



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 387 & 400 of 2004**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 1377 of 2004 of the Chief Magistrate's Court at Nairobi (J.O. Oseko (Mrs.) - PM)**

**ABDI KARIM MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 400 OF 2004**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 1377 of 2004 of the Chief Magistrate's Court at Nairobi (J.O. Oseko (Mrs.) - PM)**

**ADEN SATANI GOBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The two Appellants **ABDI KARIM MOHAMMED** and **ADEN SATANI GOBA** were the 1<sup>st</sup> and 2<sup>nd</sup> accused persons in the lower court in which they had been charged with four other persons with two offences. The first count with **BEING IN POSSESSION OF FIREARM** and in count 2 of **AMMUNITION WITHOUT FIREARMS CERTIFICATE** contrary to **Section 4(2) (1) and 4(2) (b)** of the **Firearms Act** respectively.

It was alleged that on 20<sup>th</sup> May 2004 along Thika Road near Baptist Church, Nairobi they were jointly found in possession of a firearm namely TOKALEV S/NO. EH 80642 and 8 rounds of ammunition. After a full trial, the two Appellants were convicted for both offences and sentenced in count 1 to 7 years imprisonment and in count 2 to 5 years imprisonment with prison terms running concurrently. It is against the conviction and the sentence that they now appeal to this court.

The facts of the prosecution case were that the 1<sup>st</sup> Appellant was the driver and the 2<sup>nd</sup> Appellant the turn boy of a lorry Registration No. KAL 489M belonging to another who was neither a prosecution witness nor an accused. The two were seated at different places in the lorry with the 1<sup>st</sup> Appellant at the driver's wheel and the 2<sup>nd</sup> Appellant at the rear back of lorry. The lorry had many passengers both in the driver's cabin and the rear. In the driver's cabin there were four passengers who were accused No. 3 to 6 in the charge. The lorry left Moyale on 19<sup>th</sup> April 2004. It reached Marsabit at 10.00 p.m. that day where all the crew and passengers spent the night. The next morning they all left Marsabit for Nairobi where they reached at 10.00 p.m. They were driving towards the city centre along Thika Road when Police Officers on mobile patrol duties stopped them in order to inspect the lorry as they did to many other vehicles headed towards the city centre. It was during the search that the Police Officers, PW1, PW2 and PW3 recovered the firearm with 8 rounds of ammunition in a polythene bag under the bed cum seat behind the driver's seat in the driver's cabin. That is where two of the passengers in the lorry accused No. 4 and 6 were seated. All passengers in driver's cabin and the turn-boy at the back, 2<sup>nd</sup> Appellant, were arrested and eventually charged with this offence.

The 1<sup>st</sup> Appellant raised twenty grounds of appeal which **Mr. Nyandieka** argued on his behalf. The key issues argued by **Mr. Nyandieka** touched on possession whether the Appellants could be said to have been proved to have been in possession of the firearm.

The other issues argued touched on the discrepancy in the serial number of the firearm between the one in the charge sheet and the number given by the prosecution witnesses in their evidence. The counsel for 1<sup>st</sup> Appellant submitted that by amending the serial number at the close of the prosecution case that contradicted the evidence that prosecution witnesses had already adduced.

**Mr. Nyandieka** also submitted that the 1<sup>st</sup> Appellant was convicted on basis of extraneous matters that did not form part of the evidence adduced before the trial Court.

**Mr. Mutinda**, counsel for the 2<sup>nd</sup> Appellant argued the appeal on behalf of his client. Counsel relied on the three grounds in the petition of appeal filed by the 2<sup>nd</sup> Appellant in person in which the 2<sup>nd</sup> Appellant challenged the sufficiency of the prosecution case to meet the standard of proof required and also the failure by the trial court to consider his defence. Counsel submitted that the reasons for convicting the 2<sup>nd</sup> Appellant were given by the learned trial magistrate at page J5 and J8. That the reasons included the fact that he spoke in his mother tongue obstructing police officers therefore creating their suspicion and the fact that the 2<sup>nd</sup> Appellant had driven the lorry at one point and yet was not a licensed driver and failure by the defence to call as a witness the lorry owner. That the reasons given could not have formed the basis of the conviction. Counsel also submit that the 2<sup>nd</sup> Appellant was all the time traveling at the rear of the lorry and that the learned trial magistrate erred in convicting him on the basis that he was on the driver's cabin. Learned counsel also submitted that the learned trial magistrate misdirected herself in relying on the **Mubiru case** to find Appellants were in possession of the firearm which case could not apply to the facts of the instant case.

The learned counsel for the State, **Miss Nyamosi**, opposed both the Appellant's appeal and supported the conviction and the sentences. The State Counsel submitted that the prosecution proved its case as required, that the Appellants defences were dully considered and that the Appellant's were in constructive possession of the firearm and ammunition by virtue of having been the ones in control of the motor vehicle. Learned counsel also submitted that there was a discrepancy in the evidence in regard to the serial number of the pistol and that the said discrepancy was rectified when the prosecution amended the charge. Counsel also submitted that it was the Appellant's duty under **Section 214(1)** of the **Criminal Procedure Code** to indicate if they needed to re-call the prosecution witnesses after the charge was amended and that no such request was made.

I have carefully considered this appeal and have re-evaluated and re-analysed the evidence adduced before the trial court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. I will consider the last issue raised in the learned State Counsel's submission concerning

the duty which arises under **Section 214(1)** of the **Criminal Procedure Code**. Learned counsel submitted that it was the duty of the Appellants to indicate whether they would require to re-call any of the prosecution witnesses after the amendment of the charge. **Section 214 (1)** of the **Criminal Procedure Code** gives the trial court two important and mandatory duties if it will allow an amendment of the charge

As provided under the proviso in **Section 214 (1) (i)** the trial court read over the new charge to the accused persons and required them to plead to it. Under **Sub-section (ii)** of the proviso the accused persons may demand that witnesses or any of them be re-called for further cross-examination. In **YONGO vs. REPUBLIC (1983) KLR 319** at page 324, **POTTER, HANCOX, JJA** and **CHESONI Ag. JA** while discussing **Section 241 (1) (i)** of **Criminal Procedure Code** held: -

*“unfortunately, though the magistrate recorded that he had complied with section 214 and that the amended charge was read to the Appellant he did not record that the requirement under the second proviso, namely the Appellant’s right to re-call the witnesses, was also complied with. This he should have done particularly as regards Robert, who gave the only material evidence... We cannot say that this failure to observe the requirements of the section occasioned no prejudice to the Appellant in the circumstances of the case...”*

In the instant case, after the prosecution applied to amend the particulars of the charge, the accused persons objected through their advocates. The objection was overruled and the amendment allowed. After the charge was amended, it was read to the accused persons who all pleaded not guilty to it. The prosecution then closed its case. The record of the court is totally silent as to whether the second proviso to **Section 214(1)** of the **Criminal Procedure Code** was complied with. It is the trial Court’s duty not only to comply with the proviso but to also make a note of it in the record that the same was complied with. This duty lies on the court whether or not the accused person is represented by Counsel.

The issue here is whether as a result of the failure to comply with the proviso the Appellants were prejudiced. The amendment made by the prosecution was to the particulars of the charge where the serial number of the firearm in count 1 was amended from serial No. EH80624 to Serial No. EH80642. At the time of the amendment all three prosecution witnesses had testified. All these witnesses had given evidence touching on the serial number of the said firearm. The amendment was material and in the circumstances I cannot say that the Appellants were not prejudiced by this failure to observe the requirements of the section particularly due to the discrepancy of the serial number of the firearm in the evidence of PW1 and PW3. PW1 is the one who actually recovered it from the lorry. Due to the fact that the amendment was made after PW3 the last prosecution witness admitted the discrepancy in the serial number in the charge and the evidence by the prosecution that amendment was quite substantive.

PW1 admitted in cross-examination by the 1<sup>st</sup> Appellant’s advocate that the serial number of the gun as per his statement which number he did not disclose, was different from the serial number on the gun which was exhibit 2(1). PW3 said that in his statement the serial number of the gun was EH80624 and that was the serial number quoted on the charge before the amendment. Their evidence in court that the gun they recovered was number EH80642 differed with the serial number on the charge at the time since the charge had not been amended but most important of all, also differed from the serial number on the firearm itself. So that whether the amendment was made or not made the serial number of the firearm PW1 recovered from the lorry and which they entered in their statements was totally different from the gun in court. None of the 2 witnesses PW1 and PW3 explained how the discrepancy arose at the time that they testified in court. Had they been re-called and cross-examined on it, the learned trial magistrate may have formed a different view of the evidence. Taking into account that the amendment was made soon after all the witnesses had testified and not soon after the discrepancy was noted after PW1’s evidence, that failure to comply with the proviso (ii) of **Section 214(1)** of the **Criminal Procedure Code** occasioned a miscarriage of justice. In any event even if the amendment was made or not due to the discrepancies in the evidence and statements of PW1 and PW3 there was a lacuna in the prosecution case which only the prosecution could resolve. Even though the appeal could be determined by this finding alone, I wish to discuss the issue of possession which was one of the basis of the Appellant’s conviction in this case.

Learned trial magistrate relied on the **HCCC No. 2 of 2003, Mohamed Mubiru Simon vs. Republic** to find that possession was proved against the two Appellants. In the cited case, which happened to have been my decision, the Appellant was arrested inside his house where under a mattress inside the house a rifle was recovered. The case was not supplied and I do not re-call from memory on what basis possession was proved. That notwithstanding the facts of that case cannot apply to the facts in the instant case for a simple reason that whereas a house is an immovable property and access to it, depending with the facts can be restricted, the lorry is movable property. The lorry in issue in this case had left Moyale 2 days before its arrest. It had a sleep over at Marsabit. It is not clear whether it had a sleep over at Isiolo. However, it is clear that at the time the Appellants were arrested, they had not been proved to have had exclusive access and control over the lorry and all its luggage.

They also had several passengers including four inside the driver's cabin where the firearm was found. It cannot be said that the luggage in the lorry was the same as that which had been loaded into it by the 2<sup>nd</sup> Appellant at Moyale. There were bound to have been changes as people left and entered the lorry throughout the 2 days journey.

The Firearms Act does not define possession. The penal code defines "be in possession of" or "have in possession" in section 4 of the code as follows: -

**"Possession" –**

***(a) "be in possession of" or "have in possession" includes 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 the 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..."***

That definition may not be applied as stated in the offences under the Firearms Act but it helps focus our minds on what may constitute possession. The obvious meaning of being in possession of something is where it is found in one's own personal possession i.e. in ones person. The firearm in the instant case was not in any one person's actual possession. The other meaning is where it is shown that a person had left the thing in a place whichever place it may be so that it can be proved he had both knowledge of the object being in a certain place and also control and power to use it whether exclusively or otherwise for his own benefit or for the benefit of any other. The burden is on the prosecution at all times. To prove that the accused person had 'knowledge' and 'control' as explained in the instant case, PC Keter who was PW1 recovered the firearm loaded with the 8 rounds of ammunition in a polythene paper bag hidden under a mattress where the 4<sup>th</sup> and 6<sup>th</sup> accused had been sitting at the time of the arrest. PW1 and PW2 both stated in cross-examination that they learnt from the accused persons and other passengers that the polythene bag in which the firearm was recovered belonged to the 4<sup>th</sup> accused in the case. However, those who gave those statements including the 2<sup>nd</sup> Appellant according to PW1 were not treated as witnesses so that I can say that due to the circumstances under which the gun was recovered not having yielded a person who could have been said to have been in actual personal possession of it, the police overlooked the second alternative they had of investigating the case in order to determine who had knowledge of where the firearm was and also control over it. By charging the 2<sup>nd</sup> Appellant who stated to PW1 that he knew whose polythene bag that was and by letting others who also knew the "owner" of the paper bag to go, the police blew up their case. See **WAFULA & 3 OTHERS vs. REPUBLIC 1986 KLR 627.**

The evidence before court would not justify any finding of guilt on the two appellants on the basis of possession in the two circumstances and meanings I have explained in this case. The prosecution needed to adduce evidence to assist the court determine the issue of possession and the learned trial magistrate could not have reverted to conjecture or theories without evidence to support them. I find that for both

reasons I have given in this judgment the convictions entered against the Appellants were unsafe and cannot be allowed to stand. I will allow their appeals, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 26<sup>th</sup> day of June 2006.

.....

**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellants – present

Ms. Nyamosi for the State

Mr. Nyandieka for the 1<sup>st</sup> Appellant

Mr. Mutinda for the 2<sup>nd</sup> Appellant

Tabitha - CC

.....

**LESIIT, J.**

**JUDGE**