



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 57 OF 2017**

**DANIEL MUTATI MUSAKUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from the Sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 252 of 2017** by **M. Nasimiyu S R M** on **20/11/17**)

**J U D G M E N T**

1. **Daniel Mutati Musakui**, the Appellant, was charged with the offence of **Being in Possession of Ammunition in Quantities in Excess of Those Authorized** contrary to **Section 4(2)(a)** of the **Firearms Act**.

2. Upon arraignment in Court, he admitted the charge. He was convicted and sentenced to serve **seven (7) years imprisonment**.

3. Aggrieved by the conviction and sentence he appealed on grounds that the plea was not unequivocal. That the learned trial Magistrate failed to warn the Appellant of the implications of his own plea to establish if he understood the plea; That the learned Magistrate failed to note, analyze and resolve the inconsistencies in P.Exhibit 1 recovery the circumstances of the case before her since the Appellant was an authorized National Police Reservist; That the sentence was excessive in the circumstances and the mitigation by the Appellant was not considered.

4. The Appellant was canvassed by way of written submissions. In a two (2) page write up **Mr. Nzili** learned Counsel for the Appellant stated thus:

**“We submit the plea as taken was not unequivocal hence this court ought to quash the conviction and sentence.**

**From the proceedings it is clear not all the ingredients and facts of the offence were properly read out to the accused person and admitted.**

**We rely on the cases of:-**

**1. Criminal Appeal No. 9 of 2016 Simon Gitau Kinene versus Republic (2016) eKLR.**

**2. Criminal Appeal No. 446 of 2009 as consolidated with Criminal Appeal No. 448 OF 2009 Republic versus Peter Muiruri & another (2014) eKLR.**

**3. Criminal Appeal No. 59 of 2016 Paul Mwangi versus Republic (2016) eKLR.”**

5. In response the State through learned State Counsel **Mr. Mamba** opposed the Appeal. He urged that the substance of the charge was read to the Appellant in Kiswahili a language that he understood and he admitted, the facts inclusive. He alluded to the manner of recording a plea of guilty and the steps to be followed as held in the case of **Adan vs. Republic (1973) EA 446** thus:

**“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused**

does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

6. That the trial Magistrate took note of the substance and every element of the charge that the Appellant understood before confirming the facts as true.

7. That the Prosecution produced six (6) exhibits being the firearm J70072, 7 spent cartridges, bullet head, exhibit memo form, Ballistic Expert Report, Police Firearm movement book. He cited the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA 6** where the Court held that:

**“With regards to the contradiction in the prosecution’s case, the law as set out in numerous authorities is that grave contradiction unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradiction unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”**

And that the sentence imposed was the minimum sentence.

8. I am duty bound to re-consider what transpired in the Lower Court, assess it and come up with my own conclusions.

9. This is a matter where the Appellant was convicted on his own plea of guilty. **Section 348** of the **Criminal Procedure Code** provides thus:

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”**

It is urged that both the conviction and sentence should be quashed and set aside because the plea was not unequivocal.

10. In the case of **P. Foster (Hallege) LTD vs. Roberts (1978) 2 All ER 751, 754 – 755** it was held that:

**“For a plea to be equivocal, the defendant must add to the plea of guilty a qualification which if true, may show that he is not guilty of the offence charged. The company had added no qualification to their pleas which were therefore unequivocal.”**

**11. Section 207** of the **Criminal Procedure Code** provides for the procedure to be adopted where an Accused person is called upon to plead. It states thus:

**“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**

**(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**

**Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

**(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**

**(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.**

**(5) If the accused pleads—**

**(a) that he has been previously convicted or acquitted on the same facts of the same offence; or**

**(b) that he has obtained the President’s pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”**

12. This principle of recording the plea was also set down in the celebrated case of **Adan vs. Republic (Supra)**.

13. In the case of **Alexander Lukoye Malika vs. Republic (2015) eKLR** the Court of Appeal stated that:

**“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is**

**imperfect, ambiguous, or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation where an accused person pleaded guilty as a result of mistaken or misapprehension of the facts.... An appellate court may also interfere where the charge laid against the accused person to which he has pleaded guilty disclosed no offence known in law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged.”**

14. The contention of the Appellant is that not all the ingredients and facts of the offence were properly read to him. He does not demonstrate what exactly was omitted.

15. The offence he was charged with was contrary to **Section 4(2)(a)** of the **Firearms Act** that provide thus:

**“(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.”**

16. The statement of the charge was in following terms:

**“Being in possession of ammunition in quantities in excess of those authorized contrary to section 4(2)(a) of the Firearms Act.”**

17. The particulars of the offence were stated thus:

**“On the 13<sup>th</sup> day of November, 2017 at Kasiluni AP Camp in Kavaani Location in Kyuso Sub-County within Kitui County, was unlawfully found being in possession of one extra 7.62mm ammunition.”**

18. As correctly submitted by the learned Counsel for the State the manner in which the plea was taken forms the record of the court. There was a Court Clerk present in Court who did the interpretation from English to Kiswahili, a language that the Appellant who had been retained as a National Police Reservist understood. The substance of the charge and every element thereof were read and translated to the Appellant and he only responded after understanding.

He replied thus:

**“It is true.”**

The ingredients of the offence are well captured in the particulars of the offence.

Facts of the case were stated by the Prosecution thus:

**“On the 6<sup>th</sup> November, 2017 the Accused person was issued with a G3 Fire Arm Senior No. J70072 with 18 rounds of ammunition. On 13<sup>th</sup> November, 2017 following investigations into a murder incident that occurred at Ikin Sub-Location, Kavaani Location, the Accused returned his firearm with 18 rounds of ammunitions. On 14<sup>th</sup> November, 2017, the said fire arm was taken to the ballistic laboratory for investigations and the findings was that one cartridge had been fired from fire arm Serial No. J70072 which had been issued to the Accused. This means that the Accused had additional ammunitions which had not been given to him, with a view to cover up the missing cartridge. He therefore acquired the excess ammunition illegally.**

**PEXH 1 – G3 S. No. J70072.**

**PEXH 2 – Spent cartridge.**

**PEXH 3 – Exhibit Memo dated 14<sup>th</sup> November, 2017.**

**PEXH 4 – Report of the ballistic expert dated 14<sup>th</sup> November, 2017.**

**PEXH 5 – Kenya Police Kyuso Arms Movement Book.”**

The Appellant admitted the correctness of the statement of facts stated by the Prosecution. In the result, the Court found him guilty, convicted and sentenced him as provided by the law. There was no evidence of misapprehension of facts.

19. Subsequently, the Court complied with **Section 216** of the **Criminal Procedure Code** by granting the Appellant the opportunity to tender evidence in mitigation and in passing the sentence the learned trial Magistrate took into consideration mitigating factors.

20. The sentence meted out is alleged to be harsh and excessive. Principles of interfering with the sentence were set out in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** where the Court stated thus:

**“(i) 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 a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors.”**

21. Section 4(3)(a) of the Firearms Act, Cap 114 (k) provides thus:

**“(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;”**

22. A 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;”**

23. The firearm that was in possession of the Appellant was an assault rifle that could fire bullets in calibre 7.62mm. This was therefore a prohibited weapon. The minimum prescribed sentence for the offence is what the learned Magistrate meted out.

24. In the premises the Appeal is devoid of merit. Accordingly, it is dismissed in its entirety.

25. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

**JUDGE**