case that he had nothing to do with the robbery that was the trigger to the investigations that led to his arrest. On the other hand, it was the prosecution’s case that the Appellant was a supplier of ammunition to criminals which was used in robberies that were being committed at the time. The evidence adduced by the prosecution witnesses was to the effect that upon exhaustive investigations, the police were able to establish, through analysis of mobile data that the Appellant had communicated with persons who were involved in robberies. In the course of their investigations, they interviewed DW2 who called the Appellant and requested him to supply the ammunition in question. The police officers who were with DW2 heard DW2 negotiate with the Appellant to be supplied with ammunition. The price was agreed. A trap was laid. When the Appellant arrived at the venue where he had agreed to meet with DW2, he was arrested by the police. He was searched. Ten (10) rounds of ammunition were found in his pocket. The Appellant denies that the ten rounds of ammunition were found in his pocket. His testimony in that regard was corroborated by DW2.

Upon re-evaluation of the evidence, it was clear to this court that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt that the Appellant had the ten rounds of ammunition in his possession at the time of arrest. *Why this conclusion?* The evidence adduced by the prosecution witnesses clearly established that the Appellant, being a military officer, had access to the ammunition. In the conversation that the Appellant had with DW2, it was evident that it was not the first time that he had sold ammunition to third parties hence his insistence that he wanted to be paid at the time of delivery of the ammunition. The claim by the Appellant that he was entrapped by the police to commit a crime which he would otherwise not have committed does not hold in view of the fact that he was found in possession of the ammunition in circumstances that clearly pointed to the fact that he intended to sell them for profit. The case would have been different if the Appellant did not have in his possession the ammunition. His defence to the effect that the ammunition was planted on him is not credible in view of the fact that the case was independently investigated by the military police who reached an independent determination that the Appellant had a case to answer before the Court Martial.

The Appellant submitted that the ammunition was planted on him by the police. DW2 also claimed that the Appellant was tortured by the police so that he could be entrapped for committing the offence. This court's analysis of the evidence adduced by the Appellant in his defence and that of DW2 clearly shows that their evidence was contradictory and was contrived with a view to exonerating the Appellant from the crime that he had committed. No medical evidence was adduced by the Appellant to establish that indeed he was tortured. This court was not persuaded by the thrust of the Appellant's defence that he was an innocent victim who was entrapped and thereafter framed by the police. If that was the case, the military police who independently investigated the matter would have exonerated the Appellant from the crime. As it were, the investigation by the military police confirmed the conclusions reached by the two teams of police officers investigating the case that indeed the Appellant was selling ammunition to criminals.

The prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the Appellant indeed sold ammunition to criminals which may have been connected to a robbery incident that resulted in the death of the victim of the robbery. The explanation given by the Appellant in his defence to the effect that he had no connection whatsoever with the robbery, may well be true. However, it was clear that the Appellant knew or ought to have known that supplying ammunition to unlicensed persons who held illegal firearms may very well result to injury to persons who may be victims of criminal activities. The Appellant was reckless or did not care as to the consequences of his actions. The Appellant cannot therefore say that he did not have within his contemplation that the ammunition that he supplied to unlicensed persons would be used in criminal enterprises.

This court's re-evaluation of the totality evidence adduced before the Court Martial leads it to the irresistible finding that indeed the prosecution established its case on the charge brought against the Appellant of being found in possession of ammunition in circumstances that indicated that the same would be used against the public good to the required standard of proof beyond any reasonable doubt.

The Appellant's appeal therefore lacks merit. It is hereby dismissed. The conviction and sentence of the Court Martial is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MARCH 2017

L. KIMARU

JUDGE