REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL 113 OF 2011

EPEYONOY EWOI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an original conviction and sentence of T. Nzioki – SRM in Criminal Case No. 379 of 2010 delivered on 3rd August, 2011 at Lodwar.)*

J U D G M E N T.

Epeyonoy Ewoi (herein, the appellant) appeared before the Senior Resident Magistrate at Lodwar facing two counts of possession of a firearm without a firearm certificate contrary to section 4 (2) read with section 4 (3) (a) of the firearms Act and possession of ammunition without a firearm certificate contrary to section 4 (2) read with section 4 (3) (a) of the Firearms Act.

It was alleged that on the 4th June, 2010 at Nakabosan Manyatta Turkana South, the appellant was found in possession of a firearm make AK 47 Rifle s/no. 18969 without a firearm certificate and one round of caliber 7.62 mm special ammunition without a firearm certificate.

On pleading not guilty to both counts, the appellant was tried and convicted on both counts. He was sentenced to a concurrent term of seven (7) years imprisonment on count one and two (2) years imprisonment on count two. However, the appellant was aggrieved by the conviction and sentence and preferred this appeal.

The grounds of appeal are contained in the petition dated 8th August, 2011. These were argued by way of written submissions tendered by the appellant at the hearing of the appeal.

The learned prosecution counsel, **M/s. Bartoo**, opposed the appeal on behalf of the respondent.

In her submissions, the learned prosecution counsel stated that although the appellant alleged that he was not the owner of the house where the firearm was found, PW1 and PW2 found him in possession of the firearm and ammunition which were examined by PW4 and confirmed to be firearms.

The learned prosecution counsel contended that since the appellant was found in actual possession of the firearm it was unnecessary to lift fingerprints from him.

The learned prosecution counsel contended that the sentence imposed on the appellant was lawful.

The duty of this court at this point is to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

Briefly, the prosecution case was that two police reservists, **Ekaran Edukon (PW1)** and **Joseph Doki (PW2**) proceeded to a scene along the Kitale/Lodwar road at Kakupen where gunshots had been heard on the previous day. A teacher informed them that the shots were fired by highway gangsters.

At the scene, the police reservist found three spent cartridges and followed some footsteps which led them into a "**Manyatta**" of one Lokoruo. They found the appellant sleeping on a mat outside a house. Beneath the mat, the appellant had hidden a firearm containing one round of ammunition. The appellant was arrested and the firearm taken away to be handed over to the police.

The appellant was taken to Lokichar Police Patrol Base before being transferred to the Lodwar Police Division.

Cpl. Jacob Mungare (PW3) of C.I.D. Turkana investigated the case and in the process forwarded the recovered firearm and round of ammunition to a ballistic expert who compiled a report which was produced by another expert **SP Lawrence Nthiwa (PW4)** of the C.I.D. headquarters Nairobi.

On completion of the investigations, the appellant was charged with the present offences. In his defence, he denied the offences and said that on the material date he took his goats for water at Lomoiyo village water point. Later, a vehicle arrived at the water point and he was arrested. He was taken to Lodwar police station before his arraignment in court.

The learned trial magistrate considered the evidence adduced against the appellant and the defence raised in respect thereof and arrived at the conclusion that the prosecution case had been proved beyond reasonable doubt.

This court's independent consideration of the evidence reveals that there was no dispute that a firearm and its one round of ammunition was recovered by the police reservist (PW1 and PW2). The firearm and ammunition were confirmed to be firearms in terms of the Firearms Act by the ballistic expert.

The basic issue for determination was whether at the time of the recovery, the firearm and ammunition were in possession of the appellant. The appellant denied possession and implied that he was arrested and charged without good cause. The learned trial magistrate found his story to be **"pure lies**" and held the opinion that what was stated by PW1 and PW2 was more truthful.

This court finds itself agreeing with the learned trial magistrate with regard to the possession of the firearm and ammunition by the appellant. The evidence by PW 1 and PW2 was cogent and corroborative such that it completely discredited the appellant's defence.

The two witnesses found the appellant lying on a mat outside a house. They then discovered the firearm underneath the mat.

In essence, the appellant was found in direct and actual possession of the firearm and its round of

ammunition. He did not produce the appropriate firearms certificate thereby putting himself in conflict with the law. His possession of the firearm and the round of ammunition was unlawful. Consequently, his conviction by the learned trial magistrate was sound and safe.

With regard to the sentence imposed on the appellant, it was rather excessive for a first offender even though unlawful possession of a firearm is a serious issue which should be deterred at all costs.

A sentence of three (3) years for the first count and one (1) year for the second count would be deterrent enough for a first offender.

In that regard, the sentence imposed by the learned trial magistrate is reduced to three (3) years for the first count and one (1) year for the second count to run concurrently.

Otherwise, the appeal is dismissed. Ordered accordingly.

[Delivered and signed this 24th day of May, 2012.]

J.R. KARANJA.
JUDGE.