REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 412 of 2007

JOHN MAINA KAMUNYA……………….……………….APPELLANT

-AND-

REPUBLIC ……………………………………..………RESPONDENT

(An appeal from the judgment of Principal Magistrate Mrs. R.A. Mutoka dated 21st June, 2006 in Criminal Case No. 254 of 2006 at the Chief Magistrate's Court, Nairobi)

JUDGMENT

A. BACKGROUND DETAILS

The appellant was charged, in a first count, with being in possession of a firearm without a certificate contrary to s. 4(1) as read with s. 4(3) (a) of the Firearms Act (Cap. 114, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court, was on *2nd February, 2006* at Zambia Area in Ngong Town, Kajiado District in Rift Valley Province, found in possession of one Italian Bandeli Pistol, serial number A 43851, without a firearm certificate.

In a second count, the appellant was charged with trafficking in a narcotic drug contrary to s. 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act (Act No. 4 of 1994); and the particulars were that he jointly with others not before the Court, on *2nd February, 2006* at Zambia Estate in Ngong, Kajiado District within Rift Valley Province, *trafficked in a narcotic drug by storing* in one of his rooms 22 rolls and 200 grams of *cannabis* (bhang), with a street value of Kshs. 1,220/=, in contravention of the Act.

B. EVIDENCE AS TREATED IN THE TRIAL COURT

The prosecution adduced evidence that the Provincial Criminal Investigations Officer for Nairobi, ***Mr. Julius Ndegwa***, had mounted a Police operation in the Ngong area, for the purpose of dealing with the problem created there by members of a sect known as Mungiki. Several officers from various Nairobi Police Stations, such as ***Corporal Peter Kiio*** (PW3), ***Police Constable Joseph Kisunza*** (PW4), ***Police Constable Isaac Muiya*** (PW5) were involved, and were operating under the command of the OCS, Ngong Police Station, ***Chief Inspector Paul Saitoti*** (PW6). Some 50 Police officers set out from Ngong Police Station, on 2nd February, 2006, for the Zambia Area in Ngong, all armed, and in a convoy of motor vehicles. These Police officers are said to have arrived at the gate to the appellant's home, sometime between 6.30 a.m. and 7.00a.m. It was the evidence of PW6 that he had noticed, by peeping through a hole at the said gate, that there were some ten men inside the appellant's compound; and these men fled, some of them jumping over the fence – which necessitated the Police officers jumping over the fence into

the compound. PW3, PW4 and PW6 testified that they all went up to the front door of the appellant's double - storeyed house, knocked on the door, and the appellant came and opened for them, whereupon they and several other Police officers entered promptly. These officers went straight into the master-bedroom, which had been occupied by the appellant herein. PW6 said he conducted a search in the bed, while PW3 and PW4 carried out a search in the wardrobe.

It was PW3's evidence that in a lower drawer of the wardrobe, he found a black polythene bag which he opened, and in it, he found two rolls of plant material which he suspected to be *bhang*; and in the same place, PW3 found a packet that would have contained Embassy cigarettes, save that its content was 22 rolls of *bhang*; and he also found a pistol, serial number 43851 – and the same was established by ***Alex Ndindi Mwandawiro*** (PW1) to have been an Italian Bandeli pistol, calibre 7.65 mm. PW3 alerted PW6 of the polythene bag and its contents, and he handed over the same to PW6. PW3 said he brought this find to the appellant's attention:

"I asked the accused …. about [the items] and he said he did not know how they got into his bedroom."

Further search in the bedroom revealed snuff, as well as documents which were not introduced as exhibits. PW6 handed over the polythene bag with its contents to PW5, who prepared an inventory of all the recovered items.

Alex Ndindi Mwandawiro (PW1), who is a firearm examiner attached to the CID's Forensic Ballistics Laboratory, on 6th February, 2006 received from ***Chief Inspector Samuel Kabila*** (not called as a witness) a pistol, serial number A43851. PW1 found the said pistol to be an Italian Bandeli pistol, calibre 7.65mm; it was "*in fair general and mechanical condition*" but the following elements thereof were missing –

(i) the *trigger mechanism*;

(ii) the *firing pin and the pin that retains it*;

(iii) the *left and right side stops*;

(iv) the *extractor*.

The witness went on to say:

"As a consequence of the above missing, the pistol is *not capable of being fired*. I concluded that it is, however, a firearm as defined in the Firearms Act …."

PW1 testified that the exhibit memo which had accompanied the said firearm when it was brought to him, requested him "to determine if the firearm was capable of being fired," and "if it had been used in the commission of any offence." His answer was:

"*Since it could not be fired, I could not test-fire it.*"

On the same point, PW1 went on to say in response to cross-examination:

"If the pistol was used, I could not tell. It had dust on it. It looked slightly rusty on the slide and the barrel. It is not my duty to estimate its age. It is in fair general and mechanical condition."

Simon Ndubi Atebe (PW2), a Government Analyst from Government Chemist, testified that ***Police Sgt. Mwancia*** (not called as a witness) had submitted to Government Chemist on 6th February, 2006 an envelope bearing the name ***John Kamunya Njenga***, and containing 158 grammes of plant material, and 22 rolls of plant material; and PW2 was requested to analyse the plant material to see if it fell under s. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. PW2 conducted physical and chemical tests on the specimens, and concluded that they were narcotics within the terms of the Act

aforesaid. PW2 smelt the plant material, examined the leaves, and conducted chemical tests on the same.

The appellant, who was represented at the trial by counsel, made a sworn statement denying the charges. He said, of the house where he was arrested, that he was using that house, though it had a *different owner*; in his words:

"The house belongs to ***George Nyanja***. I do not normally live in that house."

The appellant denied having been found inside the main house, at the time he was arrested; he said he was in an out-house, that served as a store, dealing with agricultural produce. He stated that the polythene bag with which he is said to have been found, was brought into the compound by one ***Police Constable Mwangi*** of Karen Police Station in Nairobi; and he denied that the firearm was recovered from the house.

The appellant called witnesses – ***Joseph Nduati Macharia*** (DW3) and ***Grace Wairimu Nyameri*** (DW4); DW4 said she used to sleep in the main house; DW3 and DW4 testified that the firearm had not been recovered from within the compound, and that ***Police Constable Mwangi*** is the one who brought it into the compound and planted it on the appellant herein.

The learned Magistrate defined the question for resolution as: "whether the prosecution witnesses were credible with respect to the recoveries allegedly made." And she found that PW2, PW3 and PW6, the three witnesses who entered the house in question and went into the appellant's bedroom, "gave corroborated evidence on the sequence of their activities." The trial Court also considered that there were witnesses outside the main house (notably PW5 and PW7) who bore witness to the recovered items, at different times. The Court noted that PW3 who said he recovered the pistol and the *bhang* from the appellant's bedroom, had been extensively cross-examined by counsel, but his testimony had remained unshaken. PW3 had testified that the moment he found the said two items in the bedroom, he brought this matter to the attention of both PW4 and PW6, and at that moment, a question was posed to the appellant, on how those items got into his house – and he denied any knowledge of it. The trial Court rejected the defence statement that the pistol and the narcotic drug had been brought at some stage, by one ***P.C. Mwangi***, to the house: for this point was not canvassed by the defence counsel when he cross-examined PW3 and PW4, and even when cross-examining PW6; yet PW6 is the one who led the search in the home and bedroom. Instead of concentrating on PW3, PW4 and PW5, the trial Court noted, the defence counsel had preferred to raise the issue as to the role of ***P.C. Mwangi*** only with PW5 – and this, even when PW5 had been recalled for further cross-examination. This scenario led the learned Magistrate to find as follows:

"**It is evident from the record that this alleged *P.C. Mwangi* only became prominent during the defence case …. I have perused the inventory and it sets out the recovered items. Nothing prevented [the appellant herein] from noting down his claim about *P.C. Mwangi* ….[Merely] saying it was *P.C. Mwangi* of Karen Police Station is not sufficient identification of a person well known to [the appellant]. Therefore the defence claim that it was the prosecution's burden to call evidence in rebuttal to this claim is untenable ….**"

The learned Magistrate found the evidence of the prosecution to be: "unshaken and hence is credible and I accept it as it relates to the recovery of the pistol and the *bhang*." She found that the pistol was recovered from the bedroom of the appellant herein, and that the appellant "must have known about its presence in his room and is presumed to have known." It was held that the appellant herein had not denied that the bedroom in question was his, and "he never stated if anyone else had access to his bedroom." The trial Court remarked:

"**Since it was his bedroom and there is no evidence that he shared it with any other person, constructive possession must be applied, in the absence of any other explanation for its being there. [Counsel's] submission that [the appellant herein] did not know the firearm was there, is unsupported and remains pure conjecture, therefore.**"

Was it relevant that the pistol had vital parts missing, and was unserviceable? To this question, the

trial Court's answer was: "…. it is immaterial because, for the purposes of [the Firearms Act] [Cap. 114], …. the pistol is defined as a firearm."

The trial Court found that the prosecution had proved the firearm charge beyond all reasonable doubt, and convicted the appellant herein.

As regards the narcotic drug charge, the Court thus found:

"….**since the bhang was inside the polythene bag in which the pistol was found, I find that the prosecution has proved [the charge] against [the appellant herein] to the required standard, and he is found guilty as charged, and ….convicted accordingly."**

After considering the appellant's statement in mitigation, the trial Court remarked that "the offence is serious and carries a maximum sentence of up to 14 years", and that:

"**It matters not that the firearm had no trigger and was incapable of being fired. For all intents and purposes, it had the appearance of a firearm that is serviceable, and, possession of it without a certificate is unlawful."**

On the first count, the appellant was sentenced to a *five-year* term of imprisonment; and on the second count he was sentenced to a *three-year* term of imprisonment – the two to run concurrently.

C. THE GROUNDS OF APPEAL

The original petition of appeal, filed on 4th July, 2007 raised the following grounds:

(a) that conviction had been arrived at on the basis of circumstantial evidence that did not meet "the required legal standards";

(b) that there was no evidence linking the appellant herein to the charge;

(c) that the trial Court had shifted the burden of proof;

(d) that the evidence contained material contradictions that should have been resolved in favour of the appellant herein;

(e) that the trial Court had not shown independence and impartiality as contemplated by s. 77(1) of the Constitution;

(f) that the appellant's constitutional rights under s. 72(5), 74(1), and 77(1) and (2) (a), (b), (c), (d) of the Constitution had been contravened during trial;

(g) that irrelevant evidence had been relied on by the trial Court;

(h) that conviction had been arrived at on the basis of a defective charge-sheet;

(i) that the trial Court's finding on "possession" did not "meet the required legal standards";

(j) that conviction had been arrived at on the basis of "mere suspicion";

(k) that the trial Court had not given due consideration to the appellant's plausible defence;

(l) that the trial Court had misapprended the facts and applied wrong legal inferences, to the prejudice of the appellant;

(m) that the prosecution case had not been proved beyond reasonable doubt.

Just over a year later, on 17th September, 2008 the appellant through his new advocates, filed a supplementary petition of appeal, the main elements of which may be summarized as follows:

(a) that the charge in count 1 was defective, for being framed contrary to ss. 134 and 137(a) of the Criminal Procedure Code (Cap. 75, Laws of Kenya);

(b) that the charge in respect of count 2 was defective, for being framed contrary to ss. 134 and 137(a) of the Criminal Procedure Code as read together with the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994);

(c) that the firearm which was the basis of the charge in count 1, "is not a firearm within the meaning of s. 2 as read with s. 4(3) of the Firearms Act;"

(d) that the firearm in question was not one that is known under s. 4(1) as read with s. 5 of the Firearms Act;

(e) that the laying of the charge in count 2 was "vindictive, malicious, and an abuse of power and discretion in that the particulars of the charge and [the] prosecution evidence relate to an offence under s. 3 as opposed to s. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994."

(f) That the trial Court erred in law and in fact in convicting the appellant of the charge in count 2, although the prosecution evidence was in relation to, or in support of an offence under s. 3, as opposed to s. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994";

(g) that the trial Court erred in law and in fact, in convicting the appellant of the charge in count 2, notwithstanding the prosecution of the appellant in disregard, and in contravention of ss. 4, 67, 75, 79 and 86 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994;

(h) that the judgment dated and delivered on 21st June, 2007 is "fatally defective and a miscarriage of justice in that it violates s. 169 of the Criminal Procedure Code."

(i) that the conviction was not a safe one;

(j) that the trial Court wrongly held, contrary to s. 4 of the Penal Code (Cap. 63, Laws of Kenya), that the appellant had been found in constructive possession of the polythene bag containing the pistol and *bhang* allegedly recovered from his bedroom;

(k) that the conviction on count 2 could not be sustained, because the doctrine of recent possession was inapplicable, in relation to a charge under s. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994;

(l) that the prosecution failed to prove all the ingredients of the charges facing the appellant;

(m) that the trial Magistrate erred in law and fact in "advancing theories and speculations to fill glaring loopholes in the prosecution case";

(n) that the conviction of the appellant was based on presumptions and circumstantial evidence not sufficient to justify any reasonable inference of guilt;

(o) that the trial Court ignored serious irregularities in the investigation and prosecution of the case, and this was in breach of the appellant's trial-rights under s. 77 of the Constitution;

(p) that the conviction of the appellant was a miscarriage of justice which gave the impression that the appellant is a victim of political persecution, and an abuse of power by the prosecuting authorities;

(q) that the trial Court relied on a “fabricated, contradictory and speculative case”, to arrive at a conviction;

(r) that “the learned Magistrate erred and misdirected herself in law and fact by evaluating and analyzing the respective cases of the prosecution and the defence in a speculative, skewed, slanted and unfair manner against the appellant”;

(s) that “the learned Magistrate’s judgment is based on her skewed opinions and selective analysis of the respective cases of the prosecution and the defence, as opposed to solid evidence on record.”

D. CANVASSING THE APPELLANT’S CASE

Learned counsel, ***Mr. Kibe Mungai*** presented the appellant’s case, in prolonged submissions. Counsel submitted that the framing of count 1 of the charge (regarding firearm) did not comply with ss. 134 and 137(a) of the Criminal Procedure Code (Cap. 75, Laws of Kenya). S. 134 of that Act provides that:

“***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge.”***

And s. 137 (a) of that Code requires that: “a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence”; a statement of offence shall briefly describe the offence, and *relate this to any applicable provision of statute*; particulars of the offence shall be set out.

Counsel submitted that the information contained in count 1, that the appellant had in his possession a firearm without an authorizing firearm certificate, stated no offence in the terms of ss.134 and 137 (a) of the Criminal Procedure Code – as s. 4(1) of the Firearms Act (Cap. 114, Laws of Kenya) did not *create any offence*; it was merely a definition section.

Counsel then had to deal with the tenor and effect of s. 4(3) of the Firearms Act, since the charge was framed under s. 4(1) as read with s. 4(3) (a) of the Act. Counsel noted, as s. 4(3) itself states, that the *creation* of offence is under *s. 4(2)* of the Firearms Act – and s. 4(3) is only concerned with *penalty*. Counsel urged that so long as count 1 of the charge made no reference to s. 4(2) of the Firearms Act it was a defective charge, for it made no mention of the *creation* of the offence; the charge, therefore, in the words of counsel, “was fatally defective”: and, as a consequence, the appellant could not, in law, be charged, tried, and convicted. The further consequence, it was urged, is that the appellant was serving an unlawful sentence.

The foregoing point was the subject of a further objection, in the context of *s. 77 (2) (b) of the Constitution*, which provides that –

“***Every person charged with a criminal offence –***

……

(b) ***shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged*** ….”

Counsel submitted that, so long as the provision creating the offence, namely *s. 4(2) (b) of the Firearms Act*, was not cited in the charge, there was no possibility of availing to the appellant the explanation required to be given under s. 77(2) (b) of the Constitution: and the effect was that the trial being conducted was in respect of an *unspecified offence*. Counsel urged that the basis for any trial is an offence that has been stated in the charge-sheet; but in the matter in which the offence was stated, there was no offence stated in the charge-sheet.

With regard to the second count of the charge, learned counsel urged that even though the narcotic drug which was involved was *stated in the charge-sheet* to be worth Kshs. 1,220/=, there was no evidence that a *proper officer* in the terms of s. 86 of the Narcotic Drugs and Psychotropic Substances (Control) Act, had made the value-assessment; it was required there be evidence that such a person was a proper officer; there be evidence of the valuation; there be the assessment report – and only on that basis, could the Court be properly informed that there had been a compliance with the terms of the Act under which the charge was brought. For this reason, counsel urged that the narcotic drug charge was "incurably defective."

Mr. Mungai returned to count 1 of the charge, and submitted that, given the testimony of PW1 (the firearms examiner) that the gun's trigger mechanism as well as other devices were missing and it could not be fired, this could not be a firearm, in the terms of ss. 2 and 4 of the Firearms Act. In counsel's words, "what was presented before the firearms expert did not answer to the description of a firearm"; and so, it was urged, the witness had exceeded his jurisdiction when he declared it to be a firearm. Counsel urged that it was not the remit of the firearm examiner to determine what *was* a firearm: this was the responsibility of the Court, which had abdicated its responsibility.

Counsel submitted that it was wrong in law to sentence the appellant under s. 4(3) (a) of the Firearms Act, since this could only be done where an offence, *as created* under s. 4(2) of the Act, had been committed; but he had not been charged under s. 4(2) of the Act.

Learned counsel urged that the "firearm" which was the basis of the charge was not a firearm, in view of the definition of that term in s. 2 of the relevant Act, which is as follows:

" '***firearm' means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile …."***

A firearm, it was submitted, must have a *trigger mechanism*; but in the instant case there was none; and so, "only a piece of metal can be shown to the Court." Counsel urged that a firearm must be *capable of firing*, and must be the kind of device for which a licensing officer would issue a firearm certificate; and that the trial Court made no finding as to whether a firearm certificate was required for such a piece of metal.

On count 2 of the charge, counsel urged that there was no witness who testified, during trial, that the appellant herein was found *trafficking* 22 rolls of *cannabis sativa*, and yet conviction was for "trafficking by storing"; the same, it was urged, had not been proved; the prosecution had set out to prove possession of a *firearm*, but ended up alleging that the firearm and the narcotic drug were in the same polythene bag; and an attempt was made to prove that the said polythene bag *was* in the possession of the appellant. Counsel urged that the trial Court had dealt with count 2 as a case of *possession*, but not *trafficking*; the statute makes trafficking narcotic drugs a specific offence, but it does not define *storing*. Counsel submitted that "trafficking" implies a commercial activity – and in pursuit of such an activity, one could store the narcotic drug. Counsel submitted that if a person is charged with drug trafficking, but the evidence only shows possession, then there will be no basis for convicting for trafficking.

Counsel relied on the Court of Appeal decision in ***Madline Akoth Barasa & Another v. Republic***, Crim. Appeal No. 193 of 2005 for the principle that trafficking of drugs bears certain manifestations which must be proved:

"….***for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking…."***

The charge was trafficking, counsel urged, but the conviction was for possession – on the basis of *constructive possession*. It was submitted that a charge of possession of narcotic drugs had not been brought against the appellant herein.

It was submitted that the prosecution did not comply with ss. 4, 67, 75, 79 and 86 of the Narcotic Drugs

and Psychotropic Substances (Control) Act, and that there was, as a result, no basis for the conviction. By s.67 of that Act, it was for a *gazetted officer* to say if what had been recovered *was* a narcotic drug; and the value of the drug was required to be given by a qualified officer (s. 86); and custody and mode of disposal the drug in question was required to be in accordance with the provisions of ss. 75 and 79 of the Act.

While acknowledging that "possession", in relation to count 2 of the charge, by s. 4 of the Penal Code, meant actual or constructive possession, counsel urged that just as the prosecution had not proved actual possession of the drug in question, they had not proved constructive possession, since it was not shown that the appellant *knew of the presence* of the polythene bag and of the said drug, in the house in which he was found. It was submitted that it had been erroneous for the trial Court to take the position that since the appellant had spent the night in the house in question, he must know of the presence therein, of the polythene bag and its contents: and that this amounted to a shifting of the burden of proof.

On this point, counsel relied on a decision of this Court, ***Omar Said Omar alias Ahmed Ali Mohamed v. Republic***, Nairobi High Court Crim. Appeal No. 169 of 2006; and the relevant passage in that decision relates to *constructive possession*:

"**Clearly, no witness has squarely linked the appellant to the special ownership (of tenancy) of the flat that was the *locus in quo*; and it follows that it would have been wrong, as a matter of fact, to apply the doctrine of constructive possession, to link the appellant to the firearms and explosives which were said to have been recovered."**

Witnesses in the instant case, gave evidence that the house where the appellant was said to have spent the night leading to the material time, belonged to somebody other than the appellant. Counsel urged that the law makes the presumption that the owner of a house is the possessor of things found therein; but that the prosecution gave no evidence to establish the capacity in which the appellant had spent a night in the house in question; it was not even proved he was a tenant at the house; so, who was the *owner of the wardrobe* in which the offending items may have been found?

E. NO RESPONSE FROM THE RESPONDENT

To the appellant's case, the respondent made no response, save to say, through learned counsel ***Mr. Warui***, that "the Attorney-General has directed me that this appeal be left to the Court to determine." It means, in my opinion, the outcome is to depend on the merits of the appellant's case by itself, as assessed by the Court.

F. ASSESSING THE APPELLANT'S CASE.

The points of assessment emerge, from the submissions of learned counsel ***Mr. Mungai***, as: (i) fundamental questions of law and of the Constitution; (ii) the application of legal concepts to the facts of the case; and (iii) findings made from the evidence.

(a) Does the formulation of the Charge-sheet offend the Terms of the Constitution?

Section 77(2) of the Constitution requires that any criminal charge brought against a person do state explicitly the nature of the offence charged. As learned counsel ***Mr. Mungai*** urged, such a statement must refer to the *specific law that creates the offence* – for it is only thence, that the criminal wrong-doing being communicated to the accused, as required by s. 77(2) (b) of the Constitution, emerges. It is quite obvious, as learned counsel urges, that the charge-sheet in this case made *no reference to s. 4(2) of the Firearms Act*, which is the specific law that creates the offence set out in count 1 of the charge.

Clearly, therefore, count 1 was not a proper charge in accordance with the law, and the charge sheet was, to this extent, defective.

(b) Who decides what's a Firearm, for the purposes of the Firearm Act?

From the evidence, it is quite clear that the item which was the basis of the firearm charge was the rump of a pistol, less the critical gadgets that would make it fire. *Was* this a firearm, in respect of which a certificate was required to be obtained by the possessor? According to the learned Magistrate, "it is immaterial, because, for the purposes of [the Firearms Act] ….the pistol is defined as a firearm."

Section 2 of the Firearms Act defines firearm as:

"….***a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile …"***

Not only did the firearms expert testify that the pistol in question was *not capable of being fired*; he said nothing as to the possibility that it could be "*adapted for the discharge of any shot, bullet or other missile"* – and that is vital matter on which he would have been expected to give testimony.

Section 2 of the Firearms Act, in its definition of "prohibited weapon," includes –

"***a firearm which is so designed or adapted that –***

(i) when pressure is applied to the trigger missiles continue to be discharged until such pressure is removed or the magazine or belt containing the missiles is empty…."

In that category of "prohibited weapon", quite clearly, the "pistol" in question in this case did *not* fall.

As the terms "firearm" and "prohibited weapon" have been *statutorily defined*, it follows that the ultimate interpreter is *the Court*, and not the firearms expert. In this particular case, it is clear that the trial Court did not properly interpret the term firearm, for the purpose of the offence created under *s. 4(2) of the Firearms Act*, and in relation to licensing. The legal position, I believe, would have been different if the said "pistol" had been found in the possession of persons suspected of having committed *robbery with violence* under s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya) – for in that case, appearances alone will give form to the element of *violence*.

(c) Possession of a Narcotic Drug, and Trafficking in a Narcotic Drug

"Possession" is provided for in s. 3, whereas trafficking is provided for in s. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994). In count 2, the appellant was charged with "trafficking in a narcotic drug by storing in one of his rooms 22 rolls and 200 grams of *Cannabis* with a street value of Kshs. 1,220/-…." As already noted, the decision in ***Madline Akoth Barasa & Another v. Republic***, Crim. Appeal No. 193 of 2005 holds that the charge-sheet is to specify clearly "*the conduct of an accused person which constitutes trafficking."* Storage itself would, in my opinion, only give the impression of *possession*, unless it was shown that the act of storage was related to a more active process, such as commercial transactions, or delivery to some place or places; but no evidence in this regard was given, and indeed, no such specification was given in the charge-sheet.

So, once again, this charge lacks the detail and specificity required under ss. 77(2) (b) of the Constitution; 134 and 137(a) of the Criminal Procedure Code (Cap. 75, Laws of Kenya). So long as the distinction between "possession" and "trafficking" was not taken into account, it was not possible, in my view, to impose a *proper sentence*, on the basis of the charge-sheet as it stood.

(d) Law and Evidence

Under this heading, it has already been held that the trial Court was in error, in drawing from the evidence the inference that a firearm *had been found* in the appellant's possession.

But a second error, in my assessment, was that there was an evidentiary basis for coming to the conclusion that the appellant had been found in *constructive possession* of a firearm and a narcotic drug. There was evidence showing that the appellant was not a regular user of the house in question, and that a

different person was the owner of the house; therefore, constructive possession could only have applied if it was shown that *he knew* of the items that were the basis of the charges.

(e) Trial Court's Findings on the Evidence

While an attempt was made to prove that the appellant had been found in possession of a firearm, hardly any proof at all went into count 2 of the charge; "proof" here was being made purely by inference: since the "firearm" had been found in the same polythene bag in which the narcotic drug was kept, proof of count 1 necessarily also disposed of count 2.

As already noted, proof of count 1 did not meet the standards required before conviction is entered; and so, similarly, the inferred proof of count 2 just won't stand up.

G. THE DECISION

Not only does the prosecution case fail on the basis of the provisions of the Constitution and of the applicable statute law, the evidence failed to show guilt on the part of the appellant, and thus, the conviction entered failed to meet the mark of *safety*.

Accordingly, I hereby *allow* the appeal, and set aside the conviction and sentence in respect of both counts of the charge. The appellant shall forthwith be released, unless otherwise lawfully held.

Orders accordingly.

DATED at Nairobi this 22nd day of April, 2009.

J.B. OJWANG

JUDGE.

DELIVERED at Nairobi this 28th day of April, 2009.

M. WARSAME

JUDGE.

Coram: Warsame, J

Court Clerk: Tabitha

For the Appellant: Mr. Kibe Mungai

For the Respondent: Mr. Mureithi

Court: Judgment read in open Court in the presence of the appellant, his advocate, ***Mr. Mungai*** and ***Mr. Mureithi*** for the State this 28th April, 2009.

M. WARSAME

JUDGE.