



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 15 "B" OF 2015

STANLEY MWANGI NGATIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in criminal case number 819 of 2012, R. vs Stanley Mwangi Ngatia at Karatina, delivered Hon. S. Mwayuli, R.M delivered on 30. 3. 2015).

JUDGEMENT

The appellant was convicted of the offence of being in possession of a rifle attachment namely a butt contrary to Section 26 (1) (e) of the Firearms Act[1] and sentenced to serve seven years imprisonment.

The appeal is **not** opposed. Learned Counsel for the DPP **Festus Njue** submitted that notwithstanding the fact sufficient evidence was adduced, he nevertheless conceded to the appeal on grounds that the appellant was charged under a non-existent provision of the law. Counsel argued that the appellant was charged under Section 26 (1) (e) as read with Section 26 (2) (5) of the Firearms Act.[2] Counsel submitted that Section 26 (2) (5) was to give the penalty prescribed. However, there is no such paragraph under sub- Section (2) of Section 26.Thus, in counsels view, the punishment that the appellant contemplated is non-existent and this went to the root of the charge and the defect was not curable under Section 382 of the Criminal Procedure Code[3]

Section 26 (1) (e) provides as follows:-
 (1) It shall not be lawful for any person, other than a person in the service of the Government acting in his capacity as such and authorized in writing in that behalf by the Minister or a person of a class for the time being authorized in that behalf by the Minister by notice in the Gazette, shall sell, transfer, purchase, acquire or have in his possession—

(e) any accessory or attachment, of a kind specified by the Minister by notice in the Gazette, which is designed or adapted for use with or as part of a firearm;

26(2) (b)
 Any person who does any the things prohibited by subsection (1) shall be guilty of a offence and—
 of

(b) if the firearm ammunition (as the case may be) falls within any of the remaining categories specified in paragraphs (c), (d) or (e) of subsection (1) be liable to imprisonment for a term of not less than seven, but not exceeding fifteen, years.

Clearly, the drafter of the charge sheet quoted Section 26 (2) (5) instead of 26 (2) (b) stated above. Was

this the kind of an error that could not be rectified as provided for under section **382** of the Criminal Procedure Code?^[4]

Thus, the only mistake in the charge sheet was that the wrong section of the law relating to sentence was cited. As I understand the decision, the Learned Magistrate was of the view that the defect of quoting non-existent provisions of the law was curable. The question that begs for an answer is, was the said defect curable? True, the law contemplates that there may be occasions when there will be an error, omission or irregularity in a charge. And there will be errors, omissions or irregularities that will defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a failure of justice. This is the foundation of Section **382** of the Criminal Procedure Code^[5] which provides:-

“382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

Discussing the above proviso, **Rudd J** in the case of *Mwasya vs Republic*^[6] stated that “as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the proper provisions.” I have diligently searched the entire record and I find that no objection to the charge sheet was raised at all through-out the proceedings.

Also relevant to the issue at hand are the clear provisions of Section **134** of the Criminal Procedure Code^[7] which provides that:-

“Every 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 information as to the nature of the offence charged.”

I find nothing to show that the charge sheet as drawn with regard to count one was incurably defective or prejudicial to the appellant. In my view count one as drawn discloses an offence under section **26 (1) (e)** as read with Section **26 (2) (b)** of the Act. Thus, even if the said omission constituted a defect, such an omission is not in the opinion of this court fatal nor can it be said to have occasioned injustice. My position in this regard is fortified by the holding in the case of *Seidi vs Republic*^[8] where the state counsel conceded in court that the charge sheet as framed was defective. The court held that the defects in the charge sheet had occasioned no failure of justice and were curable.

A similar position was held in the case of *Mwasya vs Republic*^[9] where the court authoritatively held that the charge was defective, but not of such an irregularity or error as had occasioned a failure of justice under Section **382** Criminal Procedure Code.^[10]

In *Avone vs Uganda*, the court held that where the mis-descriptions in the charge sheet had not prejudiced the appellant, the convictions ought to be allowed to stand.

I am fully alive to the fact that it is an established position that where a charge sheet does not allege an essential ingredient of ^[11]the offence, then it is defective. In the case of *Sigilani vs Republic*^[12] it was held that the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous

manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

This court takes the view that from the onset, the appellant knew the charge facing him.^[13] The particulars were carefully spelt out and the appellant has not demonstrated that he suffered any prejudice as a result of the charge sheet. He fully participated in the trial and the trial process was fair.^[14] The charge sheet outlines the essential ingredients and particulars of the offence in count one and the evidence adduced was geared to establishing the said offence and the defence offered was clearly a direct response of the allegations made against the appellant, thus he fully understood the nature of the offence and the evidence against him. Thus where no prejudice is alleged to have been suffered or demonstrated, or the charge sheet is out rightly defective or ambiguous the court will be reluctant to pronounce the same as defective. The mis-description of the Section under which the penalty is provided is in my view curable and as was held in the above cited case of *Avon vs Uganda*, the mis-description cannot be said to have prejudiced the appellant nor has it been shown that he was prejudiced in any manner. I find that the said error was curable. Accordingly, I find no merit in the submission by both counsels that the charge sheet was incurably defective.

My above finding is also fortified by numerous court decisions on similar situations. In *Republic v Mohamed Abdi Bille*^[15] discussing a similar situation, the learned judge stated held that the appellant was not prejudice nor was there "a miscarriage of justice or prejudice due to the manner the charge is drafted....."

Also *Vincent Shatuma Naste v Republic*^[16] a two judge bench declined to find that the charge sheet was defective where no prejudice on the accused person was proved.

Section 134 of the Criminal Procedure Code^[17] requires that every 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. In my view count one complies with the above section.

Section 137(a) of the Criminal Procedure Code^[18] further requires that the Statement of an offence should offer a brief description in ordinary language, avoiding as far as possible the use of technical terms and that it is not necessary to put all the elements of the offence within the Statement. I find that count one also conforms to this section.

Section 137(a)(i) and (ii) of the Criminal Procedure Code^[19] also provides that if the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence. In this regard, Section **26 (1) (e)** which creates the offence was cited. To me, the accused knew the offence he was facing. Then section **26 (2) (5)** was cited instead of **26 (2) (b)**. This, in my view was an error capable of being corrected as stated above, hence a curable defect. Accordingly, I find that the magistrate correctly held that the mis-description of the said section was a curable defect.

On the evidence, three prosecution witnesses, namely **PW1, PW2 and PW3** acting on a tip arrested the appellant, then proceeded to his home, searched and recovered part of a firearm. They prepared an inventory which was signed by the appellant who also retained a copy. **PW4** examined the exhibit and found that it was indeed part of a firearm.

I have carefully evaluated the evidence tendered in the lower court and the defence offered by the appellant and the submissions filed by counsel for the appellant, the relevant law and authorities and I am persuaded that the learned magistrate properly analysed the evidence and arrived at the correct conclusion and that the conviction is supported by the evidence.

As was held in the South African case of *Ricky Gandavs The State*^[20] I have weighed all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, I am persuaded that the conviction was justifiable. I find that there was no

reasonable basis for creating reasonable doubts as to the guilty of the accused.

The upshot is that this appeal against both conviction and sentence fails. Accordingly, I dismiss the appeal and up hold the conviction and sentence and order that the appellant serves the full sentence imposed by the lower court.

Signed, Delivered and Dated at Nyeri this 20th day of May 2016

John M. Mativo

Judge

[1] Cap 114, Laws of Kenya

[2] Ibid

[3] Cap 75, Laws of Kenya.

[4] Ibid

[5] Ibid

[6] {1969} EA 280

[7] Supra

[8] Supra

[9] {1967} EA 345

[10]

[11] See Yosefu and Another vs Uganda {1960} EA 236

[12] {2004}2KLR 480

[13] Brian Kipkemoi Koech v Republic [2013] eKLR

[14] See Fappyton Mutuku Ngui vs Republic CA Cr app no. 32 of 2013-Kiahar Kariuki, Maraga & J. Mohammed

[15] [2014] eKLR

[16] [2014] eKLR

[17] Ibid

[18] Ibid

[19] Ibid

