



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 13 OF 2019

MOHAMUD ABDILLE HAMUD.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. Mugendi Nyaga (SRM) in the Senior Principal Magistrate's Court at Wajir Criminal Case No.521 of 2018, delivered on 6th January, 2019)

JUDGEMENT

1. The appellant was charged jointly with another on Count I with the offence of 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. The particulars were that on 6th day of December 2018 in Boji Abdille Gulbet area of Wajir South Sub-County within Wajir County, were found in possession of 25 live rounds of caliber 7.62 by 39mm in contravention of the said Act.

2. On Count II they were charged with offence of being in possession of a specified firearm without a firearms license contrary to section 4A (1) (a) of the Firearms Act. Particulars being that on 6th day of December 2018 in Boji Abdille Gulbet area of Wajir South Sub-County within Wajir County, were found in possession of a specified firearm namely AK-47 serial number MF1732 with one magazine in contravention of the said Act.

3. He pleaded not guilty and matter went into trial. He was convicted and sentenced to 7 years imprisonment on Count I and 14 years imprisonment on Count II. Both sentences to run concurrently. The 2nd accused person was acquitted on all counts.

4. Being aggrieved by the verdict above he lodged instant appeal and set out which he amended as follows:-

(1) That the learned trial magistrate erred in law and fact to convict him without considering that the prosecution failed to prove its case beyond reasonable doubts contrary to section 109 and 110 of the Evidence Act.

(2) That the pundit trial magistrate erred in law and fact to convict him without considering that the prosecution's witnesses though claimed to be together, their evidences were contradictory and inconsistency contrary to section 163 of the Evidence Act.

(3) That the pundit trial magistrate erred in law and fact to convict him without considering that there was no ballistic report. Examiner Mr. Alex Mwandani who examined the alleged exhibits was not brought to court hence creating doubts on admissibility of the exhibits contrary to section 150 of the Criminal Procedure Code.

(4) That there was no dusting done to prove whether he was the possessor of the alleged gun and ammunitions since he was not arrested in possession of them.

(5) That apart from the soldiers and the chiefs, there is no independent witness from the alleged scene of crime where he alleged to have been arrested since it was someone's homestead the allegations were tailored and fabrications.

5. Parties were directed to file submissions to canvass appeal.

EVIDENCE ADDUCED:

Prosecution's Case:

6. Mohamed Omar Barre, the Senior Assistant Chief Lehley Location (PW1) testified that on 6th December 2018 around 6.00p, he received information from a member of public that he had seen a motorcycle carrying 2 suspicious looking individuals. He was informed that the motorcycle was headed to Abdille Gulbet area.
7. PW1 testified that on receipt of the information he called someone at Abdille Gulbet. The person told him that he had seen the individuals going to a certain hut. PW1 reported the matter to the OCS Lehley Police Station.
8. According to PW1, 14 police officers led by the OCS left for Abdille Gulbet area around 9.20pm. PW1 accompanied them. PW1 told the court that they went to the hut where the individuals were. They found 2 people in the hut.
9. It was his evidence that they arrested the accused person. His colleague managed to escape. PW1 testified that they found the accused person with an AK 47 rifle serial number MF1732 and one magazine with 25 rounds of ammunition.
10. PW1 testified that they found the appellant person holding the gun. It was his testimony that the suspect who escaped was the 2nd accused person. He testified that the 2nd accused was arrested at Lagbohol the following morning.
11. In cross examination PW1 testified that the appellant was surrounded by 14 police officers and told to surrender. He told the court that the appellant could not use the gun because he was surrounded. It was his testimony that the accused person did not pass through settlements and that is why he was noticed by security apparatus.
12. In cross examination by the 2nd accused person PW1 admitted that he could not tell if the 2nd accused was the person who escaped or not. PW1 testified that he was told by the Assistant Chief Busbus Sub-Location that the 2nd accused said that he was from Lehley. PW1 testified that they did not see the 2nd accused person's face when he was escaping.
13. No.233757 Chief Inspector Julius Munene the OCS Lehley Police Station (PW2) testified that on 6th December 2018 around 9.21pm, PW1 accompanied by Administration Police Officers reported to him that 2 people had been sighted at Abdille Gulbet carrying an AK 47 rifle.
14. PW2 told the court that he mobilized his officers and together with the AP officers they proceeded to Abdille Gulbet area. PW2 testified that when they arrived at the area, PW1 called 2 members of public who led them to where the suspects were. The suspects were in a traditional Somali hut.
15. PW2 told the court that they surrounded the suspects. It was his testimony that only 4 officers of the 12 that he had approached the suspects. PW2 testified that there was no lighting in the area. However, one of them knew the area well. According to PW2, they found the suspects taking tea.
16. When they asked them to surrender one of them escaped. PW2 testified that they recovered a gun at the scene and 25 rounds of ammunition. They also recovered some metallic objects. PW2 testified that they arrested the appellant person who told them that he was from Eldas headed to Habaswein. PW2 testified that they took the appellant person to Lehley Police Station.
17. It was PW2's testimony that the 2nd accused person was taken to him the following day. PW2 testified that when the 2nd accused was taken to Lehley Police Station he identified him as the person who had escaped the previous day. PW2 testified that at the scene they had recovered a bag.
18. From the bag he recovered a refugee certificate bearing the name Ahmed Ahmed Osman. He also recovered an application for refugee acknowledgement bearing the name Ahmed Ahmed Osman. PW2 testified that the 2nd accused told them that he was going to sell the black substance at Habaswein.
19. On cross examination by the appellant person PW2 testified that they found him sitting down. It was his evidence that the accused person could not defend himself because they found him sitting down. PW2 testified that the scene was bushy area. PW2 testified that the information he received was that the accused person had arrived at the area around 5.00pm.
20. PW2 testified that the accused persons were dropped at the area by a motorcycle. PW2 admitted that he could not tell where the accused person had obtained his gun from. PW2 testified that the appellant told him that he had purchased his gun from some people who moved around selling guns.
21. On further cross examination PW2 testified that the appellant told him that he had been approached by the 2nd accused while carrying some stones he suspected had gold. The 2nd accused requested him to escort him to Habaswein where he was going to sell the stones.
22. On cross examination by the 2nd accused PW1 testified that no exhibits were found on him when he was arrested. PW2 testified that when the 2nd accused person escaped they did not fire at him to avoid injuring members of public. According to PW2, the scene of crime was a settled area.
23. PW2 testified that he identified the accused person as the person who escaped. Also PW2 testified that when he interrogated the 2nd accused he told him that he was with the appellant. Further, he told him that he had been to Dadaab.

24. Mohamed Abdi Hassan the Senior Assistant Chief Busbus Sub-Location (PW3) testified that on 7th December 2018 around 6.00pm he was outside his house when he saw the 2nd accused walking along Wajir-Habaswein road. PW3 told the court that he was in company of some elders. PW3 told the court that together with the elders they followed the 2nd accused. He went to a certain hut where he was given water and a shirt by a lady.
25. According to PW3, when he asked the accused where he had come from he introduced himself as Farah Aden Issack. PW3 testified that the accused person also told him that on 6th December 2018 while in company of the appellant a certain hut along Wajir-Habaswein road they had been attacked by some people who were armed with guns.
26. It was PW3's testimony that the 2nd accused person told him the appellant person had been arrested. On his part he had managed to escape. PW3 testified that the 2nd accused person told him that he suspected that appellant had been killed by the people who arrested him. Also, the 2nd accused told him that the people had taken his gold, a gold weighing machine and Kshs.180,000/=.
27. PW3 testified that he convinced the 2nd accused to accompany him to the police. PW3 testified that a police officer named Abdi Fillow called him and told him that the 2nd accused had escaped from them. According to PW3, the said officer and his colleague went to Logbohol and picked the 2nd accused.
28. No. 220359 Senior Sergeant Gabow Ali Abdi of Lehley Administration Police Camp (PW4) testified that on 6th December 2018 while at the said camp PW1 went to him. He told him that someone had informed him that there were 2 armed people at Abdille Gulbet ara.
29. PW4 testified that together with the Sub-County AP Commander they organised for an operation. They also called PW2 for a joint operation. PW4 testified that they comprised a team of 14 police officers. PW1 also accompanied them. PW4 testified that they went to the scene where they found the accused person sitting down.
30. According to PW4, they fired in the air and told the accused persons to raise their hands. The 2nd accused managed to escape. However, they managed to arrest the appellant. PW4 testified that they recovered an AK 47 rifle serial No. MF1732.
31. He told the court that the rifle was between them. Also, they recovered a magazine with 25 rounds of ammunition. PW4 testified that they escorted the appellant to Lehley and then to Wajir Police Station.
32. PW4 testified that on 7th December 2018 the Deputy Sub-County AP Commander called him. He told him that he had received information from PW3 that he had arrested the 2nd accused and handed him over to Lagbohol Police Post.
33. It was PW4's testimony that he went to Lagbohol with the Deputy Sub-County AP Commander and 5 other officers. They picked the 2nd accused and escorted him to Lehley. PW4 testified that the 2nd accused told them that the appellant was accompanying him with the rifle. They escorted the 2nd accused to Wajir Police Station.
34. In cross examination PW4 testified that he found the appellant with a loaded rifle. He told the court that at the time of arrest he could not use the rifle because he was not prepared. PW4 testified that they arrested the appellant at Abdille Gulbet. PW4 testified that he was the one who arrested the accused person.
35. In cross examination by the 2nd accused PW4 testified that after they fired in the air the appellant picked the rifle. PW4 told the court that they did not fire at the accused persons to avoid injuring members of public. PW4 testified that the 2nd accused ought to have been in a refugee camp.
36. No. 230245 Senior Superintendent of Police Lawrence Nthiwa, a firearms examiner attached to the Firearms Laboratory at the Director of Criminal Investigations Headquarters, Nairobi (PW5) testified that his colleague Alex Mwandawiro examined the exhibits in this case and prepared a report.
37. PW5 testified that his colleague received a rifle serial No. MF1732 marked as exhibit A1, a rifle magazine marked as exhibit B1 and 25 rounds of ammunition marked as exhibits C1-C25 from PC Job Omino of Anti-Terrorist Police Unit, Wajir.
38. According to PW5, upon examination it was found that exhibit A1 was an AK 47 rifle manufactured in Hungary and chambered for ammunition in caliber 7.62 by 39mm. The rifle was found to be in good general and mechanical condition complete in its component parts and capable of being fired.
39. PW5 testified that on physical examination of the chamber breech face and the barrel black soot was found. This was an indication of a discharge. Further PW5 told the court that the rifle was successfully tested using 6 rounds of ammunition of which 3 were randomly picked from the lot comprising of C1-C25.
40. The others were from their laboratory. It was his testimony that exhibits C1-C25 were in caliber 7.62 by 39mm and all of them were found suitable for firearms as such as exhibit A1. PW5 testified that his colleague formed the opinion that the rifle and the rounds of ammunition were capable of being fired.
41. Further, it was PW5's testimony that exhibit B1 is a magazine designed for use in AK 47 rifles such as A1. The same carries 30 rounds of ammunition when fully loaded. PW5 testified that the saw was found to be in a good working condition.

42. PW5 produced the ballistic examiner's report dated 14th December 2018 as exhibit 9, the exhibit memo form as exhibit 10, the AK 47 rifle as exhibit 1, magazine attached to the rifle as exhibit 2, 22 live ammunition as exhibit 3, spent cartridges as exhibit 4 and 6 bullet heads as exhibit 5.

43. No. 108390 PC Jackson Katana of Anti-Terrorism Police Unit Wajir (PW6) testified that he was allocated this case for investigations on 7th December 2018. PW6 was given an AK 47 rifle serial No. MF1732, 25 rounds of ammunition of caliber 7.62 by 39mm, 3 mobile phones and a suspect gold stone.

44. The exhibits were recovered from the accused persons by police officers from Lehley Police Station. PW6 testified that he prepared an exhibit memo form and forwarded the exhibits to Nairobi for analysis by an expert.

45. PW6 testified that he was told that officers from Lehley Police Station went to Abdille Gulbet area for an operation. During the operation they managed to arrest the appellant. The 2nd accused escaped but he was arrested the following day by the Assistant Chief of Busbus area.

46. According to PW6, he interrogated the accused persons. They told him they were taking a suspected gold stone to Habaswein for testing. PW6 testified that the 2nd accused did not prove that he was in the country legally.

47. He told the court that his efforts to establish the nationality of the 2nd accused did not bear any fruits. Further, he told the court that on carrying out a verification of his refugee card he found that the same does not exist in the refugee register.

48. PW6 produced the rocky substance recovered from the accused persons as exhibit 6, refugee certificate as exhibit 7, waiting card for refugee registration as exhibit 8, a report from the Ministry of Petroleum and Mining as exhibit 11 and an exhibit memo form in respect of the substance as exhibit 12.

Defence Case:

49. In his defence the appellant denied that he was found with a gun. He told the court that he was arrested while looking for his lost camels. According to the accused person, he was arrested at Lehley and not at Abdille Gulbet. The accused person told the court that he does not know how to handle a gun. Finally, it was his defence that he did not know the 2nd accused.

ISSUES:

50. After going through the evidence on record, I find the issues are whether the prosecution proved its case beyond reasonable doubt? Was appellant defence considered?

ANALYSIS AND DETERMINATION:

51. The Evidence Act, Cap 80 of the Laws of Kenya provides that;

Section 107

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

52. It is now cast in stone as established in the *lucus classicus*; *Woolmington vs DPP (1935) AC 462*, that; Lord Sankey in the celebrated "Golden thread; speech;

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to..... The defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

53. PW1 testified that on 6th December 2018 around 6.00 pm he was informed that some suspicious people had been sighted headed to Abdille Gulbet area. On receipt of the information he called someone at Abdille Gulbet who told him that the 2nd character had been seen going to a certain hut. PW1 relayed this information to the police.

54. PW2 testified that on receipt of the information he organised a team of police officers and they proceeded to Abdille Gulbet. PW1

accompanied the police officers. PW4 was among the police officers who went to Abdille Gulbet area. He corroborated PW2's testimony. PW1 and PW2 testified that they found the accused persons in a hut.

55. PW1 testified that they found the appellant person in possession of an AK 47 rifle serial No. MF1732, one magazine and 25 rounds of ammunition. PW1 testified that the appellant person was holding the rifle. PW1 testified that they recovered a gun at the scene and 25 rounds of ammunition. PW4 corroborated this.

56. He told the court that the gun was between the appellant and the 2nd accused. It was PW4's testimony that when they surrounded the accused persons, the appellant picked up the rifle. This clearly shows that the appellant person had a connection with the same.

57. The appellant in his defence denied being in possession of a gun. He even told the court that he did not know how to operate a gun. However, from the evidence by PW1, PW2 and PW4 the appellant person and his colleague were found with an AK 47 rifle, one magazine and 25 rounds of ammunition. The defence by the appellant person was an afterthought.

58. On the day of the arrest the police only managed to arrest the appellant. The appellant in his defence told the court that he was arrested at Lehley and not at Abdille Gulbet. The testimony by PW1, PW2 and PW3 was corroborated on where the appellant person was arrested. The court did not have a reason to doubt the truthfulness and credibility of the 3 witnesses.

59. In any event the court was not given any reason as to why the 3 witnesses would have framed the appellant. The AK 47 rifle (exhibit 1), the magazine (exhibit 2) and the 25 rounds of ammunition were found next to the appellant person and his colleague. This evidence was not challenged.

60. PW5 testified that when the rifle was examined it was found to be an AK 47 rifle manufactured in Hungary and designed to chamber 7.62 by 39mm rounds of ammunition. The 25 rounds of ammunition that were recovered were found to be rounds of ammunition in caliber 7.62 by 39mm. They were found to be suitable for use of rifles such as the one in this case that is exhibit 1. From the foregoing it is not in issue that what the police recovered was an AK 47 rifle, one magazine and 25 rounds of ammunition.

61. The upshot of the foregoing is that I find that the appellant person was found at Abdille Gulbet area. In his possession was an AK 47 rifle serial No. MF1732 (exhibit 1) and 25 rounds of caliber 7.62 by 39mm ammunition (exhibit 3, 4 and 6). Thus he was properly convicted by the trial court. Thus the court finds no merit and dismisses the appeal accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 7TH DAY OF NOVEMBER, 2019.

C. KARIUKI

JUDGE