REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 829 of 2003

MOHAMMED ALASON ABDI..…….....……..…….…… APPELLANT

VERSUS

REPUBLIC …….....……..……..RESPONDENT

JUDGMENT

The Appellant, ***MOHAMMED ALASON ABDI*** was charged in the Chief Magistrate's Court, Nairobi with unlawfully being in possession of a firearm without a Firearms Certificate contrary to Section 4 (2) of the Firearms Act. He also faced a 2nd count of unlawfully being in of possession ammunition without a Firearms certificate contrary to Section 4 (2) (a) of the Firearms Act. The particulars of the two charges were that on 5th day of October, 1998 at Eastleigh 12th Street in Nairobi Area, within the Nairobi within the Nairobi Area, the Appellant was found in possession of a Firearm make US Colt Serial Number 23603 and twenty four rounds of 45MM calibre ammunition and 39 rounds of 22 mm calibre ammunition without a Firearms Certificate. The Appellant was duly tried and covicted on both counts. He was then sentenced to serve a period of 10 years imprisonment on each count. The sentences were ordered to run consecutively.

The Appellant was aggrieved by the Conviction and sentence and hence lodged this Appeal. When the Appeal came up for hearing, the Appellant expressed his desire to withdraw the Appeal on conviction and concentrate on Appeal on sentence only. His wish was duly granted and the Appeal proceeded on sentence only.

In support of his Appeal on sentence, the Appellant submitted that the sentence of 10 years imposed on him on each count and the order that the said sentences do run consecutively was harsh and excessive. The Appellant pointed out that he had been held in custody for 5 years awaiting the Judgment of the Court. That the case was concluded in 1999 but it was not until 15th August, 2003 that the Judgment was delivered. The Appellant further stated that he was remorseful and consequently sought the reduction of the jail term.

Miss Gateru, learned State Counsel opposed the Appeal on sentence. She submitted that the sentence imposed was lawful. That the offences carry a minimum sentence of 7 years and a maximum of 15 years. Counsel further pointed out that although at the time of the Appellant's arrest there was no minimum sentence provided for, however as at the time of his conviction the law had been amended to provide for a minimum sentence in the event of a conviction.

I have carefully considered the submissions by the Appellant and by the Learned State Counsel, as well as the facts and the circumstances of this case and the law. It is not correct as submitted by the Learned State Counsel that as at the time when the Appellant was arrested, i.e. on 5. 10. 98, the law had not been amended to provide for a minimum and maximum sentences on firearms related offences. The amendment came as early as 1993. Indeed it was act number 11 of 1993 that brought in the minimum and maximum sentences in these kind of offences. Consequently as at the time she imposed the sentence, the Learned trial Magistrate was perfectly entitled to take into consideration the said amendment.

When does this Court have jurisdiction to interfere with sentences imposed by the Lower Court? The

principles were set out in the celebrated case of ***OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270.*** The principles are:-

1. The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant he might have passed somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial magistrate unless as was said in ***JAMES VS REPUBLIC (1950) 10 EACA 147.***

"……. ***It is evident that the Magistrate has acted upon some wrong principles or overlooked some material factors……."***

2. The criterion is that if the sentence is manifestly excessive in view of the circumstances, of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a Lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice.

3. Finally in the case of ***WANJEMA VS REPUBLIC (1970) EA 494,*** it was held:-

"……***Appellate Court should not interfere with the discretion which the trial Court exercised as to the sentence unless it is evident that overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case….."***

Applying the above principles in the circumstances of this case, I note that although the case was heard and concluded on 27th October, 1999 by S. N. Mutuku (Mrs) SRM, as she then was, it was not until 15th August, 2003 that the Judgment was delivered. This was a whole 4 years after the case had been concluded. Indeed the Judgment was delivered by Mrs. Oseko SRM although the same had been written and signed by Mrs. Mutuku. No reasons as far as I can gather from proceedings were given for this rather inordinate delay in the delivery of the Judgment. I believe that had the Magistrate taken into account this aspect of the matter, she would probably not have imposed the sentence of 10 years on each counts and ordered that the sentences do run consecutively. The Appellant was not to blame for his continued incarceration pending Judgment. The blame squarely lies with the Court. An injustice and prejudice has thereby been occassioned to the Appellant. This is a case that should have attracted the sympathy of the Court but for minimum sentence prescribed by the law. It is also a case that called for order that the sentence do run concurrently rather than consecutively.

In view of what I have said above I will interfere with the sentence and alter it to the extend that the Appellant shall now serve a period of seven (7) years imprisonment on each count. The sentences shall run concurrently effective form 15th August, 2003. To that extent the Appeal on sentence succeeds.

Dated at Nairobi this 22nd day of March, 2006.

……..

MAKHANDIA

JUDGE