REPUBLIC OF KENYA.

IN THE HIGH OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 45 OF 2016

TIMOTHY JOHN VICTOR…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence on a plea of guilty in the Chief Magistrate's Court at Nairobi Criminal Case No. 659 of 2016 entered by Hon. H. Nyaga, CM on 1st March, 2o16)

JUDGMENT

The Appellant herein was charged with two counts. In Court I he was charged with importing or exporting of firearms contrary to Section 27 (1)(9) as read with Section 27 (3) of the Firearms Act Cap 114 clause of Kenya. The particulars of the offence were that on the 26th day of February, 2016, at Terminal 1A Jomo Kenyatta International Airport screening area Departures Lounge within Nairobi Area County was found with a toy pistol without an import/export permit. In count II he was charged with being in possession of prohibited item contrary to Section 55 as read with Section 38 (1)(2) (A) of the Civil Aviation(Security) Regulation Act 2008. The particulars of the offence were that on 26th day of February, 2016 at Terminal 1A Jomo Kenyatta International Airport screening area Departures Lounge within Nairobi Area County was found in possession of a toy pistol which is prohibited item.

The Appellant was convicted on his own plea of guilty. In Count I he was sentenced to 7 years imprisonment. In count II he was sentenced to 1 year imprisonment. Both sentences were to run concurrently. The trial magistrate explained to the Appellant his right of appeal. He exercised that right by preferring the instant appeal. By a Petition of Appeal dated 8th March, 2016 filed by the law firm of M/S Nyaundi Tuiyott and company advocates, the Appellant raised the following grounds of appeal.

1. ***The learned trial magistrate improperly recorded a plea of guilty when Count No. 1 on the charge sheet was defective for duplicity in that it stated that the accused was in the same instant "importing or exporting" with the result that the appellant was misled and prejudiced.***
2. ***The learned trial magistrate improperly recorded a plea of guilty when Count No. 2 on the charge sheet was defective as the particulars did not inform the Appellant of all necessary ingredients of the offence and in particular that the appellant was in possession of the toy gun at an area of the airport specifically designated as "security restricted area" under Section 38(1) of the Civil Aviation (Security) Regulations Act 2008 "security restricted area" which omission misled and prejudiced the appellant.***
3. ***The learned trial magistrate erred in law in entering a plea of guilty when the facts outlined by***

the prosecution did not disclose the stated offence with the result that the admission of facts and plea of guilt was not unequivocal.

4. ***The learned trial magistrate failed to adequately and properly take and record an unequivocal plea of guilty thus resulting in an unsafe conviction.***
5. ***The learned trial magistrate erred in fact and law by convicting the appellant for the offence of importing or exporting a firearm when the particulars of offence as outlined by the prosecution and admitted by the appellant were that the appellant was in possession of a toy pistol which act did not constitute an offence under the Section 27 of the Firearms Act Cap 114.***
6. ***That the plea of guilty was obtained through deliberate deception in that the appellant was, while under arrest and without the benefit of proper legal advice, induced by the arresting officers to admit to the offences by deliberately misrepresenting to him that the being in possession of a toy pistol was a misdemeanor for which he will be liable only to a fine and thereafter be free to travel to his home country. (The appellant shall apply for leave to adduce evidence in support of this ground.)***
7. ***The proceedings leading to the conviction of the Appellant were conducted in violation of the appellant's constitutional rights to a fair trial in that,***

a. ***From the time of his arrest to his arraignment the accused was denied an opportunity to communicate with an advocate being a right guaranteed to an arrested person under Article 49(1)© of the Constitution of Kenya 2010.***
b. ***The accused was not granted an opportunity to choose and be represented by an advocate nor was he promptly informed of this right being a right guaranteed to an accused person under Article 50(2) (g) of the Constitution of Kenya 2010.***
c. ***Notwithstanding that substantial injustice could result, the Appellant was not assigned an advocate nor was he informed of this right being a right guaranteed to an accused person under Article 50 (2) (h) of the Constitution of Kenya 2010***

8. ***The learned magistrate took into account extraneous matters and disregarded information on record in convicting and sentencing the appellant.***
9. ***That the sentence meted out by this Learned Trial Magistrate is in the particular circumstances of this case illegal and excessive.***

It is important to point out that the appellant first came to court on an application for bail pending appeal Vide Miscellaneous Criminal Application No. 83 of 2016. After parties had closed their submissions on that application, the court advised that the entire appeal be argued firstly, because there was already on record the entire certified copy of proceedings and secondly, since the applicant was a foreigner it did not make sense to hear the application and in the event that the application succeeded the appellant would have been compelled to return to court for hearing of the appeal. The proposal was agreeable with both parties on record.

Learned counsel for the appellant did not wish to make further submissions than he already had in the application for bail pending appeal. I will consider them individually in this judgment. Learned State Counsel for the Respondent M/S Aluda conceded to the appeal. She submitted that indeed the charge was duplex as it did not disclose whether the appellant was either importing or exporting the firearm. The particulars as stated disclosed the offence of being in possession of a firearm. She submitted that in addition the charge having been brought under the Firearms Act the toy pistol did not fit in the definition of what constitutes a firearm under part 2 of the Act. Further, Ms. Aluda submitted that in Count 1 the appellant having been sentenced to seven years imprisonment the sentence was harsh and excessive taking into account his mitigation and that he was a first offender. Finally, she submitted that if the appeal succeeded the appellant should meet his own costs of travelling back to his own country, South Africa.

I shall first deal with the question of whether or not the charges as drafted were duplex. What constitutes a good charge is explained under Section 134 of the Criminal Procedure Code which reads as follows:

> ''E**very charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with**

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged''.

Section 135 (1) & (2) provides for instances where Joinder of counts in charge or information is allowed. They read as follows:

1. **''Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
2. **Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count''.**

From the above provisions it is correct to state that duplicity of charges would occur in instances where more than one offence is charged in one count. In such a case, an accused would be presented with difficulty as he would not be in a position to know exactly what charge to plead to or defend. This scenario is well expounded by the Court of Appeal for Eastern Africa in the case of **Cherere son of Gukuli vs Republic (1955) 22 EACA 478** which stated as follows:

"Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening Section 135(2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused is so charged, it cannot be said that he is so prejudiced because he does not know exactly with what he is charged, and if he is convicted he does not know exactly of what he had been convicted."

Reverting to the instant case, in Count I, the statement of the charge reads as follows:

"Importing or exportation of firearms contrary to Section 27(1) (9) as read with section 27(3) of the firearm Act Cap 114 Laws of Kenya."

Section 27(1) of the Firearms Act provides for the offence whereas Subsection (3) provides for the penalty. Subsection (1) reads as follows:

"No person shall import or export any firearm or ammunition save under and in accordance with the terms of an import or export permit issued by an authorized officer."

It is then clear that when drafting a charge under Sub-Section (1) the accused can only in any one count be charged with either importing or exporting a firearm. The two words, *import' & export'* cannot be used in one count. The rationale is simple, that an accused cannot at any one given time be importing and exporting a firearm. He could only at any given time either be exporting or importing in which case he would be charged with two separate counts each constituting the particulars of the importation or exportation of the firearm. It follows then that the instant charge having combined the two elements of importation and exportation is bad for duplicity. In that case the appellant having pleaded to the charge was prejudicial to him as he was faced with a difficulty of knowing exactly whether he was convicted for the offence of importing or exporting a firearm.

Turning on to the particulars of the offence, they read as follows:

"Timothy John Victor: On the 26th day of February 2016 at Terminal 1A Jomo Kenyatta International Airport, screening area departures lounge within Nairobi Area County, was found with a toy Pistol without an import or export permit."

A glance at those particulars definitely shows that the appellant committed the offence of being in possession of a toy pistol, thus contravening and being a departure from the statement of the offence. It is trite that the particulars of a charge must at any one time support the statement of the offence. They must also be stated in such clear and unambiquous manner as to enable the accused to know the offence he is

pleading to. In the absence of this cardinal principle an accused would get confused to know which charge he was pleading to and would defend himself. This is what obtains in the instant case which leads me to conclude that the charge sheet herein was defective.

With regard to Count II, in which the appellant was charged with being in possession of a prohibited item under the Civil Aviation (Security) Regulation Act is a replica of the particulars spelt out in Count I. That again is a representation of duplicity having charged the appellant twice with the same offence.

Counsel for the appellant further made the argument that Count I offended the provisions of part II of the Firearms Act since a toy pistol is not a firearm as defined therein. According to both the learned counsel for the appellant and the respondent, a toy pistol is not a firearm as defined by the Act. Whereas both cited a contravention under part II of the Act my view is that they ought to have referred the court to what constitutes a firearm under the Act so that they could eliminate a toy pistol as a firearm. The definition of a firearm is given under Section 2 of the Act as follows:

> **"firearm" means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes-**
>
> a. **A weapon of any description designed or intended to discharge -**
>
> i. **Any noxious liquid, noxious gas or other noxious substance; or**
> ii. **An electrical charge which when it strikes any person or animal is of sufficient strength to stun and temporarily disable the person or animal struck (such weapon being commonly known as a "stun gun" or "electric paralyser");**
>
> b. **Any air gun, air rifle, air pistol, revolver, crossbow, laser gun or any other similar weapon.**
> c. **The barrel, bold chamber, silencer, muffler, flash-guard or any other accessory designed or adapted to diminish the noise or flash caused by firing a weapon and also other essential component part of any weapon; and**
> d. **Any weapon or other device or apparatus which may be specified by the Minister by order published in the Gazette to be a firearm for the purpose of this Act.**

The weapon that the appellant was found in possession of was a toy pistol which definitely was an imitation of a firearm. As such the appropriate provision under which he would have been charged is Section 34 of the Firearm Act. Whereas the trial court is conferred with powers to convict an accused person with an offence that is disclosed by the evidence, in the present case, the appellant already pleaded to the wrong offences which amounted to a mistrial.

It was further the argument of the appellant's counsel that the plea was not unequivocal since the particulars of the offence did not support the charge. Further, that those particulars did not outline the ingredients of the offence with which the appellant was charged. In this respect the court was referred to the case of **Aden Vs Republic (1973) EA, 445**. In that case, an unequivocal plea of guilty should constitute the following steps:

> i. **The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language that he understands.**
> ii. **The accused's own words should be recorded and if they are an admission, a plea of guilty should recorded;**
> iii. **The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
> iv. **If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**
> v. **If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.**

A look at the trial court record seemingly would show that the correct procedure of taking a plea was followed in which case the plea would be deemed as unequivocal. However, taking into account that in Count I the particulars of the offence did not support the statement of the charge it is correct to state that the appellant pleaded to the wrong offence. Therefore, the entire process represented a defective plea and the plea cannot therefore be deemed as unequivocal. Were the court to hold that the plea was unequivocal it would be rubberstamping an illegality.

Counsel for the appellant further alluded that the plea was obtained by deception. According to him, upon the arrest of the appellant at the airport he was immediately taken into custody. He was persuaded by the arresting officers that the offence he had committed was misdemenour and would not attract a heavy penalty beyond a fine. The said police officers escorted him to an ATM machine to withdraw cash to pay the fine. To the dismay of the appellant, upon pleading guilty was jailed for 7 years. Whereas it may be difficult to confirm that assertion, the offence in Count I being serious, it was imperative upon both the investigating officer and the trial magistrate to explain to the appellant the attendant result of his pleading guilty. It is certain that, with the attendant heavy penalty, had the same been explained to the appellant, he definitely would not have pleaded guilty. In that respect, I am inclined to think that what the counsel told the court was a true reflection of what transpired at the time of arrest. Be that as it may, I have already ruled that the charge sheet was defective and the plea was not unequivocal. It follows that this is a good case in which the appeal should succeed.

The appellant finally alluded that his constitutional rights to a fair trial were violated since he was not given an opportunity to communicate with his advocate, to choose to be represented by an advocate of his choice or to be assigned an advocate to represent him. An accused's right to a fair hearing as enshrined under Part IV of the Constitution cannot be derogated as provided under Article 25(c). Under Article 49 b (1) (c) an arrested person has the right to communicate with an advocate and other persons whose assistance is necessary. Under Article 52 (2)(g) an accused person has the right to a fair hearing which includes the right to choose and to be represented by an advocate and to be informed of this right promptly whilst under Sub Article (2)(h) to have an advocate assigned to him by the state and at state expense if substantial injustice would otherwise result and to be informed of this right promptly. From the short proceedings before me it is difficult to tell whether the appellant demanded that he be represented by an advocate. The plea was also taken when the Legal Aid Bill had not been signed into law, in which case Sub Article (2) (h) would have been applicable. However, that is not to say that, taking into account the nature of the offence the appellant was facing and his pleading guilty to a serious offence, the trial magistrate ought not to have reneged on this noble task to inform the appellant of his right to be represented by an advocate of his choice. It is my view that, had the Appellant been represented by an advocate probably the prejudice occasioned to him would not have occurred. Having ruled that the trial was a mistrial, the prejudice would be well mitigated by a verdict that this appeal should succeed.

In the result, I allow the appeal, by quashing the conviction and setting aside the sentence. I order that the appellant be and is hereby set free unless otherwise lawfully held. I further order that the appellant's passport which was deposited in the lower court proceedings be released to him to facilitate his travel back home to his home country. The appellant having legally and voluntarily come into the country shall meet his own costs of travelling back to South Africa.

It is so ordered.

DATED AND DELIVERED at Nairobi this 26th Day of April, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. **Munyambu for the Appellant.**

2. **M/s Atina for the Respondent.**