

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**CRIMINAL APPEAL NO. E006 OF 2025**

**MOHAMMED MUTUA HASSAN.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC .....**  
**.....RESPONDENT**

**(Being an appeal against the original Conviction and sentence of the Hon .C. Wekesa, Senior Principal Magistrate, delivered on 26.02.2024 in Marsabit MCCR No E079 of 2023 )**

**BETWEEN**

**REPUBLIC**  
**.....PROSECUTOR**

**VERSUS**

**MOHAMMED MUTUA HASSAN.....ACCUSED**  
**PERSON**

## **JUDGEMENT**

### **A. INTRODUCTION**

1. The Appellant, **Mohammed Mutua Hassan** charged was charged with the offence of **being in possession of a ammunition without holding a firearm certificate, contrary to section 4 (1), (2),(a) as read with Section 3(a) of the Firearms Act, Cap 114 Laws of Kenya**. The particulars were that on the 5<sup>th</sup> day of May, 2023, at Wabera Street within Marsabit town within Marsabit County, without reasonable excuse, he was found in possession of 4 rounds of 7.62mm x 39mm special in circumstances which raised reasonable presumption that the said ammunition was intended to be used in a manner prejudicial to public order, without a firearm certificate.

### **B. FACTS AT TRIAL**

2. **PW1 PC Elphas Simiyu**, formally stationed at DCI Marsabit Central police station, but currently stationed at DCI Starehe, recalled that on 05.05.2023 at about 8.00 hours, they went to the home of the accused at Wabera street within Marsabit town, on

the basis that he had been adversely mentioned in a shooting incident that had been reported vide OB 40/21/4/2023, which occurred along Bank quarters.

3. They did introduce themselves to him and proceeded to conduct a search within his house, and in the process, his colleague PC Justine Munene found a small black polythene bag which had four (4) rounds of live ammunition. They also recovered a pair of tactical military boots, military trousers, a black toy gun, and a military jungle jacket. He did further prepare an inventory of the recovered items before escorting the accused to Marsabit central police station, where further interrogation was done, before they preferred the charge he faced before the court.
4. PW1 identified the recovered ammunition, the search certificate signed by the appellant, and the inventory, which the appellant refused to sign. He also identified the accused person as the person they arrested in possession of the ammunition on the date in question. Under cross-examination, PW1 reiterated his earlier evidence and confirmed that the ammunition was recovered from the appellant's house by PC Munene, hidden between several small

mattresses. He also denied falsely implicating the appellant and/or planting the ammunition on him

5. **PW2 Cpr Simon Muchere** testified that he worked at DCI headquarters, ballistic department, and was a qualified ballistic examiner, having trained in ballistic and two-mark examination at the Regional Forensic Laboratory and had also received further training in weapon technical intelligence at the Humanitarian and Peace Support School, situated in Embakasi. He had worked for the said department for the last 6 years
6. Before court, he had a ballistic report authored by his colleague, Mr Lawrence Nthiwa, and was allowed to present the same based on the provisions of **Section 33 of the Evidence Act**. Their office did receive an exhibit memo form, and four ammunition marked A1 – A4 from PC Justine Munene, who desired to ascertain whether the said Exhibits were ammunition, and if so, which caliber and firearm could be used to fire the same. The ammunition examined was found to be 7.62mm x 39mm, and two rounds were randomly picked and successfully test-fired within laboratory setting.

7. As a result, the examiner did form the opinion that the ammunition (A1 to A4 ) were designated to be fired by a firearm in the caliber of 7.62mm x 39mm, such as AK-47 Rifle, were capable of being fired, and thereby were ammunition as defined by the Firearms Act, Cap 114 Laws of Kenya. PW2 produced the firearm report dated 24.05.2023 and the exhibit memo form as exhibits before the court.
8. Under cross-examination, PW2 confirmed that the ammunition recovered was not connected to any particular firearm and that, in their line of duty, their role was to confirm if the ammunition recovered was a firearm as defined under the Firearms Act. They did not undertake fingerprint examination on the ammunition recovered, nor could they tell, from whom the said ammunition was recovered, as that was the work of other agencies within DCI and the investigating officer.
9. **PW3 Pc Justine Munene** of DCI Marsabit Central confirmed that their office had received a report of a shooting incident made via OB No 40/24/4/2023, which incident had occurred at Bank quarters along Marsabit - Badassa Road. While investigating the said

case, the appellant had been adversely mentioned as a suspect, and acting on intelligence report, they had located the appellant's home and raided the same on 05.05.2023.

10. They did systematically searched through all rooms, and while at the bedroom, he uncovered several small mattresses, under the main mattress, and came across a black polythene paper bag. Upon untying the same, he found four (4) rounds of live ammunition. Therein he also discovered one pair of tactical military boots, tactical military trouser, plastic toy pistol and military jacket. He thereafter prepared a search certificate, which was duly signed by the appellant, while his colleague Pc Elphas Simiyu prepared the inventory of recovered items.
11. They thereafter proceeded to arrest the appellant and escorted him to Marsabit police station. He later prepared the Exhibit Memo form and forwarded the recovered ammunition for examination at DCI headquarters. The same were tested and it was confirmed that they were ammunition as defined under the Firearms Act. PW3 produced all the recovered items as Exhibits before court and

positively identified the appellant as the person they arrested on the material morning.

12. Under cross examination PW3 confirmed that they had arrested the appellant as he came out of the pit latrine and thereafter proceeded to search his house in his presence, where they had recovered the items produced before the court as Exhibits. Further he confirmed that they did not take photographs of the recovered items as they were not scene of crime officers, nor did he opt to charge the appellant for being in possession of government stores since the recovered military attire did not have government ownership marks.

### **C. DEFENCE CASE**

13. The appellant was placed on his defence and opted to give sworn evidence. He recalled that on 14.04.2022 his relative had been shot within town. They rushed him to hospital and he had unfortunately passed on while being treated at the hospital. They proceeded to bury him on the same day and during the funeral, a scuffle had ensued and he was arrested and detained by the police from 12.30 pm to 3.00pm.

14. After the said occurrence, he became a marked man for loudly protesting against the injustice (unlawful killing) which had occurred. He averred that the charges levelled against him had been fabricated and urged the court to note that the officer who conducted the ballistic examination had not attend court, the said ballistic report failed to include the code Number, and the OB extract of No 26/5/2022, which detailed his arrested captioned the same as 1.17pm, yet the witnesses had alleged that he was arrested at 8.30 a.m.
15. The appellant further accused the DCI of breaking into his house, while he was away at his father's house and had proceeded to plant the ammunition presented before the court to falsely implicate him. Be that as it may the appellant confirmed the cloths recovered were his, which cloths he had obtained from his work place at the county government and the that one of the rooms within his house had many mattresses because it was the children's room. The toy pistol also belonged to his son.
16. The appellant further testified that he was a trained police officer and could not keep ammunition in his

house as he knew that would be illegal nor had he involved himself in criminal activity. Under cross examination the appellant confirmed that before retiring, he was attached to the DCI flying squad team and anti-narcotic squad too. He had been arrested twice on 14.04.2022 and later on 05.05.2022 at about 7.00pm. He reiterated that when the police searched his home, he was not there but again contradicted himself by stating that he was at the toilet, when the DCI officer arrived and that Pc Munene had drawn his gun on him.

17. The appellant reiterated that he was innocent and was facing trumped up charges and urged the trial court to acquit him of the charges faced.

18. The trial court considered the evidence adduced by both parties, and convicted the Appellant on the charge levelled against him. Upon mitigation, he was sentenced to serve a term of four (4) years imprisonment.

#### **D. THE APPEAL**

19. Being wholly dissatisfied by the said judgment and sentence, the Appellant filed his petition of Appeal and raised the following grounds of Appeal;

**a. The learned Trial Magistrate erred in matters of law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubt.**

**b. The learned Trial Magistrate erred in matters of law and fact by failing to note the sentence passed is harsh and excessive in the circumstance.**

**c. The learned trial magistrate erred in law and fact in failing to consider my mitigation**

**d. That the Appeal has overwhelming chances of success.**

20. The Appellant thus sought to have his conviction and sentence quashed and he be set free forthwith.

21. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanour. This court relies on the finding of the Court of Appeal in **Kiilu &**

**Another V Republic, [2005] 1 KLR 174**, where they stated thus:

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***

***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

22. I have considered the entire record of Appeal, the trial bundle record, and the submissions on record filed by

the parties. I find that the issues for determination are as follows;

***a. Whether the Appellant was found in actual possession of the four (4) live 7.62 x 39mm ammunition.***

***b. Whether the sentence passed was harsh.***

**Issue 1: Whether the Appellant was found in actual possession of the firearm.**

23. **Section 4 of the Penal Code**, which is the interpretation section, defines **“possession”** as follows;

**(3) “Possession”**

**(4),(a) “be in possession of” or “ have in possession” includes not only having in one’s own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place ( whether belongs to or occupies by oneself or not) for the use or benefit of oneself or any other person;**

**(5),(a) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;**

24. The Black's Law Dictionary, 10<sup>th</sup> Edition, defines the term "possession" to mean -

***The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls.***

25. The definition of possession connotes two elements -

***(1) being in physical control of the items of the offence and or in joint control with another.***

***(2) knowledge or intention of having the article, instruments, thing or items constituting the offence.***

26. In the case of **Jean Wanjala Songoi & Patrick Manyola v Republic (2014)eKLR**, the court expounded the same as follows:

***“...Possession would involve an element of control of the thing a person is said to have. It is, in effect, the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the appellants.”***

27. In **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR**, the Court of Appeal, in constructing the provisions of **Section 4 of the Penal Code**, held that the section encompasses both actual and constructive possession. The Court held that:

***In our view, under that provision, having the RDX does not require the appellants to be in actual, personal physical possession of it. So***

***long as there is evidence on record that they knowingly had the RDX at the golf course for their own use or that of any other person, that will constitute possession within the meaning of the Penal Code. Indeed in Martin Oduor Lengo & 2 Others v. Republic [2014] eKLR and Chrispine Kent Otieno v. Republic [2017] eKLR, this Court affirmed that possession under section 4 of the Penal Code encompasses both actual and constructive possession.***

28.PW2 Corporal Simon Muchere confirmed that his colleague Inspector Lawrence Nthiwa examined the four live ammunition in caliber 7.62mm x 39mm, test fired two of the said ammunition and formed the opinion that they were all were capable of being fired and were ammunition as defined under the Firearm Act, Cap 114.

29. PW1, and PW3 were part of the team that arrested the appellant, and described in detail how the said ammunition was recovered from the appellants bedroom hidden in a black polyethene bag, under his mattress. The appellant was present during the search

exercise and signed the search warrant but refused to sign the inventory of recovered items.

30. In defence, the appellant initially denied being present during the search by the police, but in cross examination confirmed that, ***“It was a Friday. They (children) were awake. I didn’t see the police coming. I was in the toilet when they came”***. He further confirmed that the recovered cloths belonged to him, having acquired the same from his employer and that the toy gun belonged to his son. Critically the appellant also admitted that one of the rooms in his house had several mattresses because it was the children’s bedroom.

31. Having signed the search warrant and admitting under cross examination that the police arrived when he was in the toilet, the appellant cannot be heard to allege that the search was conducted in his absence. His own evidence supports the prosecutions evidence that a lawful search was carried out and that all the recovered items were produced before the court.

32. Even though the appellant denied being in possession the recovered ammunition, facts remain stubborn in that the same were recovered from his

house, which means he was in constructive possession of the same and did not produce a firearm certificate authorizing the said possession. He thus was correctly convicted of the offence he faced before the court.

33. In his submission the appellant alleged that he was not accorded a fair trial as he was not supplied with witness statements and that the prosecution had failed to call author of the ballistic report to testify , thus was prejudiced by not being able to cross examine him on the contents of the said report. Secondly the appellant also submitted that the charge sheet was defective and its particulars were never proved.

34. Regarding the first issue raised, the trial record at page 4 shows that On 08.06.2023 the court did order that the appellant be supplied with witness statements and on 14.06.2023 he did point out to court that the same had not been supplied. On 05.10.2023, when the matter was scheduled for hearing of the first witness the appellant indicated that he was ready to proceed and PW1 was heard on the said date. The appellant never raised any complaint from the said date hence forth about lacking witness statements and cannot in

good conscience raise the same on appeal, as it is an afterthought.

35. As to whether the appellant was prejudiced by PW2, producing ballistic report authored his colleagues , I do find that a proper basis was laid allowing for production of the same based on **Section 33 of the Evidence Act**. The appellant did extensively cross examine the said witness and was not in any manner prejudiced by having the said report produced by a person, who was not its author.

36. Finally on his allegation that the charge sheet was defective, **section 134 of Criminal Procedure Code** provides for what the components/ingredients of the charge sheet constitutes;

***“Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”***

37. The court of Appeal in **Sigilani versus Republic (2004)eKLR** 480 held as follows;

***“The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”***

38. In the case of **Isaac Omambia versus Republic (1995) eKLR** the court of Appeal considered the ingredients necessary in a charge sheet and stated as follows;

***“In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of a charge. Every charge or information shall contain and shall be sufficient, if it contains a statement of the specific offence of offences with which the***

***accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”***

39. Finally on this issue, the court of Appeal in **Benard ombuna Vs Republic** also addressed the issue of a defective charge sheet in the following terms;

***“In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”***

40. **Section 382 of the criminal Procedure Code**, also gives guidance on whether even with such defect justice could still be met or whether the defect is curable. It provides that;

**“ subject to the provision’s hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings” .**

41. Applying the above test, it is clear that the appellant fully participated in the proceedings and cross

examined all the witnessed. This denotes that he understood the particulars of the charge he faced. It is also noted that the error pointed out related to the penal section of the offence, as **Section 4(1),(2)(a) of the Firearm Act**, stated on the charge sheet gave the appellant sufficient information of the charge he faced. As such he cannot be said to have been prejudiced in any manner. This ground of appeal therefor cannot hold.

**Issue 2: Whether the sentence passed was harsh**

42. The Court of Appeal in the case of **Benard Kimani Gacheru Vs Republic (2002) eKLR** stated;

***“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly***

***high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matters stated i.e. shown to exist.***

43. Similarly **In Mokela Vs The state (135/11)(2011)**

**ZASCA 166**, the supreme court of south Africa held that;

***“it is well established that sentencing remains pre-eminently within the discretion of the sentencing court. The salutary principle that the appeal court does not enjoy carte balance to interfere with sentences which have been properly***

***imposed by the sentencing court.in my view, this includes the terms and conditions imposed by s sentencing court on how or when the sentence is to be served.”***

**44. Section 4(3),(a) of the Firearms Act, Cap 114 Laws of Kenya**, provides for a sentence of not less than 7 years and not more than 15 years imprisonment if found guilty of being in possession of an ammunition without a license. The appellant was sentenced to serve four (4) years' imprisonment.

45. The sentence passed was not manifestly high/excessive in the circumstances of the case, and no error or misdirection has been noted to warrant this court's interference with the same.

**E. DISPOSITION**

28. The upshot is that the appellants' appeal against his conviction and sentence fails and is dismissed.

30. Right of Appeal 14 days.

**Judgment read, signed and delivered in open Court at MARSABIT this 14<sup>th</sup> day of OCTOBER 2025.**

**FRANCIS RAYOLA OLEL  
JUDGE**

Delivered on the virtual platform, Team this **14<sup>th</sup>** day  
of **OCTOBER, 2025.**

**In the presence of: -**

N/A .....Appellant

Mr. Kilinyet ..... For ODPP

Mr. Jarso.....Court Assistant