REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 10 OF 2011

LESIIT, J.

ABDI MOHAMMED ….....

……..APPELLANT

VERSUS

REPUBLIC …….…….

…….RESPONDENT

(From Original S.P.M. Court Criminal Case No. 705 of 2009 at Isiolo; M. R. Gitonga- Senior Principal Magistrate)

JUDGEMENT

The appellant was convicted of two counts. The first count was for being in possession of a firearm without a Firearm' s Certificate contrary to Section 4 (1) as read with subsection (3) of the Firearms Act. The second count was being in possession of three rounds of ammunition without a Firearm's Certificate contrary to Section 4 (1) as read with Subsection (3) of the same Act. The appellant was sentenced to five years imprisonment on each count and ordered the two sentences to run concurrently.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant has raised eight grounds in his petition of appeal as follows;

" 1. The trial was conducted in a language that the Appellant did not understand

2. The Appellant was not subjected to a fair trial and his Constitutional Rights were greatly infringed.

3. The trial magistrate erred in fact and law in failing to find that the prevailing night conditions were unfavourable for identification in respect of the alleged offences against the appellant.

4. The trial magistrate erred in fact and law by failing to make a finding that the prosecution evidence was riddled with inconsistency and loopholes to sustain a conviction.

5. The trial magistrate totally failed to consider the evidence adduced by the defence.

6. The trial magistrate erred in law and fact by failing to hold that the failure to call the taxi driver allegedly mentioned in the prosecution's evidence was fatal to the prosecution's case.

7. That trial magistrate erred in law and fact by failing to make a finding to the effect that the prosecution had failed to prove its case beyond reasonable doubt as is required by the law.

8. The trial court erred in fact and law by failing to make a finding that the ingredients of the offence facing the accused person had not been proved.

The appellant was represented by Mr. Muriuki who argued the appeal on his behalf. The state was represented by Mr. Kimathi. The learned state counsel conceded the appeal.

The facts for the prosecution case were that three police officers. PW1, 2 and 4, were escorted to the appellant's home by an informer on allegations that the appellant had in his possession a gun. Ten (10) minutes after the three police officers and the informer laid ambush at his house, the appellant appeared carrying something in a sack. The appellant is said to have passed through the fence. He obeyed the order to stop. In the sack a rifle with three rounds of ammunition was found. Evidence was adduced by PW3 to the effect the rifle and ammunition were a firearms and ammunition as defined under the Firearms Act (herein after the Act).

The accused gave a sworn statement and called his wife as his witness. The evidence of both was consistent. The appellant stated that he was asleep in his house when three Police Officers and one Ahmed Abdi went to his home. He was taken to the fence and asked to pick something which was there. When he refused P.C. Nasio, PW1 pulled out a gun from the fence. He gave it to P.C. Mailu who put it in a sack. The appellant stated that he was then led away to the Police Station and charged for this offence.

Nimo Bakar, DW2 and wife of the appellant corroborated the testimony of the appellant.

I have fully considered the appeal. I have also subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation. I am guided by the case of **OKENO VS REPUBLIC 1972 EA 32** where the role of a first appellate Court is given 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.)"

The state has conceded to the appeal on grounds the alleged informer who led police to the appellant's house was well known to the appellant; that he was a vital witness; that in view of the appellant's defence that he had a grudge with him, he should have been called as a witness. The learned state counsel did not comment on any of the issues raised by the appellant. To be fair to the learned state counsel, he had made submissions earlier in answer to the appellant's application for bail pending appeal which were valid points. Those points dwelt on the misdescription of the firearm allegedly recovered in this case and the failure by the prosecution to call two vital witnesses to testify, a taxi man and informer.

The first ground urged was that the trial was not fairly conducted on grounds the appellant did not understand the language used by the witnesses in their testimony. Mr. Muriuki relied on **SIMIYU VS REPUBLIC : (2006) 1 KLR 100** where the Court of Appeal held:

1. The provisions of section 77 (2) (b) and (f) of the Constitution and section 198 of the Criminal Procedure Code make it clear that in a criminal trial, the language of the trial must be understood

by the accused person.

2. That right extends to an advocate representing an accused person if the advocate does not understand the language of the trial. Even if the accused himself understands the language of the trial but his advocate does not, the language must be interpreted to the advocate in English.

3. In this case, there was a failure by the trial court to comply with the provisions of the constitution and the criminal Procedure Code and on that basis alone, the appeal had to be followed.

The record shows that plea was taken in the Borana language. The record shows further that all the witnesses testified in Kiswahili except prosecution witnesses who spoke in English. There was no interpretation throughout the period the witnesses testified as the record does not show that any was done.

When the appellant gave his defence, there was interpretation of the proceedings to the appellant into Kisomali language. That interpretation was also given thereafter when the second defence witness testified and when the

judgment was read and the sentence passed.

Section 198 (1) of the CPC states:

"(1) When ever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands

S. 77 (2) (b) and (f) of the (old) Constitution provides:

"(2) every person who is charged with a criminal offence –

(a)…….

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."

The law gives an accused person a right to interpretation during proceedings to a language he understands. Going by the record of the lower court, it is not clear which language the appellant understood. At the critical stages when the appellant's responses were required, there was interpretation. At the plea taking, there was interpretation into Kiborana. At the stage of giving his defence, there was interpretation into Kisomali. The rest of the time there was no interpretation and the language used was recorded as being English and Kiswahili.

I am not satisfied that from this record the appellant received a fair trial as it is not clear if he followed the proceedings especially during the plea taking and the testimony of the prosecution witnesses. The fact the appellant was represented by counsel does not change the legal position. The appellant as an accused person before the court has a right to follow the proceedings whether or not he is represented by counsel. I therefore find that the trial before the lower court was a nullity on this ground. Consequently I quash the conviction and set aside the sentence entered by the lower court.

The question to determine is whether I should order a retrial. The principles which apply are well settled.

The court of Appeal made an observation in the case of **Jackson Leskei v Republic, Criminal appeal No.313 of 2005** thus:

"……By entrenching in the constitution the right of interpretation in a criminal trial the framers of the constitution appreciated that it is fundamental for an accused to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protection……..

The failure of the lower court as stated before to indicate the language leads me to find that the trial was a nullity. For that reason, the conviction of that court will be quashed and the sentence of that court will also be set aside. The learned state counsel requested that the court would order the appellant to be retried

A retrial will normally be ordered as has been decided in previous cases in the following circumstances:-

(i) If original trial was illegal or defective.
(ii) If it is in the interest of justice.
(iii) If it will not occasion injustice or prejudice to the appellant.
(iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial.
(v) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally;
(vi) Each case must depend on its particular facts and circumstances."

The court cannot order a retrial if it is clear that a conviction is unlikely to result if the self same evidence is adduced at the retrial. There were several reasons why I think that the interest of justice will not require a retrial in this case. For once there was contention in the prosecution case as to the make of the firearm allegedly recovered from the appellant. While PW1 and 2 were clear that the rifle they recovered as an MI6, PW4 was not certain. His testimony was that they, him and PW1 & 2, recovered the rifle, that it may have been an MI6.

PW3 the Firearm Expert identified the gun he was asked to examine as an SAR 80 rifle. Infact after the testimony of PW 3 the prosecution successfully applied to amend the particulars of the charge in order to describe the rifle as an SAR 80 in substitution of a rifle MI6.

The evidence by PW1 and 2 still remains that the rifle they recovered from the appellant was an MI6. If a retrial is ordered, it will give the prosecution an opportunity to fill gaps in its case and rectify the inconsistency in their evidence. That will not serve the interest of justice.

The other point is that the appellant brought a witness who corroborated his evidence in defence that he was not found in possession of the rifle. That defence was plausible and ought to have been considered favourably. That is more so because the alleged informer who led police to the appellant was not called as a witness. The alleged informer told the Police, that is, PW1, 2 and 4 that the appellant had in his possession a firearm. It transpired that the informer was well known to the appellant and his wife. He ought to have been called to tell the court how he came to know about the rifle. Since the appellant denied possession and called his wife to support his defence, in light of the allegation of an existing grudge between the appellant and the informer, I do not think that a Tribunal correctly addressing its mind to the issues in this case, would have entered a conviction against the appellant.

Having come to the conclusion I have of this matter, I decline to order a retrial. I order rather that the appellant should be set at liberty unless he is otherwise lawfully held. Those are the orders of the court.

Dated, Signed and Delivered this 13th day of April 2011.

LESIIT, J.
JUDGE