**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**HCCRA NO. 17 OF 2019 CONSOLIDATED WITH HCCRA NO. 16 OF 2019**

**MAHAT ISSACK ABDILLE.....1ST APPELLANT**

**HABIBA ALI OMAR.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellants were charged with Count I being in possession of ammunitions without holding a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4 (3) (a) of the Firearms Act. Particulars being that on diverse dates between 31st March 2018 and 16th April 2018, in Dela area of Eldas Sub-County within Wajir County and with others not before court, were found in possession of 62 live rounds of calibre 7.62 by 51mm and 196 live rounds of calibre 7.62 by 39mm in contravention of the said Act.

2. Count II being in possession of a specified arm without a firearms license contrary to section 4A (1) (a) of the Firearms Act. Particulars being that on the 31st day of March 2018 at Dela are in Eldas Sub-County within Wajir County and with others not before court were found while possessing a specified firearm namely G3 body serial number defaced without a magazine, one BKM light machine gun and carebeeen rifle serial number defaced in contravention of the said Act.

3. They pleaded not guilty and mater went into full hearing whereof they were convicted and sentenced to serve 7 years' imprisonment on each count. Sentences to run concurrently.

4. They were dissatisfied with the verdict thus lodged instant appeal and set out 9 grounds namely:

**(1) That the trial court erred in law and in facts by failing to find that there was no recovery form prepared and signed by the police officers involved in the recovery.**

**(2) That the trial court erred in law by failing to find that there was no search certificate or record prepared and signed by the police officers who conducted the search.**

**(3) That the trial court erred in facts and law by failing to find that the prosecution failed to proof possession of the firearm as required under section 3 of the Firearms Act.**

**(4) That the trial court erred in law and facts by failing to find that the firearms purportedly recovered by the police officers were not similar to those that were examined by the firearms expert.**

**(5) That the trial court erred in facts by failing to find that PW3 tendered exculpatory evidence that was corroborated by the appellants and their witnesses.**

**(6) That the mandatory nature of the sentence prescribed under section 3(a) of the Firearms Act is unconstitutional on account of limiting judicial desecration on sentencing.**

**(7) That the trial court erred in law and facts by failing to find that the evidence was at variance with the charges and as such, the charge sheet was defective.**

**(8) That the trial court erred in law and facts by failing to find that the defence that was tendered had impeached the prosecution's case.**

**(9) That the trial court erred in law and facts by failing to find that the prosecution had not proved its case to the required standard of proof.**

5. The parties tendered oral submissions:

APPELLANTS SUBMISSIONS:

6. The appellants submitted that there was no inventory or documents of recovery. Officers did search but no inventory. The recovered items he submitted were planted on appellants. It's crucial for inventory. No search certificate or inventory made thus should be awarded an acquittal. Inventory was crucial. There was break of chain of custody.

7. These materially differ with what was recovered. The evidence is at variance with charge sheet. See Count II particulars talk of BKM machine rifle, G3 rifle, Carebeen rifle. This is not on record. Tragonal machine gun with serial number not in the count.

8. No specificity on possession. PW1 & 2 said when they moved to the scene they found appellant No. 2 in the house who is wife of 1st appellant. Appellant 2 in court denied possession. Why would court believe PW1 and PW2? Selective mechanism!!!

9. Appellants submit that appellant No. 1 was not at the scene. Was not found at the scene. It was his house. It was alleged he had fled. But evidence is that he had gone to graze his animals. PW3 say at scene were components of a firearm. PW3 components and firearms so the contradictory.

10. PW5 was given recovered items from scene no inventory. No handover note to another. PW4 ballistic received 3 firearms. It is fatal to prosecution case for want of inventory from PW1 – PW5. This leave room to add other component. See authority No. 1 on list. See page 11 on chain of custody. Reliability evidence becomes on issue.

11. The chain of custody comes to play. Police officer cannot determine what is a firearm. Only ballistic expert under section 2 of Firearms Act can prove some is so PW1 and PW2 put component together and created a gun. They ought to have been put together by ballistic expert to determine whether there was firearm by putting together the components.

12. PW1 and PW2 contradicted themselves to what was recorded. See authority No. 3.

13. Case of Toy Pistol (Bonoko) same not taken to firearms expert. It said only examiner can persuade court. Same facts apply herein. See also Authority No. 4 to deciding what a firearm is. See highlighted parts. What was recovered was not examined by expert.

14. PW1 (recovery officer) said recovery was of a Carebeen rifle. See page 5 of proceedings. PW2 talk of Carabeen rifle. PW1 expert said 3 firearm were; tragonal rifle, G3 rifle, BKM machine gun. PW3 said appellant 1 had gone herding. He was a prosecution witness. Court should take Judicial notice the place is of herders. He did not have to own firearm. DW3 – DW7 said appellant as a herder not fled.

15. The sentence in possession of firearm is mandatory sentence provided under section 4(2) (a) of the Firearms Act – 7 years mandatory custodial sentence. See Muruatetu case para 69 on mandatory sentence.

16. Same unconstitutional. It was applied in Authority No. 7 on robbery with violence. Court said paragraph applies to robbery with violence.

17. High court is constitutional court. The firearm Act section 4 (2) (a) firearm on mandatory sentence on firearm possession. Sentencing is Judicial discretion. Reference to Article 50 on Fair Hearing. Act of Parliament cannot render discretion futile is unconstitutional so is section 4 (2) (a) of the Firearms Act. Appellants are husband and wife with 6 children. It's a nucleus. This was nuclear family. There is no father or mother at home now thus need for judicial discretion. Thus the cited authorities.

RESPONDENT'S SUBMISSIONS:

18. The prosecution in their submissions opposed appeal and supported conviction. On issue of inventory, they argue that there are 2 appellants who were arrested with subject items herein and PW5 came up later with inventory.

19. On variance of evidence, it is submitted to be same very minor. Section 382 of the Criminal Procedure Code can cure the discrepancies. Serial numbers were not given in particulars are in Count 2. On exhibits recovered and firearm officer gives the identity of the same.

20. Thus they urge Court peruse evidence and reject appeal.

**EVIDENCE ADDUCED**:

**Prosecution's Case:**

21. **PC Fredrick Ochieng (PW1)** who testified that on 31/3/2018 while stationed at Eldas Police Station, he had gotten information while at the station that some suspects residing at Dela were smuggling firearms. He and his colleagues then proceeded to the said home and found the 2nd appellant therein. They then searched the compound and found a sack with metallic items and upon opening the said sack found that it contained parts of a firearm.

22. On further search they also found a G3 rifle, a Carebeen rifle, a BKM light machine gun, 196 rounds of 7.62mm ammunitions and, sixty-two rounds of 303 ammunitions.

23. They then arrested the 2nd appellant person and took her to the Eldas Police Station and thereafter surrendered her to the Anti-Terror Police officers. He listed the total items recovered from the appellant person as 62 rounds of 303 ammunitions, 196 rounds of 7.62mm ammunition, a Carebeen rifle, a G3 rifle, a BKM light machine fun, Kshs.113,000/= in cash contained in a black bag, XTG phone, Nokia phone and Nokia FM and all the said items were marked.

24. When cross examined by the 1st appellant he stated that he only arrested the 2nd appellant.

25. In cross examination by the 2nd appellant he stated that they arrested her in her homestead. That the homestead had only three Manyattas and that he carried out the arrest along with other officers.

26. **PC Musama Peter (PW2)** testified that on 31/3/2018 acting on a tipoff that a firearm smuggler was to be found in Dela they proceeded to the home of the appellant herein but found that the 1st appellant had fled the home. They however found his wife (the 2nd appellant) and upon conducting a search found two sacks under the bed containing metallic objects.

27. They opened the bag and found that it had 196 rounds of 7.62 by 39mm ammunition and assorted rifle parts. On further search they found one Carebeen rifle, 62 rounds of 303 ammunition, one BKM light machine gun, one G3 rifle, one pair of military boots, Kshs.113,000/= in cash wrapped in a polythene bag. (He identified all the said items in court).

28. It was his further evidence that upon making the recovery they escorted the suspect to the Eldas police station where she was later collected by DCI officers from Wajir.

29. When cross examined by the 1st appellant he stated that he had not arrested the 1st appellant and that he had not seen the 1st appellant on that day.

30. In cross examination by the 2nd appellant he stated that he had recovered all the ammunition and the guns her in her house. That the house was a manyatta and that he had not taken any photos of the house.

31. **Ibrahim Haret Gaal (PW3)** was not present during the arrest and had nothing material to offer on the recoveries of the exhibits which were in issue in the case. His only link to the case was in presenting the 1st appellant to the police in a bid to get the 2nd appellant to be released on bond. He was not cross examined.

32. **Alex Chirchir (PW4)** introduced himself as a ballistics expert based in DCI headquarters in Nairobi with ten years' experience in the field and testified that he had received 3 batches of exhibits from PC Geoffrey Omete with instructions to determine whether they were firearms and ammunition and whether they were capable of being fired.

33. He stated that the first batch were three firearms labeled D1, D2 and D3 whilst the 2nd batch were 258 rounds of ammunition marked A1-A196 and B1-B62. The last batch comprised three component parts of a firearm marked C1-C3.

34. It was his evidence that upon examining the exhibits he found that exhibit D1 was a draganov machine fund serial No. BM0598 in caliber 7.62mm designed to chamber ammunition in caliber 7.62mm x 54mm. the gun had a weak return spring and lacked what he described as a return spring locking pin and he therefore could not test fire it on safety grounds.

35. He found exhibit D2 to be a Chinese simonow rifle serial No. 22012633 in caliber 7.62mm in good general condition and capable of being fired. He tested fired D2 with 3 rounds of ammunition that he picked at random from A1-A196.

36. His examination of D3 revealed that it was a G3 rifle manufactured in Germany in caliber 7.62mm. The serial number was illegible on account of rust and he was able to test fire the rifle using three rounds of ammunition picked from their lab.

37. On examination of A1-A196 he found them to be 196 rounds of ammunition in caliber 7.62mm by 39mm. B1-B62 were 62 rounds of ammunition in caliber 7.62 x 54mm and since he could not test fire them on D1 dissected and tested three of them and found them to be live.

38. As for the components, he found C1 to be a bolt head carried for G3 rifle, C2 was a cocking handle – a component part for a rifle. C3 was also found to be a bolthead.

39. It was his assessment that D1-D3 and B1-B62 were all capable of being fired and were thus firearms and ammunitions respectively. He produced the ballistics report containing his findings as Pexh.13.

40. When cross examined by the 1st appellant he stated that he had not arrested the 1st appellant. That he did not recover the exhibits and that he did not know where the exhibits were found.

41. When cross examined by the 2nd appellant he stated that he had not arrested the 1st appellant. That he did not recover the exhibits and that he did not know where the exhibits were found. When cross examined by the 2nd appellant he stated that he has never seen the 2nd appellant before and that he did not know where the exhibits were found.

42. PC Geoffrey Omeche would have been the fifth witness but was stood down before he had given any evidence.

43. **Inspector Nicholas Waringa (PW5)** is the one who received the appellant as well as the exhibits and he produced the recoveries in the following order. 62 rounds of 7.62 x 51 ammunition (Pexh.1a), 196 rounds of 7.62mm x 39mm (Pexh.2), Carebeen rifle (Pexh.3), G3 rifle (Pexh.4), BKM light machine gun (Pexh. 5) Kshs.113,000/= in cash (Pexh.6).

44. When cross examined by the 1st appellant he stated that the 1st appellant had surrendered himself to their offices. That the 1st appellant did not have any of the exhibits with him. That the exhibits were recovered from the 1st appellant's home.

45. That he did not pick the guns from the appellant's home. That the exhibits were handed to him by officers who raided the 1st appellant's home. That the 1st appellant's wife had also been arrested. That the guns were found in the appellant's home. That they had called only witnesses relevant to the case and that the officers who did the raid had testified.

46. When cross examined by the 2nd appellant he stated that he was not involved in the raid. That he had been called after the raid and that the statements of the officers who conducted the raid showed that the appellant had the exhibits. He was the final prosecution witness.

**Defence Case:**

47. When placed on their defence, both appellant persons elected to give sworn defences and reiterated their innocence. The first appellant averred that at the material time he was in the grazing fields when he was told that his wife had been arrested for being in possession of guns.

48. He denied any knowledge of the said guns and asserted that he has always raised his family by pastoral means and averred that of all the things allegedly recovered from his home, only the Kshs.113,000/= was his. He alleged that there is a chief called Salat who bore him a grudge and contended that it was the said chief who had caused him to be arrested.

49. He averred that the said chief wants to get rid of him because he belongs to a minority tribe and claimed that all his woes were the result of ethnic discrimination.

50. The 2nd appellant on her part stated that on the material day she was at home when chief Salat came in the company of police officers and forced her to open her box from where they took the money. They then took her to the Eldas Police Station where the police produced guns and placed them before her. She was then charged with the current offence.

51. Like the 1st appellant, she denied any knowledge of the guns and alleged that the appellant were being persecuted because of their tribe and averred that despite knowing the appellant for a long time they had not seen the appellant with any guns.

52. Noor Ahmed Ali (DW5) testified that when he had heard of the 2nd appellant's arrest he had visited her in police custody and she told him that the guns belonged to other people who ran away. He further stated that the police had investigated the case further and found that the guns were owned by people in Tarbaj.

53. Mohamed Ali (DW6) corroborated the appellants' assertion that it was the chief of the location who was behind the appellants' arrest whilst Abdullahi Hassan (DW7) maintained that the appellant had been framed.

**ISSUES, ANALYSIS AND DETERMINATION**

54. This being a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **OKENO VS. REPUBLIC [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a 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 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 Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."***

55. 23. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus;

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***

56. 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; 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.

57. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See ***Pandya vs. R [1957] EA. 336 and Coghlan vs. Cumberland (3) [1898] 1 Ch. 704.***

58. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of ***Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634,*** thus:

> ***"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:***
>
> ***'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"***

59. In ***Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR),*** **Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

60. After going through the proceedings on record and parties' submissions, I find the issues are; ***whether the prosecution proved its case beyond reasonable doubt? and whether the sentence was unconstitutional and or excessive?***

61. Section 4 of the Firearms Act which reads:

> **"4(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time."** *(emphasis mine).*

62. The ingredients necessary to prove the two charges are thus the same and all the prosecution needed to prove is that the guns and the alleged ammunition listed in the said charges were indeed firearms and ammunition within the meaning of the Firearms Act and that the appellants' had purchased, acquired or had the same in their possession.

63. What is in issue on the first charge is ammunition listed in the charge sheet as 62 live rounds of caliber 7.62 by 51mm and 196 live rounds of caliber 7.62 by 39mm.

64. The said rounds of ammunition were sent to the ballistics expert (represented in this trial by PW4) and after examination by the said PW4, the 62 rounds were found to be ammunition in caliber 7.62 x 54Rmm whereas the 196 rounds were found to be ammunition in caliber 7.62 x 39mm of which three rounds were successfully test fired.

65. The resulting verdict from the expert is that the rounds in issue answer to the definition of ammunition as per the Firearms Act and I have no basis to disregard his assessment. What is in focus on the 2nd count are guns described in the charge sheet as G3, a BKM light machine gun and a Carebeen rifle.

66. As the summary shows, the same were equally subjected to a ballistics' test and found to be a Hechler and Koch G3 rifle, a Russian Dragunov machine gun and a Chinese simonov rifle respectively.

67. During the ballistics' tests the Chinese simonov and the G3 rifle were found to be capable of being fired whereas the Dragunov machine gun was incapable of being fired for want of a return spring locking pin and a weak spring. Nevertheless, the expert returned a finding that the three guns were firearms and I once again see no basis to reflect his assessment.

68. From the foregoing, and more particularly the expert's findings, the trial court was justified in finding that the prosecution proved to the required standards that the items listed in the charge sheet and which were produced in court as Pexh 1-5 were all together firearms and ammunitions. This court agrees with that finding.

69. The residual question is thus whether the same were in the possession of the appellants.

70. As seen from the evidence, PW1 and PW2 who are both police officers gave consistent evidence that following a tip off from members of the public they proceeded to the home of the appellants where they found the 2nd appellant and upon searching her house found all the guns and ammunitions as listed.

71. Both officers were firm that they did not know the appellants before and nothing has come up in evidence to suggest that they bore any grudge against the appellants or their testimony was actuated by malice. Their evidence thus comes across as straightforward and objective

which leaves the court with no doubt that the appellant had the firearms and ammunition in their possession.

72. It is not contested that appellant 1 and 2 are husband and wife respectively and it is further not in contest that it took the arrest of the 2 nd appellant for the 1st appellant to surrender himself to the police.

73. Given that the two lived as husband and wife, and taking further note of the number of guns and ammunition recovered, it is hard to believe that one of them would be in possession of the said guns or ammunition without the knowledge of the other. That is especially so given that when the search was conducted the guns were retrieved from a box which, the officers correctly stated was in fairly plain sight.

74. The evidence against the appellants was airtight and, in my consideration, proved beyond reasonable doubt that the appellants were in possession of the firearms and ammunition in issue.

75. That said, it did not escape trial court attention that there was some variances in the description of the guns as captured in the charge sheet and in the ballistics expert's report but still was convinced by the evidence that the guns were recovered in the home of the appellants.

76. Further the trial court was satisfied that the same were then forwarded to the ballistics experts for examination. It was the expert who would know best how to name the forwarded guns and in what caliber they were. Any discrepancies in description thereafter would then, in my view, be immaterial to the charges. The provisions of Section 382 of the Criminal Procedure Code cure the discrepancies.

77. I observe that the trial court in above findings did not ignore the appellants' defence. Rather, it considered the same and found it to be without substance. The appellant, along with their witnesses, averred that they were being victimized because of belonging to a minority tribe and further averred that their woes were caused by a certain chief yet the record shows no input whatsoever by the said chief.

78. But even if it were to be believed that the chief was the informant who told the police that the appellants had guns, it would still not discount the fact that the police visited the home of the appellants and retrieved the guns and ammunitions in issue.

79. In addition, the trial court was alive to the fact that, all the witnesses who were called by the appellants were somehow related to the appellant and admitted to being from the same small community as the appellants.

Why then would the chief or the police pick only on the two appellants herein and choose to persecute them?

80. No answer comes to mind save for the obvious one, to wit; that the appellant have come up with that theory to avoid their criminal liability. Thus the court finds that the appeal has no merit and is dismissed on conviction.

81. On sentence the court finds that the trial court sentenced appellants without mitigation on the basis that the sentence was minimum mandatory sentence which tied courts hands in sentencing and thus could not consider a lesser sentence but to award any number of years from 7 years and above.

82. It is now trite law after SCOKE case of **MURUATETU** and subsequent decisions that all the mandatory aspect of sentences are unconstitutional. Thus this court will revisit the sentence herein.

83. The court therefore finds that the sentence of the 2 accused persons as far as it was imposed as mandatory minimum sentence is unconstitutional, it is therefore set aside and court makes the following orders:-

***(i) The appeal on conviction is upheld.***

***(ii) The sentence of 1st appellant is re-imposed by this court to 6 years to run from 16/4/2018 date of arrest.***

***(iii) The sentence of the 2nd appellant Habiba Ali Omar is set to 2 years' probation to enable her take care of the 5 young children as her husband 1st appellant serve 6 years jail term.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 20TH DAY OF NOVEMBER, 2019.**

**.....**

**C. KARIUKI**

**JUDGE**