REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 318 OF 1986

KIALA…….,……..……APPELLANT

V

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant was convicted by the learned resident magistrate of being in possession of 15 rounds of ammunition contrary to section 4(2) (a) of the Firearms Act, cap114 Laws of Kenya and was sentenced to imprisonment for 2 years.

Sergeant Shangalla (PW 1) and PC Musyimi (PW 3) of CID, Machakos, who were investigating a case of robbery at Kangundo interrogated two suspects, who led these police officers to the house of the appellant in Nairobi during the night of March 18, 1985. These police officers were with some other police officers from Nairobi, amongst whom was I/P Julius Katonyi. The door of the one roomed house was broken into when appellant and his wife who were inside did not respond to the knocks of the police officers. After identifying themselves and demanding search, these two police officers searched the house. Amongst the clothes hanging on the wall, they found a coat. Inside one of the pockets of the coat they found a box containing 8 rounds of ammunition and in another pocket of the same coat they found a match box containing 7 rounds of ammunition, all of which were later examined and tested by a ballistic expert (PW 2) who testified that these were live rounds of ammunition as defined under the Firearms Act.

Upon being questioned by Seargent Shangalla the appellant said that he had forgotten these rounds of ammunition in his pocket as he had a similar case in Nairobi, whilst his wife said that the appellant had just arrived from town wearing the said coat.

Both the appellant and his wife were charged but he wife was properly acquitted.

The appellant's defence was that the police officers led by Inspector Katonyi came to his house and searched the same but they did not find anything. His shop at Yatta was searched but nothing was recovered. At Kangundo Police Station, he was tortured and interrogated about a pistol but he denied knowledge of the same. The wife's statutory statement was to the effect that police broke open the door whilst she was about to open the same and I/P Kitonyi said that "he is the one" and her husband was questioned about a pistol. They searched the house and took away 2 watches and a coat. She contended that the ammunition was not found in their house.

The learned magistrate considered all the evidence and accepted the evidence of the police officers with regard to finding of rounds of ammunitions in the coat at the house of the appellant.

In a lengthy memorandum of appeal, the appellant submits that common intention was not established, that the learned magistrate acted on hearsay evidence of a single witness, that there ought to have been 30 rounds of ammunition, if both police officers found 15 rounds each, that his defence was rejected without sufficient or reasonable grounds, that the learned magistrate unjustifiably disallowed the evidence of his co-accused, which exonerated him, that the prosecution failed to produce the suspect who had mentioned his name and that there was not independent evidence to support the allegations of the two police officers and that the sentence is manifestly harsh and excessive. The appellant has repeated more or less these

grounds in his written submissions at the hearing of the appeal.

With respect, this was not a case where common intention need to be established. Although the learned magistrate took into account the hearsay information of the suspects to the police that a pistol may be found in the house of the appellant his error did not occasion miscarriage of justice.

There was not question of 30 rounds as both witnesses testified about the same search from the pocket of the coat though there were discrepancies in their evidence, which was not material. It cannot be said that the learned magistrate rejected the defence of the appellant and the statutory statement of the wife of the appellant with sufficient or reasonable grounds. In fact, the learned trial magistrate did more than that in considering whether the vebulous suggestion of the appellant under crossexamination that Inspector Kitonyi may have planted the ammunition. The learned magistrate properly rejected such allegation. It was not necessary to call the suspects for robbery who pointed out the house of the appellant unless the circumstances so required such evidence. It was not necessary in this case, where rounds of ammunition were found whilst searching for the pistol. In any event, the appellant was not charged with these suspects nor did circumstances require prosecution to call the suspects who may not have been charged with any offence unless there was a possibility raised that the suspects had planted such ammunition. It was not so raised here.

Upon consideration of all the evidence before the trial court, I am satisfied that the appellant was properly convicted.

The sentence of 2 years imprisonment for possession of rounds of ammunition by a person who had two previous convictions for offence against property was eminently reasonable.

In the event, the appeal is dismissed in its entirety.

April 24 ,1987

ABDULLAH J