REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 107 OF 2014

ABDI HARET DIGANE ……..…… APPELLANT

V E R S U S

REPUBLIC ……..….. RESPONDENT

From the original conviction and sentence in Criminal Case No. 1573 of 2013 of the Chief Magistrate's Court at Garissa.

J U D G M E N T

The appellant was charged in the subordinate court with two counts. Count 1 was for being in possession of ammunitions without a firearm certificate contrary to section 4(2)(a) of the Firearm (Cap 114 of the Laws of Kenya). The particulars of the offence were that on the 8th November 2013 at Mathagisi area in Dadaab District within Garissa County was found in possession of 120 rounds of 7.62 times 39mm boll ammunition without a firearm certificate. Count 2 on the other hand, was for possession of firearm accessories Contrary to Section 26(1)(e) as read with Section 26(2)(b) of the Firearm Act. The particulars of the offence were that on the same day and place was found in possession of firearm accessories namely 4 AK 47 rifle magazines without a firearm certificate. He denied both charges. After a full trial he was convicted on both counts and sentenced to serve 10 years custodial sentence in respect of count 1 and 4 years custodial sentence in respect of count 2.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his first grounds of appeal on 26th May 2014. Before the hearing of the appeal however, on 16th may 2015 he filed amended grounds of appeal which he relied upon. The amended grounds of appeal are as follows:-

1. The trial magistrate erred in law and facts to convict him without considering that there was no dusting done to establish who exactly was in possession of the alleged ammunitions and the fire arm accessories save fabricated allegations.
2. The trial magistrate erred in law and facts to convict him without considering that the alleged informer was not summoned to adduce his evidence in support of the alleged prosecution witness allegations.
3. The trial magistrate erred in law and facts to convict him without considering that the prosecution witnesses' evidence was uncorroborated and inconsistent.
4. The alleged vehicle is established to be a miraa vehicle or a Landcruiser and thus the prosecution case was not proved beyond any reasonable doubt.

The appellant also filed written submissions which I have perused. At the hearing of the appeal, the

appellant relied on the written submissions. He elected not to make oral submissions.

The learned prosecuting counsel Mr. Orwa opposed the appeal. On identification, counsel submitted that the appellant was arrested at a road block after a tip off and after a search all the exhibits were found on him. He was thus arrested and there was no mistaken identity. With regard to dusting of the exhibits, counsel submitted that it was not necessary as the exhibits were found on him and the items were immediately taken to the ballistics examiner. Counsel added that PW1 to PW3 stated that the exhibits were wrapped in a kikoi and as such in counsels view finger prints would not be found on the same. The appellant also did not raise any allegations in cross examination that the exhibits were planted on him. Counsel submitted that it was not the function of the ballistics expert to establish the person who was in possession of the exhibits.

With regard to the motor vehicle, counsel submitted that there was a minor variation between the evidence of PW1 and PW2 on the registration number. However counsel submitted that it was a mere human error and a mistake of form.

Counsel submitted also that the informer could not be compelled to come to court as he would have prejudiced his own security. There was thus no violation of the Constitution rights of the appellant. Counsel submitted that the prosecution had proved its case against the appellant beyond any reasonable doubt.

Lastly, counsel submitted that the sentence was within the law and was neither harsh nor excessive.

In response to the prosecuting counsel submissions, the appellant stated that the people who boarded the vehicle were not called to testify though they were key witnesses in the matter.

During the trial, the prosecution called four witnesses. They were all police officers.

PW1 was Inspector David Langat of IFO Police Station. It was his evidence that they received information that one Abdi Haret was seen with ammunitions taking it from Dobley in Somalia heading to Dadaab. Together with other police officers, they organized a road block and a Toyota Land cruiser registration KPR 008 B approached. They flagged the vehicle to stop. The vehicle had a number of passengers and was a miraa vehicle. After conducting a search they found the appellant in possession of four AK 47 magazines each loaded with 30 rounds of ammunitions wrapped in a kikoi. The total rounds of ammunitions were therefore 120. They thus arrested the appellant and took him to the police station. In cross examination he stated that they released the other passengers. He stated that they also found a small mobile phone in the possession of the appellant which they took to verify the telephone communication the appellant had done. They denied taking from the appellant Kshs14,000/=.

PW2 was Sergeant Jonathan Lekachuma. It was his evidence that on 8th of November 2013 at 1.00 Pm they received a tip off that someone was ferrying ammunitions from Dobley in Somalia to Dadaab. They organized a road block and stopped a Toyota Land cruiser vehicle. On searching the people in the vehicle, they found 4 AK 47 magazines and ammunitions wrapped in a kikoi in possession of the appellant. They thus arrested him.

In cross examination he stated that he had heard about the appellant before but had not seen him.

PW3 was Sergeant Duncan Mulinda who stated that on 7th November 2013they received information from the Assistant Commissioner of Police that ammunitions were being transported from Somalia to Dadaab. They thus organized a road block, which he did not attend. On the 8th of November 2.00 Pm, he was informed of the arrest of the appellant. He later saw the items, made an exhibit memo, and forwarded the items to the ballistics expert. He produced the ammunitions and magazines as exhibits. In cross examination he stated that he was the investigating officer and had previous information that the appellant was a bandit.

PW4 was Chief Inspector Alex Chirchir a ballistic examiner. It was his evidence that on 20th

November 2013, he received exhibits from Police Constable Wafula from Dadaab Police Station. He examined the exhibits made a report, signed the same and produced it in court. In cross examination he stated that the exhibits were brought to him but he did not know the person from whom, the same were recovered.

When put on his defence, the appellant gave unsworn testimony. He stated that on 8th November 2013, he was doing his usual job of herding cattle. He then took a lift in a motor vehicle heading to Dadaab. At a place called Mathangisi they met police officers who searched them. He was then taken to IFO Police Station while all the other passengers were released. He did not know the reason for his arrest and denied possession of the items mentioned in the charge sheet.

Based on the above evidence, the learned magistrate found that the prosecution had proved its case against the appellant on both counts The court convicted the appellant and sentenced him to serve 10 years imprisonment on count 1 and 4 years imprisonment on count 2 with no indication on to whether the sentences would run concurrently or consecutively.

This being a first appeal, I have to start by reminding myself that I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to be mindful of the fact that I did not see witnesses testify to determine their demeanor and give allowance for that fact see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. The appellant has come on appeal on several grounds. He has firstly complained that there was no dusting of the magazines or the ammunitions to establish who exactly was in possession of the same.

Indeed no dusting was done. However there is no evidence or allegations on record that the appellant was holding any of those items in his hands or with his fingers. The items were found wrapped in a piece of cloth. The prosecution evidence from PW1 and PW2 was that the items were found in the possession of the appellant but wrapped in a piece of cloth. Therefore in my view the failure of the prosecution to dust the items for finger prints did not have a negative impact on the prosecution case. I dismiss that complaint of the appellant.

The second complaint of the appellant was that the informer was not called in court to testify. Indeed, the informer was not called to court to testify. However in my view an informer is just an informer and is not necessarily a witness. The information given by an informer is information that might or might not confirm the commission of an offence. It is meant to assist the police in going to a scene to establish the commission of an offence or to carry out independent investigations to establish whether or not that information is true. Therefore in my view an informer is not required to come and testify in court. It is sufficient that investigations were carried out and an offence established.

The evidence to be considered to determine whether or not an offence had been committed is not the tip off of the informer but the evidence of those who conducted investigations and established the commission of the offence. In the present case it was the officers who conducted the road block and search as well as the investigating officer and the ballistics examiner who testified to the commission of the offence by the appellant. I dismiss that ground.

The appellant has also complained that the other people in the vehicle where he was arrested were not called to testify. In my view it was not necessary to call the occupants of the Toyota Land Cruiser vehicle as witnesses. They were mere passengers and there is no evidence to suggest that any of them pointed at the appellant as a suspect. They were people like the appellant who were surprised that the police stopped the vehicle and started searching them. As such in my view there was no need to call any of them as a prosecution witness.

The appellant has complained that the prosecution did not prove its case beyond reasonable doubt and that the prosecution evidence was not corroborated and was inconsistent. I have carefully considered the prosecution evidence. The chain of evidence is quite clear and straight forward to me. A tip off was

received that the ammunition was being transported by a person from Dobley in Somalia to Dadaab. A road block was mounted by PW1 and PW2. They stopped a Toyota Land cruiser, searched the people there in and found the appellant in possession of 4 magazines and the ammunitions. He was arrested. The items were taken to the ballistics expert who tested them and found the ammunition to be live. He prepared a report on both the magazine and the ammunition which was produced in court as an exhibit. The mere variation of the registration number of the motor vehicle was not material. It is very clear to me that the vehicle was a Toyota Land cruiser and that the appellant was found in that vehicle together with others. The appellant himself stated that he had got a lift that day in a vehicle and was heading to Dadaab when the police stopped the vehicle searched it and arrested him.

Having considered the totality of the evidence herein tendered at the trial, I find that the prosecution proved its case against the appellant beyond any reasonable doubt for the two offences. I will thus dismiss the appeal against conviction.

The appellant has not appealed against sentence though in his submissions he has talked about the sentence being excessive.

In my view the sentence imposed is within the law. However as the offences are interrelated and committed at the same time, I think that the sentences should have been concurrent. I will thus order that the two sentences do run concurrently.

Consequently and for the above reasons, I dismiss the appeal against conviction. I uphold the conviction of the trial court. With regard to sentence, I order that the sentences on count 1 and count 2 do run concurrently from the date the sentences were pronounced by the trial court. It is so ordered.

Dated and delivered at Garissa 29th July 2015.

GEORGE DULU

JUDGE