

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. E002 OF 2025

ABDIFATAH

ADAN

ALI.....APPELLANT

VS

REPUBLIC.....

RESPONDENT

**(Being an appeal against the conviction and sentence of Hon.
B. Khapoya (S.P.M.) delivered on 15.07.2025 in Criminal Case
No. E322 of 2024 at the SPM's Court Mandera)**

JUDGMENT

1. The appellant was charged with the offence of being in possession of ammunition without holding a certificate c/sec 4(2) (a) as read with section 4(3) (a) of the firearms Act 114 L.O.K.
2. The particulars were that on 04.10.2024 at around 0500hrs along border point a Zulu 5 within Mandera County, he was found in possession of one live bullet of 7.62 x 51mm of Pulemot Kalashnikov Modern (P.K.M.) machine gun without a license or permit or other lawful justification from a firearm licensing officer.
3. Count II: Being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011.
4. The particulars were that on 04.10.2024 at around 0500hrs along border point a Zulu 5 within Mandera County, being a Somali national, he was found being unlawfully present in Kenya without a valid passport or permit/visa authorizing him to stay in Kenya.

5. Count III: Entering Kenya through a place not designated as a place of entry/exit contrary to section 15(2)(a) of the Kenya Citizenship Regulations 2012 and Trespass contrary to section 3(1) as read with section 3(2) of Trespass Act. The particulars were that on 04.10.2024 at around 0500hrs along border point a Zulu 5 within Mandera County, being a Somali national he was found having entered Kenya through border point 3 which is not a designated point of entry or exit.
6. He was convicted of Counts I and II while he was discharged of Count III and consequently sentenced as follows: Count 1, 7 years' imprisonment and Count II, 12 months' imprisonment. The sentences to run concurrently. That upon completion of sentence, the appellant to be repatriated back to his country of origin, Somalia.
7. In the same breadth, the court directed that the time spent by the appellant in custody be computed in consideration of his sentence.
8. Aggrieved by the conviction and sentence by the trial court, he proffered this appeal citing the following grounds:
 - i. **That the trial magistrate erred in law and fact by convicting and consequently sentencing him yet the prosecution did not prove its case beyond any reasonable doubt.**
 - ii. **That the trial magistrate erred in law and fact by failing to consider his mitigation and defence which exonerated him fully.**

9. Briefly, PW1, Abdiwali Ali Omar, testified that he hails from Bulla Zulu and serves as a Kenya Police Reserve attached to Customs. He stated that on 4.10.2024, at about 4:00 a.m., while on duty at Zulu 5 together with his colleague Abdifatah, the appellant arrived at their post. He explained that, not knowing the appellant's intentions, they apprehended him and conducted a search. In the course of the search, they allegedly recovered a PKM live bullet, a phone, and a knife, which they later escorted to the police station together with the appellant.
10. On cross-examination, the witness maintained that the arrest took place at 4:00 a.m. in the presence of his colleague Abdifatah, who also witnessed the incident. He emphasized that he had no prior knowledge of the appellant before the arrest. He further confirmed that the bullet was live and had been concealed in the boot worn by the appellant.
11. PW2, Abdirishad Mohamed Abdille, testified that he hails from Mandera Bulla Mpya and previously worked at the Border Post but is now employed at KPLC. He stated that on 4.10.2024, at about 4:00 a.m., while at the Kenya-Somalia border on the Kenyan side together with his colleague, they encountered the accused person in the dock. He stated that they called out to him, and PW1 pursued and apprehended him. Upon searching the accused, they recovered one bullet, a knife, and a phone. He added that the accused did not have an identity card or any identification documents, and since there was no immigration office at the point where they found him, they suspected that he

was a Somali national. He confirmed that they escorted him to the police station where he was charged.

12. PW3, No. 2241302 I.P. Francis Karoni, a forensic ballistic expert attached to DCI headquarters, testified that on 18th October 2024, he received under escort from No. 109997 PC Julius Muthama of ATPU Mandera, one round of ammunition marked as exhibit 'C'. He explained that the exhibit was accompanied by an exhibit memo form vide letter No. 609/24. That he was tasked to ascertain whether the recovered ammunition could be linked to any firearm used in terrorist incidences, whether it could be connected to any offence previously committed, and whether it could provide any other investigative leads.
13. He stated that upon receipt, he examined the exhibit and found it to be one round of ammunition of caliber 7.62 x 54mm rimmed. He noted that the round bore a white thread on its rims and was complete in all its component parts, namely cartridge case, propellant charge, primer, and bullet. He further explained that the applicable firearms for such ammunition include rifles and PKM machine guns. He concluded that exhibit 'C' was indeed ammunition as defined under the Firearms Act.
14. On cross-examination, he confirmed that the bullet was a complete round and added that it did not bear a company of manufacture.
15. PW4, No. 108239 PC Emmanuel Chacha based at Anti-Terror Unit Mandera, was on 04.10.2024 in his office when he was shown the appellant for interrogation. That upon interrogation, the appellant disclosed that he had been arrested at border point 5. After

interrogation, he allegedly confirmed that he was found in possession of a bullet and did not have an identification card to ascertain whether he was a Somali or Kenyan. That there was no immigration desk at the point nor an entry point.

16. Upon completion of investigation, he concluded that the appellant was of Somali origin and the bullet belonged to the Somali government.
17. DW1, Abdifatah Adan Ali, testified that he resides at PB1 location and works as a donkey rider. He stated that the border areas of Bulla Hawa and Mandera are neighboring, each other and that he usually comes from Bulla Hawa into Mandera for work. He explained that on the material day he was taken to Mandera Police Station, where he was accused of being unlawfully present in Kenya. He denied the allegations, saying that he was framed with other charges, including possession of a bullet, which he insisted he did not have. He prayed for leniency and requested to be repatriated.
18. On cross-examination, he admitted being a Somali national who regularly entered Kenya through the Border point while riding his donkey.
19. The appeal was canvassed by way of written submissions.
20. The appellant through his undated submissions urged that the prosecution did not prove its case to the required standard as he was simply framed and consequently charged with the offences herein. That the ammunition allegedly recovered from him could

not be linked to him as the same lacked the name of the manufacturing company.

21. He also argued that noting that he was not represented by an advocate during the proceedings herein and neither did the court inform him of the same, his constitutional rights were thus infringed. He contended that the sentence meted out by the trial magistrate was also harsh given the circumstances herein. He thus prayed that his appeal be allowed.
22. The respondent on its part submitted that the appeal against the findings of the trial court in respect to counts I and II does not hold water. That on count 1, the relevant section under which he was charged provides for a sentence which stipulates a minimum sentence of 7 years' imprisonment upon conviction and therefore, the trial court's finding cannot be faulted.
23. On count II, the learned prosecutor urged that the statute under which the appellant was found to have contravened being section 53(2) of the Kenya Citizenship and Immigration Act stipulates that:

'Any person convicted of an offence under this section shall be liable upon conviction to fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both.'
24. That to that end, the finding by the trial court was not only sound but also lawful hence the call upon this court not to disturb the said finding.

25. I have considered the grounds of appeal and submissions by both parties. The only issues for determination are as follows:
- i. Whether the prosecution proved its case beyond reasonable doubt.**
 - ii. Whether the sentence was harsh in the given circumstances.**
26. Section 4 of the Penal Code, Chapter 63 of the Laws of Kenya defines possession as follows: -
- (a) "be in possession" 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 belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:**
- (b) 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;"**
27. On the other hand, section 4 (2) (a) under which the appellant was charged provides as follows:
- "(2) If any person— (a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or"**

(3) Any person who is convicted of an offence under subsection (2) shall— (a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; ”

28. On the charge of being in possession of ammunitions without a firearms certificate, the prosecution only needed to prove two things. First, that the appellant had ammunitions in his possession and; secondly, that the appellant had no firearms certificate permitting him to be in such possession.
29. Having reviewed the evidence herein, I find that the prosecution's case rests on the testimonies of PW1-PW4. PW1 and PW2, both present at the time of arrest, consistently testified that the appellant was apprehended at the Kenya-Somalia border around 4:00 a.m. and found in possession of a bullet, a knife and a phone. Their accounts corroborate each other, particularly on the recovery of the bullet and the absence of identification documents. PW1 further confirmed that the bullet was concealed in the accused's boot, while PW2 emphasized that the accused had no immigration papers, leading to suspicion of Somali nationality.
30. PW3, the ballistic expert, examined the recovered bullet and confirmed it was a live round of 7.62 x 54mm caliber, applicable to rifles and PKM machine guns. His professional findings

established that the item recovered was indeed ammunition as defined under the Firearms Act. PW4, the investigating officer, confirmed the arrest details and further produced the exhibit memo and ballistic report. He concluded that the appellant was of Somali origin and noted that the bullet belonged to the Somali government.

31. The defence, through DW1, denied possession of any ammunition or firearm. He stated that he was a donkey rider crossing from Bulla Hawa into Mandera for work and that he was framed with the charges. He admitted, however, that he entered Kenya through the border without proper documentation and was arrested by Kenya Police Reservists. His defence centered on denial of possession and a plea for leniency, requesting repatriation.
32. In my view, the prosecution witnesses were consistent in their accounts of the arrest, the recovery of the bullet and the lack of identification documents. The chain of custody of the exhibit was properly established, from recovery by PW1 and PW2, to analysis by PW3 and production in court by PW4. The defence's denial of possession was weakened by the corroborated testimonies of two prosecution witnesses and the forensic confirmation of the bullet. Pw1 and pw2 had no reason to frame up the appellant who was a stranger to them.
33. On being unlawfully present in the country, the appellant was charged under section 53(1)(j) as read with section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011 which stipulates as follows;

(1) A person who—

(j) unlawfully enters or is unlawfully present in Kenya in contravention of this Act;

(2) Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;

34. DW1's admission that he crossed into Kenya without documentation supports the charge of unlawful presence. His claim of being framed is unsubstantiated and contradicted by the consistent evidence of the prosecution.
35. On the basis of the evidence, the court recounts that from the evidence on record, it finds no fault on conclusion arrived at by the trial court.
36. On sentence in reference to Count I, as already mentioned, a person found guilty of the offence is liable to imprisonment for a term of not less than seven years and not more than fifteen years.
37. While on Count II, section 53(2) stipulates that, any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.
38. It is trite law that sentencing is at the discretion of the trial court and an appellate court can only intervene if the same is

excessive, unlawful or arrived at after considering wrong legal principles or taking into account irrelevant factors or failure to consider relevant factors. See **SHADRACK KIPCHOGE KOGO =VS= REPUBLIC and MACHARIA =VS= REPUBLIC [2003] 2 EA 539**

39. Having considered the facts herein, it is my view that the appeal lacks merit and as such, the same stands dismissed.

Dated, signed and delivered virtually this 12th day of March 2026

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J . N. ONYIEGO

JUDGE