



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 236 OF 2010**

**LESIT, J.**

**SAMSON A. LENYAKOPIRO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From Original P.M's Criminal Case No.876 of 2010 at Meru; S. N. Andriessen- P.M.)*

**JUDGEMENT**

The Appellant **SAMSON LENYANKOPIRO** was arraigned before the PM's court Isiolo with another, charged with being found in possession of Ammunition C/S 89 (1) of the Penal Code. In the second count they were charged with Handling Stolen Goods contrary to Section 322 (1) and (2) of the Penal Code. The particulars of the two counts were that both the appellant & his co-accused were jointly found with 27 rounds of 5.56 mm ammunition and 29 rounds of 7.62 mm ammunition.

The appellant admitted both charges when they were read to him. The facts were then given by the prosecution as follows:

**“On 13.12.2010 at 6.00 p.m. in the evening OCPD Archers Post received information from the members of public that there were people selling ammunition within Archers Post. Police went and arrested 2nd accused Samson. They recovered 29 rounds of 7.62 mm ammunition used by the military and G.3 rifles. Upon interrogation 2<sup>nd</sup> accused not complete escorted them to Archers Post Police. The 29 rounds are in the court.”**

The appellant in answer to the facts stated:

**“it is true. I had the ammunition”**

The appellant was convicted in count 1. Mr Omayo filed the appeal on behalf of the appellant. He raised the grounds of appeal in the petition of appeal as follows:

- “1. The Lower court magistrate erred in law and in fact by not considering the mitigation offered by the Appellant in lower court.**
- 2. The Learned Trial Magistrate erred in Law and in fact in not finding that the ammunition belonged to the 1<sup>st</sup> accused who did not deny.**

3. **The Learned Trial Magistrate erred in Law by convicting the Appellant when the material ingredients of the charge were not proved in that no Firearm Certificate was tendered in evidence.**
4. **There was no proper interpretation of the Charges the appellant faced thus admission of the charges.**
5. **The sentence was excessive in the circumstances.**

The Appellant's counsels main contention is that at the time of plea, both appellant and his co-accused admitted the charge yet only the appellant was sentenced to 7 years imprisonment, while the case of his co-accused was set down for hearing. The second point argued was that there was no Firearms Report on the exhibits. Mr. Omayo urged the court to order a retrial.

Mr. Kimathi for the state did not oppose retrial.

I have considered the appellant's appeal. I am in agreement with the two counsels for the appellant and the state that a retrial should be held in this case. My reasons are however completely different from those urged, by Mr. Omayo even though the lack of Firearms Examiner to fully establish the charges of illegal possession of ammunition was a common ground and a fundamental requirement.

The facts led by the Prosecution did not disclose the offence charged. There was a misjoinder of counts. The facts disclosed that each accused was found with different types and rounds of ammunition. The charge and particulars disclosed that the accused before court had joint possession of the rounds of ammunition recovered. On that ground alone, the learned trial magistrate ought to have rejected those facts and set down the case for hearing. Faced with the lack of the Firearms Examiner's Report the learned trial magistrate should have adjourned the taking of facts from the prosecution to another day when the Report, would be availed. If none was forthcoming the case should have been set down for hearing.

There was another defect in the charges. The second count was of Handling stolen goods contrary to section 322 (1) & (2) of Penal Code. It was in respect of the same ammunition. The charges as framed were defective. The prosecution had not made up its mind which charge they wished to proceed with since both counts as framed were duplex. What the prosecution should have done is to treat the handling charge as an alternative count and the Possession Charge as the main count. Failure to indicate so rendered the charges bad for duplicity. I endorse that the learned trial magistrate treated the Handling charge as an alternative charge. However the charge sheet does not reflect so For reasons of duplicity, the learned trial magistrate was wrong to enter any plea to any of the charges against the appellant.

I will allow the appeal by quashing the conviction and setting aside the sentence.

I can see from the original file that the case against the appellant's co-accused has not been heard. I order that this case be returned to PM's court Isiolo for hearing and disposal with the guidance of the comments made in this judgment.

To facilitate the retrial, the appellant shall be held in custody until 18<sup>th</sup> April 2011 when he should be presented to the P.M.'s court Isiolo for trial as ordered. The learned trial magistrate may also consider granting the appellant bail.

Those are my orders.

Dated and delivered on 13<sup>th</sup> April 2011

**LESIT, J.  
JUDGE**