REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 62 OF 2013

MURUSI LMEINGACH LURUK.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

The Appellant Murusi Lmeingach Luruk was charged with one count of being in possession of ammunition without a firearms certificate contrary to section 4 (2) (a) as read with section 4 (3) (a) of the Firearms Act. The particulars of the offence were that the Appellant on the 9th day of 2013 along Marsabit Isiolo road, in Marsabit Central District, within Marsabit County, was found in possession of fifteen (15) 7.62 *51mm caliber ammunition without a firearms certificate.

The Appellant was tried and at the end was convicted of the offence and sentenced to serve 5 years imprisonment. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the grounds of appeal, the Appellant raised the following issues:

a. **THAT the trial magistrate erred in law and fact in convicting the Appellant in a charge where the essential ingredients of the offence had not been proved beyond reasonable doubt.**

b. **THAT the trial magistrate erred in law and fact in the manner he treated the evidence tendered by the prosecution which was insufficient and thus arriving at a wrong finding.**

c. **THAT the defence tendered by the appellant was weighty and credible.**

d.**THAT the sentence was excessive.**

This is the first appellate court and as such, subjected the evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Okeno Vrs. Republic** 1972 EA 32

The facts of the prosecution case were that PW1, Hudson Nyongesa who was a KWS Officer working at Marsabit National Reserve extending up to Merile, got a report from an informer on 9th April 2013, that somebody was suspected to be dealing in game trophies. He and his colleague PW2 Gutiba Sagila Herron were further informed that the suspect was travelling from Marsabit to Isiolo on Liban bus.

PW1 and PW2 informed Marsabit police station and followed the bus using their vehicle. They found the bus at Malgis where it had been stopped by their colleagues from Laisamis. They told the passengers to alight and with the help of those who knew the Appellant, they found him and the conductor removed his luggage which had several cartons of cooking oil and a big nylon paper and a personal bag. The Appellant was then escorted to Marsabit Police Station with his luggage whereupon PW1 and his colleagues asked Police Officers to help them search the luggage. They did not find anything in the cartons of oil but found 15 rounds of ammunition in his personal bag which were wrapped in nylon. He further testified that prior to this incident; he did not know the appellant but one of his colleagues knew him and that they used his identity card to identify him.

PW2 Gatiba Sagita, who was PW2's colleague, corroborated PW1's evidence on what information they received that led to the arrest of the appellant.

PW 3 and 4 both police officers from Marsabit Police Station also testified how a suspect was brought by two KWS officers (PW1 and 2) who requested them to conduct a search on the appellant's luggage. On conducting the search, they found 15 rounds of ammunition which had been wrapped in a nylon paper.

Ms Nelima counsel for the appellant submitted that the charge of possession of ammunition was not proved because the act of possession was not proved. She urged that the Fire Arms Act does not define what possession means and the definition of possession under the said Act is not the same as under the Penal Code. Counsel urged that after arrest in the bus, no search was conducted at the time of arrest from the bus but it was done at the Police Station. Counsel relied on the decision of **Muthiori V. Republic CRA 459/1974** where the court held that possession means being found with the item at the time of arrest. Counsel also submitted that the appellant's luggage was transported in a different vehicle to the Police Station and he was not in control of the luggage at all times. Counsel also submitted that the investigation officer was never called to testify including the driver and conductor of the vehicle to identify the goods that the appellant was found with and further that the ballistics expert was not called to produce the rounds of ammunition. It was counsel's contention that a doubt was raised in the prosecution case which should be resolved in his favour.

In opposing the appeal, Mr. Mulochi Learned Counsel for the State submitted that the evidence of the prosecution witnesses was credible, consistent and overwhelming; that the witnesses were not known to the appellant and there was no possibility of fabricating the charges. As to whether the prosecution failed to call crucial witnesses counsel relied on section 143 of the Evidence Act which provides that one witness can prove a fact unless the law requires otherwise (**Benjamin Gitau vs Republic CRA 257/2009**). Counsel urged that the sentence is an illegality in that under Section 4(2) (a) of the Firearms Act the minimum sentence is 7 years imprisonment. As a result he filed a notice of enhancement.

I have reviewed all the evidence adduced in the trial court, the submissions by counsel and grounds of appeal.

Whether the appellant was found in possession of the ammunition; both PW1 and 2 testified that after the appellant was found on the bus, his luggage was not searched till he was taken to the Marsabit Police Station at Marsabit. PW1 told the court that one of their vehicles broke down and they transferred his luggage to another vehicle. In cross examination, PW1 said that the appellant remained with the bag in the vehicle in which PW1 was but the rest of the other luggage was transported in another vehicle. PW2 on the other hand said "**we put all your luggage in another vehicle and escorted you to the station. We put you in another vehicle that was ahead while your luggage went in the motor vehicle behind**."

From this evidence it is clear that the appellant was not in control of his luggage on the journey between the police station and the place of arrest. The question that the prosecution did not answer is why the search was not done immediately upon arrest. The appellant was arrested about 8.00 am and the search was not done till about 4.00 pm. Between 8 am to 4.00 pm, since the appellant was not in control of the property, anybody could have interfered or tampered with it.

Did the prosecution omit to call crucial witnesses? Section 143 of the Evidence Act provides that no particular number of witnesses are required to prove any fact unless the law requires otherwise. In this case, it is the appellant's contention that the conductor and driver should have been called as witnesses. In my view the conductor of the Liban bus where the appellant was found was a very crucial witness. PW2 told the court that after they identified the appellant, with the help of the conductor, the appellant's luggage was off loaded. There is evidence on record by PW3 that some of the luggage taken to the police station was later released to some women. It means that not all that was taken from the bus to the Police Station belonged to the Appellant. The conductor who identified the appellant's luggage should have been called as a witness. The prosecution have a duty to call all witnesses whose evidence is material or relevant to their case. **Bukenya V. Republic 1973 EA 353**. I agree with the defence that a crucial witness was not called.

The other key witness that was not called was the Ballistic Expert who examined the ammunition. No reason was given why he was not called. PW4 produced the exhibits irregularly without laying any basis why the ballistic expert could not produce them. Expert reports are produced under section 77 of the Evidence Act and an accused person has the right to cross examine the expert on his findings. If the expert for some reason, cannot be found, the report can be produced by another person after the basis is laid by the prosecution making an application to the court and the accused being allowed to respond. The Ballistic Report was irregularly produced in evidence.

Having considered all the grounds raised by the appellant. I am satisfied that sufficient doubt has been raised in the prosecution case as to whether or not the appellant was in possession of the ammunition produced in court, key witnesses were not called and that raises a presumption that they may have given adverse evidence to the prosecution case. In the end, I find that the trial court returned a wrong verdict when it found that the prosecution had proved its case beyond any doubt. Consequently, I find the conviction to be unsafe and is hereby quashed, sentence set aside and accused is set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 13TH DAY OF MARCH, 2015.

R. P. V. WENDOH

JUDGE

M/s Nelima for appellant

Mr. K. Mugo for State

Jane/Kirimi Court Assistant

Appellant present.

R. P. V. WENDOH

JUDGE