REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 5 OF 2016

(From original conviction and sentence in criminal case No. 385 of 2014 of the SPM Magistrate's court at Mandera – P. N Areri - SRM)

ABDIKADIR NOOR MAALIM ..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant Abdikadir Noor Maalim Mustafa was charged in the magistrate's court at Mandera with three counts. Count 1 was for being in possession of specified firearms without licence contrary to section 4A and (1)(a) of the Firearms Act No. 6 of 2010 (Cap 114 Laws of Kenya). The particulars of the offence were that on 13th August 2014 at Korome area within Mandera County was found being in possession of AK 47 rifle serial No. 01522 without a licence or permit or other lawful justification. Count 2 was for being in possession of ammunition contrary to section 4(2)(a) as read with section 4 (3)(a) of the Firearms Act No. 6 of 2010 (cap 114 Laws of Kenya). The particulars of the offence were that on the same day and place was found being in possession of 15 rounds of ammunitions of 7.62 mm special without holding a firearms certificate. Count 3 was for being in possession of magazine contrary to Section 4(2)(a) as read with Section 4(3)(a) of the Firearms Act No. 6 of 2010 (Cap 114 Laws of Kenya). The particulars of the offence were that on the same day and place was found in possession of one empty magazine without holding firearms certificate.

He pleaded not guilty to all the three counts. After a full trial, he was convicted of all the three counts. He was sentenced to serve 14 years imprisonment in count 1, 7 years imprisonment in count 2 and 7 years imprisonment in count 3. The three sentences were ordered to run concurrently. The trial court also ordered that the AK 47 rifle serial No. 015522 together with the magazine and ammunitions be forfeited to the State through the Kenya Police Service.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel Mr. C. K. Nzili and Company Advocates on the following grounds:-

1. The learned trial magistrate erred in law and in fact in convicting the appellant on charges which were defective, illegal and not supported by any evidence.

2. The learned trial magistrate erred in law and in fact by failing to consider appellants defence.

3. The learned trial magistrate erred in law and in fact in acting on evidence without corroboration.

4. The learned trial magistrate erred in law to take into account irrelevant considerations that had no

factual basis therefore arriving at wrong conclusions in law.

5. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant.

6. The learned trial magistrate erred in law and in fact by giving an excessive sentence without considering the appellants mitigation and the circumstances of the case.

Counsel for the appellant also filed written submissions which I have considered. Counsel relied in a number of decided cases counsel also highlighted the submissions in court. At the hearing of the appeal Mr. Nzili for the appellant highlighted the written submissions. Counsel emphasized that the alleged scene was near the Kenya Somali border and was a hilly quarry area. Counsel said exclusive possession of the alleged items by his client was not proved by the prosecution evidence. Counsel felt that his client was convicted because two weeks after the alleged offence there was a massacre of people in the area.

Counsel emphasized that women who were alleged to have been herding camels nearby were not called to testify. He felt that since land was not adjudicated his client could not be said to be in exclusive control of the area as well as the ammunition since he was alleged to have merely been found at a place where the rifle was found and was deep asleep. According to counsel the appellant could not have known of the presence of the rifle.

Counsel emphasized that the witnesses were all police officers and that no independent witnesses testified. In addition, no inventory or photos were taken and as such, there was no corroboration in the evidence. Counsel emphasized what was decided in the case of ***David Njogu -vs- Republic 2014 EKLR*** relating to possession and the case of ***Nicolas Kinyanjui -vs- Republic 2006 EKLR*** on contradictions in evidence of recovery of items.

The Director of Public Prosecution through Senior Assistant Director of Public Prosecution Mr. Wanyonyi also filed written submissions to the appeal. The Assistant Director of Public Prosecutions in the written submissions conceded to the appeal on the ground that count 1 was defective as the charge sheet only cited the definition section of the offence. He also stated that the magistrate misinterpreted section 4A (2) regarding the definition of a specified firearm when he said that an AK 47 rifle was a specified firearm complete without its components. Counsel also submitted that evidence of PWI, PW2, PW3 and PW4 was contradictory regarding the scene where the gun was found. In addition, there was no inventory or photographs prepared by the police and the officer who made the recovery of the rifle Corporal Ole Keyapi was not called to testify.

This is a first appeal. As a first appellate, court I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to 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 considered the submissions on both sides as well as the authorities cited to me. I have perused the judgment of the trial court.

The appellant was convicted on 3 counts. Firstly, for being in possession of a specified firearm without a licence. Secondly, he was convicted of being in possession of ammunition. Thirdly, he was convicted for being in possession of a magazine. The first issue is whether the charge is defective. The submissions of both the counsel for the appellant and the state are that the charge is defective as it cited only the section that defines the offence. I see no defect in the charge as the offence section was cited, even if the punishment section was not cited. In case that is a defect it is curable under S. 382 Criminal Procedure Code as the appellant was not prejudiced.

The appellants counsel has submitted very strongly that the offences were not proved beyond reasonable doubt. Counsel has stated that possession of the alleged items was not proved. He has stated or emphasized that the area of Torome in Mandera is a quarry area which is very volatile and that the

appellant was implicated merely because he was found alone in that area.

Indeed, all the eye witnesses stated that the appellant was found in possession of the gun, the ammunition, and the magazine. They were police officers. They were all on patrol. PWI was PC Tyrus Omondi. PW2 was PC Samuel Nyaga Njora, while PW3 was Inspector Ekai Marok, and PW4 was PC Nicolus Otieno. They all stated that they saw the appellant sleeping in the bush around the quarry area while laying his head on or near the AK 47 rifle. The appellant on his part denied the offence and said he was implicated wrongly by the police.

The rifle and ammunition were taken to the ballistic examiner and they were all confirmed to be in good condition.

Having perused the evidence on record, I find that the evidence of the four police witness who went to the scene and arrested the appellant was consistent and corroborative. The details differ a little, but that is what is expected of evidence from truthful witnesses. The difference of details were not the same as contradictions. In my view the appellant was found at the place where the gun was. The gun had ammunition and had a working magazine.

Appellant's counsel has suggested that the appellant might not have been aware of the presence of the rifle around the scene. There is however no evidence or suggestion that the rifle was buried in the ground and that as such he was not aware about its presence. There is no suggestion that it was far from the place where the appellant was and as such he could not see it. One may ask, how a stranger to a gun would lie down and sleep comfortably resting on or just next to a gun of which he didn't know the owner. That in my view would be impossible as the owner could emerge at any time and the sleeping man would probably be in trouble.

In his defence the appellant suggested that he was having a water jerrican and an axe when he was arrested. He denied having the rifle or being near the rifle. He agreed however that he was arrested at a place where he was sleeping near the road. In my view, the defence of the appellant that he was in possession of a water jerican and an axe was an after though meant to divert issues, as he did not put any questions to the police officers who arrested him which would suggest that he was found with a water jerican and an axe. I agree with the trial court that the defence of the appellant was a mere denial.

The appellants counsel has cited a number of court cases regarding and possession. I agree with the findings in those cases, such as ***Fredrick W. Kinuthia –vs- R(2008) eKLR.*** However I am of the view that in the present case, on the evidence on record, possession was proved.

The charge of possession of a rifle and possession of a magazine were duplication. The rifle and the magazine were from the evidence on record affixed to each other. They were not separate items. I will thus quash the conviction for possession of a magazine, as the charge was a duplication.

The sentences were determined by the trial court after considering the mitigation of the appellant. Sentencing is a discretion of a trial court. The sentences were made to run concurrently. The sentence for possession of a magazine has to be set aside, as the conviction was quashed. It is of note that the Mandera area is an area that is prone to acts of violence using ammunition. It is common knowledge that guns and other ammunitions have been used against defenseless civilians repeatedly. As such in my view, the sentences being deterrent are justified in the matter.

I wish to emphasize that this is not a case of handling stolen goods. It was also not a case where it would be practical to take photographs. The police officers were on patrol in that volatile area and they could not be expected to be carrying such photographs to the scene.

I dismiss the appeal on count 1, and 2 and uphold both the conviction and sentence. I quash the conviction for count 3 for possession of magazine, and set aside the sentence imposed thereon.

Dated and delivered at Garissa this 31st day of October 2016.

GEORGE DULU

JUDGE