



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO 56 OF 2016**  
**HAJIR BORU ABDHULA .....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa CM Criminal Case No. 787 of 2012 –M. Wachira CM)**

**JUDGEMENT**

The appellant was charged in the Chief Magistrate’s Court at Garissa with 3 counts. Count 1 was being in possession of a firearm contrary to Section 89 (1) of the Penal Code. The particulars of the offence were that on the 24th May 2012 at Madogo within Tana River County was found without reasonable excuse carrying a firearm namely: AK47S/NO 19746P8889 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order. Count 2 was for being in possession of a firearm without a firearm certificate contrary to Section 4(1) as read with Section 4(3) of a Firearms Act. The particulars of the offence were that on the same day and place had in his possession a firearm namely AK 47 S/NO 19746P8889 without a firearm certificate. Count 3 was for being in possession of ammunitions without a firearm certificate contrary to section 4(1) as read with Section 4(3) of the Firearms Act. The particulars of the offence were that on the same day and place had in his possession 30 rounds of 7.62mm ammunitions without a firearms certificate.

He denied all the charges. After a full trial, he was convicted on all 3 counts and sentenced to 7 years imprisonment on each., the sentences to run concurrently.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his appeal in 2016. Before the appeal was heard however he filed an amended petition of appeal and written submissions. The grounds in his amended petition of appeal are as follows:-

1. That prosecution witnesses failed to prove possession of the weapons by the accused in the 3 counts.
2. That there was no evidence of dusting for finger prints in the alleged ammunitions.
3. That the ballistic expert report was not produced by the ballistic expert and the investigating officer was wrong in producing the same.
4. That the charge sheet was defective.
5. That there were mass contradictions in the prosecution evidence.

6. That all the 3 counts and the prosecution case were not proved to the required standards.

At the hearing of the appeal, the appellant relied on the written submissions filed. I have perused and considered the said written submissions. He also added orally that the case was started a fresh by the succeeding magistrate and complained that the prosecution witnesses changed their evidence though their witness statements remained the same. He also stated that he was arrested on 24<sup>th</sup> at the police station not by Kenya Wildlife Services Officer as alleged by the prosecution. He stated that the case was a frame up and the prosecution evidence was contradictory. According to him, PW1 had a grudge against him.

The learned Principal Prosecuting Counsel, Mr. Okemwa opposed the appeal, and stated that it was the appellant who asked for a retrial after Hon Ndeda SPM was transferred.

According to counsel, the prosecution called 5 credible witnesses and the appellant in his cross examination did not indicate any bad blood between him and PW1. Counsel submitted further that PW2 a KWS Officer confirmed that the gun had been taken from a colleague who was shot dead in Tsavo East National Park, and that the appellant did not have a certificate to possess the gun which was confirmed to be a gun by ballistic report. Counsel added that under count 1 there was a presumption that the appellant was going to cause public disorder.

Counsel submitted also that in cases of possession of illegal items the burden shifted to the accused to explain the circumstances of his possession which the appellant did not.

In response, the appellant stated that he did not sign any document to confirm that he was found in possession of the items. He maintained that he had an agreement for PW1 to pay him Ksh.3,000 every week for transport which caused the grudge after PW1 defaulted in payment for transport services rendered.

This is a first appeal. As a first appellate court, I am bound to reexamine all the evidence on record and come to my own conclusions and inferences. I am required to bear in mind that I did not see witnesses testify to determine their demeanor and give due allowance to that fact. See the case of OKENO -VS- REPUBLIC (1972) EA 32.

I have re-evaluated the evidence on record. I have perused the judgment and considered the submission of the appellant as well as the submissions of the Learned Prosecuting Counsel. The appellant has come to appeal on several grounds.

The first ground I will deal with is whether the charge sheet was defective. I have perused the charge sheet and considered the arguments of the appellant on appeal. I find that there is no defect on the face of the charge sheet. I dismiss that ground of appeal.

In my view, the main issue relates to whether the appellant was really in possession of the items alleged. The prosecution evidence was that the appellant was seen at Bangale with a gun by PW1 Mahamud Abdi Korono on the 18<sup>th</sup> of May 2012 at 7.00pm. He was together with another person who also had a gun. The two informed PW1 that they wanted to sell each gun at Ksh.70,000, and PW1 immediately conveyed this information to the police after the two went away. Later on 24<sup>th</sup> May 2012, the appellant called PW1 on phone and said that he was at Garissa Police Station.

The actual evidence of his arrest was that on 24<sup>th</sup> May 2012, PW2 Jacob Zenga Mwaria a KWS officer received information that there was a person selling guns at Madogo and that the person was seen around Tana Bridge. They proceeded there and at around 4.30 pm they arrested him in Garissa town near the junction at police line along Kismayu road. They interrogated him and he took them to the bush in Madogo area to a place which he pointed, and they dug the soil and recovered a gun inside a tyre tube. Inside the same tyre tube were also 30 live ammunitions. This officer was with Ranger Willis Otieno Osumba PW3 when they received the information on 24<sup>th</sup> May 2012.

The appellant was then arrested and handed over to the police. Three of the ammunitions were tested by

the KWS officers and found to be live bullets. The items were then taken to the ballistic examiner in Nairobi and a report prepared which confirmed that the items were indeed a gun, a magazine, and live ammunitions. The ballistic report was produced by PW5 Cpl Francis Muchiri.

When put on his defence, the appellant gave sworn testimony and called his wife as a witness. The appellant stated that he had provided transport to PW1 for 7 weeks at Ksh3,000 a week on the motorcycle belonging to his wife DW2. Pw1 later became rude and refused to pay the money. The appellant stated further that he was arrested by the police after leaving the prison camp where his wife worked, where upon PW1 called to ask where he was. He denied possessing or handling the gun or ammunition.

His wife DW2 Sabrian Maisha Beeru testified on oath that she was a prison officer initially stationed at Garissa but now at Nakuru Prison. She stated that on 25th May 2012 they were together with her husband when a KWS motor vehicle approached and the occupants asked him if he was Hajir Boru, then took him away even though he protested. Thereafter she was told that her husband had been charged with possession of firearm.

Both defence witnesses were not cross examined by the prosecution.

Having weighed the prosecution evidence against the defence, it is clear to me that according to the KWS officers, the information they received which led to the arrest of the appellant was received on 24<sup>th</sup> May 2012 the same day of the arrest not 18<sup>th</sup> May 2012. This means that it was not the information of 18<sup>th</sup> May 2012 given by PW1. The source of that information was not disclosed. The appellant however, said that PW1 called him on that 24<sup>th</sup> to ask where he was and he said he was at the police station. The appellant also stated that it was PW1 who informed the KWS officers that he should be arrested, while the PW1 said he reported the possession of guns around 18<sup>th</sup> of May 2012.

PW3 Ranger Willis Otieno Osumba to whom PW1 said he reported on 18<sup>th</sup> of May 2012 stated in fact that he received a call at 5.00pm from informers in Garissa town on 24<sup>th</sup> May 2012. He did not mention any earlier report or say that he was looking for a suspect prior to 24<sup>th</sup> May 2012 at 5.00pm.

In my view, the arrest of the appellant seems to be inline more with defence position than the evidence of PW1. This fact seriously weakened the prosecution case and seriously dented the credibility of PW1 as a witness.

In addition to the above, the prosecuting counsel did not cross examine the appellant on his sworn defence. He also did not cross examine DW1 in her sworn evidence in support of the appellant. The effect of this failure to cross-examine the appellant and his witnesses was that the evidence of the defence was uncontroverted. It stood unchallenged while the appellant actually cross examined prosecution witnesses to challenge their story. The result was that the balance turned in favour of the appellant.

On both the above two reasons, the prosecution cannot be said to have discharged its burden of proving their criminal case against the appellant beyond reasonable doubt. The prosecution is bound to prove its case against an accused person beyond reasonable doubt in all criminal cases, even if the accused raises a defence of alibi. See the case of LEONARD ANISETH –VS- R (1963) EA 206.

Consequently, and for the above reasons, I allow the appeal and quash the conviction of the appellant in all the 3 counts and set aside the sentences imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa on 27<sup>th</sup> July, 2017**

**George Dulu**

**Judge**