



**Mutirithia v Republic (Criminal Appeal E188 of 2022)
[2024] KEHC 6591 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E188 OF 2022**

LW GITARI, J

MAY 24, 2024

BETWEEN

JULIUS GITONGA MUTIRITHIA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the following offences: -
2. Count I: Being in possession of ammunitions without holding a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4 (3) (a) of the *Firearms Act*.
3. Particulars being that on or before 03.09.2019 at Mutambithi area in Isiolo Sub -County within Isiolo County was found in possession of one firearm namely SAR Serial no.073 without holding a fire arm certificate at that time.
4. Count II: Being in possession of ammunition without a fire arm certificate contrary to section 4 (2) as read with section 3 (b) of the *Fire Arm Act* Cap 114 laws of Kenya.
Particulars being on 03.09.2019 at Matambithi area within Isiolo Central Sub-County in Isiolo County was found possession of 9 rounds of ammunition of 5.56 mm without holding a fire arm certificate at that time.
5. Count III: Being in possession of magazine without firearm certificate contrary to section 4 (2) (a) as read with section 4 (b) of the *Firearm Act* Cap 114 laws of Kenya.
6. Particulars being that on 3rd September 2019 at Matabithi area within Isiolo Central Sub County in Isiolo County was found in possession of a magazine without holding a firearm certificate at that time.



7. He pleaded not guilty to all the charges and the matter went to full trial. The trial magistrate found him guilty on the 1st and 2nd counts convicted him and sentenced him to serve five (5) years imprisonment on each count, the conviction and sentence to run concurrently.
8. He was aggrieved by the court decision thus filed the instant appeal dated 13.12.2022 setting out 8 grounds of appeal namely: -
 - (a) The learned trial magistrate erred in both law and fact in convicting the appellant without considering that the charge sheet was defective.
 - (b) That the learned trial magistrate erred in both Law and facts in failing to observe that the prosecution tendered collaborating, (*sic*) inconsistent and contradictory evidence.
 - (c) That the trial suffered procedural irregularities by convicting him.
 - (d) That the learned trial magistrate erred in law and fact to see the whole case in total was not proved beyond reasonable doubts to justify a conviction.
 - (e) That the learned trial magistrate erred in both law and fact in failing to note that the presentation of the exhibited raffle fell short of the required standard in law.
 - (f) That the learned trial magistrate erred in law and facts in dismissing and disregarding the appellant defense without any sufficient reasons for the same.
 - (g) That he prayed to be present during the hearing of this Appeal.
 - (h) He prays that the conviction be quashed the sentence be set aside and he be set at liberty.
9. The parties agreed to canvass the appeal via written submissions.
10. The appellant submitted on the brief facts of the case. The Appellant further submitted that the weapon found with the appellant did not show any evidence that it was used to commit other crimes within the country. The Appellant therefore appeals against the sentence on the grounds that it was excessive. The Appellant submitted that the court should consider that he is a first offender and he is remorseful and has reformed while serving his sentence. That he is the sole bread winner of his family and his younger siblings since his mother died while he was in custody and his father is elderly almost 70 years.
11. The Appellant submitted that he has been trained and he has acquired skills for personal development and he has acquired several courses with the help of prison staff.
12. The Appellant submitted on sentencing and relied on section 4 (2) (a) as read with section 4 (3) (b) of the Act which he further submitted that the court may impose any sentence of five years but not exceeding 10 years. That the trial court has the discretion to sentence an accused person to a lesser sentence depending on the circumstances of each accused. The Appellant relied in the case of Caroline of Caroline Auma Majabu v Republic (2014)eKLR. Where the Court of Appeal stated that the term liable merely gives a likely maximum sentence and allows a measure of exercise of discretion.
13. It is the Appellant submission that the Judiciary Criminal Procedure Bench Book 2018 provides elaborate step by step considerations that the court must apply when sentencing an offender. The Appellant relied on paragraph 22 which provides for the principles of proportionality, equality, uniformity, parity, consistency, impartiality, accountability, transparency, inclusiveness, respect for human rights and fundamental freedom and conformity to both domestic and international Law with regard to standards on sentencing.



14. The Appellant relied in the case of Titus Ngamau Musila alias Katitu criminal case No.78 of 2014.
15. The Appellant pleaded for mercy and leniency based on the above mitigation.
16. The prosecution did not file any submission.
17. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and come up with its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor v Associate Motor Boat Co. Ltd* 1968 EA 123. See also *Okeno v Republic* (1972) EA 32 for the same holding.
18. PW1, PC Samuel Ongeri testified that on 3.09.2019 he was heading to 78 Battalion and he was with colleagues who included the County Commander and the County Commissioner as they were going to Garba Tulla. That they met a person who was carrying a gun.
19. PW1 testified that the person they met is the accused. That the gun was SAR make and it had nine rounds of ammunition. That they asked the accused where he got the gun. He said that he was going to track their stolen goats. That they took the accused to Isiolo police station. He was booked and then charged. PW1 identified the gun marked PMF1-1 and PMF1-2 are the rounds of ammunition.
20. PW1 testified that the gun is S.A.R not AK 47. That he confirmed the model later. That he had indicated M16 first.
21. PW2, PC Fred Mariaka Testified that he is based at Isiolo police station. That he participated in the arrest of the accused on 3rd September, 2019.
22. PW2 stated that they were heading to Garba Tulla with colleagues PC Koech when they passed 78 Battallion they met a man carrying a gun. That he is the accused. That they stopped and asked him what he was doing with the gun and he stated that he was tracking his stolen goats. That his goats had been driven towards Ngare Mara area.
23. PW2 testified that they took him to Isiolo police station where he was booked. That the gun had nine rounds of ammunition. He identified the gun marked PMF 1 a S.A.R steering Assault Riffle. That they assumed it was M16 but the make was confirmed later.
24. PW2 further identified the rounds of ammunition marked PMF1-2 referred to the gun as M16 in his statement before the make was confirmed. PW2 also identified the magazine marked PMF1-3.
25. PW3 testified as PC Paul Kiarie Mungai. He testified that he is based at Isiolo police station. That he was the arresting officer in the case. That on 3rd September, 2019 around 7.30 am he was heading to Garba Tulla escorting the County Commissioner and the County Commander when they saw the accused walking on the side of the road carrying a gun which he had hang on his right hand. That they stopped their motor vehicle and the county commander ordered him to stop and surrender the gun which he complied.
26. PW3 stated that he got the gun from his father to protect their animals and he had no permit to show that the gun belonged to his father. That they took him to Isiolo police station and he is the accused in the dock. He identified the SAR gun which he found the accused carrying marked PMF1 and it had 9 rounds of ammunition marked PMF1-2.
27. PW3 testified that they were in a magazine marked PMF1-3. PW3 further testified that although his statement he referred the gun as M16 they confirmed after investigation the gun is SAR make.



28. PW4 testified as sergeant Florence Karimi of DCI Headquarters Nairobi fire arm section. PW4 produced the report on behalf of Inspector Reuben who prepared the report.
29. PW4 stated that the exhibit memo is dated 4th September, 2019 by corporal Henry of DCI Isiolo. That a fire arm serial number 073 marked exhibit A was submitted and 9 rounds of ammunition B and a magazine marked MF 1-1-2 and 3 respectively.
30. PW4 testified that the fire arm is sterling assault rifle designed to chamber and Fire ammunition in caliber 5.56 by 45mm and it was in a good mechanical condition but the butt stop is shortened.
31. PW4 testified that the magazine was also found to be fit in the rifle and can take in 30 ammunitions and was in good working order. That the fire arm did not match the record on where it may have been previously used. Further such firearm is not licensed to the civilians.
32. PW5, CPL, David Kungu, a DCI Isiolo. He testified that CPL Githinji was the initial investigation officer and he is now retired. PW5 stated that he received the rifle before court, magazines and ammunition 5 of them and 3 spent cartridges and a report from the ballistic expert and exhibit memo are before court. The rifle SR, the ammunition exhibit 2 and the magazine exhibit 3.
33. PW5 testified that he had established that the accused did not have the relevant certificates allowing him to be in possession of the fire arm and ammunitions.
34. The trial court via a ruling delivered on 03.10.2022 found that the prosecution had established a prima facie case against the appellant.
35. When placed on his defence, the appellant in his sworn defence stated that he had been framed in this case. It was his assertion that a police motor vehicle came and stopped him. That a police man Kithinji who was well known to him and whom he had leased land to alighted and asked him to sell his land to him. That he told him that the title was not in his name. That after 3 days he entered the land and asked the workers what they were up to.
36. The Appellant testified that on 3rd September, 2019 he was arrested by the police and he alleged that Kithinji caused his arrest and he was charged before court. That Kithinji found him at the police station and had promised to teach him a lesson.
37. The Appellant further testified that he is an innocent person and the fire arm was planted on him.
38. DW2, testified as Fedelis Kawira from Muthara. DW2 testified further that the accused is his neighbor and on 3rd September, 2019 he was with the accused. That his father had sent him books and on the way a police vehicle came and stopped and a certain man came out and said he was interested with the accused. That he was left alone.
39. After going through the submissions and evidence on record, I find the single issues for determination is whether the prosecution proved its case beyond reasonable doubt?

Whether the prosecution proved its case beyond reasonable doubt?

40. The prosecution led evidence of 5 witnesses who were consistent that the accused was found with a fire arm namely SAR serial no. 073 without holding a firearm certificate at that time. When the accused was questioned why he had the fire arm he stated that he was tracking their stolen goats. The same was corroborated by PW1, PW2 and PW3.
41. Therefore, I opine that the prosecution presented a water tight case to convict the accused.



Section 4 of the Penal Code, Chapter 63 of the Laws of Kenya defines possession as follows: - (which is also the definition under the Firearm Act)

- “(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;”

The evidence by the prosecution witnesses was well corroborated leaving no shired of doubt that the appellant is the one who was in possession of the firearm which was loaded with nine rounds of ammunitions. The appellant abandoned the appeal on conviction and argued the appeal on the sentence. Section 4(2) (a) as read with Section 4(3) (b) of the Firearms Act provides as follows:-

“If any person-

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 case of ammunition in quantities in excess of those so authorized, he shall subject to this Act be guilty of an offence.

- 4(3) If the firearm concerned is any other type or ammunition or any weapon not
- (b) being a prohibited weapon, liable to imprisonment for a term not less than five years but not exceeding ten (10) years.

The charge as drawn is not defective as it discloses an offence and the sentence thereof. The evidence tendered supports the charge.”

- 42. The court has also considered the sentence imposed by the trial court and noted that the trial court indicated that it considered mitigation that although the accused was a first offender. He considered that the offence committed is serious and a stern punishment is called for. While am aware that sentencing is a discretion of the trial court and this court can only interfere in exceptional circumstances. This Court finds that the sentences meted out were justifiable in the circumstances of the case.
- 43. The sentence imposed on the appellant was lawful. Sentencing was the discretion of the trial magistrate. As submitted by the appellant, liable connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was so held by the Court of Appeal in Daniel Kijalo Muema v Republic (2009) eKLR where it stated that the term "shall be liable to".
- 44. This court upon evaluating the evidence on record, finds no fault on conclusion arrived at by the trial court.

In conclusion: the appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MAY 2024.

L.W.GITARI



JUDGE

