



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 6 OF 2014

IBRAHIM BASHIR SOMO APPELLANT

V E R S U S

REPUBLIC STATE

(From the conviction and sentence by Garissa Chief Magistrate's Criminal Case No. 67 of 2013 – B. J. Ndenda – S.P.M)

JUDGMENT

The appellant was charged in the subordinate court in the same case with one Aden Hussein Muhummed with possession of ammunition without a firearm certificate contrary to section 4(2)(a) of the Firearm Act (Cap 114 Laws of Kenya). Each was charged with a separate count. Count one related to the appellant. The particulars of the offence were that on 11th January 2013 at Ifo market in Dadaab District within Garissa County was found in possession of 132 rounds of 7.62 mm/special calibre ammunition without a firearm certificate.

Count two, on the other hand, related to the co accused Aden Hussein Muhummed. The particulars of the offence were that on the same day and place was found in possession of 109 rounds of 7.62 mm ordinary calibre ammunitions without a firearm certificate.

Both denied the respective charges. After a full trial, the co- accused was acquitted of the offence he was charged with. The appellant was however convicted of the offence he was charged with and sentenced to serve 10 years custodial sentence.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial memorandum of appeal on 6th February 2014. On 29th June 2015 however, he filed an amended petition of appeal as well as written submissions. He relied on the amended petition of appeal, whose grounds are as follows:-

1. The trial magistrate erred in law and fact in believing that he was in possession of the alleged ammunition without considering that the ballistic report did not prove possession of the alleged ammunition since dusting was not done to ascertain whether he had touched them.
2. The trial magistrate erred in law and fact to convict him without considering that the recovery of the alleged ammunition was doubtful.
3. The trial magistrate erred in law and fact to hold that the evidence of his co accused established his guilt and conviction.
4. The trial magistrate failed in law and fact to convict him without considering that the person who was arrested in possession of the alleged ammunition was discharged, then shifting the allegation on his back.

5. The prosecution evidence on possession was not fully discharged against him.
6. The prosecution evidence was contradictory and full of inconsistencies and hence unsafe to warrant a conviction.

At the hearing of the appeal, the appellant elected to rely on his written submissions and not to tender any oral submissions. In his written submissions, he doubted whether the items allegedly recovered were ammunitions in law. He also submitted that it was not proved that he was the possessor and that he was arrested with the same. He also complained about his mode of arrest and said that the ballistic examiner's report was wrongly admitted in evidence in the absence of the ballistic expert. He stated that his co-accused's evidence was self serving and therefore should not have been used against him.

The learned Prosecuting Counsel Mr. Wanyonyi opposed the appeal. Counsel submitted that PW1 Corpral Chelumo Deche gave clear evidence that he was at the police station in broad day light, when the appellant was brought with another by the Kenya Police Reserve Service, who had searched them and found a bag containing ammunition. Counsel emphasized that none of the two suspects gave an explanation as to how they came into possession of the ammunition.

Counsel submitted that the appellant was actually in possession of the 132 round of ammunition in a plastic container, while the co-accused had a bag containing 109 rounds of ammunitions. Both the bag and ammunitions were produced as exhibit. Counsel submitted that the ammunitions were forwarded to the firearm examiner who confirmed them to be live. The report of the ballistic examiner was in counsels' view properly produced in court under section 77 of the Evidence Act (cap.80), and in any case the appellant did not object to the production of the same.

Counsel submitted further that there were no contradictions in the prosecution evidence and that each of the co-accused merely laid blame on the other during their defence. Counsel maintained that the appellant was properly arrested and, though the arresting officer did not come to court to testify the reason was that he had died before tendering evidence.

Counsel submitted that the offence carries a minimum of 7 years and a maximum of 15 years imprisonment. Therefore the sentence of 10 years imprisonment imposed by the trial court could not be said to be harsh and excessive.

Counsel relied on the case of *John Muguthi Kangethe -vs- Republic Cr. Appeal No. 158 of 2014 at Nairobi* ; the case of *Ahmed Muhamed Ali -vs- Republic Mombasa Cr. Appeal No. 21 of 1998*; and *Mohamed Hassan -vs- Republic Meru High court Cr. Appeal No. 78 of 2006*.

In response to the submissions of the learned Prosecuting Counsel, the appellant stated that the person who was acquitted paid money to be so acquitted.

During the trial the prosecution called two witnesses. PW1 was Corproal Chelumo Deche. It was his evidence that on 11th January 2013 at 10.00 am while at Ifo police station, two persons arrested by Kenya Police Reservist Abdi Olal Ali at Ifo market, were brought to the Ifo Police station. He was informed that the two were found carrying ammunitions and arrested. They then with PC Longole took the suspects and then counted the ammunitions.

According to him, the appellant had 132 rounds of ammunitions stacked in a plastic container wrapped in a green cloth. The other suspect had 109 live ammunitions wrapped in an improved bag with a zip.

The items were then taken to the ballistic expert who confirmed them to be live ammunitions. They received the report from the ballistic expert which he produced in court as exhibit. According to him, the appellant and his other suspect did not have any objection to the production of the items and the ballistic report.

In cross examination by the appellant, he stated that the appellant was arrested at 9.30 am at Ifo

market where he was buying miraa and had in his possession the alleged ammunitions. He stated that the appellant never complained about loss of Kshs 5,000/= or his phone or a hospital card. He stated also that the Kenya Police Reservist Abdi Ali was assisted by members of the public in arresting the appellant. He stated that the appellant was taken to the police station by the Kenya Police Reservist Officer who was together with the members of the public.

In cross examination by the other accused, he stated that he did not know whether that accused carried the ammunitions knowingly or unknowingly. He stated that no issue of loss of money was raised by that accused. He also stated also that when the two arrived at the police station each had their respective luggage of ammunitions, but he did not know whose they were. At this point, the other accused was recorded by the court as saying that it was the appellant who told him to carry the ammunitions.

PW2 was PC Emmanuel Longole who stated that on 11th January 2013, while at Ifo police station, one Kenya Police Reservist Abdi Olal, who had by then died, brought two suspect at the police station in a taxi with other members of the public.

It was his evidence that on being brought to the police station, the appellant and his co-accused each had ammunitions in his possession. One had 132 rounds of ammunitions and the other 109 rounds of ammunitions. They then arrested them, but learnt afterwards that the person (police reservist) who initially arrested the two, was shot dead about one month after the arrest. It was his evidence that none of the two had a certificate to handle the ammunitions.

In cross examination by the appellant, he stated that the appellant was brought to the police station by a Kenya Reservist Officer who had now died. In cross examination by the other accused, he stated that, that accused was arrested by the Kenya Police Reservist but did not know if the appellant gave him the items to carry.

In re- examination, he stated that none of the two claimed to be carrying the items for the other, when they were brought at the police station. That was the close of the prosecution evidence.

When put on their defences, the appellant elected to give unsworn testimony while his co-accused elected to give sworn testimony.

The record does not however show that either of them gave sworn or unsworn testimony. Each of them was given a chance by the trial court to cross examination each other, but the prosecution did not cross examine any of them, which would suggest that the defence testimony by both was unsworn. In my view, a person who tenders unsworn evidence should not be cross-examined even by a co-accused.

In his defence the appellant, stated that he was a herder from Bangale. That he went to the market place and someone gave him camel on the 12th January 2013 which he sold for Kshs 53,000/=. While at the market, some people threatened him demanding Kshs 3,000/= and, when he refused, they stopped him on the way searched and arrested him and took away his money plus a mobile telephone. They took him to the other accused's place where he found him being interrogated. He stated that he was asked where he had gotten the ammunitions. He complained that the police who arrested him never testified in court and maintained that the case was a fabrication as the ammunitions were not his and that did not know where the same were found.

In cross examination by the co-accused, he denied that they met at Ifo. He also denied that he told the other accused to carry ammunitions.

He denied offering him money. He denied calling the ammunitions a luggage.

In his defence, the other accused said that he came from Doblely and was a herder. He was from Wajir but went to Doblely during draught where he got information that his grandfather was unwell. He then took a vehicle to Bangale and, on arrival, went to a hotel to take tea where he met the appellant who

enquired if he could do some work. When he agreed the appellant asked him to carry some luggage and paid him Kshs 6,000/= for the job.

He stated that he did not know what he was carrying, and that while at Ifo walking with the appellant carrying the luggage, police arrested them after they asked them to identify themselves. According to him, the police asked them to open their luggage and he told them that the luggage belonged to the appellant. He said that the police opened the bag and found the ammunitions arrested them and took them to the police station. He denied the charges.

In cross examination by the appellant, he stated that he had not known the appellant until they met in Kenya. He stated that he came from Doble in Somalia and alighted from a car and, while walking on the road, the appellant asked him if he could do some work and gave him the luggage. He stated that they met at Bangale and that he used a private landlover to go to Ifo.

Faced with the above evidence, the trial court acquitted the co-accused on count II as the court felt that he might not have known the contents of the luggage but convicted the appellant on count I and sentenced him. Therefrom arose the present appeal.

I have to start by reminding myself that this being a first appeal, I am duty bound to reevaluate 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 in order to determine their demeanor. ***See the case of Okeno -vs- Republic (1972) EA 32.***

The appellant has come on appeal and raised several grounds.

The first complaint is that the ballistic report did not prove his possession of the ammunition as no dusting was done to ascertain whether he touched the ammunition. The ballistic examiners' report was produced by a police officer PWI who was not the ballistic examiner.

Under section 77 of the Evidence Act (Cap 80) any document purporting to be a report of any ballistic expert may be used in criminal proceedings and the signature of any such documents can be presumed by the court to be genuine, and the court may if it thinks fit summon the ballistic expert for examination. That is the law. In my view, that means that there is no legal requirement that a ballistic expert be called to testify and produce a ballistic report. The court however has a discretion to summon the ballistic expert to produce the report and be cross examined on its contents. This point adequately was discussed in the case of ***John Muguthi Kangethe -vs Republic Nairobi Cr. Appeal 158 of 2013*** cited by the Prosecuting Counsel which confirmed my above reasoning. In addition, the record shows that both the appellant and his co-accused agreed to the production of the ballistic report by a person who was not the maker. It is thus my finding that there was no errors in the production of the ballistic examiner's report without calling the maker.

The appellant has however talked about proof of his finger prints on the ammunitions. In my view, a ballistic examiner's report is not intended to establish or identify the finger prints of any person who has touched the subject item alleged to be ammunition. It is meant to determine whether the item is a firearm or ammunition, what type, and whether it is live or spent, or defective. The function of dusting for finger prints cannot thus be part of the ballistic report. The function of establishing finger or foot prints is a function of other specialists such as scenes of crime officials. In any case, the evidence on record was that the ammunitions was carried in bags, so the issue of dusting the same for fingerprints in my view would not be of any evidential value as there was no suggestion that any of the suspects touched the ammunition with fingers. I dismiss that complaint of the appellant.

The appellant has complained that proof of his possession of the alleged ammunition was doubtful and that the person who was in possession of the alleged ammunition was discharged. With regard to possession of the ammunitions, both PWI and PW2 stated very clearly that the appellant and his co-accused were led to the Ifo police station, each carrying a separate bag in which the ammunitions were

found. No objection was raised either at the police station or even in court and during their defence, that any of the bags were planted on them. It was clear from the prosecution evidence that the person who initially saw the appellant and his co-accused with the bags was shot dead shortly after the arrest of the suspects. He could thus not come to court to testify. In my view therefore, each of the two was found in possession of the bags with items with which he was charged.

Indeed, the co-accused was acquitted by the trial court. However the evidence on record is not that he was the one who was carrying all the items. The evidence is that he was carrying a bag which had 109 ammunitions and the appellant was carrying the other bag which had 132 rounds of ammunition. The appellant was not convicted of carrying the bag having 109 rounds of ammunitions. Therefore the discharge or acquittal of the co-accused did not mean shifting the allegation to the appellant. I dismiss the complaint of the appellant.

The appellant has also complained that the trial magistrate erred in relying on the evidence of the co-accused to convict him. Indeed, the co-accused maintained that he was given the bag he was carrying by the appellant to carry for payment and was paid Kshs 6,000/= to do so. The learned magistrate acquitted the co-accused. That was his view of the evidence. In my view, in convicting the appellant the magistrate did not just rely on what was said by the co-accused. There was independent evidence from PW1 and 2 that the appellant was in possession of the bag which had 132 rounds of ammunitions, at least when he arrived at Ifo Police Station. I thus find no basis for the complaint of the appellant in this regard. I dismiss the complaint.

The appellant has also complained that there were several contradictions and inconsistencies in the prosecution evidence. Having perused the evidence on record, I find no material contradictions that would have affected the prosecution case in relation to the appellant and even the co-accused.

The evidence of the prosecution was very clear that both were found at a market in Ifo around 9.30 am, each carrying a bag. Each bag was found to contain rounds of ammunitions. They were taken to the police station each carrying the respective bags. They were arrested, the ammunitions taken to the ballistic examiner who confirmed them to be live ammunitions. That evidence, in my view is clear and consistent. I find no contradiction in the prosecution evidence in this case.

With regard to sentence, though the appellant was a first offender, the offence is serious. It calls for a deterrent sentence. In my view, the sentence was neither harsh not excessive.

Consequently, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.

Dated and delivered in Garissa this 30th November 2015.

GEORGE DULU

JUDGE