REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.151 OF 2011

JOSPHAT MWITI KIRIMI……APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

(From the original conviction and sentence in Chief Magistrate'sCriminal Case No. 1499 of 2010 by Hon. R.N. Kimingi)

JUDGEMENT

1. That the Appellant was convicted of being in possession of Ammunition without firearms certificate contrary to section 4(1) & 4(3) CAP 114 of the Fire Arms Act. The Appellant was sentenced to 7 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal.
2. The Petition of Appeal contains 7 grounds of appeal. In brief the Appellant challenges the learned trial magistrate for failing to comply with procedural laws under section 169(1) and section 200 of the Criminal Procedure Code.He also challenges the learned magistrate of failing to consider the Appellant's mitigation and meting out a harsh sentence.
3. The Appellant in his submissions in court relied on his petition of appeal and on the grounds set out thereunder, and urged the court to allow his appeal against the sentence by agreeing with him that it was excessive and consequently reduce it.
4. The Appeal was opposed. Mr. Moses Mungai for the State urged that the sentence was lenient considering the maximum sentence for the offence charged.
5. I have considered this appeal and have subjected the evidence which was adduced before the trial court to a fresh analysis and evaluation. I have drawn my own conclusions having borne in mind that I neither saw nor heard any of the witnesses and have given due consideration. I am guided by the Court of Appeal case of **OKENO Vs REPUBLIC 1972 EA 32** where the duties of a first appellate court is set out as follows:

> "**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has**

had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

6. The Appellant was charged of being in Possession of Ammunition contrary to section 4(1) of the Act. Section 4(1)1 makes it an offence for a person to have in his possession ammunition unless he holds a firearm certificate in force at the time. The prosecution's duty was to adduce evidence to prove that the Appellant had in his possession ammunition and that at the time of the said possession he did not have a firearm certificate in force.
7. The evidence adduced before the learned trial magistrate shows the Appellant was approached by two police officers within Maili Saba,at a club where he was. They posed as customers and asked the Appellant whether he had any ammunition and was given 50/- to go and collect the ammunition from where he was keeping them. The Appellant is said to have gone away and returned with 11 rounds of blank ammunition of 7.62mm which he then offered to sell to PW1 and 2 at the cost of Ksh.500/- each. He was then arrested and charged for having the same.
8. From that evidence of PW3 who worked at Soy Military camp and Maili Saba, PW3 saw the Appellant earlier that day seeking for a job. PW3 stated that he did not offer him any as he had no identity card and no certificates. PW3 said that at the Soy Military camp they carry out training using blank cartridges similar to the ones found with the Appellant. PW3 testified that the Appellant may have collected the blank ammunition from the Camp.
9. I saw the report of the Firearm Examining Officer. He stated that he examined 11 blank rounds of ammunitions and formed the opinion that they are all capable of being fired and that they were ammunition in terms of the Firearms Act.
10. Under the definition section of the Firearm's Act, ammunition includes blank ammunition.
11. Having considered this appeal it is clear that the Appellant was convicted of being in possession of blank cartridges or blank ammunition. The evidence before the court is that the Appellant went to the Military Camp to seek employment. He did not succeed. He then offered for sale 11 rounds of blank ammunition to Police Officers. The blank ammo was said to be very similar to ammo used in training. PW3 went further to show that such blank ammo could easily be collected in training fields at the Camp. I do not excuse the Appellant of possessing blank ammo. However it is an issue that the Person's in charge of Training at the Camp could leave prohibited items lying about. Worse still is how members of public could easily access such items within the Training Camp. This is a serious matter and an indictment to security management at the Camp. This is a matter worth investigating and measures taken to remove both laxity and negligence from the Training Camp.
12. The Appellant does not deny possession. He only challenges the sentence. A person convicted of an offence under section 4(1) and 4(3) (a) of the Act is liable to imprisonment for a period not less seven and not more than fifteen years. For a conviction under 4(3)(b) the offender is liable to imprisonment for a term not less than five (5) years but not more than ten (10) years.

13. The Appellant was a first offender. He was sentenced to seven years imprisonment. Before sentence, the learned trial magistrate formed the opinion that Appellant was charged with being in possession of caliber 7.62 blanks ammunition which fall under the definition of prohibited weapon in section 2 of Cap 114. The learned trial magistrate concluded that the section under which the Appellant was charged was 4(3) (b) and that therefore he should be sentenced under that same section of the law.

14. The charge against the Appellant was framed under section 4(1) and 4(3) of the Act. It was not clear under which subsection the Appellant was charged. The issue of which subsection was relevant to the charge was of utmost importance. It ought to have been settled before the plea was taken. That could have been of assistance to the Appellant to know exactly what charge he was facing.

15. In the celebrated case of **ADAN VRS REPUBLIC 1973 EA 445** the Court of Appeal for Eastern Africa set out the steps that a plea court should take in order to record a proper plea. The Court of Appeal held:

i. **The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**

ii. **The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**

iii. **The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

iv. **If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**

v. **If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

16. The Cardinal rule when taking a plea is that the Court should ensure that an accused person fully understands what it is that he is accused of committing and the manner he is accused of having committed the offence. This is more important where an accused person is unrepresented. This is the reason why the court reads the charge to the accused person and takes a further step of stating and explaining to the accused every element of the charge which constitutes the offence he or she is facing, and in a language he or she understands. After the charge is explained to an accused person the prosecution is then required to outline the facts of the alleged offence before a conviction or otherwise is recorded.

17. In this case, the charge read over and explained to the Appellant was vague as the charge as framed created more than one offence. The Prosecution should have made it clear whether the offence the Appellant was alleged to have committed was under section 4(2) (a) or (b) and the sentence under section 4(3)(a) or (b). Having failed to do so, the charge was vague; the Appellant could not have known what his offence is and consequently suffered prejudice as he could not know how to defend himself.

18. I have come to the conclusion that the charge as framed was materially defective and that the Appellant has suffered prejudice for facing the said charge as he could not understand what his offence is, and consequently how to defend himself. I find merit in this appeal and allow it. I quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

DATED AND DELIVERED AT MERU, THIS 22ND DAY OF MAY, 2014

LESIITJ.

JUDGE.