**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL 490 OF 2010**

***(From Original Conviction and Sentence in Criminal Case No. 3939 of 2009 of the Chief Magistrate's Court at Mombasa – R. Mutoka,CM)***

**1. MAHAT MUHAMMED ALI**
**2. ABDULLAH MOHAMED HIBAR**
**3. NOOR MOHAMED ABIKAR**
**4. MAHAT BILAWI MUHAMED**
**5. SAID MAHALIM AHMED**
**6. SAID MUHAMED KHALID**
**7. OSMAN MUSA MUHAMED**
**8. ABDULKADIR ABDULAHI HILE**

**9. FULAHAN AHMED MAALIM ……..…… APPELLANTS**

**- Versus -**

**REPUBLIC ……..… RESPONDENT**

**J U D G M E N T**

All the appellants are Somali Nationals. They were charged and convicted on two counts of being in possession of firearms without a Firearm Certificate contrary to Section 4(1) as read with Section 4(3) (a) of The Firearms Act and three counts of being in possession of Ammunition without firearms Certificate contrary to Section 4(2) (a) as read with Section 4(3)(a) of The Firearms Act. Each was sentenced to serve a prison term of 9 years.

The appellants had filed separate appeals but which were consolidated and heard as one appeal, this appeal.

At the trial the prosecution called a total of ten witnesses and each appellant gave a sworn statement in defence.

On 1st December 2009, a boat reached the shore off the farm of a Mr. Stein. There were nine people on board. Swaleh Bwana Riziki (PW 3), a guard employed by Mr. Stein, saw them disembark. They were desperately thirsty and asked for water. PW3 obliged. Having quenched their thirst they returned to the boat, removed its engine and brought it to shore. PW3 also saw them throw some items he could not identify into the water. In the meantime PW3 informed his supervisor Peter Gathuru Waihumbo (PW 2) of the incident. PW2 saw the nine people walking towards Lamu, he called them back and directed another guard Sereu Ole Masiaya (PW 7) to take them to Mr. Steins house.

PW2 was uneasy about of the strangers and made a report to Samuel Ndirangu Mutahi (PW 1) a police officer at Mpeketoni Police Station. PW1 visited the scene in the company of Inspector Hammerton Mwazera Mwaliko (PW 4) of the Administration Police Unit, Cpl Ibrahim Wasika (PW 8) and Cpl Singi. On reaching the scene they saw the boat off the shore. PW8 and Cp Singi were left at the scene but undercover while PW8 and PW4 arrested the nine (9) at Steins home. These nine are the appellants.

Events of the following day were more dramatic. As he patrolled the beach near where the boat had anchored, PW7 saw a cache of weapons. Shaken he called out to PW3 and told him what he had seen. PW3 alerted PW2 and the latter called PW1. The weapons were collected, and examined by Inspector Eliud Langat (PW 5) and Inspector Alex Mudindi Mwanadawiro (PW6). The two officers found the weapons to be ammunition and firearms within the meaning of the Firearms Act.

In the sworn defence, the Appellants gave a similar and consistent story. That they are all fishermen who were brought together by fate. The 2nd, 4th 6th, 8th Appellants were on a fishing boat which caught five. They jumped off it and were rescued by the 1st, 3rd, 5th and 7th appellants who were on a skiff (small boat) that was trailing the bigger boat. The skiff run out of fuel and strong waves, thankfully, pushed them to the Kenyan Coastline where they surrendered to members of public.

Mr. Alando appearing for all the appellants argued the following grounds-

***(a) That Counts II and IV of the charge sheet were improperly framed and incurably defective.***

***(b) That the evidence linking the weapons to the accused person was weak and insufficient.***

***(c) The circumstances existing weakened or destroyed any inference of guilt on the part of the appellants.***

***(d) The sentence imposed was manifestly excessive and harsh.***

The State Counsel conceded to the appeal.

I begin by considering the manner in which Counts II and VI were framed. It is the view of counsel for the Appellants that the charges are incurably defective for failing to comply with the provisions of Section 134 and 137(a) of The Criminal Procedure Code as they did not refer to the enactment creating the offence. Section 4(1) of the Firearms Act makes it illegal for a person to purchase, acquire or have possession of any firearm or ammunition without a valid Firearms Certificate. It is couched in the following terms;

***"Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a Firearms Certificate in force at the time."***

There would be no difficulty in understanding this provision. It simply outlaws the purchase, acquisition or possession of any firearm or ammunition without a valid Firearms Certificate.

I agree with Counsels submission that it is Section 4(2) of The Firearms Act that specifically creates the offence. It goes beyond the definition and elaborates on the various aspects of the offence. No doubt the framing of Counts II and VI did not conform with the provisions of Section 137 a(ii) of The Criminal Procedure Code which provides that-

***"the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the Section of the enactment creating the offence." (emphasis mine)***

What then is the effect of this irregularity? It helps to reproduce Counts II and VI fully. They read as

follows-

***"Count I:***

***BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4(1) AS READ WITH SECTION 4(3)(A) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA.***

***On the 1st day of December 2009 at the Sea Shore of Tenawi Village, Baharini Location in Lamu District within Coast Province, jointly were found in possession of 7 AK 47 assault rifles S/No. 56-129337188, 56 – 1102890, AQ – 78642, 56 – 170017.85, 56-22100098, 56-16035, 56 – 48048988, with 18 AK 47 magazines and one rocket propelled grenadelauncher S/No.810060 without firearms certificate in force at the time.***

***Count VI***

***BEING IN POSSESSION OF FIREARM WITHOUT FIREARMS CERTIFICATE CONTRATY TO SECTION 4(1) AS READ WITH SECTION 4(3) (A) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA.***

***On the 1st day of December 2009 at the Sea shore of Tenawi village, Baharini Location in Lamu District within Coast Province, jointly were found in possession of one Tokarev Pistol S/No. 2007923 with one magazine without firearms certificate in force at the time. "***

As is evident, notwithstanding the failure to state the enactment creating the offences, the charges contain sufficient detail and particulars to inform the appellants of the nature of the offences they faced.

The charges as framed disclosed an offence known in law albeit its omission to specifically refer to Section 4(2) which creates the offence. In addition the charges specified Section 4(3)(a) of The Firearms Act which prescribes the punishment. This court cannot see how the lapse in framing of the charges occasioned a failure of justice as the appellants were fully informed of the charges they faced and the possible sentence if convicted. Lapses of this nature are complemplated by the provisions of Section 382 of The Criminal Procedure Code. I also give regard to the fact that upto the close of the prosecution case the appellants were represented by counsel. There was sufficient opportunity to raise an objection but non was raised. It must be assumed that they acquiesced to the defects. I find that the defects in Count II and VI cannot vitiate the proceedings and the conviction in respect thereof.

The evidence linking the weapons to the appellants was circumstantial and in addressing whether or not the conviction was sound the court will apply the tests restated in the decision of **Court of Appeal in Criminal Appeal No. 56 of 1998 Omar Mzungu Chimera –Vs- Republic**. The Court rendered itself as follows-

***"It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:***

***(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.***

***(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(iii)The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

PW3 first saw the boat at 2.00pm on 1st December 2009. He saw the appellants throw some items from

the boat into the water. The boat was about 100 feet from the shore. He was unable to identify the items from where he stood. This is what he said under cross examination-

***"As they threw items in the Sea, I never saw what they were throwing."***

Fast-forward to 2nd December 2009. PW3 reported to work at 8.00am and later on that day received information from PW7 that there were weapons laying on the seabed. PW3 saw the weapons. They were 100 meters from the shore. They were visible as the water had retreated.

PW7 was on duty on 2nd December 2009. He was on foot patrol. At about 10.00am and while on at the beach he saw some weapons. He saw firearms. He saw 2 gadgets resembling bottles with sharp points. He immediately told PW3. PW7 noted that the weapons were about 20 – 30 meters from where the boat had anchored. These are the weapons that were produced as exhibits during the trial. The crux of this matter is whether the prosecution established an unbroken and intimate link between the items that PW3 saw being thrown by the appellants on 1st December 2009 and the weapons seen by PW7 the following day.

Four police officers visited the scene on 1st December 2009. They were PW1, PW4, PW8 and a Richard Singi. There is no agreement as to the exact time they reached the scene. PW1 put it about 2.00pm while PW8 put it at about 4.00pm. What is more certain is that the police officers found PW3 at the scene. I say so because this is the testimony of PW3-

***"When the police came, they had already left and the police met them on the way."***

This compares with PW8's testimony when he says-

***"We were directed to the scene and there we found some guards employed by Mr. Stein."***

What the above evidence reveals is that PW3 was at the scene from the time the appellants arrived at the shore to at least the time that PW1, PW4 and PW8 arrived there. It is not clear what time he left the scene but he must have returned the next day by about 10.00pm when PW7 informed him that he had seen some weapons on the seabed.

When PW1 and PW4 left the scene for the house of Mr. Stein (the 2nd camp) they left behind PW8 and a Richard Singi to remain undercover watching over the shoreline and the appellants boat. PW1 said as follows-

***"I left 2 police officers at the scene and told them to conceal their presence."***

This is corroborated by the testimonies of PW4 and PW8. PW4's testimony is that-

***"We left two officers there as we went to the home of Mr. Stein"***

While PW8 had this to say-

***"While Cpl Singi and I were left at the scene to keep an eye on it we were to operate undercover and so we pretended to leave then hid in the bush where we monitored the area."***

It is on evidence that PW8 and Cpl Singi remained watching over the scene until PW7 saw the weapons on the morning of 2nd December 2009. Throughout their watch there was only one eventful occurrence. On the night of 1st December 2009 a tractor came by the shore and picked the 2 engines left by the appellants on the beach. These were under the directions of the police. PW7 was himself unaware of the presence of these two undercover officers. This was his testimony-

***"I went to where the boats are at 10.00am. There was no police officer there. I only learnt later they had been at the camp … After 15 minutes the 2 police officers arrived there."***

My analysis of the above evidence leads me to believe that from the time some items were dropped by the appellants upto the time the weapons were seen by PW7 at low tide, the shoreline and the area around where the boat had anchored was at all times under the watch of either Mr. Steins guards (PW3 and PW7) or the police officers (PW1 and Sgt Singi). None of these witnesses saw any other person at the scene or drop/throw something into the Sea. In addition there is no evidence that there were weapons on the beach or seabed prior to the arrival of the appellants. Given this evidence and that the weapons were found near the place the boat had first stopped, I am unable to fault the learned Magistrates finding that the items thrown by the appellants into the Sea on 1st December 2009 where the weapons found by PW7 on 2nd December 2009. This is a logical conclusion to draw from the evidence.

The trial court considered the Defence case at some length. The Appellants case was that they were all fishermen who had run into bad luck. But found in the boat were only two fishing hooks! Does this support the theory that they had set out to the deep Sea on a serious fishing expedition? I am inclined to agree with the following assessment by the learned Magistrate-

***"… if the 1st, 2nd, 3rd and 7th accused persons were actually using this boat, then it would have been reasonable to expect it to have more fishing equipment, than just two hooks … Further it is interesting to note that they never mentioned to anyone, even the police that they had been with others in a mother boat that burnt and sank."***

This explanation was not sufficient to displace the strength of the prosecution evidence.

Does the conduct on the part of the appellants' amount to possession of the weapons? Section 4 of the Penal Code defines possession to mean the following-

***"(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 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."(emphasis mine)***

It is indeed a wide definition. I have found and held that the appellants were involved in trying to get rid of the weapons by removing them from the boat and throwing them into the Sea. The boat was under the control of the appellants. It would be safe to infer that each one of the appellants knew the nature of the items in their possession and hence their action of discarding them.

The Appellants have also questioned the sentence imposed. They say it is manifestly excessive and harsh. But is that so? Section 4(3)(a) of The Firearms Act prescribes a minimum sentence of 7 years and a maximum of 15 years. In imposing a sentence of 9 years the learned Magistrate considered the mitigation of the Appellants but also noted that they possessed dangerous weapons. On my part, I can hardly consider the sentence to be inappropriate given the recent proliferation of illegal weapons in Kenya.

The conclusion I reach is that the conviction returned by the learned Magistrate was safe and the sentence imposed reasonable. I find no reason to upset that decision. This appeal is therefore dismissed. T

***Dated and delivered at Mombasa this 23rd day of April,2012***

**F. TUIYOTT**
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Tanui for State**

**Alando for Appellants**

**Court clerk - Moriasi**

**F. TUIYOTT**
**JUDGE**