REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 48 OF 2012

DOUGLAS KIBII :: APPELLANT

=VERSUS=

REPUBLIC :: RESPONDENT

[Being an appeal from the original conviction and sentence by Hon. H. Nyagah (Senior Principal Magistrate) at the Kabarnet Senior Principal Magistrate's Court Criminal Case No. 21 of 2012 dated 28th February, 2012]

JUDGEMENT

The Appellant – **Douglas Kibii** was charged with the offence of being in possession of ammunition without a Certificate contrary to Section 4 (2) (a) as read with Section 4 (3) (a) of the Firearm Act, Cap 114, Laws of Kenya.

Particulars of the charge are that on the 5th day of February, 2012, at Marigat township in Marigat District within Baringo County was found in possession of two rounds of ammunition of 7.62 mm without a Firearm Certificate in force at that time.

The Appellant was convicted on his own plea of guilty and sentenced to serve seven (7) years imprisonment. The sentence was handed to him on 28th February, 2012.

He filed his petition of appeal on 13th March, 2012. Four grounds of appeal are raised therein. They all contain mitigating factors as to why the imprisonment term should be reduced, or, altogether, be substituted with an non-custodial sentence.

In this regard, the Appellant is only appealling against the sentence. The mitigating factors advanced are as follows:-

1. That he is remorseful and regret for the act and promise not to repeat the offence;

2. That he has a family to cater for and is its sole bread winner;

3. That the sentence imposed on him is harsh and severe;

4. That he should be forgiven a non-custodial sentence;

The appeal came up for hearing on 11th April, 2013. He was not represented by a counsel. He reiterated that he was appealing against the sentence alone. He submitted in a single statement that he did not know it was wrong to possess firearm ammunition.

The prosecuting counsel, **Mr. Munene** opposed the appeal. He submitted that, under Section 348 of the Criminal Procedure Code, no appeal shall be allowed where an accused has pleaded guilty and has been convicted except as regards to the sentence.

It was his submission that, under the Firearm Act, the sentence carries a minimum sentence of seven years imprisonment, and that is what was given to the Appellant.

Notwithstanding that the Appellant appeals only against the sentence, it is important that the court satisfies itself that the plea was taken in a proper manner as would not prejudice the Appellant.

The case law on how a plea should be taken is rich. Just but to cite one such decided cases, in **PAUL MULUNGU -VRS- REPUBLIC (2006) E KLR,** the Court observed:-

"The Courts have always been concerned that before a plea

of guilty to such a charge is accepted and acted upon by

any court, certain vital safeguards must be strictly

complied with and it must appear on the record of the

court taking the plea that those safeguards have been

strictly complied with; - and those safeguards are that:-

(i) The person pleading guilty understands the offence

with which he is charged, the Court before whom he is taken to be pleading guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language he understands and that with that understanding and out of his own free-will, the pleader admits the charge. This requirement applies not only to offences punishable by death but to all types of offences".

The second safeguard as enunciated by the court in the cited case relates to offences punishable by death and I therefore do not wish to duplicate it.

Record of proceedings shows that the plea was first taken on 6th January, 2012. The language used at the time is indicated as **"Kiswahili".** Court noted as follows:-

Court: The substance of the charge(s) and every element thereof is stated by the Court to the accused in the language that he/she understands, who on being asked whether he/she admits or denies the charge (s) he/she replies:-

Accused: It is true.

On this day, the prosecutor was not ready with the facts of the case and the same were deferred to 20th January, 2012. On the 20th January, 2012, the Appellant pleaded not guilty and a hearing date was given.

On the hearing date, which was 24th February, 2012, the prosecution was ready to proceed with the hearing with two witnesses but the Appellant indicated to court that he wanted to change plea. The proceedings of the day were recorded in the following manner:-

Accused: I want to change plea. I admit the offence.

Court: Accused warned on the consequences.

Accused: I admit it.

Court: Charge read to the accused in Kiswahili. He understands and replies:

"It is true"

The Prosecutor then read the facts to which the accused responded.

Accused : The facts are true.

Court : Accused convicted on his own plea of guilty.

Accused in Mitigation: I pray for lenience. I had collected them on the ground.

The Chronology of the above proceedings clearly shows that no step in taking a proper plea was omitted. It is factual from the record that the Appellant knew what he wanted, just to plead guilty as his persistence to plead guilty is evident. The plea was also taken in a language he well understood.

For purpose of emphasis, the case of **ADAN -VS- REPUBLIC (1973) E. A 445** clearly spells each and every step to be followed in taking a proper plea as follows:-

"(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."

In essence therefore, the Appellant was properly convicted and as per the provisions of Section 348 of the Criminal Procedure Code (C.P.C), an appeal would lie only "**as to the extent or legality**

of the sentence"

Under Section 4 (3) (a) of the Firearm Act, Cap 114 of the laws of Kenya, a person who is convicted for being in possession of a firearm or ammunition without holding a firearm certificate at the time is liable to imprisonment for a term of **not less than seven years or not more than fifteen years**.

In this regard, the learned magistrate passed the sentence that is legally provided for. The Appellant did not offer any mitigating factors that would otherwise have afforded him anything less such as a discharge under section 35(1) of the Penal Code.

And as the adage goes, "**ignorance of the law is no defence"**, he ought to have handed over the ammunition to the authority if indeed he had, in the most remote scenario, collected them from the ground.

In this regard, I dismiss the appeal in its entirety. I confirm both the conviction and the sentence, unless the Appellant is otherwise lawfully set free.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 20th day of June, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Wainaina for the State/Respondent