REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 73 of 2006

ADENO SMAN JEHON……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 2534 of 2005 of the Chief Magistrate's Court at Nairobi- A.O Muchelule C.M)

JUDGMENT

ADAN OSMAN JEHON, the appellant, was charged before the subordinate court a with two counts. Count 1 was for being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearms Act (Cap. 114). The particulars of the offence were that on 14th November 2005 at Eastleigh Section II, Nairobi, within the Nairobi Area, was found possession of Torkalev Pistol S/No. 1966 B8631 without a firearm certificate. Count 2, on the other hand, was for being in possession of ammunitions without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearms Act (Cap. 114 Laws of Kenya). The particulars of the offence were that on 14th November 2005 at Eastleigh section II, Nairobi within the Nairobi Area, was found in possession of seven rounds of ammunition 9mm. caliber without a firearm certificate.

After a full trial, he was convicted on both counts. He was sentenced to serve 8 years imprisonment on each count, which sentences were to run concurrently. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court against both conviction and sentence.

His amended grounds of appeal are three, and they are as follows –

1. The learned trial magistrate erred both in law and fact in convicting him on exclusively circumstantial evidence which was inconclusive and dubious.

2. The case of the prosecution was far from proved, thus the conviction and harsh sentence was unsafe and bad in law.

3. That his defence was not considered at all which was an error in law.

The appellant also filed written submissions and, in addition amplified his written submissions at the hearing of the appeal. He stated that when he was arrested at Eastleigh Section two, he was in the company of another person and was carrying a handbag, Kshs.20,000/= as well as his identity card. He

was then taken to the lodging by force, where he was actually not staying. He submitted that it was the manager of the lodge (PW2) who brought out the keys, though PW1 stated that the appellant had the keys. He contended that it was neither him (the appellant), nor the receptionist as alleged by PW4, who brought the keys. He challenged the evidence by the manager that he was staying in the lodge. He especially denied staying in the lodge, on the ground that it was the prosecution evidence that he had not paid for the accommodation from 30/10/2005 to 15/11/2005. This evidence that he has not paid, he contended supported his contention that he was not a resident in the lodge. He contended that the police took his Kshs.20,000/=, his identity card and mobile telephone. He submitted that he wanted the court to order that he be given back his belongings.

The learned State Counsel, Mrs. Gakobo, opposed the appeal.

Counsel contended that the prosecution had adduced sufficient evidence to sustain the convictions. It was counsel's contention that the evidence of PW4 was to the effect that the appellant led them to his lodging room, where they searched and found a pistol and 7 rounds of ammunition. This evidence was supported by the evidence of the manager (PW2), that the appellant had occupied the subject room, which was room number 4, for a number of days. Counsel contended that PW2 produced the relevant documents to show that the appellant occupied the subject room, and that he occupied it alone.

Counsel further contended that the pistol and ammunition were examined by PW3 and found to be functional. It was counsel's view, that the prosecution evidence was consistent and corroborative. The court analysed the evidence for the prosecution and the defence, therefore the defence of the appellant was considered. On the sentence, counsel contended that each of the offences carried a minimum sentence of 7 years imprisonment. Therefore, the sentences were neither illegal nor harsh or excessive.

In a short response, the appellant submitted that the lodge register was written in hand and no receipt was issued. He contended that the police took his identity card, which they used to make the record in the register. He also emphasized that the police relied on an informer, who was not called in court to testify.

The summary of the fact is as follows. On 14/11/2005 PW1 CPL. TOM OTIENO ODERA and PW4 PC PETER MUTUNGA, on information received from an informer who did not testify in court, proceeded to Eastleigh Section II, with six other police officers. They arrested a suspect who was walking on the street. He was the appellant herein. After enquiring from him about his residence, they went together to ANUSHAMSHI Lodge. They found a caretaker of the Lodge who took them to room No.4. In the room, they found a pistol make Torkaler under a bed in the bag. In a bag, beside the pistol, they found 7 rounds of ammunition. The pistol and ammunition were taken to the firearms examiner PW3. In his report which was produced as exhibit 2, the firearms examiner confirmed that the pistol Tokaler serial No. B8631 of Russian make, was mechanically functional. It was designed to chamber 7.62 by 25mm ammunition. It was not loaded. The report also confirmed that the ammunition which was taken to the Government analyst were 7 rounds of caliber 9 by 19 mm Each of them was capable of being fired by the appropriate firearm, which was not the model of pistol recovered.

The appellant was consequently charged with the offence. In his defence, the appellant gave sworn testimony. He stated that on the day that he was arrested, he had come from taking supper and was heading home with four other people. Some people who identified themselves as police officers, and were about 8 in number, called from behind and asked him for his identity card. When he produced his identity card, they questioned its validity and slapped him. They took him around and threatened him. Ultimately, he took the police to his house. At his house, three officers entered the house leaving him outside with other police officers. The officers who were in the house then called and said that they had got what they wanted. He was then taken to Pangani Police Station where he had been found with a firearm. The police then took his identity card, wallet with Kshs.20,000/=, cell phone Nokia 3310 and Casio watch. He was taken to court after 4 days.

In cross-examination, he stated that he lived with a woman called ELBA NUR JELE. However, he did not take the police to the house of ELBA. He stated that a the police forced him to take them to the ANASHAMSHI lodge, but that was not where he used to live. It was the police who forced him to room

Faced with this evidence, the learned trial magistrate found that the prosecution had proved the case beyond reasonable doubt and convicted the appellant. The learned trial magistrate stated –

"**I know that it is the duty of the prosecution to prove the guilt of an accused beyond doubt and the burden does not shift. The prosecution evidence is clear to me that this accused rented the room in question and he exclusively occupied it. It is clear he brought the police here when asked where he stayed. There is no dispute the pistol and ammunition were recovered here in his presence and that of PW2, and exhibit 9 confirms that. The claim that accused stayed elsewhere, or that he was forced into the room, is false. I find the accused was the owner of the pistol and the ammunitions. For each he has no certificate".**

The conviction of the appellant is predicated on circumstantial evidence. No one found him in actual physical possession of the firearm (pistol) or the ammunition. Both were found in a room, which was said to be occupied by him at ANUSHAMISHI Lodge Eastleigh. In **MUCHENE –v- REPUBLIC [2002] 1 KLR 367, Chunga CJ, Tunoi & Owuor JJA, held –**

1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exists no co-existing circumstances which would weaken or destroy such inference.

2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.

From the above therefore, for there to be a justification to support the conviction of the appellant herein, the evidence before the court must lead to no other reasonable hypothesis than that the appellant, indeed, had possession of the firearm (the pistol) and the ammunition. Proof of possession is very crucial in our present case to prove both the charges. From the evidence on record, it is clear that the items were recovered in a room, not on the physical person of the appellant. Was the appellant in possession of the items for which he was charged? It was observed by Mbaluto and Kubo JJ in **NSEMBE –vs- REPUBLIC [2003] KLR 521** for someone to be in possession, that person has to have knowledge of such possession, and the said possession, has to fall within the meaning of section 4 of the Penal Code. The definition of possession under section 4 of the Penal Code (Cap. 63) is as hereunder –

"**Possession"**

(a) "be in possession" of or have in possession" include 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 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."

Having considered the circumstances of this case, the information about the appellant having the firearm and ammunition was given by an informer. That informer did not come to court to testify to explain the circumstances under which the appellant was in possession of the items. The key to the room was brought either by the receptionist at the lodge or the manager. It was not found in possession of the appellant. There is no evidence that someone else could not have entered that room and placed the pistol and ammunition under the bed. No attempt appears to have been made to dust the pistol for finger prints. The pistol and ammunition were not found in any item that could be said to belong to the appellant or to which the appellant had exclusive control. I find that the appellant actually lodged in room 4 where the

pistol and ammunition was found. In my view, though there is probability that the appellant had in his possession the pistol and ammunition, the prosecution was not able to close the gap of any other hypothesis. It was quite possible that, even assuming as I have found, that the appellant was the occupant of that room, that he did not know about the items. It is also possible that someone else would have put pistol and the ammunition there, as the appellant was not exclusively the person with the key to the lodge room. It is possible that the informer put the items there under the bed. The burden was on the prosecution to prove their case beyond any reasonable doubt. It never shifts to the appellant. Therefore the failure of the prosecution to close all the gaps with regard to circumstantial evidence and possession, means that the benefit goes to the appellant. For that reason I find the conviction of the learned magistrate to be unsafe and the same cannot stand. I will allow the appeal on that ground.

The other ground of appeal is that the appellant's defence was not considered. That ground has no basis. It is clear from the judgment that the learned trial magistrate considered the appellant's defence that he was forced into the room. The trial magistrate found the evidence to be false. I dismiss that ground of appeal.

The appellant has asked this court to order the released to him of certain items which he claims were taken by the police. He claims that his identity card; watch; and mobile phone money and purse were taken by the police. None of these items was produced in court or was a subject of these proceedings. I decline to issue any orders on those items. The appellant should pursue the release of those items separately as they were neither produced in court nor were they subject of these proceedings.

Consequently, and for the above reasons, I allow the appeal quash the convictions of the learned trial magistrate on both counts and set aside the sentences. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 1st October 2007.

George Dulu

Judge

In the presence of –

The appellant

Mrs. Gakobo for State - absent

Eric - Court clerk

Ali Hassan - Somali interpreter