



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 68 OF 2012

**FROM THE ORIGINAL CONVICTION AND SENTENCE OF THE SENIOR PRINCIPAL
MAGISTRATE (J.N.ONYIEGO) IN GARISSA CHIEF MAGISTRATE'S CRIMINAL CASE NO.
3095 OF 2011.**

AHMED SALAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Ahmed Salat, the appellant in this judgement, was charged with being in possession of ammunition without a certificate contrary to section 4 (2) (a) of the Firearm Act (Cap.114 Laws of Kenya). The particulars are that on 23rd of December 2011 at Liboi sub-location, Lagdera District within Garissa County was found being in possession of twelve rounds of 7.62 by 39mm ammunitions without a valid Firearm certificate.

The evidence

Three witnesses testified in support of the prosecution case. Johnstone Musyoki Mwongela, PW1, is the firearms examiner who examined and tested the twelve rounds of ammunitions presented to him by Police Constable John Misoi, PW3. He picked three of them and test fired them. He found them to be live ammunition capable of being fired and concluded that they were ammunitions as defined under the Firearms Act, Cap 114 Laws of Kenya. He produced the report contained his findings as exhibit three.

The twelve rounds of ammunition had been recovered from the appellant according to the evidence of Corporal Stanley Kimatu, PW2, and PW3 both of Liboi Police Station. According to their evidence they were instructed by the Officer in Charge of the Station C.I Alfred Shigholi to go and intercept a bus carrying a suspect suspected to be carrying ammunitions. In company of other police officers, PW2 proceeded Kulan area where they laid ambush. They spotted bus registration number KAP 997T operated by Sagal Bus Services arriving from

Garissa and stopped it. PW2 directed to driver to drive the bus with all passengers on board to the Liboi Police Stations. A search was conducted on the passengers.

The evidence shows that the police had information that the appellant, one of the passengers, had ammunition in his pocket. They took the appellant to the police station and PW3 searched him. He was found with the ammunition in his trouser pocket. He was charged with this offence.

In his defence, the appellant told the trial court that he was herding livestock on the day he was arrested. He denied having ammunition and said the case was fabricated.

The trial magistrate was convinced that the appellant was found with ammunition without a licence and termed his defence as unsatisfactory and a mere denial. He found the case proved beyond reasonable doubt and convicted the appellant. He sentenced him to ten years imprisonment.

Petition of appeal

The appellant is aggrieved by the conviction and sentence and has come to this court on appeal. In his self made grounds of appeal, the appellant states that the trial magistrate relied mainly on police statements; that he was unable to follow proceedings due to language; that the police plotted to 'fix' him because he was a police officer from Somalia and had differences with the area chief of Liboi; that he was not allowed time to look for his witnesses and that the trial magistrate did not consider his case.

Upon coming on record, Mr. C.P Onono, for the appellant filed a Petition of Appeal dated 3rd April 2013 listing two grounds of appeal that the proceedings are not an accurate record of the trial before the lower court to the extent that the appellant was denied a chance to call witnesses despite having informed the court that he had witnesses to call and that the conviction of the appellant was not safe.

Appellant's submissions

Counsel for the appellant submitted that the record of the trial court is not correct; that the record on 22nd February 2012 shows that the appellant would give a sworn statement and call three witnesses; that on 23rd February 2012 the appellant informed the court that he was not able to contact his witnesses at Liboi and Nairobi and required time to contact them. However, the record of the court dated 30th March 2012 shows that the appellant did not have witnesses to call; that the record of the court is not accurate and that the appellant's assistant chief was a key witness who ought to have been summoned to testify. Counsel further submitted that the appellant pleaded his innocence. The appellant is seeking retrial.

Respondent's submissions

The appeal was opposed by the learned state counsel who submitted that the case was handled by two magistrates and the appellant agreed that the case should proceed from where the first magistrate left it; that the second magistrate explained to the appellant his rights and he informed the magistrate that he would give a sworn defence with no witnesses which can only mean that he had decided not to call any witnesses.

Determination

As expected of this court sitting on first appeal, I have evaluated and analysed the evidence afresh. The evidence of PW2 is clear that they were acting on a tip off. He did not say who had tipped the police on this matter. PW3 stated that he searched the appellant and found him with twelve rounds of ammunition wrapped in a black paper bag. I have considered this evidence and the trial magistrate's analysis of the same and I find nothing out of ordinary. The trial magistrate analysed the evidence as required of him and arrived at a conclusion that the appellant was guilty as charged.

The first magistrate heard the case to the stage where he put the appellant on his defence. The appellant told the court that he had three witnesses and needed time to call them. This was on 22nd February 2012 prompting the trial court to adjourn the matter to the following day. This to me was not adequate time given that the appellant was in custody. The appellant was not however prejudiced as on 23rd February 2012 when he sought time and was allowed up to 28th March 2012.

The trial magistrate was transferred and another magistrate took over the matter. The appellant was also released on bond. When the matter came for hearing on 28th March 2012 section 200 of the Criminal

Procedure Code was explained to the appellant and he opted to have the matter proceed without recalling the witnesses who had already testified. The trial magistrate explained section 211 CPC afresh to the appellant who informed the court that he would make a sworn statement and had no witnesses to call.

The record of the court is not wrong as alleged by counsel for the appellant. The record in my view reflects what the appellant informed the court. Up to that stage of the trial, I find no prejudice on the part of the appellant. The appellant was within his rights to state that the case was fabricated.

The only mistake the trial court committed in my considered view is failure to indicate that the appellant had closed his case. After the appellant was cross examined, the trial magistrate proceeded to give a date for judgement without indicating that the appellant had closed his case and this is an error on his part which affects the fair trial of the appellant.

In my view therefore, procedure was not followed. To allow the appellant to be accorded a fair trial this court will and does hereby order a retrial before a different magistrate. The appeal fails on all the grounds advanced. However, due to the failure of the trial court to indicate that the appellant had closed his case this case shall be retried. I make orders accordingly.

Dated, signed and delivered this 11th February 2014.

S.N.MUTUKU

JUDGE