



**REPUBLIC OF KENYA**

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

**HCCRA NO. 122 OF 2017**

**ELIJAH KIPKENEI KIMAGAL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction in the Principal Magistrate's court at Kabarnet delivered on the 18<sup>th</sup> day of November, 2015 by Hon. S.O.Temu PM]**

**JUDGMENT**

1. The appellant was convicted for a charge set out in the Charge Sheet as ***“being in possession of ammunitions without a firearms certificate contrary to section 4A (1) (a) of the Firearms Amendment Act No. 6 of 2010”*** and convicted to imprisonment for 7 years on 18<sup>th</sup> November, 2015. The particulars of the charge were that the accused had on the 16<sup>th</sup> day of March, 2015 at about 14.00hrs at Yatia Trading Centre, Yatia Location, Baringo North Sub-county had been found in possession of eleven (11) rounds of ammunitions calibre 7.62 millimetres special without a firearms certificate.

2. The appellant listed the following Grounds of Appeal dated 23<sup>rd</sup> of January, 2017:

*The appellant herein appealed against conviction and sentence on the following grounds:*

- 1. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant to serve 7 years imprisonment when the charge before the trial magistrate was fatally and incurably defective.*
- 2. That the learned trial magistrate erred in law in convicting and sentencing the appellant on a charge before the court that did not disclose an offence contrary to section 169 (2) of the Criminal Procedure Code.*
- 3. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant while relying on section 4A (1) of the Firearms Amendment Act No 6 of 2010 Cap 114 of the Criminal Procedure Code.*
- 4. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant on a charge before the court that did not disclose the proper and correct provision/section of the law to wit section 4A 1(b) (repealed) Rev. 2015 Firearms Act No. 25 of 2015.*
- 5. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without giving regard to the evidence adduced before court.*
- 6. That the trial magistrate erred in law and in contradicting and/or misdirecting himself while analysing the whole evidence tendered by the prosecution witnesses and the testimony of the defence.*
- 7. That the trial magistrate erred in law and in fact by failing to independently analyse and/or evaluate before drawing conclusion as per the law required.*

3. The evidence of the witnesses for the Prosecution and the Defence before the trial court was as follows:

**Prosecution's case**

1. **PW1** Johana Kipngetich

*“My name is Johana Kipngetich, a resident of Gatia. I am an AP Officer No. 87088801. I have served as such for 28 years. On 16/3/2015 I was at Gatia at about 2.00 pm I was at the camp when the Area resident came and stated that there was a person who was of bad character within the area.*

*We went to the centre where we found one man and we arrested him. We took him to our camp and we had searched the bag he had and we had recovered one torch.*

*We had opened the torch and we recovered bullets (ammunition) inside 11 in number. The torch battery were also in the bag. There was sheet and whimp for one Kilogram. We had then asked officers from Loruk Police Station to pick him. The officers picked and they took him to Loruk Police Station.*

*The accused was from Baritabwa Division Kapturu Location as per his ID card. That was far from Yatia where we found him. It was distance of over 60 Km.*

*The bullets in court are the ones we found with the accused. 11 bullets are identified in court. All the 11 bullets had not been used.*

*In court three had been fired. The 8 unused bullets are marked as MFI P 1 and the 5 used cartridges are marked as MFI P 2. The torch is identified and marked as MFI P 3. The two batteries now are produced as exhibit P4.”*

#### **Cross-examination by accused**

*“Members of the public had made a report at the post that you were spying at the area for attack. The bullets were in your torch. We arrested you because we had recovered the bullets. We arrested you for investigations and we had recovered bullets with you. You stay within Pokot area.*

#### **2. PW 2 No, 248087 APC Stephen Omondi**

*“I am attached at Yatia Camp posted in 2014 December. On 16/3/2015 at 1400 hrs we received a report at the camp from members of the public that there was a suspect cattling rustling within the area. We had gone to the centre and we had interested the suspect for interrogating. We had found an ID card which indicated that the accused was from Bartabwa Division Ngororwa Location.*

*We had looked in his belongings and we had recovered a torch which had in it 11 rounds of ammunitions for AK47 rifle. The bullets were in the torch and the batteries were in the bag. We only use G3 rifle in our camps.*

*The bullets that the accused had was only used with KPR within the region and since he was not one of them we had arrested him. The bullets and torch were in the bag which we handed over to the Police Station.*

*The bullets and torch are identified in court and bag and batteries. I had recorded statements at Loruk Police Station.”*

#### **Cross-examined by accused**

*“You are the one who had the bullets and the torch that is before court. I do not know where you were taking the bullets.”*

#### **3. PW3 No. 231894 Chief Inspector Charles Kiorege.**

*“I am attached to the CID headquarters Nairobi as fire arms examiner. I have acted as such for 8 years now. I know Alex Chirchir who is my colleague at the CID Office as Forensic expert. I have worked with Alex since 2007 to date. I can identify his signature and writing. The said Chirchir is before Nairobi Court and I was asked to come and produce the report on his behalf.*

*On 20/3/2015 we received 11 exhibits for Moses Mwithi a police officer attached at Loruk Police Station. The Officer wanted to have exhibit examined and established whether they were ammunition and whether they were live or not. We conducted initial examination and we established that the exhibit comprised 11 ammunition of which were 7.62 per 39 mm. the exhibits were useful in AK47 and Simonov machine guns among others.*

*Three rounds were picked from the 11 and they were found to be live ammunitions. From the examination we found the opinion that the 11 exhibits were live and capable of being fired. They were thus ammunitions as per the Fire Arms Act. We complied the report on 23/3/2015.”*

#### **4. PW4 No. 79218 PC Nurses Morigi.**

*“I work at Loruk Police Station, I am the Investigating Officer. On 16/3/2015 I was at the Police Station when I received a report from Yatia that a person had been arrested while having bullets. We proceeded to Yatia and on the way we met AP Officer from Yatia with the accused who is before court. We had arrested the accused and I took over the exhibit.*

*I took the bullets which were in torch together with a bag and dry cells. I took the accused to the Police Station and upon interrogation he was not able to give any explanations, I recorded the statements from the AP Officers and I took the bullets to*

Nairobi for analysis. I had prepared an exhibit memo to that effect.

The analyst had prepared a report and they stated that the bullets were for AK47 rifle which is common with cattle rustlers.

The accused did not have a fire arm certificate and I had then charged him.”

#### **Cross-examined by accused**

“I do not know whether you have a criminal elements. I recorded statement from the witnesses who found with the exhibits before court.”

#### **Defence case**

4. When put on his defence the appellant gave an unsworn statement and called one witness as follows:

1. **DW1** Elijah Kipkenei made an unsworn statement that:

“I am a resident Burtaswa, I am farmer. The charges are not true. On the date I had left Bartabwa going to Loruk. The Police Officers arrested me for no reason. I am not the one who had bullets.”

2. **DW2** Mwetich Sarboti

“I am a resident of Kaprotano, I am a village elder. The accused had gone to Loruk where he stays and we later heard he had gone to Yatia and he was arrested.

The accused is my neighbour at Chepturo and he has another wife at Loruk. I was not at Yatia on the date of the incident.”

#### **Cross-examined by prosecution**

“I was not with the accused on the date of incident. He had gone to his place at Loruk that morning.”

#### **Statement of the judgment**

5. In convicting the appellant the trial court found that the prosecution had proved the charge as follows:

“Upon hearing the entire case the issues for determination were:

Whether the bullets were found with the accused had a permit to possess the said bullets.

Whether the prosecution had proved each case beyond any reasonable doubt that indeed the bullets were recovered from the accused.

As per the evidence of PW1 and PW2 AP Officers it was clear that the bullets were found with the accused in church. That the evidence was not contradicting when the two officers testified. The two officers identified the dry batteries which were also recovered from the accused and they were bound together which meant that they had not been put in the torch in which the bullets were found.

The accused was found far from his place of resident that is Bartabwa and Loruk and there was no explanation given as to what he was doing at Yatia which was far from two homes and thus the two AP officers had all the reasons to interrogate him before they recovered the bullets.

The recovered bullets were all tested as per the report that was produced in court and found to be live ammunitions. The defence tendered did not contradicting the prosecution’s evidence nor did DW2 add value to the defence since he was not with the accused on the date of incident. I thus have no doubt that the said bullets were found or recovered from the accused.

The accused in his defence stated that he was a farmer and he had no certificate to prove that he was licenced to own the bullets and thus I find that he had lawn unlawfully.

I thus find the prosecution had proved their case beyond reasonable doubt and I find the prosecution had proved their case beyond reasonable doubt and I find the accused guilty and I convict him for the offence of being in possession of ammunitions without firearms certificate contrary to section 4A (1) (a) of the Firearms Movement Act No. 6 of 2010 as charged.”

#### **SUBMISSIONS**

6. The Counsel for the appellant and for the respondent made oral submissions before the court as follows.

**Appellant's submission – Ms. Kibichy Advocate for the appellant**

1. Defective charge

On evidence adduced is on ammunition section 4A (1) (a) of the Firearms Act defined. The appellant was allegedly to have ammunitions, which is not specified under the section.

The offence alleged to have occurred on the 16/3/2015 at the time there was another ammunition Firearms Act, 2015 of 2015. He was charged under the wrong provision of the law. He should have been charged under section 4A (1) (b) of the Act. The charge before the magistrate was defective.

2. Section 89 of the Criminal Procedure Code. Amendment of charge under section 214 of the Criminal Procedure Code or dismissal of the charge. The trial magistrate did not order amendment or dismiss the charge. I refer to **Omondi v. Republic** [2015] eKLR and **Republic v. Mohammed Assf Yusuf** [2014] eKLR.

The charge sheet was defective.

**EVIDENCE**

3. PW1 at p. 9-10 of the record of appeal. Resident came and reported of a person that a person with a bad character. He said they found ammunitions in the bag which the appellant was carrying.

PW2 stated that members of the public alleged that there was a suspect who was cattle rustling in the area. The people who said to have reported the matter were not called to testify. The court did not make inquiry as to why they did not testify. They should have been testified on how they identified the appellant.

Appellant was not represented by a counsel. The court was under duty to explain as to the importance of the document. The appellant was not aware.

Attendance of the maker was said to be time consuming.

I rely on **Michael Onyango Nyamodi v. Republic** [2015] court has a duty to inform the accused of the repercussion of a report produced.

Evidence of the defence appellant testified at p. 17. DW2 testified that he knew the appellant. The evidence explained why the appellant was at Yatia to see his wife.

Judgment of the trial magistrate at p. 22 that the appellant left Bartabwa for work is not in the evidence. He was going to see his wife. The trial court did not adduce the evidence. Evidence of the prosecution was contradicting the residence or members of the public.

PW4 the Investigating Officer (I.O.) did not indicate the investigation. He did not go to scene and did not find who had complained. Hearsay evidence none of the critical evidence testified.

It was not corroborated. The contents never came to court. The appellant was charged because he was in town. The motive of the residents or the public was not explained. The judgment did not comply with section 169 (2) and 382 of the Criminal Procedure Code.

**Prosecution's Submissions– Ms. Macharia, Ass. DPP for the Respondent.**

The appeal is opposed. Offence of being in possession of ammunition without a Firearms certificate. The section was shown as 4A (1) (a) instead of (1) (b). However, it was not prejudicial as the evidence by the prosecution clearly states that the appellant was in possession of ammunition and not firearms.

Defect in the charge sheet does not in any way vitiate a conviction. The Court of Appeal decision **Kivevo v. Republic** [2015] eKLR quoting **JMA v. Republic** (2009) eKLR that –

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

Although charge sheet was defective the evidence proved the charge under section 4A (1) (b) of the Firearms Act, 2015.

**Evidence**

Appellant arrested by 2 Administration Officers. How the two officers came to information of the appellant is irrelevant. The fact is that he was arrested in possession of ammunitions without a certificate.

### Number of witnesses

PW1 – PW4 witnesses. Prosecution can call even 1 witness. The number of witnesses is not an issue.

That Prosecution relied on hearsay and that complainant did not testify. The ammunition belong to the State and the State is the complainant

PW3 expert witness – firearms examiner testified on behalf of Chirchir who was before Nairobi Court on that date. The witness was allowed to present the report under section 77 of the evidence Act. The evidence is valid. He said that the 11 ammunitions recovered from the appellant were capable of being fired and were ammunitions for purposes of the Firearms Act.

### Witness at Nyatia going to Loruk

The appellant is Kenyan and could be at any time where he wishes to be. The issue is that he was in possession of ammunitions without a licence or certificate.

The Prosecution has proved its case. Sentence on the appellant was seven years. Under section 4A (1) (b), the sentence is 10 years and the sentence was therefore fair in the circumstances.

## ISSUE FOR DETERMINATION

7. The primary issue for determination is whether the charge sheet and the proceedings thereon were defective. If so, there would arise a question as to whether a re-trial is to be ordered. For that reason, the court does not propose to discuss the evidence on the merits at the outset as that may prejudice any re-trial as may be ordered in the final determination.

## DETERMINATION

8. As conceded by the DPP, section 4A (1) (a) of the Firearms Act is not the correct section for charge of being in possession of ammunition in the circumstance of the particulars of this case. Section 4A (1) (a) of the Act is in the following terms:

### “4A. Offences relating to specified firearms

(1) Notwithstanding section 4, any person who—

**(a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or**

**(b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence under this Act and is liable to imprisonment for life.**

(2) For the purposes of this section, “specified firearm” means any of the following firearms—

(a) AK 47;

(b) G3;

(c) MP 5; and

**(d) such other similar firearms as may be specified by the Minister by order published in the Gazette. (3) A court before which an offence under subsection (1) is found to have been committed may order the forfeiture to the State of any firearms, ammunition or other parts produced as exhibits in the trial. [Act No. 6 of 2010, s. 26.]”**

9. Section 4A provides for “**offences relating to specified firearms**” and not generally ammunition, save for ammunition used in the special firearms under section 4A (1) (b). Section 4A (1) (a) of the Act relates to firearms and not ammunitions and is clearly inapplicable. Section 4A (1) (b) only applies where the offender is “**licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition**”, which was not alleged to be the case here.

10. The correct provision under which the appellant ought to have been charged is indeed not even section 4A (1) (b) of the Firearms Act as urged by the appellant and accepted by the DPP. The prosecution, on the evidence presented before the court, ought to have been under the offence created under section 4 (1) as read with 4 (2) (a) and (3) (a) of the Firearms Act.

11. The entire section 4 of the Act is set out below:

### “4. Penalty for purchasing, etc., firearms or ammunition without firearm certificate

**(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.**

(1A) No person shall manufacture, assemble, purchase, acquire or have in his possession an armoured vehicle unless he holds a certificate of approval issued under this Act.

(2) If any person—

**(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or**

(b) fails to comply with any condition subject to which a firearm certificate is held by him; or

(c) manufactures, assembles, purchases, acquires or has in his possession an armoured vehicle without approval under subsection (1A),

he shall, subject to this Act, be guilty of an offence.

(3) Any person who is convicted of an offence under subsection (2) shall—

(a) if the firearm concerned is a **prohibited weapon** of a type specified in paragraph (b) of the definition of that term contained in section 2 or **the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or**

(b) if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years:

*Provided that, when the offence for which the person is convicted (not being an offence in relation to a prohibited weapon or to any ammunition therefor) is failure by neglect to renew a firearms certificate such person shall be liable to pay a fine at the rate of five hundred shillings per day for every day or part hereof during which his default continues but so that no person shall be liable to pay a fine greater than the maximum provided by this subsection and if such fine is not paid then to imprisonment for a term not exceeding two years. [G.N. 1566/1955, L.N. 172/1960, Act No. 13 of 1972, Sch., Act No. 10 of 1981, Sch., Act No. 8 of 1988, s. 4, Act No. 11 of 1993, Sch., Act No. 2 of 2002, Sch., Act No. 19 of 2014, s. 36.]”*

12. The term ‘**prohibited weapon**’ is defined in section 2 of the Act as follows:

**“prohibited weapon”** means—

(a) a firearm which is so designed or adapted that—

(i) when pressure is applied to the trigger missiles continue to be discharged until such pressure is removed or the magazine or belt containing the missiles is empty; or (ii) for each pressure of the trigger more than one discharge of a missile can take place, unless such firearm has been modified to the satisfaction of the chief licensing officer so as to ensure that for each pressure of the trigger the discharge of only one missile can take place;

**(b) any automatic or semi-automatic self-loading military assault rifle of 7.62 mm or 5.56 mm calibre or of any other calibre from time to time specified by the Minister by notice in the Gazette;**

(c) a firearm fitted with or including any device, accessory or attachment which reduces or is designed or adapted to reduce the noise or flash caused by discharging such firearm and includes any such separate device, accessory or attachment;

(d) any weapon which can be or is designed or adapted to discharge any noxious liquid, gas or other substance unless such weapon, noxious liquid, gas or other substance are of classes or types authorized by the Minister by notice in the Gazette; and

(e) any firearm or ammunition prescribed or any class or type of firearm or ammunition or any such device, accessory or attachment as is referred to in paragraph (c) prescribed by the Minister by notice in the Gazette;”

13. Section 134 of the Criminal Procedure Code gives the object of a charge as being to give to the accused information of the offence that he is charged with as follows:

“134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the

*nature of the offence charged.”*

14. I think that the charge sheet in this case failed to communicate to the accused the precise charge that he was facing and its likely consequences upon finding of guilt so as to enable him to adequately prepare his defence.

15. In accordance with the Court of Appeal decision in **Kivevo** case which binds this court, the question becomes one as to whether, pursuant to section 382 of the Criminal Procedure Code, the appellant was prejudiced by the defective charge sheet. The defect is of course conceded by the DPP, and the correct provision for the charge of being in possession of ammunition has been identified by this court as section 4 (1) as read with 4 (2) (a) of the Firearms Act. But was the appellant prejudiced by the misstatement of the provision of law under which he was charged?

16. I think so, because while the statement of the Particulars of the charge clearly informed the accused of the allegations of which it was alleged he was guilty of the offence of being in possession of ammunitions namely **calibre 7.62mm special** without certificate, it did not state that **the ammunition is ammunition for use in a firearm, which is a prohibited weapon, and which would therefore attract a more severe penalty under the law**. Indeed it is shown that the trial court sentenced the appellant to imprisonment for seven years which is the minimum sentence for offence of being in possession of such ammunition under section 4 (3) (a) of the Act as shown above.

17. The trial court convicted the appellant “for the offence of being in possession of ammunitions without a firearms certificate contrary to section 4A (1) (a) of the Firearms Amendment Act no. 6 of 2010.” The sentence under section 4A (1) (a) of the Act is set out **without a minimum sentence** as follows:

**“4A. Offences relating to specified firearms**

(1) Notwithstanding section 4, any person who—

**(a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or**

**(b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity,**

**commits an offence under this Act and is liable to imprisonment for life.”**

18. The trial court, however, treated the case as one charged under section 4 (1) (a) as read with 4(3) of the Firearms Act when it said in sentencing that—

**“I have considered the nature of the offence which common within the area and it needs deterrent sentence. The law requires that a person convicted for the offence of being in possession of ammunition without a certificate for a weapon which is prohibited is to serve not less than 7 years imprisonment.”**

19. The trial court did not order amendment of the charge as it could have done before closure of the prosecution case under section 214 of the Criminal Procedure Act. Yet it proceeded upon conviction to sentence the appellant under a provision of law for which he had not been charged. For this, the trial court, with respect, fell into error.

20. Upon conviction for the offence as charged the appellant has served imprisonment for almost **2 years and 9 months** of the seven (7) year sentence. With remission for 1/3<sup>rd</sup> of the 7 year sentence, the appellant would have to serve 4 years and six months. As the appellant has served over half of this period following conviction on a defective charge, the prejudice to the appellant is indisputable.

**Whether to order a re-trial**

21. The court has refrained from delving into the merits of the charge to avoid prejudicing the determination of the case should a retrial in the end be ordered. However, the court considers in applying the principles for an order for retrial (See, **Fatehali Manji v. Republic** (1966) EA 343; **Muiruri v. R** (2003) KLR 552; **Mwangi v. R** (1983) KLR 522 and **Opicho v. R** (2009) KLR 369) that upon a proper charge of possession of ammunition, there is evidence upon which a court could convict.

22. However, a retrial after a defective trial should only be directed where the interests of justice so require without causing an injustice to the appellant. See cases cited above. In considering whether to order a retrial in this case, this court, while agreeing with the trial court as to the prevalence of firearm related crimes in the area prone with cattle rustling and other community based violence, considers that the prejudice to the appellant who has already served a substantial portion of the sentence, imposed by the trial court in proceedings based on a defective charge outweighs the community interest in retrial for the prosecution of the prevalent crime.

**ORDERS**

23. Accordingly, for the reason set out above, there shall be an order of the court quashing the conviction of the appellant for the offence charged as **“being in possession of ammunitions without a firearms certificate contrary to section 4A (1) (a) of the Firearms Amendment Act No. 6 of 2010”** and setting aside the sentence of imprisonment for 7 years imposed by the trial court in punishment therefor.

24. There shall, therefore, be an order for the immediate release from custody of the appellant, unless he is otherwise lawfully held.

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JULY, 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Ms. Kibichy, Advocate for appellant

Ms. Macharia, Ass. DPP for the Respondent.