



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 33 OF 2015

BALISO LIKWALE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.605 of 2012 of the Chief Magistrate's Court at Meru by Hon. D.W Mburu – Ag. Principal Magistrate)

JUDGMENT

The appellant, **BALISO LIKWALE**, was convicted for the offence of being in possession of ammunition without a firearm certificate contrary to section 4 (1) as read with section 4 (3) of the Firearms Act cap 114 laws of Kenya.

The particulars of the offence were that on diverse dates between the 25th day of April 2012 at Lewa Downs Conservancy Limited in Buuri District within Meru County was found with five bullets of 7.62 mm special ammunition without a firearms certificate.

He was sentenced to serve seven years imprisonment.

He now appeals against both conviction and sentence.

The appellant was represented by Ms. Thibaru, learned counsel. She abandoned all the grounds of appeal except the following:

1. That the learned trial magistrate erred in law and fact in holding that the alleged ammunitions were found in the possession of the appellant who was not the only person who had access to the residential house.
2. That the learned trial magistrate erred in law and fact in convicting the appellant on the contradictory evidence of the prosecution witnesses.
3. That the learned trial magistrate erred in law and fact by failing to take into account the appellant's defence.

The state opposed the appeal through Mr. Namiti, the learned counsel.

Briefly the facts of the prosecution case were as follows:

After the police had received a report that the appellant was a suspected poacher, they went into a house he shared with another and recovered ammunitions under a mattress.

The appellant contended that he was arrested on allegations of poaching and was taken to the police station. He denied that his house was searched in his presence. He claimed that he was falsely implicated in the offence due to differences at his place of work.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32**.

During cross examination of PC Bernard Mbichi (PW2) he testified that the appellant shared the house with another person and that the key to the house was kept at a common place. He indeed confirmed that at the time of his arrest the appellant did not have the keys to the house. This raises an issue as to whether it was the appellant and his housemate only who knew where the keys to the house were kept. There was a burden on the prosecution to call the appellant's housemate to testify on this point. He was not called and no explanation was given for the failure to do so. This failure was prejudicial to the appellant in view of his defence.

It would appear that the prosecution was very casual in prosecuting the appellant. This is explained by the failure to call his housemate who had been arrested with him as a witness. His evidence could have put to rest the issue of the ownership of the bed where the ammunitions were allegedly recovered. We can only be left guessing.

The foregoing analysis of the evidence coupled with the defence proffered by the appellant raises reasonable doubts that the learned trial magistrate ought to have resolved in favour of the appellant.

I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru this 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE