



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 7 OF 2011

**Appeal from original conviction and sentence by the Principal Magistrate (J.N. Onyiego) in Garissa
Principal Magistrate's Criminal Case Number 1889 of 2011**

ABDULLAHI HARUN ADEN.....1ST APPELLANT

ADEN ABDI MOHAMED.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

The two appellants were tried by the Principal Magistrate at Garissa in Criminal Case Number 1889 of 2011. They appeared in the order in which they appear before this court. In the lower court they were charged with three counts as follows:

1. Being in possession of a firearm without a certificate contrary to section 4(2) (a) of the Firearm Act Cap 114 Laws of Kenya. It was alleged that they were found in possession of four AK47 rifles Serial Numbers 1974-6P 2765; 1969-m 48532; 1974-6P 8217 and 1974-6P 9987 on 30th October 2011 at Githuthe in Fafi District of Garissa County without a valid firearm certificate.
2. Being in possession of ammunitions without a certificate contrary to section 4(2)(a) of the Firearm Act. It is alleged that on the same date and place as in Count 1 they were found with four hundred and sixty six (466) rounds of 7.62mm calibre ammunitions without a valid certificate.
3. Being in possession of a firearm accessory contrary to section 26(1)(e) as read with section 26(2) (b) of the Firearms Act. It is alleged that on the same date and place as in Count 1 they were found with sixteen (16) AK47 rifle magazines, four (4) pouches, one (1) ground sheet and gun oil without a valid firearm certificate.

1st Appellant pleaded guilty to the three counts and was convicted and sentenced to serve 10 years imprisonment in each count, sentences to run concurrently. The 2nd Appellant denied the charges and was subjected to full trial at the end of which he was convicted on count 2 and 3 and acquitted on count 1. He was sentenced to serve 10 years jail term in each count and the sentences to run concurrently.

The appellants are dissatisfied with the conviction and sentence and have appealed to this court.

Petitions of Appeal

Each appellant has filed a petition of appeal listing grounds of appeal in separate files: Criminal Appeal No. 7 of 2011 in respect of the 1st Appellant and Criminal Appeal No. 69 of 2012 in respect of the 2nd Appellant. Both files were consolidated on 26th September 2013 into one appeal.

Each appellant has also filed written submissions. They have asked the court to consider the grounds of appeal and the written submissions and give a judgement. The respondent has also prepared written submissions in opposition of the appeals.

1st Appellant's Appeal

By a Petition of Appeal filed on 16th November 2011, the 1st Appellant has stated that the trial magistrate did not consider all the facts of the case; that the ammunitions belonged to someone who ran away; that he admitted the charges because he had been beaten; that he was at home when the incident happened; that he is the bread winner of his family of four children and that his case was not properly determined and he requests for a retrial. At the same time he is also asking to be set free.

The 1st Appellant submitted that he and his colleagues has hidden the firearms in the bush intending to transport them back to Somalia or surrender them to the Kenya Defence Forces but he was arrested before he made a decision; that he explained all this to the police and showed them where the guns were hidden; that he was trained by the Kenyan military at Manyani but he is illiterate and does not understand the law. He is pleading for pardon.

The 2nd Appellant's Appeal

The 2nd Appellant has prepared his Petition of Appeal in which he has listed six grounds of appeal. He states that the trial magistrate did not consider that the case was not proved beyond reasonable doubt; that the trial magistrate relied on the evidence of a single witness which was inconsistent and uncorroborated; that the investigations were poorly carried out; that the ballistic expert did not testify; that the mode of arrest was poor (sic); that the sentence infringes on his fundamental rights under Article 25 (a) (b) and (c) of the Constitution.

He has submitted that the prosecution did not prove the case beyond reasonable doubt and that the evidence of PW2 was not corroborated; that the investigating officer did not investigate this case at all since all he stated in evidence was that the exhibits were handed over to him with allegations that they had been recovered from the appellants; that he did not confirm the allegations; that the court did not summon the ballistic expert to produce the ballistic report and this left the prosecution case unproved; that it is not clear from the evidence how the appellants were arrested and that the sentence is illegal as it offends Article 25(a)(b) and (c).

Submissions by the Respondent

The State opposed the appeal. Learned state counsel submitted that the 1st Appellant was convicted on his own plea of guilt; that section 348 Criminal Procedure Code prohibits courts from entertaining an appeal where an appellant had pleaded guilty except to the extent or legality of the sentence; that the 1st Appellant's appeal is misconceived and an abuse of this court's process; that the submissions amount to mitigation; that the principles of plea taking were taken into account by the trial court and therefore there is no miscarriage of justice against the 1st Appellant.

In respect of the 2nd Appellant it was submitted that by dint of section 143 of the Evidence Act no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact; that the lower court did not see the need to summon more witnesses; that PW2 gave a detailed account on how he met the 2nd Appellant until the time he was arrested and this was captured in the judgement of the trial court; that the trial magistrate warned himself of the dangers of relying on the evidence of a single witness; that the 2nd Appellant has no objection to the production of the ballistic

report by the investigating officer.

Counsel further submitted that the prosecution proved its case beyond reasonable doubt and that there is overwhelming evidence against the 2nd Appellant. Counsel asked the court to order repatriation of the appellants to Somalia after completion of the sentence.

Determination

I have reminded myself of the duty of this court while sitting on first appeal in line with the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22** where it held that:

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect.*”**

See also the cases of **Dinkerrai Ramkrishani Pandya v R [1957] EA 336** and **Shantilal Maneklal Ruwala v R [1957] EA 570** on the same requirement of the first appellate court.

In respect of the 1st Appellant, he pleaded guilty to the three charges. The facts were presented to him and he admitted them. He mitigated thus:

“I am a Somali Military Officer from Dobley. We were four people. I left my guns in Somalia and came to Kenya. We have stayed in Kenya for 7 months. We were given 16,700/= Kenya Shillings salary which was not enough to sustain us. We ran away after fighting Alshabaab at Dobley and our leader was compromised. We were fearing to surrender the guns to the Kenya Government. We surrendered the guns voluntarily. The other three ran away. I gave their names to the police. I am praying for leniency. I was given guns by our Government.”

After careful analysis and evaluation of the grounds of appeal and submissions, it is my considered view that the 1st Appellant is not sure what he wants. He claims that the trial magistrate did not consider all the facts of the case. This claim in my view has no merit. The 1st Appellant pleaded guilty and admitted the facts. His mitigation amounts to a confession.

He claims that the ammunition belonged to someone else who ran away. This may be the case but the 1st Appellant was found with the guns which he admits and explains how he came to be in possession of the same. He admitted the facts which included possession of ammunition. He claimed that he was beaten by the police and therefore admitted the offence. In court he was not under any threat yet he freely mitigated and admitted the offences.

His claim that he was at home when the incident occurred cannot be true since he admits to leading police to the place where the firearms were recovered from.

I find that there is no merit in the grounds of appeal and there is no illegality in the sentence. The sentence is not excessive either.

The 2nd appellant denied the charges and was subjected to full trial. Evidence in support of the prosecution case was given by three witnesses. According to APC Ramadhan Mohamud Abdi, PW2, an informer told them of some people planning to sell guns. Arrangements were made to bring the seller to the police who posed as buyers. The 2nd Appellant was brought to the police as the seller. They took a taxi to go to 2nd Appellant's home at Gathuthe. The 2nd Appellant brought 466 rounds of ammunition and 16 AK 47 Magazines. He asked for money before producing the guns but PW2 handcuffed him and called for reinforcement. After getting more police officers the 2nd Appellant was told to produce the guns. He

asked for credit to call his colleague. He called one Abdullahi who arrived and was arrested. Abdullahi is the 1st Appellant in this case. The 1st Appellant led the police to the bush where the guns were hidden buried underground. Four AK 47 rifles and military pouches were recovered.

Among the officers who recovered the guns was SSGT Patrick Omia, PW1. He confirms that he found the 2nd Appellant already in police custody and that the 2nd Appellant led police to where the 1st Appellant was. He confirmed that the two appellants led police to the bush from where four AK 47 rifles were recovered. There is however contradiction between the evidence of PW1 and PW2. PW2 told the court that the 466 rounds of ammunition and 16 Magazines were recovered from the 2nd Appellant and that at the bush police recovered 4 guns which had no magazines. PW1 said they recovered the 16 magazines from the bush together with the guns.

Corporal Duncan Mulinda, PW3, testified that he received report of recovered firearms and ammunition from SSGT Omia; that he received the recovered exhibits and prepared exhibit memo in respect of the same; that he took them for examination and later received the report confirming the firearms and ammunition were capable of firing and being fired respectfully. He produced the exhibits which included the report from the ballistic expert.

In his defence, the 2nd Appellant claims that he was arrested as he travelled to hospital in a taxi from which the bullets were found; that police arrested him and the taxi man; that the taxi man led police to the 1st Appellant who had the guns and that the taxi man bribed the police who released him.

The trial magistrate considered this evidence and was convinced that the 2nd Appellant was guilty. He convicted and sentenced him on counts 2 and 3. He was acquitted on count 1.

I have analyzed and evaluated the evidence on record. Safe for the contradiction between PW1 and PW2 on where the magazines were recovered from, I find the evidence against the 2nd Appellant strong and convincing. The informer took the 2nd Appellant to the police who had posed as buyers. He led them to his house where he gave them the 466 rounds of ammunition and 16 magazines. He also led them to the 1st Appellant who led them to the bush where the guns were hidden. The magazines were confirmed by the ballistic expert as suitable for use with and are components of the AK 47 rifles and the ammunition was found to be designed for firing in AK 47 rifles.

Given that the ammunition and the magazines were found with the 2nd Appellant and he led police to the 1st Appellant and to the recovery of the guns, it is safe to make an inference that both appellants knew of the firearms and ammunition and therefore were in possession of the same. By their own admission, they were soldiers from Somalia. For whatever reason they had come to Kenya, they ought to have surrendered to the Government of Kenya, either to the Police or the Kenya Defence Forces. They did not. Instead they hid the guns and ammunition. No one knows what their intentions were but perhaps selling the same was one of their intentions.

I do not believe the defence by the 2nd Appellant. I am alive to the fact that the evidence touching on him especially the recovery of the ammunition and magazines is evidence of one witness. The taxi man did not testify nor did any other officer on the issue and PW1 found the 2nd Appellant already arrested. I however do not doubt the evidence of PW2 given that PW1 corroborates it especially to the extent that he led police to the 1st Appellant and the recovery of the guns. The contradiction on where the magazines were recovered from does not prejudice the 2nd Appellant. In my view it does not affect the prosecution case in a substantial manner given that the ammunition was recovered from the 2nd Appellant. This court appreciates the fact that PW1 joined his colleagues after the 2nd Appellant had been arrested and may have confused where the ammunition and magazines were recovered from.

I have warned myself that the evidence of PW2 ought to be treated with caution and care. I have considered it together with the other evidence touching on the recovery of the firearms and I am

convinced that the 2nd Appellant was found in possession of the ammunition and magazines and led police to the 1st Appellant and the recovery of the guns.

On investigations, PW3 did not seem to have done anything else safe to receive the exhibits and forward them to the expert. However, there is adequate evidence and it is my finding that the prosecution proved this case beyond reasonable doubt. The 2nd Appellant had no objection to the production of the ballistic report by the investigating officer and there is nothing wrong legally with that in view of section 77(1) of the Evidence Act.

Before making my conclusions, I wish to comment on the sentence in respect of the 2nd Appellant. The trial magistrate sentenced the 2nd Appellant to ten years imprisonment for each of the counts two and three. This is an error. The penalties as provided under sections 4 (3) (a) and 26 (2) (b) of the Firearms Act do not include hard labour. The 2nd Appellant is right in claiming that this sentence infringes on his fundamental rights.

In conclusion therefore, the respective appeals have no merit and must fail save for the sentence in respect of the 2nd Appellant in reference to hard labour. I do hereby correct that error and state that the 2nd Appellant shall serve ten years imprisonment for each count (counts 2 and 3) and the sentences to run concurrently. The appeals for the 1st Appellant and that of the 2nd Appellant are hereby dismissed save for the corrections made in respect of the 2nd Appellant.

I note that the trial magistrate did not make an order for repatriation of the appellants to Somalia. I therefore make a further order that the appellants shall be repatriated to Somalia after completion of their sentences. I make orders accordingly.

Dated, signed and delivered this 27th January 2014.

S.N.MUTUKU

JUDGE