



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

**Criminal Appeal 55 of 2010
JOHN KUNGU MURAMBACHA APPELLANT
VERSUS
REPUBLIC RESPONDENT**

JUDGMENT

The appellant, John Kungu Murambacha, was charged in the first count with the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code and in the second count with being in possession of ammunition without a firearm certificate contrary to section 4(2) of the Penal Code. Learned counsel for the respondent observed that the charge ought to have been brought under the Firearms Act and invited the court to amend the charge sheet under section 354(3) (d) of the Criminal Procedure Code to correct that error.

Under that provision at the hearing of the appeal the court may make any amendment that may appear just and proper. Accordingly the charge sheet is amended in the 2nd count to read Firearms Act in place of the Penal Code.

After a full trial the court found that prosecution evidence in respect of the count of preparation to commit a felony did not attain the requisite threshold and acquitted the appellant (although not expressly stated).

The court, however found that sufficient evidence had been presented in support of count 2, and upon conviction sentenced the appellant to 5 years imprisonment. That aggrieved the appellant who preferred this appeal citing six grounds which may be summarized as follows:

- (i) the prosecution case was not proved beyond any reasonable doubt as possession was not proved,
- (ii) the prosecution evidence was contradictory
- (iii) the sentence was excessive.

It is the duty of this court as the first appellate court to re-evaluate the evidence on record in order to arrive at its own independent conclusion before considering the above grounds of appeal.

It was the prosecution evidence that the police upon receiving information that there were weapons in a certain club in Nakuru town called Bubbles, conducted a raid and 61 pangas and 59 rounds of live ammunition recovered. The ammunitions were submitted to the firearms examiner who confirmed that they were indeed ammunitions as defined under the Firearms Act.

The appellant was then charged with the offence, the subject of this appeal.

The appellant denied being in possession of the pangas and the ammunitions and claimed that the police arrested him and took him behind some toilets before returning him to the club where he saw the exhibits; that the police claimed they were found in his bedroom in the club.

I have considered the entire evidence presented before the trial magistrate and appreciate I did not have the benefit of seeing the witnesses. I have also considered submissions by both counsel and the authorities cited. It is not denied that the exhibits were recovered from Bubbles Club. The only question falling for determination is whether the appellant was in possession of the 59 rounds of live ammunition.

The term possession is not defined in the Firearms Act. That omission notwithstanding, whether a person is in possession of a firearm is a question of fact which will depend on the peculiar circumstances of each case. But a person will be said to be in possession in relation to a thing if the person has the exclusive control of the thing at his behest. So that a person at the relevant time may not have physical possession of the thing but nonetheless truly be said to be in possession of it. The prosecution evidence on possession is to the effect that the appellant was the manager of the club and that the ammunitions were found in his room. It was the testimony of PW2 Abdi Salat, the DCIO, that the appellant identified himself as a staff in the club. That there were two rooms one of which the appellant told them was being used by him and the other by visitors. In one room the ammunitions were found under the bed/mattress. Shortly after, a man by the name Benson appeared and introduced himself as the manager of the club. This evidence does not answer the question why the appellant was singled out, out of several people including Benson; of the two rooms in which one were the ammunitions recovered; did the appellant have the exclusive use of that room; why was the owner of the club or Benson not called to testify and clarify the use and occupancy of the room?

The club being a public place and in view of the evidence that there were workers renovating the club as well as other employees, the

evidence on record does not show that the room belonged to the appellant or that he had exclusive access or control of it.

For these reasons, this appeal succeeds and is allowed, the conviction quashed and sentence of 5 years set aside. The appellant will be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered this 22nd day of July, 2010.

W. OUKO
JUDGE