



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 164 OF 2013

MOHAMED ABDI ISMAEL..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1539 of 2013 – B. J. Ndeda SPM)

JUDGMENT

The appellant was charged in the subordinate court with four counts. He was charged with another called Ahmed Nur Mohamed. Count 1 was for being in possession of a firearm without a firearms certificate contrary to section 4 (2) (a) of the firearm Cap 114 Laws of Kenya. The particulars of the charge were that on 3rd November 2013 at Kambio Refugee Camp in Fafi District within Garissa County jointly were found in possession of one firearm make tokalev S/No. 19003624 without a firearm certificate. In count 2 he was charged jointly with the other person with possession of ammunitions without a firearm certificate contrary to section 4 (2) of the Firearm Act. The particulars were that on the same day and place jointly were found in possession of five rounds of 7.62 x 25mm ammunitions without a firearms certificate. Count 3 was for possession of firearm accessories contrary to section 26 (1) (e) of the Firearm Act. The particulars of the offence were that on the same day and place jointly were found in possession of firearm accessories namely tokalev magazine without a Firearms Certificate. Count 4 was for conveying suspected stolen property contrary to section 323 of the Penal Code. The particulars of the offence were that on the same day and place having been detained by number 233595 Ins. Yunis Samir as a result of the exercise of the powers conversed by section 26 (c) of the Criminal Procedure Code jointly were found conveying 3 mobile phones make Nokia 2626, Nokia M2 and Tecno T345 reasonably suspected to have been stolen or unlawfully obtained.

When the charges were read to them, on 5/11/2013 the appellant was recorded as having pleaded guilty to count 1, 2, and count 3. He was recorded as not pleaded guilty to count 4. His co-accused Ahmed Nur Mohamed pleaded not guilty to all counts. The case was adjourned to 6th November 2013 for the prosecutor to give summary of the facts.

On that day the prosecutor gave a summary of the facts and the accused was recorded as having agreed to the facts. He was thus convicted on the three counts and sentenced to serve 7 years custodial sentence on each. With regard to count 4 the case was fixed for hearing on 14th of January 2014.

Subsequent to the conviction and sentence, the appellant on 17th February 2014 made an application for revision of the sentence and order of the court. The request was in writing. He stated that he pleaded guilty and did not waste the courts time and therefore his sentence should be reviewed. In the same request for revision however he challenged the conviction on various grounds. According to him the facts

given by the prosecutor neither proved that the item was a firearm nor that he was in possession of the same.

The revision application was determined by the court through a ruling delivered on 18th June 2014. The court relying on section 364 (5) of the Criminal Procedure Code held that since there was an avenue for appeal it was wrong for the appellant to use the revision procedure. The court thus gave an opinion that the appellant brings an appeal instead.

Thereafter the appellant on 2nd July 2014 filed his appeal in this court following an application to appeal out of time. The grounds of appeal are as follows:-

1. That the learned trial magistrate erred in law and fact in entering and convicting the appellant on a plea of guilty when the plea was unequivocal.
2. The learned trial magistrate erred in law and fact in failing to warn the appellant on the implication of his own plea or to establish if he understood the plea.
3. The learned trial magistrate erred in law and in fact in failing to establish beyond any reasonable doubt scientifically if the alleged weapons were indeed firearm as described under the Firearms Act cap 144 Laws of Kenya.
4. The trial magistrate erred in law and in fact when he convicted and sentenced the appellant when the charge sheet and facts which were read were too ambiguous thereby leaving more questions than answers as to who was and did what was in question.
5. The learned trial magistrate erred in law and in fact when he convicted the appellant without considering that the charge sheet did not support the facts that were read out and by and large they were never proved beyond reasonable doubt.
6. The learned trial magistrate erred in law and fact in convicting and passing out a severe sentence which was too excessive for a first offender.

The appellant also filed written submissions to the appeal which I have perused. He relied on the written submissions.

Learned Prosecuting Counsel Mr. Orwa submitted that the appellant was recorded as having pleaded guilty to the charges. However the facts given by the prosecution were confusing and it was not clear whether they were directed at one accused or the two of them. The facts do not indicate the person from which the pistol was recovered. The mobile phones recovered were also not produced in court thus creating lack of logic. There was confusion in identifying the serial numbers of the mobile phones as the same numbers appear to have been used for the pistol. According to counsel there was no evidence of a technical nature to establish that the pistol was a firearm. Counsel submitted that the court should determine the matter on its merits. The court could also consider a retrial.

In response the appellant submitted that the case against him was fabricated. That he did not own the house where he was chewing miraa. He stated that the people who came and arrested him must have come with the firearm.

This being a first appeal I am duty bound to re-evaluate the evidence and the record and come to my own conclusions and inferences. See the case of *Okeno Vs. Republic [1972] EA 32*.

The appellant was recorded as having pleaded guilty to three of the four counts brought against him. He was convicted on these three counts, and the fourth count was to go for full trial. He has now appealed regarding the conviction and sentence in the three counts. The learned Prosecuting Counsel Mr. Orwa has submitted that the conviction was not based on facts. That the facts did not prove with certainty that the appellant committed the offences, and that his plea was therefore not unequivocal. He has not however stated he concedes to the appeal.

I have perused the record. The facts as given by the prosecutor were that the appellant and the other accused were in the house. They were sitting on a mat chewing miraa. Police officers had received intelligent information that the occupants of the house had a pistol and ammunition. They proceeded there

and found the two and when they searched on the mat they found a pistol loaded with 5 rounds of ammunition and 3 mobile phones. Both the people who were found there were arrested and charged. They were charged jointly. When the facts were summarized for count 1, 2 and 3, in court the appellant was recorded as having stated as follows “facts are correct. I had the pistol.”

In my view the above statement by the appellant clearly shows that he knew the existence of the pistol and that he was in possession of it. Though he has complained on appeal that he was not the owner of the house, he himself admitted that he had the pistol. Therefore ownership of the house ceased to be a material fact to be considered by the court. The appellant also in mitigation stated as follows “I plead for leniency. I am a transitional federal Government soldier. I belong to the Somali national army. My service No. is 1000217”.

It is clear to me from what the appellant said above that he was not the owner of the house. He was a visitor. Since he admitted that he had possession of the pistol, in my view the plea of guilty and conviction was proper and in line with what was stated in the case of *Adan Vs. Republic [1973] EA 455.*

The appellant has also complained that the said pistol was brought by the people who came and arrested him. This allegation is negated by his own statement in the trial court that the pistol belonged to him or that he possessed it. This contention in my view is an afterthought.

The appellant has also contended that there was no proof that the pistol was a firearm that there was no technical evidence to prove that it was a firearm. Indeed there was no evidence from the ballistic examiner. However in my view technical evidence is required only when there is a shade of doubt. In our present case the appellant admitted that it was a pistol with ammunition, with a magazine and that he himself was a member of the Transitional Federal Government of Somalia Army. In my view the circumstances of this case are such that the facts given by the prosecutor were adequate to establish commission of the offences.

The learned Prosecuting Counsel has stated that the mobile phones were not produced and their numbers were confusing with those ones of the pistol. I do not see any evidence of confusing numbers between the mobile phones and the pistol. It must be noted that the appellant did not plead guilty to the charge relating to the mobile phones. The proof of that charge is subject to a full trial and is therefore not part of the convictions on a plea of guilty to the first three counts.

I observe that the sentence imposed was 7 years on each count. The learned magistrate did not state whether the sentences would run consecutively or concurrently. In my view, since the charges arose from the same circumstances, I would think that the sentences should have been ordered to run concurrently. As the learned magistrate did not state whether the sentences were concurrent it meant that they would be consecutive, which is wrong. I will thus order that the sentences will run concurrently.

To conclude I dismiss the appeal on conviction and uphold the conviction of the learned magistrate. With regard to sentence I order that the sentences will run concurrently from the date on which they were imposed by the trial court.

Dated and delivered at Garissa this 5th day of May, 2015

GEORGE DULU

JUDGE