REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 104 OF 2014

MOHAMED HASSAN MAHAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 1267 of 2013 by Hon. B. J. Ndeda (SPM)

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Garissa with possession of ammunition without a firearm certificate contrary to section 4 (2) (a) of the Firearm Act Cap. 114 Laws of Kenya. Particulars of the offence were that on 17th day of September 2013 at Kaasqow village in Dadaab District within Garissa County was found in possession of 61 rounds of 7.62mm special ammunition without a valid firearm certificate. He was charged with a second count of being in possession of public stores contrary to section 324 (2) as read with section 36 of the Penal Code. The particulars of the offence were that on the same day and place was found in possession of public stores namely; 1 sleeping bag, 1 jungle trouser and 1 jungle jacket of the Kenya Defence Forces such properties being reasonably suspected to having been unlawfully obtained. Count 3 was for possession of a firearm accessory contrary to section 26 (2) (b) of the Firearms Act. The particulars of the offence were that on the same day and place was found in possession of a firearm accessory namely; AK47 rifle magazine without a firearm certificate.

2. He denied all charges. After a full trial, he was convicted of all the three counts. He was ordered to serve 7 years in custody for Count 1, 1 year in custody for Count 2 and 1 year custodial sentence for Count 3.

3. The appellant has come to this court on appeal. He filed his initial appeal in December 2014. Before the appeal was heard, he filed written submissions.

4. His grounds of appeal are that:-

> **(1) The magistrate did not consider that the offences were not proved as required under section 110 and 111 of the Evidence Act.**
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> **(2) That the magistrate did not consider the many contradictions in the prosecution case contrary to section 163 of the Evidence Act.**
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> **(3) That the magistrate did not consider that the ballistic expert was not brought to testify in court to prove the allegations as required under section 77 of the Criminal Procedure Code.**
>
> **(4) That the magistrate did not consider his defence which was strong enough to rebut the prosecution's evidence contrary to section 154 of the Criminal Procedure Code.**
>
> **(5) The magistrate did not consider that he was not in possession of the alleged firearm or firearm accessories.**
>
> **(6) The investigations were not properly done.**

5. During the hearing of the appeal, the appellant relied on his written submissions which I have perused and considered and added orally that the police killed his donkey, took his identity card and that he did not know where those items were. He stated also that he was arrested from his house without ammunition and only saw the ammunition at the police station. He stated that he had lived at Kulan town between Liboi and Dadaab for 28 years.

6. In response, Mr. Okemwa the learned Principal Prosecuting Counsel submitted that this court should re-evaluate the evidence on record,

but maintained that the evidence on record for the prosecution was consistent, trustworthy and plausible.

7. Counsel said that possession of the three items in the charge sheet was proved and that the ballistic expert proved the genuineness of the ammunition and as well as the two magazines. Counsel submitted that the appellant did not have a certificate and that the magistrate's findings should thus be upheld. He stated that the sentence imposed by the magistrate was lenient.

8. In a short response the appellant said he was not in possession of any items mentioned by the prosecutor.

9. This being a first appeal, I am required to re-evaluate all the evidence afresh and come to my own independent conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanour. See the case of **Okeno vs Republic [1972] EA 32**.

10. I have re-evaluated the evidence on record. The prosecution called four witnesses in the case. PW1 was police constable Epoo Edwin who stated that on 17th September 2013 at about 6.30 in the morning, they were on patrol duties with other police officer on the Dadaab – Liboi road when they met a land cruiser motor vehicle carrying miraa being robbed by bandits, one of whom carried an AK47 rifle and the other one unarmed. They gave chase and the armed bandit exchanged fire with them while running in the bush. They however chased the two and managed to arrest the unarmed bandit who led them to a homestead with two houses in one of which they found a black bag and a mattress on the floor in which they found military combat uniform, two rifle magazines, a torch and other items as well as rounds of ammunition loaded in the two rifle magazines. PW2 was police constable Victor Baraza who also said they were on patrol duties and in Kadogo area they saw two people robbing a miraa vehicle. They gave chase and the armed bandit fired back at them in the bush but they managed to arrest the unarmed bandit who led them to a manyatta or homestead where on conducting a search found a bag underneath a mattress. It contained a green sleeping bag which was government stores only used by armed forces. They also found 2 magazines and 61 rounds of ammunition, and further a knife. According to this witness, the motor vehicle which was being robbed sped away and that was the reason they could not charge the appellant with robbery. PW4 police constable Nehemia Karua Wesonga testified that he filled an Exhibit Memo Form and forwarded the ammunition and magazines to the government analyst Nairobi for testing.

11. PW3 was Superintendent Lawrence Nthiwa a firearm examiner who produced the ballistic report prepared by Hassan Moningo a Firearms Examiner with whom they worked but who had resigned from the service. He stated that the 2 rifle magazines were serviceable and the ammunition was also live as 5 of the ammunition were test fired. He said that the magazines were confirmed to be for AK47 rifle and each could hold 30 rounds of ammunition.

12. The appellant gave sworn testimony and said that on the 17th September 2013 he went for branches to build a house, then took tea after which he heard gun shots and saw people running away. He was then arrested by the police who searched his house and took his Primary School Certificate and a mobile phone. He was thereafter taken by the police to the police station where he was shown a mattress and the other items. He denied committing the offence. In cross examination he said that he saw a Land Cruiser vehicle at the scene of his arrest. He called 3 other witnesses; Mohamed Omar Abdi DW2 who said that he knew that the appellant owned a cart and a donkey which had died. Said Hassan Mahat DW3 a step brother of the appellant who said he heard that the appellant had been arrested with ammunition. Abdi Abdinoor Mohamed DW4 said that he knew the appellant but did not know about the case.

13. Having perused the judgment, I find that the trial court dwelt so much on the defense of the appellant in a way that suggests that the trial court expected the appellant to prove his innocence. In my view, such action by the trial court amounted to shifting the burden of proof on the appellant.

14. Having said so, I do not think that the offence of possession of public stores contrary to section 324 (2) of the Penal Code was proved by the prosecution. The allegation was that the sleeping bag, jungle trouser and jungle jacket belonged to Kenya Defence Forces. No witness came to testify in court from the Kenya Defense Forces to prove that in deed the items belonged to them. In my view, mere resemblance of the garments by appearance was not adequate proof of ownership by Kenya Defence Forces as the prosecution was required to prove their allegations against the appellant beyond any reasonable doubt. I will thus acquit the appellant on Count 2 and set aside the sentence.

15. With regard to Count 1 and Count 3, the major issue to me relates to the possession of the items by the appellant, as the items were proved by the prosecution to be live ammunition as well as serviceable accessories for an AK47 rifle. The prosecution witnesses said that they found the items in the house of the appellant. The appellant said that he was arrested after taking tea and after hearing gun shots. He stated that he found the mattress and other items at the police station. He called witnesses who did not appear to know what happened. The appellant testified on oath and was cross-examined.

16. The incident is alleged to have taken place in broad daylight. The police witnesses were consistent that they traced or followed the appellant without losing sight of him until they restrained him and he took them to the house where they found the items. In cross examination the appellant admitted that his house was searched. The evidence of the prosecution on the search and recovery of the items is not detailed. They do not say they took an inventory of the items. They were certainly chasing the appellant because of an alleged attack on a miraa vehicle. He was not armed, while the person who was armed managed to escape. Why they went along to search his house, is anybody's guess. From the defence of the appellant, however it is possible that the items were planted on him merely because he appeared to be a bandit and ordinarily bandits use the ammunitions to execute their mission.

17. I find that the prosecution did not prove possession of the firearms and ammunition to the required standard. The 2 magazines were said to have been recovered and taken to the firearm examiner. However, the charge sheet only refers to 1 magazine and was not amended throughout. Secondly, the prosecution evidence was that the magazines were loaded with 61 rounds of ammunition. The firearm expert said that each magazine could only carry 30 rounds, which meant that all the 61 rounds of ammunition could not possibly be loaded on the 2 magazines as alleged.

18. With the above contradictions in my view therefore, the prosecution did not prove possession which was a crucial ingredient of the offence alleged.

19. I thus find merit in the appeal, and quash the conviction on Count 1, 2 and 3. I set aside the sentences imposed by the trial court. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Garissa this 19th day of September, 2018.

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George Dulu

JUDGE