Case Number:	Criminal Appeal 34 of 2015
Date Delivered:	09 Mar 2016
Case Class:	Criminal
Court:	High Court at Marsabit
Case Action:	Judgment
Judge:	Kiarie Waweru Kiarie
Citation:	Galm Halo Galgalo v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Boaz M. Ombewa – Senior Resident Magistrate
County:	Marsabit
Docket Number:	-
History Docket Number:	Criminal Case 389 of 2015
Case Outcome:	Appeal Dismissed.
History County:	Marsabit
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.34 OF 2015

GALM HALO GALGALO.....
.....APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(From the original conviction and sentence in Criminal Case No.389 of 2015 of the Principal Magistrate's Court at Marsabit by Boaz M. Ombewa – Senior Resident Magistrate)

JUDGMENT

The appellant, **GALM HALO GALGALO,** was Charged with an offence of being in possession of ammunitions without a firearms certificate contrary to section 4(2) (a) (3) (b) (sic) of the Firearms Act Cap 114 Laws of Kenya.

The particulars of the offence were that on 24th June 2015 at Nyayo road of Marsabit township within Marsabit County, the appellant jointly with another were found in possession of 17 rounds of 7.62 x 39 mm special ammunition without a firearm certificate.

The appellant was found guilty of the offence and sentenced to seven years imprisonment. He is now appealing against both conviction and the sentence.

Most of what the appellant calls grounds of appeal is a narration of events from the time of his arrest to the trial. I was however able to discern the following four grounds:

1.That the appellant was not conversant in English and Kiswahili and was unable to follow court proceedings.

2.That a witness called **Dida Sora** confessed that he had been requested by the OCS to testify falsely against him.

3. That the learned trial magistrate erred in law and in fact by failing to make a finding that the exhibits did not meet the required standards.

4. That the learned trial magistrate erred in law and in fact by convicting the appellant while the prosecution case was rife with contradictions.

The state opposed the appeal through **Mr. Mwangangi,** the learned counsel.

The particulars of the case are that when police officers received information of some suspicious characters in a house which was under construction, they swiftly moved to the site. They found the

appellant at the door who on seeing them dropped a paper bag he had. This paper bag had some rounds of ammunitions. Some more rounds of ammunitions were recovered under the mat which the appellant and another were using as a bed. The two were arrested, charged, tried and convicted. The conviction has given rise to this appeal.

At the trial the appellant contended that they were attacked at the site of construction. When police officers arrested their attackers, they were also arrested. It was at the police station they learned of ammunitions which now the police officers claimed were theirs.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424.”

Before a magistrate takes a plea from an accused person, (s)he should ensure that the charge is correctly drafted and that the cited section is correct. In the instant case the section under which the appellant was charged was incorrectly cited; it ought to have read:

"....contrary to section 4 (1) as read with section 4 (2) (a) ...."

On the issue of citing a nonexistent section of the law the Court of Appeal in **FAPPYTON MUTUKU NGUI Vs REPUBLIC CRIMINAL APPEAL NO. 32 OF 2013 (NAIROBI)** said the following:

" The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

Section 382 of the CPC provides as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

The above authority gave rise to some four guidelines for the court to follow. In such a case the defect is curable under section 382 of the Criminal Procedure Code. They are as follows:

1.Where the appellant understood the charge and fully participated in the trial;

2. Where no prejudice was suffered;

3. The appellant had adequate notice of the charge facing him; and

4. The essential ingredients and the particulars of the offence are outlined.

In the instant case these guidelines were satisfied and I therefore find that the defect is curable under section 382 of the CPC.

Although the appellant did not expressly claim that he was not able to follow proceedings, I will endeavour to find out if his claim is true, it affected his ability to follow the court proceedings. The plea was taken on 25.6.2015. Before it was taken, the appellant informed the court that he understood Borana language. Interpretation was done in Borana and the plea was taken. On the subsequent hearing dates the record indicate that interpretation was done in Borana language. although the record does not specify who did the interpretation, Hussein is always indicated as having been present. I am aware that Hussein is a native Borana speaker. The record show that that the appellant fully participated in the trial. I therefore find his claim on language baseless.

Dida Sora Galgalo was called as prosecution witness two. This witness did not testify anything adverse to the appellant or his co- accused. My perusal of the evidence on record does not support the contention of the appellant. This ground is dismissed for lack of merits.

Though the appellant raised an issue with the exhibits, my perusal of the record does not reveal anything that would be prejudicial to him. The issue of the exhibits which did not meet standards does not arise.

I was invited by the appellant to make a finding that there were material contradictions in the prosecution case that would make the conviction unsafe. I will start with issue of dates.

The charge indicates the date of the offence as 24.6. 2015. **PW1** and **PW3** who arrested the appellant testified that the arrest was at about 11 pm on the 23.6.2015. The evidence of **PC Mwirigi Ronald Kaenga, PW5**, is that whereas the report was made at 11 pm on 23.6.2015, the matter was entered in the **OB** at 1.10 am on the 24.6.2015 This was an issue of a few hours difference. The difference in the time cannot be said to be material. In any case, PW5 was able to explain the discrepancies which the draftsman of the charge sheet failed to appreciate.

The appellant raised an issue as to where the police officers said the ammunitions were recovered. His contention that one police officer testified that the ammunitions were recovered under a carpet lacks merit for it was him (the appellant) who raised it during cross examination. In totality, I do not find any material contradictions to warrant any interference with the verdict arrived at by the learned trial magistrate.

Section 4 of the Firearms Act provide as follows:

4. (1) Subject to the Provisions of this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.

(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

(b) fails to comply with any condition subject to which is a firearm certificate is held by him.

he shall, subject to the provisions of this Act, be guilty of an offence and liable to imprisonment for a term not exceeding ten years.

The appellant was sentenced to serve seven years imprisonment whereas the section has an upper limit of ten years imprisonment. The ammunitions involved were many and the sentence cannot be said to be manifestly harsh given the fluidity of the security issues in the country. I will therefore not interfere with the sentence meted out by the learned trial magistrate.

The upshot of the foregoing analysis is that the appeal lacks merit and the same is dismissed. The appellant shall serve the sentence meted out.

DATED at Marsabit this 9th day of March, 2016

KIARIE WAWERU KIARIE

JUDGE

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