REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 1237 OF 1992

MOHAMED GOHAD MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No 456 of 1992 of the Senior Resident Magistrate's Court at Garissa: Nduku Njuki, Esq)

JUDGMENT

The appellant, Mohamed Gohad Mohamed, was charged before the learned magistrate (designation not specified), Garissa of the offence of being in possession of ammunition without a firearm certificate contrary to section 4 (1) of the Firearms Act (cap 114, Laws of Kenya). The particulars of the offence were that on the 8th day of July, 1992 at 9.40 (whether am or pm- not specified) at Garissa Police Station within Garissa District of the North Eastern Province was found in possession of 200 rounds of ammunition of unknown caliber and two empty magazines of unknown firearm without a valid firearm certificate.

When the charge was put to the appellant, he replied, " It is true." The facts were then outlined by the prosecution and the appellant replied, " I do admit all the facts as true."

The Court is then on record to have entered a plea of guilty and having heard from the prosecutor that he does not have the previous record of the accused, etc, the Court proceeded to sentence him to a period of 6 years imprisonment.

It has been argued on appeal that the appellant was "convicted" on a plea which did not amount to unequivocal plea of guilty as the language used by the Court was not shown and the charge was not read to the appellant in a language which he understands. I will shortly revert to the question of language, but I wish first of all to point out that no conviction was entered against the appellant. The record does not show that the appellant was convicted of the offence charged whether or not on his own plea of guilty. No punishment can be imposed on an accused person by a Court of law unless such person is found guilty of an offence and duly convicted. Where there is no record of any such conviction having been entered, as is the case here, then such sentence is improperly imposed and the whole proceedings become a nullity.

Going back to the record, it is essential that the language used in a trial should be stated and that the charge ought to be read and explained to the accused in a language which he understands. Although in the instant case the court clerk was duly named, there is no record of the kind of language that was being used. The only time when the Court became nearer to specifying the language used was after the facts had been outlined by the prosecutor and the accused then indicated as having said in " *Kisomali*" that he admits the facts as true. This by itself does not show that the proceedings were conducted in *"Kisomali"*. The need to specify the language used in criminal proceedings was stressed by the Court of Appeal in the case of *Diba Wako Kiyato v Republic* [1982-88] 1 KLR 794. Furthermore we have repeatedly held that a reply by an accused person to the charge that " It is true" does not really mean that the accused fully understands the charge and wishes to admit each and every essential ingredient thereof: *Adan v Republic* [1973] EA 445; *Lusiti v Republic* KLR 143. Of course there are certain instances where detailed narration of facts can cure a plea which is otherwise equivocal: *Daniel Wachira v Republic* (Nakuru Cr Appeal No

181 of 1988) (Unreported).

Although the facts of the case appear to have been set out in sufficient detail, the “conviction” of the appellant would be a nullity for reasons already set out, ie the language of the Court was not specified, the plea was equivocal; there was no record of conviction having been entered; and finally, the appellant was not given a chance to say anything in mitigation.

Learned state counsel concedes this appeal but asks for a re-trial. I think that in view of the nature of the offence that was laid against the appellant and the large number of ammunitions he is said to have been found with, a re-trial is necessary as a conviction may well be achieved. Learned counsel for the appellant does not object to a re-trial being ordered.

For reasons given, I allow the appeal. I quash the conviction of the appellant and set aside the sentence that was imposed. I order that a re-trial be held by a magistrate of competent jurisdiction. I direct that the appellant shall be held in custody and expeditiously produced before the Chief Magistrate, Nairobi for plea.

Dated and delivered at Nairobi this 25th day of September 1992.

S.O OGUK

JUDGE