KTI.NO.384/2018

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 58 OF 2017

PHILIP KAVOSYO MUSILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence in **Kyuso Principle Magistrate's Court Criminal Case No. 251 of 2017** by **M. Nasimiyu S R M** on **20/11/17**)*

J U D G M E N T

1. **Philip Kavosyo Musilu,** 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.** Particulars of the offence were that on the **13th** 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 **Eight extra 7.62mm Ammunitions.**

2. He pleaded guilty to the charge, was found guilty, convicted and sentenced to serve **seven (7) years imprisonment.**

3. Aggrieved by the conviction and sentence he appealed on grounds that: The plea of guilty was not unequivocal; the Appellant was not warned as to the implications of pleading guilty to establish if he understood the plea; inconsistencies in P.Exhibit 1 were not noted, analyzed and resolved as the Appellant was an authorized National Police Reservist; The sentence imposed in the circumstances was excessive and mitigating factors were not considered.

4. The Appeal was canvassed by way of written submissions. **Nzili and Company** for the Appellant in a two (2) paragraph write up 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 learned State Counsel **Mr. Mamba** urged that the manner of recording a plea was laid down in **Adan vs. Republic (1973) EA, 446** where the Court held that:

> ***"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 Appellant was told in Kiswahili of the charges facing him. The Prosecutor read the facts and the Appellant admitted the same as correct.

7. That the trial Court took note of the substance of charges and stated every element of it to the Appellant which left no doubt that he understood the charges and he confirmed the facts as true.

8. That the Prosecution produced six (6) exhibits being the fire arm J72049, 7 spent cartridges, bullet head, exhibit memo dated **14th November, 2017,** Ballistic Expert Report and a Kenya Police Arms Movement Book which clearly showed that the firearm assigned to the Appellant was the one that fired the bullet and the cartridges examined that linked him to the same. 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 meted out was the minimum sentence provided after the Court considered the Appellant's mitigation.

9. I am duty bound to reconsider what transpired in the Lower Court, assess it, and come up with my own conclusion.

10. The Appellant herein 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."

11. It is urged by the Appellant that both the conviction and sentence imposed should be quashed and set aside because the plea was equivocal.

12. 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."

13. **Section 207** of the **Criminal Procedure Code** provides for the procedure a Court should follow where an Accused person is called upon to plead to the charge. It provides 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."

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

15. 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."***

16. It is the disputation of the Appellant that not all the ingredients and facts of the offence were properly read out. However he does not demonstrate the alleged omission.

17. The charge against him was brought pursuant to the provisions of **Section 4(2)(a)** of the **Firearms Act (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."***

18. 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."***

Particulars of the offence were stipulated thus:

> ***"On the 13th 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 Eight extra 7.62mm ammunition."***

19. As correctly submitted by the learned Prosecuting Counsel for the State, when the plea was taken, a Court Assistant was present and he interpreted the language from English to Kiswahili, a language the Appellant, a Reservist with the National Police understood. The substance of the charge and all essential ingredients were read and translated to the him and he responded as follows:

> ***"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 as follows:

> ***"On the 6th November, 2017 the Accused person Philip Kavosyo Musilu was issued with a Fire Arm Senior No. J72049 G3 with 20 rounds of ammunition. On 9th November, 2017 there was a suspected murder case in Ikine Sub-Location, Kavaani Location and spent cartridges and a bullet head were recovered. On 13th November, 2017 upon the police carrying out investigations, the Accused returned the said firearm with 20 rounds of ammunitions. On 14th November, 2017, the said cartridges and the fire arm were taken to the ballistic laboratory in Nairobi and upon being examined it was established that the 7 spent cartridges and the bullet head were from fire arm Serial No. J72049 which had been issued to the Accused. The Accused person fired the said bullets and proceeded to add other ammunitions not issued to him. The additional ammunition was therefore acquired unlawfully. The Accused was arrested and charged.***
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> ***PEXH 1 – G3 S. No. J2049.***
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> ***PEXH 2 – 7 Spent cartridge.***
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> ***PEXH 3 – Bullet Head.***
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> ***PEXH 4 – Exhibit Memo dated 14th November, 2017.***
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> ***PEXH 5 – Ballistic expert Report dated 14th November, 2017.***
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> ***PEXH 6 – Kenya Police Kyuso Arms Movement Book."***

20. The Appellant was granted the opportunity of responding to facts. He admitted the correctness of the same. In the result, the Court found him guilty, convicted and sentenced him as provided in law. There was no evidence of misapprehension of facts.

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

22. The sentence imposed by the Lower Court is alleged to have been 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."***

23. **Section 4(3)(a)** of the **Firearms Act** provides that:

> ***"(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;"***

24. 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;"***

25. 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.

26. In the premises the Appeal lacks merit and is dismissed in its entirety.

27. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **18th** day of **September,** 20**18.**

L. N. MUTENDE

JUDGE