REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 4 OF 2011.

BENJAMIN MZANI EREIZA :::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an appeal from the original conviction and sentence by R.M. Washika – RM. in Criminal Case No. 934 of 2010 delivered on 18th January, 2011 at Kapenguria.)*

J U D G M E N T.

1. The appellant **BENJAMIN MZANI EREIZA**, was charged with the offence of preparation to commit a felony contrary to section 308 (1) of the penal code. The information of the charge stated that on the 26th October, 2010 at Munian along Makutano-Lodwar road in West Pokot county were found armed with dangerous or offensive weapons namely live ammunitions to wit 1255 rounds of 7.62mm special in circumstances that indicated that you were so armed with intent to commit a felony namely robbery with violence.

The appellant was charged with a 2nd count of offence of being in possession of ammunition without a valid firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) (b) of the Firearm Act (Cap 114) Laws of Kenya. The information of the charge stated that on the 26th October, 2010 at Munian shopping centre along Makutano-Lodwar road in West Pokot county were found in possession of 1255 rounds of ammunitions of 7.62mm special without valid firearm certificate. The appellant pleaded not guilty to the charge and was convicted and sentenced.

2. Being aggrieved by the conviction and sentence, the appellant has appealed, he relied on the following grounds of the appeal.

1. **THAT**, the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when the whole prosecution evidence was contradictory and unreliable as to warrant a conviction.
2. **THAT**, the learned trial magistrate erred in law and fact in convicting the 2nd accused/appellant when no evidence had been tendered by the prosecution linking the 2nd defendant/appellant to either of the offences he was charged with.
3. **THAT**, the learned trial magistrate erred in law and fact in relying on the evidence as preferred by the prosecution which evidence was full of mere suspicion and without sufficient proof and/or corroboration as to sustain a conviction of the 2nd accused/appellant.
4. **THAT**, the learned trial magistrate erred in law and fact in failing to consider the 2nd accused/appellant's testimony which exonerated him from the offences against which he was charged and

thereby arrived at an erroneous decision.
5. **THAT**, the learned trial magistrate erred in law and fact in considering extraneous matters and evidence that was not placed before court and hence arrived at an erroneous conclusion that was supported by the evidence on record.
6. **THAT**, the learned trial magistrate erred in law and fact in awarding an excessive sentence against the 2nd accused/appellant.
7. **THAT**, the learned trial magistrate erred in law and fact in relying on evidence that had not been sufficiently proved and thus arriving at an erroneous decision.

The appellants put in submissions that the evidence on record did not support the charge. That the learned magistrate did evaluate the evidence properly otherwise she would not have arrived at the conclusion that she did. The true issue as to whether the accused was found in possession of the items and whether the same was dangerous need to be addressed. That the 1200 rounds of ammunition are not dangerous weapons. The defence relied on the case of **ERNEST MAINA MUNGAI VS. REP** a Court of Appeal decision in defining possession.

That the fire arms expert was not called. That this was fatal to the case. That as a 1st offender the accused ought not to have been given a maximum sentence. They relied on the case of **ELLY OTIENO VS. REPUBLIC.**

The state strongly opposed the Appeal. That the accused person was found in possession of the ammunition. That the appellant refused to open the bag in which that had the ammunition meaning he was aware of what was in it. That the amount of ammunition was large. That the accused and another had no certificate to possess the same. That they were carrying ammunition and were prepared to commit a crime. That failure to call the firearm expert can be cured by a retrial. That the offence was serious.

That had the large consignment of ammunition gotten to the public the repercussions will be severe. The defence stated that there was no need for a retrial that will only subject the appellant to an unfair system.

This is a 1st appellate court and as a matter of law the court has duty bound to re-evaluate both the law and the evidence. The court has a duty to re-appraise the evidence, subject it to exhaustive examination and reach its own findings. The court, however, appreciate that the trial learned magistrate had the advantage of seeing and hearing the witnesses. The court further appreciate that because of that advantage, the trial magistrate is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier [1985] KLR 353**.

This has been restated in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134**where the court held that:-

"It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this neither seen nor heard the witnesses and make allowance for this".

The facts of this case are that the appellant and another were intercepted by traffic police officers and were found to have carried 1200 ammunition of calibre 7.62 mm. That the appellant was the one riding the motor cycle and that he had a passenger. That there had been telephone conversations between the accused persons prior to their being arrested.

In his defence this appellant stated that he was a good Samaritan assisting someone by carrying them on his motor cycle to Sirgor market.

The defence stated that the firearm expert is not the one who produced the report. That there fore the

conviction should be quashed.
The state counsel argued that this is a case suitable for a retial
The issues that need to be determined are

The issues that call for determination in this matter are what is the effect of the failure to call the document examiner and the production of the report by the investigating officer. whether the items recovered were ammunition as defined in the Firearms Act and whether the aspect of possession has been proved or if any has evidence that the accused person is a principal offender in terms of section 20 of the Penal Code chapter 63 of the Laws of Kenya have been established.

This is an offence of possession affecting the offence of preparation. It was incumbent that that key element, which is the fulcrum upon which this case rotates be properly handled. Court only determine disputes. All that the learned Magistrate needed to have done at the time the investigating officer wanted to produce the report from the firearms expert would have been to explain to the accused person who was unrepresented at the time that he had the right to either indicate his having no objection to the production of the document or to insist that the firearms expert who prepared the report be called. Depending on the accused person's answer then the learned Magistrate would have proceeded appropriately. None of this was done. The magistrate ought to have noted that the accused person was unrepresented then and would have explicitly put to him the above question. This was a glaring omission rendering the trial defective and therefore a suitable case for retrial as held in the case of **M'kanake VS Republic 1973 E.A. 67. Mkupe vs Republic KLR 1989 523** . Unlike in the case of **M'kanake(ibid**), there is no undue delay in ordering the retrial.

In the interest of justice the court orders that his matter be retied before any other Magistrate of Competent jurisdiction in Kapenguria other that Hon.*R.M. Washika – RM.* who tried this case.

The accused person be arraigned before Kapenguria court by the 29th of November 2011 for the plea taking process and re- trial. The case to be heard on priority basis.

READ, DATED & SIGNED IN THE OPEN COURT THIS 24THDAY OF NOVEMBER 2011.

S.M MUKETI
JUDGE