REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU
Criminal Appeal 196 of 2005

ABDI OSMAN AHMED…………..……………….APPELLANT

V E R S U S

REPUBLIC……….…………..…..……………….RESPONDENT

(Being an appeal from Judgment delivered by Hon. King'ori Ag. Principal Magistrate on 29/9/2005 in Criminal Case Number 49 of 2004 at the Senior Resident Magistrate's Court at Wajir Between Republic vs Abdi Osman Ahmed)

JUDGMENT

1. The Appellant Abdi Osman Ahmed was charged with four counts of the offences of being in possession of a firearm without a certificate contrary to s.4(1) and 2(b) of the Firearms Act Cap.114 Laws of Kenya
2. n another count with the offence of being in possession of ammunition contrary to s.4(1) and 2(b) of the Firearms Act, Cap 114 Laws of Kenya. In the charge sheet these two counts were Counts I, II, III and IV respectively but he was discharged of the offences in counts I and II. At the close of the trial, the learned trial magistrate retired to consider the matter and in his judgment, he closed with these words;

"The accused has not shown any firearm certificate. He was therefore in unlawful possession of the firearm and ammunition.

In a word, the prosecution has proved beyond a reasonable doubt the charges facing the accused. I find him guilty and convict him."

2. On sentence, the learned trial magistrate is recorded as having stated;

"The offences are extremely notorious and a deterrent sentence is called for. Accordingly on count 1 ac**cused is sentenced to serve ten(10) yeas imprisonment and on Count II six (6) years imprisonment sentences to run concurrently."**

3. It should be stated from the outset that o 17.11.2004, the prosecutor applied for withdrawal of counts 1 and II and the court in its Ruling stated as follows:-

"**I have considered the prosecution's application to withdraw Count 1 and 2 against the accused under section 87 (a) of the CPC and the reasons adduced and would grant it. Accordingly accused is discharged in Count 1 and 11 under section 87(a) of the CPC**." The advocate for the Appellant has in any event listed the grounds of appeal as being :-

"**i) That the learned Magistrate erred in law and in fact in finding that the circumstances under**

which the firearm and ammunition were allegedly recovered from the Appellant satisfy the definition of possession as provided by the Penal Code.

(ii) That the learned magistrate erred in law and in fact in failing to consider the testimonies of the Appellant's witnesses.

(iii) That the learned Magistrate erred in law and in fact in speculating that the Appellant's witnesses only saw the Appellant as he was being led away by the prosecution witnesses.

(iv) That the learned magistrate erred in law and in fact in failing to appreciate the evidence of defence witness number two (2) that the Appellant was arrested in his company and not in the hut which evidence was not shaken by the prosecution.

(v) That the learned magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt.

(vi) That the learned magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when in fact there was no evidence as to establish the ownership of the hut where the alleged firearm was alleged recovered from.

(vii) That the learned magistrate erred in law and in fact in failing to confirm that the appellant had understood the charge and that the charges were read in a language that the appellant understood well.

(viii) That the learned magistrate erred in law and in fact in proceeding to convict and sentence the appellant on charges that had been withdrawn being counts 1 and II.

(ix) That the learned magistrate erred in law and in fact in failing to accord the appellant the opportunity to ventilate his case in the whole of the proceedings thereby prejudicing the case against the appellant throughout the hearing process.

(x) That the learned Magistrate erred in law and in fact in failing to consider the Appellant's mitigation and the fact that he was a first offender.

(xi) That the learned Magistrate erred in law and in fact in passing a sentence that was too harsh in the circumstances."

4. The Appeal is conceded to on the ground that the Appellant was convicted and sentenced to a jail term on counts and charges that had been withdrawn and therefore the trial was vitiated.

5. Counsel for the Appellant while relying entirely on the grounds as set out above reiterated two important matters; firstly, that "**possession**" as known to law was not proved beyond reasonable doubt and secondly, the record did not show the language used in the trial and the Appellant was greatly prejudiced.

6. For my part I agree that the trial was not properly conduted because when the plea was taken on 22.6.2004, some two(2) months after the Appellant was first arrested, and it is recorded as follows:

"**court:- charge read over and explained to the accused person in a language he understands and he replies;………………..**"

7. During the trial, the language used was never recorded and although the Appellant participated in the trial, even the language used by witnesses is not all recorded so that the submission that there may have been a miscarriage of justice is not pedestrian at all. In Desai vs R [1974] E.A. 416 it was stated that;

“**We would interpose here that we are of the opinion that whenever interpretation is required in any court’s proceedings the fact should be recorded and the name of the interpreter and the language should be shown.”**

8. I wholly agree and further add that the opinion expressed in that case although not binding should be applied depending on the circumstances of each case and justice done accordingly. In the instant case, clearly the record does not reflect any proper trial and it cannot be said that the accused was accorded a fair trial within the meaning of s.77(1) and 2(b) of the Constitution which provide as follows:-

“**S.77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

(2) “**Every person who is charged with a criminal offence, -**

(a) Shall be presumed to be innocent until he is proved or has pleaded guilty;

(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;**

(c) **Shall be given adequate time and facilities for the preparation of his defence;**

(d) **Shall be permitted to defend himself before the court in person or by a legal representative of his own choice;**

(e) **Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and**

(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 and**

except with his own consent the trial shall not take place and except with his own consent the trial shall not take place in his absence unless he so conducted himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.” (Emphasis added).

In this case, the Appellant was not brought to court until two months after his arrest and the language used was never indicated. Both actions were unconstitutional. Breach of constitutional rights would vitiate any trial and this is the case in this Appeal.

9. A second matter to be considered is the fact that the Appellant was convicted and sentenced to serve a jail term for offences that had been withdrawn and for which he had lawfully been discharged. So far as I know, it negates the principle of a fair trial when the Appellant, whether by mistake or otherwise, ends up being convicted for offences that have been withdrawn. One may be tempted to read the record and presume that in fact the convictions and sentences were for counts III and IV but that is not what the record says and there has been no attempt to rectify whatever error may have been committed. Much as I am tempted to, I do not see that having been raised as a substantive ground of appeal, vindicated by the record, this court should say otherwise than agree that there was a miscarriage of justice and the sentence imposed was illegal.

10. I should say one last thing; the Appellant was arrested in a Manyatta, sleeping, on 25.3.2004 at 6.30 a.m. at Arabajahan Area. According to P.W.1 P.C. Richard Ngethe, P.W.2, PC Joshua Athiri, P.W.3 IP Muthui and P.W.4 P.C. Kiptoss, the Appellate was found in possession of a rifle, S/NO. PF 3526 and one

round of ammunition and the same were allegedly under the mat where he was under sleeping. That evidence led to his conviction because the learned magistrate said;

"**These police officers were unknown to the accused. No grudge is shown in the prosecution case or by the defence. They had no reason absoluted to lie or frame the accused…….the accused was sleepting on a mat under which was a rifle. He was alone in the house. He had possession of the gun**."

11.I have looked at the definition of "**possession**" in the Penal Code and it is this:

i. "Be in possession of" or have in possession" includes 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;

ii. If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

Constructive possession may have a place in the Penal Code but in the Firearms Act, Possession must be physical possession only (see also Stephen vs R [1973] E.A. 22)

12. I have also seen the defence evidence by the Appellant. D.W.2 Shale Mohamed, D.W.3 Yalia Yakub all stated that the Appellant was half blind, could not see at night, was a poor man and could not possibly have the capability to use a rifle. This evidence is important because what caused the police swoop in the Arabahajan area on 25.3.2004 was that a vehicle had been attacked, at night, and when the police followed the footsteps from the scene, it led them to the Manyatta where the Appellant was arrested. I have carefully examined the evidence and my mind is clear that the defence raised was credible because on 4.5.2004 before plea was taken the Appellant stated as follows:-

"**Accused: I am unwell. I cannot see**".

13. Court: "**Treatment order to issue.**" Later on 17.11.2004 while withdrawing counts I and II, the Prosecutor said:

"**The incident occurred at 2100 hrs. The complainant did not see the accused persons….."**

14. The net effect of all these matters is that possession in abstract cannot be possession in the sense envisaged by law because save for being in the Manyatta, a little more evidence to determine to whom the Manyatta belonged and who else had access to it would have either exonerated the Appellant or firmly removed any doubt that he was indeed the person unlawfully in possession of the firearm and ammunition. As it is, the evidence against him was conclusive only to the extent of suspicion and no more. Suspicion cannot be the basis for a conviction.

15.In the end, and for all the above reasons, the law and the facts of this case would lead me to conclude that the Appeal is with merit.

16.The Appellant's conviction is quashed, the sentence set aside and he shall be released forthwith unless he is otherwise lawfully held.

17.Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 25th DAY OF OCTOBER 2007

ISAAC LENAOLA

JUDGE

In presence of

Appellant Present

Mr. Muteti State Counsel for the State

ISAAC LENAOLA

JUDGE