



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J)

CRIMINAL APPEAL No. 606 of 2006

BETWEEN

SAID HASSAN INSHAR.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Principal Magistrate J.G King'ori dated 4th May, 2006 in Criminal Case No. 831 of 2005 at Garissa Law Courts)

JUDGMENT

Said Hassan Inshar, the appellant herein, was charged with the offence of being in possession of a firearm without a firearm certificate contrary to s.4(3)(a) of the Firearms Act (Cap.114, Laws of Kenya). It was alleged that the appellant, on 30th July, 2005 at Seretho Sub-Location In Garissa District, within North Eastern Province, was found being in possession of a firearm, AK47 Serial No. A073021 without a firearm certificate. There was a second count to the charge, of being in possession of ammunition without a firearm certificate, contrary to s.4(2)(a) as read with s.4(3) of the Firearms Act (Cap.114, Laws of Kenya). The particulars under this count were that the appellant was, on 30th July, 2005 at Seretho Sub-Location of Garissa District, found being in possession of seven rounds of ammunition, 7.62 mm. calibre special, without a firearm certificate.

PW1, **Abdi Abraham Burale**, Chief of Abakeine Location in Garissa District, testified that on 30th July, 2005 at 5.15 a.m. he was inside his house in Seretho Sub-Location, when he heard the noise from a motor vehicle passing by, along the road leading to Dadaab. Soon thereafter, PW1 heard the sound of gun-fire, and the said motor vehicle stopped moving. Two more shots were fired. While at the mosque in the morning, PW1 inquired of elders there, if they had heard sounds of gunshot. The elders replied in the affirmative; and so PW1, accompanied by one **Mosali Hassan Aden** and one **Maalim Abraham**, went to the place where the gunshots had been heard. When they reached the place where the passing lorry of the early morning had stopped, they saw footprints and cigarette butts; they also saw footprints leading away from the scene. Using PW1's torch, the three followed the footprints, which appeared to be those of two persons wearing sandals. Those footprints led to the house of **Said Hassan Inshar**, within Seretho. This house was a traditional Somali hut, with door-shutter of cloth material. PW1 pushed the cloth, peeped inside, and saw the appellant herein lying on a bed. PW1 sent one **Ibrahim**, a water bore-hole operator, who had joined him and his colleagues, to call the appellant's uncle, **Warsame Ishara**. When **Warsame**

Ishara came, and PW1 asked him about the gun-shots a short while earlier, he said he had heard them. PW1 informed **Warsame Ishara** that the footprints from the *locus in quo* had led to the appellant's house. PW1 asked **Warsame Ishara** to be present as a witness, as a search was being conducted at the appellant's dwelling. This group of men then entered the appellant's house; the appellant woke up; PW1 informed the appellant, a search was to be conducted in the house. Under the bed, PW1 found a tyre-tube, which contained a magazine, with seven rounds of ammunition. Further search revealed, under a grass-made mat, an AK47 rifle. PW1 and the other elders then arrested the appellant herein; they took him to the main road, and then to Dadaab Police Station. PW1 handed over the rifle, magazine and ammunition, and the appellant herein, to the Police.

On cross-examination, PW1 said the appellant had been arrested at 6.00 a.m. as he slept on a bed. The magazine had been kept separate from the rifle. The sound of gunshot had been heard at about 5.15 a.m. The rifle had been kept under the bed. PW1 and his elders had arrested and tied up the appellant before a motor vehicle took them to Dadaab Police Station.

PW2, **Noor Abudullahi Ali** comes from Seretho Market, and knows the appellant as a resident of that area. PW2 is a village elder and is involved in security matters in the village. He was going for early morning worship on 30th July, 2005 when he heard the sound of gun-shot, along the road, close to the mosque. This was followed by two more gun-shots. PW2 still proceeded to the mosque, and said his early morning prayers. After prayers, the area Chief (PW1) inquired if others also heard the gun-shot in the morning; and they confirmed they did – i.e. PW2, **Maalim Ibrahim** (an elder), and **Ibrahim Mohamud** (an elder). Several worshippers confirmed they did hear the gun-shots. On inspection, the Chief and his elders found a place with signs that a vehicle had stopped there; and they saw footprints (of two people) leading from the scene. When the Chief and the elders followed the footprints, these led to a hut in Seretho, a hut which PW2 knew to belong to the appellant herein. PW2 remained outside, while the Chief and the two men entered the appellant's hut; they arrested the appellant and brought him out, with a rifle and a magazine. The Chief then escorted the appellant to Dadaab Police Station.

On cross-examination, PW2 restated that the rifle in question had been recovered from the appellant's house, and that this was in the wake of a robbery which had taken place. PW2 said that the appellant when found with the AK47 rifle, had acknowledged he was in possession of the same.

PW3, **Maalim Ibrahim**, is a member of the local mosque in Seretho. On 30th July, 2005 at about 5.00 a.m., PW3 was in the mosque, which is situated by the road. The Chief (PW1), after prayers, requested PW3 and other elders to accompany him to the scene where gunshots had been heard in the early morning. The Chief's party found, at a point where a motor vehicle had apparently stopped, footprints, which they now followed all the way to Seretho Village which was nearby. The footprints led to the house of the appellant herein, and the witness did know that this was the place where lived the appellant. The Chief and elders peeped into the hut after shifting the curtain-door, and saw the appellant asleep in bed. The Chief sent for the appellant's uncle, and **Warsame**, and in **Warsame's** presence, the Chief's team entered the appellant's house. In the meantime, Seretho village residents gathered around the appellant's house. The appellant woke up, and the Chief informed him he was conducting a search in the house. Under the bed, the Chief recovered a magazine and a rifle; and PW3 identified the said rifle in Court. The magazine was found separately inside a tyre-tube. The magazine had ammunition. The Chief arrested the appellant, and took him out onto the road, from where the appellant was escorted to Dadaab.

On cross-examination, PW3 confirmed that the footprints found from the scene of gun-shot in the morning, had led directly into the appellant's house; the appellant was arrested right inside his house as he slept; the rifle was found inside the same house even though the witness did not know its real owner. PW3 added, on re-examination, that the said rifle was found under the appellant's bed, and that there had been no one, other than the appellant, in that house.

PW4, Police Force No. P.C. 79587 **P.C. Abdullahi Ali Soyayn** of Dabaab Police Station testified that on 30th July, 2005 he was on stand-by duty and, at 12.00 noon a Chief from Seretho arrived, with a suspect. The Chief brought along an AK47 rifle, with seven rounds of ammunition, which he said had been recovered from the appellant herein. PW4 tendered the rifle and the ammunition as exhibits. PW4 after

receiving the Chief's report, preferred charges against the appellant herein. PW4 sent the gun and the ammunition to the Government ballistics expert, who ascertained that these items were fire-arm and ammunition, as defined in statute law.

PW5, **Lawrence Nthiwa**, testified that he was a firearms examiner attached to the firearms laboratory, at C.I.D. headquarters. He had received from **P.C. Matu Nyota**, for examination, a rifle, Serial No. AOA73021 and seven rounds of ammunition. He identified these items in Court, and testified that he had examined them and found one of the exhibits to be an AK47 rifle, calibre 7.62 mm; its external metallic parts were rusty; and its wooden parts were eaten away at the edges: an indication of poor storage. The rifle was, however, capable of being fired; the witness successfully tested the rifle using three rounds of ammunition. PW5 testified that the rifle and the ammunition exhibited were firearms, in terms of the Firearms Act.

PW6, Police Force No. 44126 **Cpl. Onesmus Kyalo** testified that he is attached to the CID Garissa, but at the material time he was attached to CID Dadaab Police Station. He was at the office on 30th July, 2005 when the OCS Dadaab called him and asked him to conduct investigations into a case reported at the Police station by a Chief from Seretho, who had arrested the appellant herein. The rifle and ammunition brought along by PW1 were handed over to PW6, for his use during investigations. He began investigations, and recorded statements from witnesses, after which he prepared an exhibit memo, and sent the exhibits under the care of **P.C. Matu Nyota** to deliver to the ballistics expert in Nairobi for examination. PW6 later collected the report from the ballistics expert in Nairobi, and the appellant herein was then charged.

When put to his defence, the appellant herein made a sworn statement, in which he said that on 30th July, 2005 he had taken a sick person from Seretho to Dadaab, and he had used the same bus in which the Chief from Seretho was also travelling. The appellant testified that when the said bus got to Dadaab, the Chief alighted and brought Police officers who came and arrested him. The appellant said he heard the charges for the first time in Court.

On cross-examination, the appellant said there had been a grudge between him and the Chief in charge of Seretho: "over relief food." The appellant acknowledged that when the Chief (PW1) had testified in Court, he had not cross-examined the Chief about the alleged grudge. The appellant said he also had a grudge with one elder (PW2) regarding relief supplies of grain. Again, he acknowledged that he had not cross-examined PW2 about relief-food supplies.

Although the appellant had earlier indicated he would call witnesses to support his case, he later informed the trial Court: "I wish to dispense with the evidence of my witnesses. I understand they have gone far away, into the bushes. I close my case".

In arriving at the final decision, the learned Magistrate thus guided himself, on evidence:

"Evidence very rich in details has been given by the area Chief (PW1) and two elders (PW2, PW3) regarding [the] circumstances in which the recoveries were made... The evidence of the area Chief and [the] two elders...was full of details and consistent, corroborative, and impressed me as truthful. I saw no cause to doubt the veracity of the evidence. The accused cross-examined them in detail and they were firm. He did not at that stage raise the issue of a grudge between [himself] and PW1 and PW2. That arose only in his evidence and only in cross-examination. I have determined this to be an afterthought....The rifle and seven rounds of ammunition were found right under the bed on which the accused was sleeping. The house was his. The accused, therefore, had possession of the firearm and ammunition. The firearm and ammunition have been certified by the ballistic expert to be so. The accused had no firearm certificate. I found his defence a mere denial."

Having convicted the appellant herein, the learned Magistrate treated him as a first offender, took his mitigation plea into consideration, and sentenced him to a ten-year term of imprisonment on the first count, and a six-year term of imprisonment on the second count, the two sentences to run concurrently.

The appellant challenges the findings and the verdict of the trial Court. He thus states:

(i) that, the trial Court had erred in both law and fact, in failing to appreciate that the evidence adduced was inconclusive and no opinion could have been founded upon it;

(ii) that proof-beyond-reasonable doubt was not achieved;

(iii) that the defence case had wrongly been rejected.

Building upon those grounds, the appellant contended that it was not true evidence that a gun was found in his possession; he said he only saw the gun in Court, and that the case against him was a frame-up. The appellant contended that the charge had been brought against him only after he had disagreed with PW1, PW2 and PW3 regarding relief food. He further raised a new point, that interpretation into the Somali language for him in Court was defective, he did not understand what was being said. He contested the prison term imposed against him as harsh, denying him an opportunity to care for his children, and subjecting him to oppressive living conditions.

Learned State Counsel **Mr. Mukura** contested the appeal, and supported both conviction, and sentence. He urged that overwhelming evidence had been adduced by the prosecution, in the form of witness testimony, exhibits, and circumstantial evidence. Counsel urged that the sentence imposed upon the appellant was lawful, and neither harsh nor excessive, as the trial Court could well have imposed up to a maximum of 15 years' imprisonment on the first count.

After considering all the evidence, as required by law, I have come to the conclusion that an overwhelming amount of evidence, of distinct, probative force, was brought fourth by the prosecution, leaving no doubts as to the commission of the offences charged, by the appellant herein. The Chief from Seretho (PW1) had used focussed and commendable methods of tracing, in the presence of village elders, which enabled him to isolate the appellant herein as a man possessed of a gun, and who had just used it to shoot at passers-by. The Chief conducted a systematic search and recovered the said gun, the magazine and the ammunition, before clinically arresting the suspect, and delivering him to the Police station. Relevant evidence was given, the truthfulness of which cannot be doubted, showing that the appellant had committed offences as charged. The learned Magistrate consciously addressed himself to demeanour of witnesses, and concluded that they were giving a true account; and it is on that basis the trial Court found the appellant guilty, and convicted him.

The residual objections which the appellant has come up with, in my opinion, as an afterthought, just will not hold. The record shows clearly that the appellant effectively cross-examined the prosecution witnesses, and this goes to negative his claim that he did not follow the language spoken in Court. The appellant's attempt to rely on grudge, as having been the basis of the case against him, just won't stand up; for the claim comes as an afterthought, and is bare and entirely unconvincing. In the outcome, the prosecution case remains standing firm, and, in my opinion, constitutes proof-beyond-reasonable-doubt.

As to sentence, I have considered the danger to human life posed by casual, unauthorized possession of firearms. Potentially- lethal hurt to individuals and communities, such as is apt to be occasioned by unregulated possession of dangerous arms, must be a public-policy concern in the Courts of law; and for this reason a deterrent sentence is entirely in order.

Consequently, I dismiss the appellant's appeal, uphold conviction, and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person