Esekon v Republic (Criminal Appeal E043 of 2022)
[2025] KECA 1499 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KECA 1499 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E043 OF 2022

JM MATIVO, PM GACHOKA & WK KORIR, JJA

SEPTEMBER 19, 2025

BETWEEN

REBECCA ASINYON ESEKON .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Lodwar (J. Wakiaga, J.) dated 12th May, 2020 in Criminal Appeal No.32 of 2019)

JUDGMENT

1. Rebecca Asinyon Esekon (the appellant), was charged jointly with two other persons at the Principal Magistrate's Court at Lodwar in Criminal Case No. 274 of 2018 with three counts. Count one was being in possession of specified firearms without firearm certificate(s) contrary to section 4 A (i) of the >/akn/ke/act/1953/40 Firearms Act}}. The particulars of the offence were that on 1st}} May 2018 at Kawalathe area along Lodwar - Kakuma road next to China City Construction Company site aboard motor vehicle registration number GKB 345M, a Toyota Land cruiser, they were jointly found in possession of specified firearms namely six AK 47 rifles body No. SE621168, 60283, 23947, 13636, BAc-223346, 06725 and six AK 47 magazines without a firearms certificate.

2. In count II, they were jointly accused of being in possession of ammunition without a firearms certificate contrary to section 4 (2) (a) as read with section 4 (3) of the >/akn/ke/act/1953/40 Firearms Act}}. It was alleged that on the above date and place, they were jointly found in possession of 30 rounds of ammunition and one round of 7.62 mm caliber ammunition without a firearm certificate.

3. In count 111, they were jointly charged with the offence of preparation to commit a felony contrary to section 308 (1) of the Penal code. It was alleged that they were jointly found in possession of six AK 47 rifles, 30 rounds of 7.62 mm special caliber ammunition in a motor vehicle registration number

GKB 345M, Toyota Land cruiser in a manner likely to suggest that they were so armed with intent to commit a felony, namely robbery with violence contrary to section 296 (2) of the Penal Code.

4. In the ensuing trial, the prosecution called four witnesses, while the appellant gave a sworn defence and did not call any witness. PW1, a police officer testified that acting on a tip off, they erected a road block at Kawalathe area along Lodwar - Kakuma road next to China City Construction Company site. At about 4 pm, a vehicle fitting the description of the suspected vehicle approached the roadblock, they stopped it and searched the occupants and the vehicle. From the interior at the back of the seats where all three (3) accused persons were seated, they recovered 6 AK 47 rifles loaded with 30 rounds of ammunition, each firearm was fitted with a magazine, each carrying 5 rounds of ammunition. Upon recovery of the said items, they disarmed a Kenya Police Reserve (KPR) Officer who was armed with a G3 rifle which was loaded with 15 rounds of ammunition. They arrested all the suspects. However, river Kawalathe was flooded and therefore, they could not cross which forced them to stay overnight with the suspects. They booked them at Lodwar Police Station the following morning. An inventory of the recovered items was prepared which all the suspects signed. He produced the firearms in court, the magazines, the ammunition and the inventory. PW2's evidence was similar to that of PW1, therefore, it will add no value to rehash it here, save to add that it was also his testimony that they photographed the vehicle immediately after searching it and before removing the firearms, thus, the photographs captured the sacks containing the guns.

5. PW3, a ballistic expert, testified that the firearms were examined by his colleague, one Charles Koilege, also a ballistic expert who tested the exhibits and confirmed that they were firearms capable of firing and that the ammunition was live. He identified the firearms, the exhibit memo form, the ammunition and gave the precise serial numbers of the firearms. Lastly, he produced the ballistics examination report prepared by Charles Koilege.

6. PW4, was the Turkana DCIO at the material time. He proceeded to the scene, but he could not cross the flooded Kawalathe River. Nevertheless, the following day, his colleagues crossed the river with the suspects and the recovered items and he took over the investigations and the exhibits, namely the firearms, the ammunition, the vehicle and the inventory. He prepared an exhibit memo form and forwarded the firearms and ammunition to the ballistics expert who examined them and prepared the report which was produced in court. Lastly, he recorded the witnesses' statements and charged the accused persons in court.

7. In her sworn defence, the appellant said that on 1st}} May 2018, it was raining and she travelled on a motorcycle from Kakuma to Nasiger market, where she got a lift in the fateful motor vehicle. In the vehicle, she found the 2nd}} and 3rd}} accused persons and together they commenced the journey to Lodwar. But near China City Construction Company site, they were stopped by the police who ordered them to get out of the vehicle. She was searched and found with nothing. She was forced into another vehicle which had 6 other persons. According to her, in the fateful vehicle, the only person who had a gun was a KPR officer. She said that the inventory she signed was not prepared at the scene but at the police station and she signed it without knowing the contents, therefore, she was implicated for no reason.

8. The learned Magistrate in her definitive finding stated:

> Section 4 A (1) (a) of the >/akn/ke/act/1953/40 Firearms Act}} Cap 114 makes it an offence for a person to have in his possession care and/ or control a firearm within the meaning of the Act without a firearms certificate. Section 4 (2) (a) and section A (3) of the same Act makes it an offence for a person to have ammunition in his/her possession care and/control. Section 308 (1) of the Penal Code on its part makes it an offence for a person(s) to be found at such a

place and time while armed with dangerous or offensive weapons reasonably under instances that clearly indicate that the persons were in the cause of preparing to commit felony.

In the instant case, PW1 related to court of how acting on information, he and others were able to intercept motor vehicle registration number GKB 345M near the Chinese Construction Company Camp. The interception was during the day and PW1 and PW2 were present, PW2 was the one directing the operation and he moved based on the information from intelligence sources. It was PW2 testimony that he stopped the vehicle, ordered the occupants to alight, searched them and on checking the vehicle, 2 sacks were visible from the front cabin seat from which all the 3 accused persons had been seating. A search of the 2 sacks revealed the 6 guns as demonstrated throughout the prosecution's evidence.

The evidence of PW2 therefore corroborates that of PW1 in all material particulars. Count I and count II are offences of strict liability so that if possession is established, the onus is now shifted to an accused to establish authorization to have possession. PW2 had the interior of the vehicle photographed before removal of the sacks and from the photographs, it is clear that these exhibits to wit gunny bags were clearly visible that one could not occupy the vehicle without noticing them. The 2nd}} accused as a driver of the vehicle in the first place must have had control of the vehicle throughout the episode that the bags could not have been inserted without his knowledge. The 1st}} accused and the 2nd}} accused persons were seated on the same seat where the cache of arsenal was stashed and this could not have stashed there without their knowledge. That, the inventory was completed the following day at the police station cannot prejudice the defence. The explanation that a river known as Kawalathe had swollen and could not be crossed to enable completion at that point. (sic). The 1st}} accused's defence that there was nothing recovered from the vehicle is farfetched given that the recovery was during the day. She signed the inventory and no motive to frame her was demonstrated. Again, the lone ammo lying under the windscreen was openly there and visible to the naked eye...

It is therefore clear from the evidence that the 3 accused persons jointly acquired the firearms, they had no certificate to carry the same, the firearms were each loaded with 5 rounds which were also not licensed and the purpose of the gun acquisition and transportation of those arms could only be known to the accused persons.

I therefore find that the accused persons guilty as charged in respect of counts 1 and II of the charge sheet and hereby proceed to convict each of (sic) these counts pursuant to section 215 of the CPC. On count 111, no evidence as to what robbery the accused persons planned to execute and how it had been planned was led by the prosecution..."

9. In passing the sentence, the learned Magistrate stated:

the charges facing each accused are serious. They carry a minimum sentence of 7 years and a maximum sentence of 15 years. The decision of the High Court in the Muruatetu case (sic) however allows this Court to order a sentence lower than the statutory minimum. Therefore, each accused is sentenced to 3 years and one day imprisonment on each of count 1 and 11."

10. The appellant was acquitted in respect of the third count.

Aggrieved by the above verdict, the appellant appealed to the High Court, at Lodwar in HCCR. No. 32 of 2019 challenging both the conviction and sentence on grounds that the trial Magistrate erred in

convicting her, yet she was not found in possession of the alleged firearms and ammunition, that the conviction was against the weight of the evidence, that the learned Magistrate shifted the burden of prove to her. After considering the appellant's appeal, the learned Judge (Wakiaga, J.) had the following to say:

> 20. Section 4 of the Penal Code defines possession as to not only having in one's own personal possession, but 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 of any other person. (b) if there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his possession, it shall be deemed and taken to be in the custody and possession each and all of them.
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> 21. All the accused persons denied knowledge of the presence of the said firearms in the motor vehicle, which were recovered therefrom by very senior police offices (sic) following a tip off as per the evidence on record. In their defenses all the accused persons admitted that the only person who was not with them at the start of the journey was the 1st accused. There were (sic) no evidence that the guns were present in the motor vehicle at the start of the journey. Having been found in the motor vehicle where the Firearms and ammunitions were it was upon the appellant to give an account as to whether she had the requisite certificates and licenses under the fire arms act which she failed to so do and therefore find no fault with the trial courts findings thereon, I find that this case was distinguishable from the case of Fredrick Waithaka Kinuthia vs. Republic [2008] eKLR submitted by the appellant as in this case the items were recovered in the presence of the appellant who signed inventory in respect of the recovery.
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> 21. The fact of the presence of the said fire arms was in the special knowledge of the appellant and her co-accused jointly and similarly (sic) for which they were under obligation under the provision (sic) of section Ill (1) of the >/akn/ke/act/1963/46 Evidence Act}} and the items mentioned being fire arms having taken into account the evidence of the prosecution witness on the how the information on their presence in the said motor vehicle was received, the court was entitled to make prescription (sic) of fact as provided for in section 119 of the >/akn/ke/act/1963/46 Evidence Act}}. I find the Appellant's explanation on the lack of knowledge of the presence of tile fire arms in the subject motor vehicle unbelievable taking into account the evidence of her co- accused persons.
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> 22. Having been in the said motor vehicle, I find and hold that the appellant fell within the second limb of definition of possession, she did not have the request (sic) certificate and or licences and further fell under the provisions of section 20 (1) of the penal code which provides for parties to the offence for which she was rightly convicted. I am not persuaded that the trial court shitted the burden of proof to the appellant, possession having been established."

11. The appellant had also argued that she did not understand the language used during the arrest and in the inventory but the learned Judge found that nothing turned on this ground.

Accordingly, the learned Judge dismissed the appellant's appeal and upheld the conviction and sentence.

12. Aggrieved by the said verdict, the appellant is now before this Court in this second appeal seeking to overturn both her conviction and sentence citing 12 grounds of appeal. However, in his written submissions dated 7th}} May 2025, Mr. Yego, learned counsel for the appellant condensed the said grounds into four issues, namely:

    (a) whether the learned Judge erred in law and in fact in dismissing the appeal and holding that the appellant was found in possession of firearms and ammunition;

    (b) whether the learned Judge erred in law and in fact in holding that there was no evidence that the firearms and ammunition were loaded into the vehicle at the start of the journey;

    (c) whether the learned Judge erred in law and in fact in failing to hold that the trial Magistrate had shifted the burden of proof to the appellant, and,

    (d) whether the learned Judge erred in law and in fact by failing to hold that the trial Magistrate convicted the appellant on the basis of conjecture rather than solid evidence. The appellant prays that the judgment be set aside, her conviction and sentence be set aside and she be acquitted forthwith.

13. Submitting on the first issue, Mr. Yego maintained that the appellant in her defence stated that she had been given a lift in the subject vehicle, therefore, there is no way she could have known what the vehicle was carrying nor did she have capacity or reason to question what the other passengers were carrying or what was in the vehicle. Further, the prosecution evidence was that the fire arms and ammunition were stashed in gunny bags, so one could not tell the contents of the gunny bags nor did the appellant have any control over the vehicle.

14. Counsel submitted that the prosecution never proved common intention and cited the High Court decision in Republic vs. Stephen Kiprotich Leting & 3 Others [2009] eKLR in support of the proposition that common intention is deduced where two or more parties intend to pursue or to further an unlawful object and it implies a pre-arranged plan. Counsel also cited Abdi Alli vs. R. 23 (1956) E.A.C.A. 573 to underscore that the existence of a common intention where more than one person are jointly charged with the commission of the same offence is the sole test.

15. Mr. Yego faulted the learned Judge for wrongfully holding that there was no evidence that the firearms were loaded at the start of the journey and by shifting the burden of prove to the appellant to explain possession of the said items, notwithstanding her clear evidence that at the time she stopped the vehicle seeking a lift, she had no luggage except her hand bag.

16. Maintaining that the burden of prove was wrongfully shifted, counsel faulted the learned Judge for improperly invoking section 4 (b) of the Penal Code which provides that if there are two or more persons and anyone 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. Counsel maintained that it was necessary to prove that the appellant had "knowledge" or "consent" to the possession of the firearms and ammunition, which is a requirement under the above provision.

17. Lastly, the appellant's counsel faulted the learned Judge for failing to appreciate that the appellant's conviction was premised on conjuncture and speculation. To underscore the said submission, counsel relied on the High Court decision in Fredrick Waithaka Kinuthia vs. Republic [2008] eKLR.

18. The respondent's counsel Mr. Kakai opposed the appeal.

Addressing the issue whether it was proved by way of evidence that the appellant was found in possession of the firearms and ammunition, counsel contended that the appellant was in the vehicle where the firearms and ammunition were found and upon failing to provide a sufficient explanation, section 111 of the >/akn/ke/act/1963/46 Evidence Act}} which deals with the burden of proof in criminal cases when specific circumstances or facts are within the accused person's knowledge came into play. Counsel maintained that the appellant's submissions were considered and rightly rejected, therefore, the two courts below arrived at the correct decision.

19. Regarding sentence, counsel maintained that whereas the law provides for a minimum sentence of 7 years, the appellant was only sentenced to serve 3 years in prison.

20. This appeal will turn on one rudimentary question, which is, whether the appellant's conviction is unsafe. Unsafe, in this context means that the conviction was not based on reliable evidence and is likely to constitute a miscarriage of justice. In order to establish whether a conviction is unsafe, this Court is required to consider both the prosecution and the defence case. If, on consideration of all the facts and circumstances of the case, this Court has doubts as to whether the appellant was guilty of the offence, this Court will consider the conviction to be unsafe.

21. Earlier in this judgment, we briefly rehashed the prosecution and the defence evidence. We need not rehash it here. Instead, we will briefly mention the definitive pronouncements made by the two courts below. The learned Magistrate stated that counts one and two are "strict liability offences" and that the 3 accused persons "jointly acquired the firearms". The first appellate court in upholding the trial court's verdict stated that the presence of the firearms was "in the special knowledge of the appellant and her co-accused jointly and similarly (sic)". The learned Judge invoked sections 111 (1) and 119 of the >/akn/ke/act/1963/46 Evidence Act}} and rejected the appellant's explanation that she was not aware of the presence of firearms in the vehicle. The learned Judge held that the appellant fell within the definition of possession as provided in section 20 (1) of the Penal Code and upheld the trial court's verdict.

22. It is trite law that in a criminal trial, the onus rests on the prosecution to prove beyond a reasonable doubt that the accused committed the crime accused of. This principle was enunciated in Woolmington vs. DPP UKHL 1, [1935] AC 462, a landmark decision by the House of Lords that established the principle of the presumption of innocence in criminal law. The case is famous for stating that the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true.

23. The onus of proof in a criminal case is discharged by the prosecution if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused person is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R. vs. Difford 1937 AD 370 especially at 373, 383). In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that the explanation put forward by the accused might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence.

24. The Court is required to take proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, decide whether the balance weighs so heavily in favour of the prosecution as to exclude any reasonable doubt about the accused's guilt. Reasonable

doubt is not mere possible doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. It means that the evidence presented must be so convincing that it eliminates any reasonable doubt in the mind of the Court about the accused person's innocence. As was held by the High Court in Gerald Ndoho Munjuga vs. Republic [2016] KEHC 6508 (KLR), essentially, it's not enough to show that the accused is probably guilty; the evidence must be strong enough to prove guilt beyond a reasonable doubt. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the offence have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

25. It is settled law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalized manner. The Court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence. In her sworn defence, the appellant said that on the material day, it was raining and she had travelled on a motor cycle from Kakuma to Nasiger market where she asked for a lift in the fateful motor vehicle in which she found the 2nd}} and 3rd}} accused persons. On their way to Lodwar near China City Construction Company site, they were stopped by the police and ordered to get out of the vehicle. She was searched and found with nothing. She was forced into another vehicle in which there were 6 people. According to her, the only person who had a gun in the vehicle in which she had sought the lift was the KPR Officer. She said that the inventory she signed was not prepared at the scene but at the police station and she signed it without knowing what it was, therefore, she was implicated for no reason.

26. As mentioned earlier, the learned Judge invoked sections 111

    (1) and 119 of the >/akn/ke/act/1963/46 Evidence Act}}. Section 111 (1) addresses the burden of proof in specific cases, particularly when an accused person is claiming an exception or exemption to the law they are charged under. It essentially places the burden on the accused to prove the existence of circumstances that would bring their case under such an exception or exemption. Section 119 deals with presumptions of likely facts. The section states that when the law allows the court to presume a fact, the court may either regard that fact as proved unless it is disproved, or may require evidence to prove it. After referring to the said provisions, the learned Judge proceeded to find that the appellant's explanation that she was unaware of the presence of firearms in the vehicle was unbelievable since she fell within the definition of possession as provided in section 4 (a) (b) of the Penal Code.

27. We have already explained above what section 111 (1) of the >/akn/ke/act/1963/46 Evidence Act}} deals with. Our reading of the record shows that the appellant never pleaded any of the exemptions contemplated under the said section. Regarding the learned Judge's finding that the appellant and her co-accused persons fell within the definition of possession under section 4 of the Penal Code, it is important to mention that the said section defines possession 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;
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> (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;"

28. The first part of the above definition requires prove that the accused person knowingly possessed the item in question. Where two or more persons are charged as in this case, the second part of the above definition requires knowledge and consent of the accused that the rest has or have anything in his or their custody or possession. Much as the learned Judge cited the above provisions, he said nothing about the rudimentary elements of possession clearly contained in the said provisions which are knowledge and consent. Had the learned Judge considered the import of the said definition and applied it to the facts before him, he would have realized that the said elements were not proved in this case as will become clear later in this judgment.

29. The other pertinent finding by the learned Judge relates to section 20 (1) of the Penal Code which provides:

"20.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

a. every person who actually does the act or makes the omission which constitutes the offence;

b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

c. every person who aids or abets another person in committing the offence;

d. any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission."

30. It is well settled that a provision of a statute should be read as it is in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural ordinary meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the Legislature or the Lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation to arrive at the true meaning of the provision. While using the tools of interpretation, the Court should remember that it is not the author of the Statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be. A reading of section 20 1. of the Penal Code leaves us with no doubt that the said word "deemed" used in the said provision only creates a rebuttable presumption. Therefore, for the presumption to come into play, the prosecution must adduce sufficient evidence establishing the key elements of the offence, which are "being in possession" and "without a licence." If the ingredient of "possession" is not established, then the second ingredient cannot arise.

31. Section 4(1) of the >/akn/ke/act/1953/40 Firearms Act}} provides as follows:

(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.

2. If any person—

   a. purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized."

32. In Peter Kinyua Ireri vs. Republic [2016] KECA 680 (KLR), this Court construed possession as used in the above section to include physical possession. The term "possession" refers to the possession backed by the requisite mental element, which is "conscious possession." The term "conscious possession" has been elaborately dealt with by the Constitutional Bench of the Supreme Court of India in the case of Gunwantlal vs. State of M.P.: (1972) 2 SCC 194. The relevant paragraph of the said judgment reads as under:

   5. ...The possession of a firearm under the Arms Act in our view must have, firstly the element of consciousness or knowledge of that possession in the person charged with such offence and secondly where he has not the actual physical possession, he has nonetheless a power or control over that weapon so that his possession thereon continues despite physical possession being in someone else. If this were not so, then an owner of a house who leaves an unlicensed gun in that house but is not present when it was recovered by the police can plead that he was not in possession of it even though he had himself consciously kept it there when he went out. Similarly, if he goes out of the house during the day and in the meantime, someone conceals a pistol in his house and during his absence, the police arrives and discovers the pistol, he cannot be charged with the offence unless it can be shown that he had knowledge of the weapon being placed in his house. And yet again if a gun or firearm is given to his servant in the house to clean it, though the physical possession is with him nonetheless possession of it will be that of the owner. The concept of possession is not easy to comprehend as writers of Jurisprudence have had occasions to point out. In some cases, under section 19 (1) (f) of the Arms Act, 1878 it has been held that the word "possession" means exclusive possession and the word "control" means effective control but this does not solve the problem. As we said earlier, the first precondition for an offence under section 25 (1) (a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control..."

33. Our understanding of the above jurisprudence is that the offense of possession of a firearm requires proving both physical control (possession) and the intention to possess. This means the prosecution must demonstrate the accused had physical custody or control of the firearm and that they were aware they possessed it and intended to possess it. Possession can be actual (physical custody) or constructive (where the accused has control over the firearm, even if not physically holding it). The accused must have intentionally possessed the firearm, meaning they were aware of its presence and intended to possess it. As was held by the Supreme Court of India in the above cited case, the offense of firearm possession requires proof of "conscious possession," meaning the individual must have knowledge of both the presence of the firearm and its nature as a weapon. We can only add that the specific circumstances of the case are very important. If a firearm is found in a house solely occupied by one person, or a vehicle used and owned by one person, then the burden shifts to him or her to explain how

the gun came into his premises or vehicle. The scenario is totally different if the premises or vehicle is used by the public or different persons.

34. Regarding the trial court's finding that possession of firearms falls within the category of strict liability offences, which essentially shifts the onus to the accused, the following excerpt from the Supreme Court of India in Sanjay Dutt vs. State through CBI, Bombay (II) [1994] 5 SCC 410, while discussing what entails conscious possession, is instructive:

> "19. The meaning of the first ingredient of "possession" of any such arms etc. is not disputed. Even though the word 'possession' is not preceded by any adjective like "knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorized substance has been understood."

35. In the instant case, the appellant's defence which was not controverted was that she requested for a lift in the subject motor vehicle. There were other occupants in the car when she asked for the lift. There is nothing to suggest that she boarded the vehicle at the commencement of the journey. Conversely, there is evidence to show that when she boarded the vehicle, it already had other passengers. There is no evidence that she had luggage when she entered into the vehicle. In fact, the available evidence shows that she only had her hand bag. Also, no evidence was adduced to show that the occupants in the vehicle were previously known to her. It was also admitted that the inventory was prepared the next day at the police station. Her evidence was that she signed it without knowing the contents. From these uncontroverted facts, it cannot be said that the prosecution established by evidence that the appellant and her co-accused persons had common intention to commit the offence or that they jointly had possession of the firearms and the ammunition. We are not persuaded that joint possession could be inferred from the circumstances of this case.

36. We find that the two courts below did not accord due weight to appellant's defence. A court's approach in a criminal trial must be to weigh up all the elements that point towards the guilt of the appellant against all that which are indicative of the appellant's innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the appellant's innocence. Considering the evidence in its totality, we are satisfied that the appellant's defence was credible, and reasonably possibly true.

37. Having considered the record and the submissions by the appellant and the respondent, we are satisfied that the appellant's defence raised serious doubts on the prosecution case. Accordingly, we find that this appeal succeeds. Consequently, we set aside the judgement delivered by Wakiaga, J. on 12th}} May 2020 in Lodwar High Court Criminal Case No. 32 of 2019 in its entirety and substitute it with an order acquitting the appellant. For avoidance of doubt, the conviction is quashed and the sentence set aside.

DATED AND DELIVERED AT NAKURU THIS 19TH}} DAY OF SEPTEMBER, 2025.

J. MATIVO

....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

....

JUDGE OF APPEAL

W. KORIR

....

. JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.