REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 121 OF 2017

BERNARD MUCHEMI RIUNGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Criminal Case No. 471

of 2017of the Principal Magistrate's court at Eldama Ravine]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for 7 years on 22/9/2015 for the offence of being in possession of ammunition contrary to section 4 (2) of the Fire Arms Act Cap 114 Laws of Kenya. The particulars of which were that on 1st May, 2014 along Marigat – Nakuru road near Mogotio Police Station Junction in Mogotio District within Baringo County he was found in possession of ammunition to with 181 rounds of 7.62 mm x 51 mm blank cartridge and 6160 rounds of 7.62mm x 51 mm spent cartridges without valid fire arms certificate.

2. In his petition of appeal dated 5/10/2015 filed through M/s S.J.A Simiyu & Co. Advocates, the appellant appealed against the conviction and sentence on the grounds that;

> ***1. That the sentence imposed upon the appellant was rather too harsh.***
>
> ***2. That the appellant was never [given] an opportunity to defend himself***
>
> ***3. That the learned trial magistrate erred in law by continuously adjourning the matter and granting the prosecution endless adjournments without putting into consideration the rights of the accused person***
>
> ***4. That no judgment was ever pronounced and the appellant was sentenced on a one line sentence.***

3.At the hearing of the appeal, the Counsel for the appellant argued that the proceedings before the trial Court were a nullity because the Court accepted the appellant's plea of guilty without the facts of the case being read out to the appellant, citing ***Adan v. R*** [1973] EA 445.

4. It was further submitted that the trial Court had not taken into account the appellant's mitigation and explained that he was a scrap-metal dealer and there were no Provision that cartridges cannot be recycled citing Meru HCCRA 51 OF 2011, ***Josphat Mwiti Kirimi v. R*** Counsel reiterated the indictment by **Lessit J**. on management of Ground Training Camps careless handling of ammunition so that they become accessible to members of the public, saying;

> ***"The blank ammo was said to be very similar to ammo used in training. PW3 went further to show that such blank ammo could easily be collected in training field at the camp. I do not excuse the appellant of possessing blank ammo. However, it is an issue that the person in charge of training at the Camp could leave prohibited items lying about. worse still is how members of the Public could easily access such items within the Training Camp. This is a serious matter and an indictment to security management at the Camp. This is a matter worth investigating and measures taken to remove both laxity and negligence at the Training Camp".***

5. Counsel for the appellant further urged that the appellant was unrepresented and the trial Court should have explained to the appellant the weight of the offence, pointing out that plea was taken 3 times in a manner that left the unrepresented accused confused as to what was going

on in the Court.

6. Counsel argued that re-trial was not possible as the exhibits had been destroyed. He urged the Court to release the appellant whom he said had learnt his lesson that he should not deal with items carelessly disposed by the state.

7. For the respondent, Ms Macharia Ass. DPP did not oppose the appeal conceding that the plea was taken 3 times with the appellant pleading guilty then not guilty and finally guilty but the facts of the case not being read out to the appellant and he being required to confirm whether he admitted the facts before the plea of guilty was accepted and a conviction entered.

8. The issue before the Court is whether the appellant was properly convicted on a plea of guilty for which no facts were read but which were said by the prosecution to be as given in the evidence of the (3) prosecution witnesses who had already testified in Court before the plea of guilty was accepted.

9. The Court is conscious of its duty as a first appellate Court under the Principle in ***Okeno v. R*** [1972] EA 32. The court also observes the procedure for the taking of plea prescribed in ***Adan v. R*** [1973] EA 445 and the requirement herein that the prosecution should after a plea of guilty by an accused immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

10. In this case, the appellant on 19/5/2014 first pleaded guilty to the charge after which the matter was adjourned for the Prosecution to provide the facts of the case. On the return date, the Prosecution told the Court that the matter was for facts but that they had noted an error on the charge sheet and he wished to substitute the same with one which had the penalty clause. The charge was from the 2nd time read and explained to the appellant who answered that it was not true and a plea of not guilty was entered and the trial commenced.

11. The prosecution called (3) witnesses to prove the charge and close its case on 22/9/2015 and the court ordered that the exhibits of spent cartridge and blank be returned to the Independent Office for disposal.

12. Out of the blues, the record then shows that "the court had the charge read over and explained to the accused in Kiswahili" and he responded "it is true". The Court recorded a plea of guilty where upon the prosecution said;

"***Facts as per the evidence on record***"

The court then records that "on your own plea of guilty accused convicted".

13. During the hearing the prosecution witnesses had testified with cross-examination by the appellant indicating that he disputed the evidence adduced by the prosecution witness in their testimonies. The appellant could not therefore be taken to have admitted the facts as set out in the testimony of these witnesses. In any event, the court did not give the appellant an opportunity to admit the facts even though they were to be considered as given in the evidence of the witnesses. The Court should have specifically given the appellant to indicate whether he now accepted the facts as given by the witnesses in view of his earlier cross-examination of the said witness suggesting his non-admission of their testimony.

Having omitted to take a crucial step in plea taking for requiring the accused to admit the facts in order to establish that the plea is unequivocal, the resultant conviction is a nullity. See ***Adan v. R*** (*supra)* and ***Elijah Njihia Wakianda v. R*** Nyeri CA CR.APP.No 437 of 2010.

14. In addition, there is no explanation as to why the matter was called for plea after the prosecution had closed its case where upon the Court ought to have noted whether the accused had a case to answer. The Court record does not show that the accused requested to change his plea for one of plea of not guilty to guilty. The Court recording was wholly unintelligible in this regard.

15. For the purposes of parties right of appeal trial court should meticulously maintain their record of proceedings so that it is intelligible to the appellate Court and the parties in subsequent proceedings.

16. I would agree with the Counsel for the appellant that in view of the destruction of exhibits a retrial may not be appropriate. See ***Opicho v. R*** [2009] KLR 369 that a re-trial should only be made where the interest of justice required it. The appellant in this case has been in custody since 22/9/2015 a period of over 2 years and I do not find in the interest of justice required a retrial bearing in mind that before the conviction and sentence, the trial had been delayed for one year between 24/9/2014 when the first witness testified to 22/9/2015 when the police file could not be found, hence the 3rd ground of appeal over numerous adjournments in the matter. This ground was however not canvassed before the court and the court does not propose to make any determination herein.

Orders

17. For the reasons set out above, the Court finds merit in the appellant's appeal herein and allows it. The conviction of the appellant for the offence of being in possession of ammunition contrary to Section 4 (2)(a) of the Fire Arms Act Cap 114 Laws of Kenya is quashed and the sentence of imprisonment for 7 years imposed on him is set aside.

18. There shall therefore be an order that the appellant be released forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED ON 13TH DAY OF DECEMBER 2017

EDWARD M. MURIITH

JUDGE

Appearances: -

Accused in person

Ms. Macharia, Ass. Director of Public Prosecutions