



REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 92 of 2012

BUYA SALIM BAJILA.....APPELLANT
VERSUS

REPUBLIC.....RESPONDENT

An Appeal from the original conviction and sentence by Resident Magistrate's Court at Hola in Criminal Case Number 191 of 2011 (M. O Obiero).

JUDGEMENT

Background and grounds of appeal

On 1st December 2011 Buya Salim Bajila (the appellant) was convicted and sentenced by the Resident Magistrate at Hola for possessing twenty three (23) rounds of ammunition without a Firearm Certificate contrary to section 4 (1) (2) (a) read with section 3 (a) of the Firearms Act. It is alleged that on 19th July 2011 he was found in possession of the ammunition jointly with Rama Galgalo Kofa at Kibuyu village in Tana River District in the same County. Rama Galgalo Kofa was accused No. 2 in the lower court but he was acquitted after the full trial. The appellant has raised the following grounds of appeal:

- i. The charge is defective
- ii. The evidence is contradictory
- iii. There was a grudge between the appellant and one of the police officers over a woman
- iv. The ammunitions were planted on him

Facts

The facts of this case are simple. It is alleged that acting on information regarding ammunition in a certain house, AP Sergeant Said Kodele Odha (PW1), APC Kea Nyundo (PW2) and APC Raymond Kirimi who did not testify, all from Galole District Officer's Office went to a certain house within Kibuyu area led by the informer. They found the appellant and one Rama Galgalo Kofa (Accused 1 and Accused 2 in the lower court respectively) outside the house. The police officers ordered the two inside the house where PW1 and PW2 joined them leaving Officer Kirimi outside guarding. While inside the house, 23 rounds of ammunition of 7.62 calibres wrapped in black polythene bag was dug out of the ground under a basin. The two were handcuffed and escorted to the DO's Office. Police at Hola Police Station were informed who went and took the suspects into their custody and took into possession the ammunitions. The two were thereafter charged with the offence. The ammunitions were forwarded for forensic examination and

later tendered in evidence as exhibits.

Accused 1, the appellant before this court testified in his defence that he had been away from his house delivering clothes to customers when he was called on his mobile phone from a customer who was waiting for him. He went home and found two people one of them a police officer but the one person was not known to him. As he was talking to the person who was not a police officer, accused 2 arrived and waited for the appellant. The person had black polythene bag. Shortly thereafter five police officers arrived and asked who the owner of the house was. The appellant said the house belonged to him. The police asked to be allowed to enter the house to conduct a search. The appellant informed that he needed to call village elders and other people before the police could enter into the house but the police forced them to enter the house and sit on the bed. The house was dark. One of the police officers showed them the ammunitions in the black polythene bag. Nothing was recovered from the house. The appellant pleaded with the police to release Accused 2 but they refused. On the way to the DO's Office, one of the Officers demanded Kshs 5,000 in order to be released but the appellant insisted that the ammunitions had not been recovered from his house.

Submissions

The appellant has relied on his written submissions in support of his grounds of appeal. He has submitted that the charge sheet states that he was found in possession of the ammunitions when the evidence is that they were recovered from a house. He submitted that the evidence does not support the charge in that respect; that the charge indicates that he was arrested on 20th July 2011 when the evidence shows he was arrested on 17th July 2011. He submitted that the evidence of AP Sergeant Said Kodele Odha (PW1) and APC Kea Nyundo (PW2) contradicted in material facts surrounding the recovery of the ammunition with each telling the court it is the other officer who searched and recovered the ammunition. It is further submitted that PW1 and PW2 came with the ammunition wrapped in polythene bag and planted on the appellant; that the investigating officer PC Richard Kipyegon did not investigate the case but believed what PW1 and PW2 told him; that the search was against the law because it was done without a warrant of search. The appellant further submitted that the trial magistrate failed to consider the appellant's defence and had he done so it would have created doubts in his mind.

The appeal has been opposed by the state. The learned State Counsel submitted that the ammunition was found in the appellant's house and it was confirmed to be live ammunition and therefore he was in constructive possession. It was further submitted that police can arrest and conduct searches without a warrant of arrest in cognizable offences.

Determination of issues

I want to dispose of the issues of search and arrest without warrant first and possession of the ammunitions first. It is not contested that the police did not have a search or arrest warrant. They have admitted as much and the learned State Counsel has submitted that this being a cognizable offence, the police did not require a search/arrest warrant. A cognizable offence is defined by section 2 of the Criminal Procedure Code thus: **"cognizable offence"** means an offence for which a police officer may, **in accordance with the First Schedule or under any law for the time being in force, arrest without warrant** (emphasis added). The offence the appellant is facing is found in section 4 of the Firearms Act which is one of the laws defined in section 2 above as **"under any law for the time being in force"**. Section 42 of the Firearms Act is specific on this issue and reads thus: **A police officer may arrest without warrant any person whom he suspects on reasonable grounds of having committed an offence under this Act.** This issue has been adequately addressed and the police in this case were acting legally.

"Possession" is defined under section 4 (a) of the Penal Code thus: **"be in possession of"** or **"have in possession"** includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person. In addition to that definition the issue of possession has been determined in various cases by the

courts. The view has been that a person can either be in direct possessions where the person is found in physical or actual possession of the stolen thing or constructive possession where though the person is not in direct and physical possession nonetheless has control or retains control over the thing wherever it is. **For this view see Court of Appeal decision in Criminal Appeal No. 110 of 2002 Kareri v. Republic [2004] eKLR.** On the issue of contradicting dates, I take that to be errors that do not affect the substance of this case.

I have carefully read the judgement of the trial court and find that the appellant's defence was considered. The relevant section of the judgement reads

“In this case the exhibits were recovered from the house and the said house belongs to the 1st accused person. My opinion is that it would not be possible that the exhibit would be in the 1st accused's house without his knowledge or his consent. I am of further opinion that the allegation made by the 1st accused and 2nd accused persons that it was one of the police officers who was carrying the rounds of ammunition is an afterthought and the same has no basis at all.”

It is not true therefore to state that the trial court did not consider the defence of the appellant. The court considered it and in its view ignored is as an afterthought.

The case against the appellant and his co-accused depended wholly on the evidence of PW1 and PW2 since Raymond Kirimi, the other Police Officer who is said to have accompanied the two officers did not testify. The evidence of PC Richard Kipyegon (PW3) was not present when the alleged recovery of the ammunitions was done. The evidence of PW1 and PW2 is as different as day and night. Each officer claimed the other conducted the search and recovered the ammunitions. PW1 stated as follows:

“When we entered into the house, the accused persons sat on the bed and APC Nyundo conducted a search. There was a hurricane lamp in the house and we used the light from the lamp. The house was a one roomed house (sic). There were water containers and a basis in the house. APC Nyundo removed the basin and under it he realized that the floor was wet and the soil therein (sic) was soft. He suspected that there was something which was being kept there (sic). When he dug the place slightly, he saw a black polythene bag. He removed the polythene bag. Inside it he saw rounds of ammunitions. He removed them and we counted with the suspects and we confirmed that they were a total of 23 rounds of ammunition calibre 7.62. I conducted a quick search but I did not recover any weapon. I handcuffed them and took possession of the rounds of ammunition and we escorted them to Galole District Officer's Office”

PW2 on his part stated as follows:

“We ordered them to enter into the house and they opened the door and we entered. We all entered into the house. It was Sergeant Kodele who conducted the search. He removed the basis which contained water and under it, he dug the place where he removed the polythene bag which contained 23 rounds of ammunitions. It was a black polythene bag. We counted the rounds of ammunitions and we confirmed that they were 23 rounds (sic). They were calibre 7.62. we conducted a further search inside the house but we did not recover any weapon.”

It was necessary to reproduce that testimony to point out how varied it is. It is strange how two officers can be in the same place at the same time and each claim that it is the other officer who conducted search and made the recovery. The search and recovery involved alleged removing a basis to reveal the alleged place where the ammunitions were concealed. That is not all; it involved digging the ground and recovering a black polythene bag containing the ammunitions. These actions were so detailed and involving physical exercise that it is not possible that an officer who has undertaken them can easily forget and claim it is another officer who did it. It is because of these contradictions that the appellant is challenging that evidence.

The trial magistrate had this to say about the issue:

“According to PW1, the ammunitions were recovered by PW2 from under the ground where they were hidden. According to PW2, when they entered the house, PW1 conducted a search and recovered the ammunitions. From the evidence of the two witnesses, it is clear that there is a contradiction in respect of the person who recovered the exhibit. PW1 says it is PW2 who recovered the exhibits while PW2 says that it was PW1 who recovered the exhibits. However, they are both in agreement that the exhibits were hidden under the basin and that the same were recovered inside the house. My opinion is that the contradiction in the evidence of PW1 and PW2 does not go to the root and or the core of this case since they are in agreement that they recovered the exhibits at a particular place and that is under the basin inside the house” (emphasis added).

The trial magistrate is entitled to his opinion but he is wrong in my view to state that this contradiction did not touch the core of this case. I find it unacceptable that two police officers who ought to know better can be in the same place and come out with two totally different versions on who among the two of them recovered the ammunitions. This is a serious matter and it is expected that two police officers ought to have treated the case with this seriousness. Some contradictions in evidence can be excusable as mere discrepancies but not this type of contradiction. My considered view on this matter is that there exists material contradictions in the evidence of PW1 and PW2 and this contradiction goes to the root of this case. Contradictions in respect of who among the two officers (PW1 and PW2) recovered the exhibit creates doubts as to whether the ammunitions were recovered the house of the appellant. When this contradictory evidence is weighed in addition to the appellant’s claim that the ammunitions were planted on him, the doubts increase. Although I find no evidence that there existed a grudge between the two witnesses or any one of them and the appellant, I agree with him that there are material contradictions which to my mind vitiate the conviction.

Before concluding this matter, I wish to point out a matter that has escaped both the appellant and the prosecution. The charge sheet ought to read “Being in possession of ammunition without a Firearm Certificate contrary to section 4 (2) (a) read with 4 (3) (a) of the Firearms Act. The charge as drawn was based under Section 4 (1) (2) (a) as read with 3 (a). It seems like a drafting error but for the record the section of the law is wrongly quoted. It has however not occasioned miscarriage of justice.

In view of my reasoning above, I hereby allow this appeal, quash the conviction, set aside the sentence and order immediate release of the appellant unless for any other lawful cause he is held. Those are the orders of this court.

S. N. MUTUKU
JUDGE

Dated, signed and delivered this 26th of February 2013 in open court in the presence of the appellant and Mr. Mulama for the State.