REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T GARISSA

CRIMINAL APPEAL NO. 33 OF 2015

ALI MOHAMED ABDI ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

From original conviction and sentence in Criminal case No. 354 of 2015 of the PM Magistrate's court at Wajir – B. Rogocho RM)

JUDGMENT

The appellant was charged in the Magistrate's court at Wajir with possession of Government Stores Contrary to Section 324(2) as read with Section 36 of the Penal Code. The particulars of the offence were that on 30th September 2014 at Township Location in Wajir East District within Wajir County had in his possession Government Stores namely Administration Police smoke jacket being reasonably suspected of having been stolen or unlawfully obtained.

He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve 20 months imprisonment with no option of a fine.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. That he pleaded not guilty to the charge.
2. That PWI and PW2 did not produce a marked exhibit as required by law which therefore clearly points to the fact that the military jacket was planted on him.
3. That the Investigating Officer plainly admitted in court that she relied heavily on the evidence of PWI and PW2.
4. That the trial magistrate had discharged him under Section 210 under the Criminal Procedure Code only, to change his verdict when the prosecutor said he was a habitual criminal citing a case he had served in the year 2005.
5. That the verdict of 20 months imprisonment for the offence which he did not commit is very unfair.

The facts in brief are as follows:-

During the trial the prosecution called 3 witnesses. PWI was PC Waweru of Wajir Police Station who testified that on 20th September 2014 at around 11 pm, as he was on his way to the police lines at Wajir with PC Wambua, they met a person at the Wajir Prison gate who was wearing an AP jungle jacket. They stopped him and on interrogation he said his name was Ali Mohammed a KPR from Leheley. When they asked him for an Identification card he did not produce any. They thus took him to the police station for further interrogation searched his body and took the jacket from him. He identified

the jacket and produced the same as exhibit in court. He stated that the OCS of Wajir Police Station who was in charge of the KPR at Leheley denied knowing the appellant and concluded that the appellant was not a KPR from Leheley They thus charged him. He said that the appellant was that person.

In cross examination he maintained that they found the appellant outside Wajir Prison gate and maintained that the jacket was an AP jungle jacket. He denied lying in court. He stated that the jacket belonged to the appellant.

PW2 was PC Wambua of Wajir Police Station. It was his evidence that on 20th September 2014 at 3.30 hours, he was walking from the station police lines in the company of PC Waweru (PW1). When they reached the Wajir Prison gate, they met a man wearing an AP Jungle jacket. They stopped the man, interrogated him and he said he was a KPR officer from Leheley but did not have documents to support that statement. They thus arrested and escorted him to the police station

where the OCS to whom the Leheley KPR usually report, said that the man was not a KPR. AS such the appellant was charged in court.

In cross examination, he stated that though they interrogated the appellant they did not record the discussion. He denied that they were carrying the jacket and maintained that the appellant was wearing it. He admitted that the jacket did not have the name of the appellant.

PW3 was PC Mwanaisha of Wajir Police Station. It was her evidence that on 21st September 2014, she was assigned this case and after perusal of the OB, carried out further interrogation and found that the suspect was not a KPR officer. They thus charged him in court. She identified the jacket in court.

In cross examination, she agreed that she did not arrest the appellant but merely interrogated him and that the appellant did not give his KPR number. She admitted that the jacket did not bear the name of the appellant.

When put on his defence, the appellant gave sworn testimony. He said that his name was Ali Mohammed Abdi. He stated that there was a grudge between him and the KPR Officers of Wajir and they were not happy because he was a manager in a lodging. He stated that those

KPR officers fixed him in the case and that the police who testified in the case were not the ones who arrested him. He denied committing the offence.

In cross examination, he stated that he lived at Wagberi and was arrested at the prison compound.

This being a first appeal, I have to start by reminding myself that as a first appellate court I am required to evaluate the evidence on record afresh and come to my own conclusions and inferences see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re evaluated the evidence on record. The appellant has raised several grounds of appeal.

In his submissions he stated that the charges were not in his names as he was not Mohammed Ali Mohamed. It is true that the appellant was described in the charge sheet as Ali Mohammed Abdi alias Mohamed Ali Mohamed. He is now denying the alias name Mohamed Ali Mohamed. He agreed however that he is called Ali Mohamed Abdi.

In my view even if there was an irregularity in using an alias name, it did not prejudice the appellant as he was aware that his name was Ali

Mohammed Abdi. He was also aware of the charges and allegations against him, on which he defended himself effectively through cross examination of prosecution witnesses and in his defence. In my view therefore, even if the alias name was a mistake, the appellant was not prejudiced and as such the irregularity was curable under the Provisions of 382 of the Criminal Procedure Code (cap.75).

The appellant submitted that he was arrested at the lodging on an allegation that he was harboring refugees. That contention is being raised on appeal. The record does not show that the appellant suggested either in cross examination or in his defence, which was sworn, that he was arrested at a lodging on allegations that he was harboring refugees. The prosecution put it very clearly in their evidence that they arrested him at the prison gates. In his defence, other than saying that the KPR Officers were envious that he was managing a lodge, there was no suggestion that he was arrested at the lodge. As such in my view the appellant attempting to tender new evidence on appeal, which is not acceptable. He should have put that defence before the magistrate for

the trial court to consider the same. New evidence on appeal can only be tendered through specific legal parameters, on application, and cannot be tendered through mere submissions.

In his submissions, the appellant complained that there was no evidence that he owned the jacket and stated that the military jacket was planted on him, and was not produced in court. My perusal of the evidence convinces me that the evidence of PWI and PW2 was very clear that the appellant was actually wearing the jacket and is said that he was a KPR officer. That evidence of the prosecution witnesses was not shaken in any way even in cross examination.

The appellant dwelt on the fact that the jacket did not have his name, which was not the same thing as saying that he was not wearing that jacket. In my view the evidence of PWI, PW2, and PW3 who was the Investigating Officer, was clear, cogent and consistent that the appellant was found at the prison gates in Wajir town wearing an AP Jacket. The jacket was produced in court. His allegation to PWI and PW2 that he was wearing the jacket because he was a member of the KPR was proved to be a lie. The allegation that he was a member of the KPR was not established because the OCS who was in charge of the KPR, denied that the appellant was a member of the KPR. Even in court the appellant did

not give any information about his membership of the KPR and merely said that other KPR officers had a grudge against him because he was the manager of a lodging. In my view the learned magistrate was correct in finding that the appellant was found wearing the jacket.

Though the appellant contended in his grounds of appeal that he was discharged under section 210 of the Criminal Procedure Code (cap.75), but later convicted by the trial court after the prosecutor said he was a habitual criminal, there is no record of his having been so discharged. That ground is thus dismissed.

The burden is always on the prosecution to prove the allegations against an accused beyond reasonable doubt. In my view the prosecution proved the charge against the appellant beyond any reasonable doubts. There is no doubt, the jacket was won by the appellant during arrest, and resembled the uniform of AP Officers. This satisfied the requirements for the offence. I will uphold the conviction.

With regard to sentence, the sentence for the offence is governed by the provisions of section 36 of Penal Code (cap.63) which provides as follows:-

> **36*"when in this code no punishment is specially provided for any mis demeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both."***

The learned magistrate sentenced the appellant to serve 20 months imprisonment with no option of a fine. Before sentencing the prosecutor stated that the appellant had previously been convicted in Criminal Case No. 21 of 2005 Wajir Law Court. The appellant confirmed that he had been imprisoned.

The sentence of 20 months imprisonment was a lawful sentence, as it fell within the two years imprisonment which was the maximum sentence. The area in Wajir has had high incidence of insecurity, and therefore an offence such as unauthorized use of uniform meant for the disciplined forces, is a serious matter. However the offence is a mis demeanor and though the appellant had a previous conviction, it is not clear whether the conviction was similar to the present one. In my view therefore the sentence of 20 months imprisonment with no option of a fine was harsh and excessive. I will thus reduce the sentence to twelve months imprisonment.

To conclude, I uphold the conviction of the trial court. With regard to the sentence, I set aside the sentence of 20 months imprisonment with no option of a fine, and substitute a sentence of 12 months imprisonment from the date in which the appellant was sentenced by the trial court.

Dated and delivered at Garissa this 3rd February 2016.

GEORGE DULU

JUDGE