IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO. 104 OF 2004

(C/F DC MOSHI ECONOMIC CASE NO. 8/1996)

ERASTO GODSON ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON JUNDU, J.

The Appellant plus another accused, in the trial court were jointly charged with unlawful possession of a firearm c/s 13(1) of the Arms and Ammunition Ordinance Cap, 223 read together with Paragraph 21 of the Schedule to and Section 59 (d) of the Economic and Organized Crime Control Act No. 13 of 1984 as added by Act No. 10 of 1989. The particulars of the offence were that the Appellant and the said another accused (not Appellant herein) jointly and together on 15/10/1996 at about 01.00 hours at Longoi Oria Kahe within the District of Moshi in Kilimanjaro Region without lawful authority or excuse were found in possession of a locally made gun (gobore).

In order to prove the charge against the Appellant and his fellow accused, the prosecution side at the trial court called four witnesses namely PW.1 Constable Hamisi, PW.2 Haji Ally, PW.3 Corporal Mwanaidi and PW.4 Sergent Nuru. It was alleged that on 14/10/1996 at 1.00 pm and PW.2 as the Village Executive Officer of Oria accompanied by others like the village militiamen went to the Appellant residence with the view of verifying the rumours that had reached them that the Appellant and his fellow accused were in possession of a gun. It was further stated PW.1 and PW.2 in their evidence adduced in the trial court that PW.1, PW.2 and their companions introduced themselves to the father of the Appellant who woke up all his sons including the Appellant. The said sons inclusive of the Appellant were required to produce the alleged gun but did not do so. It was further stated by

PW.1 and PW.2 that in their evidence that the father of the Appellant and the other accused (not appellant herein) had admitted that the 1st Appellant was in possession of the alleged gun and that having pleaded with him he produced it to the police. Thereafter, the Appellant and his fellow accused (2nd accused in the trial court) were taken to the Police Station where their statements were recorded by PW.4 and PW.3 respectively. It was further stated in the evidence of PW.1 and PW.2 that what had moved them to conduct the search for the said gun was prior report of shop breaking and robbery at gunpoint hence the Appellant and his fellow accused were held suspects.

The Appellant, in his defence evidence stated that the gun was among the assets left by his deceased grandfather and that he was keeping the gun on behalf of the family but he was not the owner. He conceded that he had no licence for the said gun. The other accused who was together charged with the Appellant had absconded and the trial proceeded in the trial court in his absence.

Having heard the evidence of the prosecution witnesses and the defence side, the trial magistrate found the Appellant guilty, convicted him and sentenced him to fifteen (15) years imprisonment. The trial magistrate in arriving at conviction of the Appellant he stated

> "The first accused concedes that he had no licence to possess the gun. Possession of a gun without licence is the core of the offence with which the accused is charged. On the basis, I find the first accused guilty and convict him of unlawful possession of firearm as charged."

The Appellant having been aggrieved by the conviction and sentence imposed on him by the trial magistrate, he has appealed to this court.

In his Petition of Appeal, the Appellant has listed five (5) grounds of appeal in his Petition of Appeal filed in this court namely:

(1) That, the learned resident magistrate erred in law and in fact for manifestlying an excessive sentence to the appellant without taking into account that the charge was not proved beyond the standard required by the laws.

(2) That, the learned resident magistrate failed to consider that the appellant was not in possession of the alleged weapon as it was not yet inherited by the appellant from his

late grandfather, the weapon was still under the custody of the whole family of the late grandfather.

(3) That, the learned resident magistrate erred in both law and in fact for rejecting the defence of the appellant which was fully corroborated by his mother who testified before the court and her testimony was really truthful.

(4) That, the learned trial magistrate erred in law for not considering that the appellant was charged in possession of the firearm illegally hence the prosecution side did not prove the charge beyond reasonable doubt.

(5) That, it was upon the trial court to had acquitted the appellant and if possible to have charged the whole family instead of charging the appellant alone.

Based on the above named grounds of appeal, the Appellant in his Petition of Appeal prayed to this court to allow the appeal, quash and set aside conviction and sentence imposed on him by the trial magistrate.

On the day of hearing of the appeal, that is on 20/9/2006, the Appellant, a layman appeared in person. He simply stated that what he had stated in his above named grounds of appeal in his Petition of Appeal sufficed to be his arguments in pursuance of his appeal filed in this court. He prayed to this court to allow the appeal, quash and set aside conviction and sentence imposed on him by the trial magistrate and to order his release from the prison forthwith. On the other hand, Mr. Rwegerera, learned State Attorney who acted for the Respondent/Republic did not support conviction and sentence.

First, Mr. Rwegerera, learned State Attorney, when addressing this court he stated that the Appellant had been charged under Section 8 (1) of the National Security Act No. 3 of 1970. My proper perusal of the record and the Judgment of the trial court shows me that the Appellant as I have stated at the start of this Judgment he was charged under Section 13 (1) of the Arms and Ammunition Ordinance Cap.223 read together with paragraph 21 of the Schedule to and Section 59 (a) of the Economic and Organized Crime Control Act No. 13 of 1984 as added by Act No. 10 of 1989. Admittedly, in my considered view, a holding charge was made under Section 8 (1) of the National Security Act No. 3 of 1970 as can be seein in a copy existing on the record but the proceeding and the Judgment were not based on the said Act.

My careful reading of the charge which was used to prosecute the Appellant in the trial court shows me that it was grossly defective. The Appellant was charged for "unlawful possession of a fire arm". However, Section 13 (1) of the Arms and Ammunition Ordinance Cap. 223 on which the said charge was founded is on deposit in public warehouses of imported arms and ammunition. The said provision of law has nothing to do with "unlawful possession of a fire arm." In Mohamed Kaningo VR. [1980] TLR 279, the Court of Appeal (Kisanga, J.A) stated that conviction of an accused based on a defective charge is improper. It presupposes that there was no charge against the accused person. In other words, even the particulars of the offence in the charge sheet do not disclose the offence charged. If the trial magistrate had he been diligent would have read the charge sheet to satisfy himself of its correctness before commencement of the trial and ordered the same to be amended for the said defect. That was not done by the trial magistrate hence the Appellant was convicted on a defective charge sheet. Such conviction is improper in this particular case under appeal.

Secondly, Mr. Rwegerera, learned State Attorney in his submission brought to the attention of this court that the trial magistrate did not conduct preliminary hearing in the trial as mandatorily required under Section 192 (1) – (5) of the Criminal Procedure Act, 1985. Section 192 (1) of the Criminal Procedure Act, 1985 states

> "Notwithstanding the provisions of Section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial"

The above provision of law is self explanatory. This court has on several occasions stated that non-compliance of Section 192 of the Criminal Procedure Act, 1985 vitiates the proceedings and the judgment of the trial court. It renders them a nullity. In the present case under appeal, that is the position because the trial magistrate did not comply with the said provision of law.

In grounds 1 and 4 of the Petition of Appeal, the Appellant contends that the prosecution side at the trial court did not prove the charge against him beyond reasonable doubt. My thorough reading of the Judgment of the trial magistrate shows that he relied on the

caution statement of the Appellant that was tendered in the trial court by PW.4 to the effect that the Appellant had admitted to be in possession of the alleged gun. However, the record shows that the Appellant had objected to the admission of the said caution statement when PW.4 tendered it in the trial court. Upon the said objection, the trial magistrate admitted the said caution statement stating that its truthfulness or otherwise would be decided later on. He never did it. The trial magistrate did not conduct any investigation to determine whether the said caution statement tendered by PW.4 was voluntarily made or not by the Appellant. In my considered view, it was wrong for the trial magistrate to have admitted the said caution statement as evidence before conducting the investigation. Further, on the circumstances, it was wrong for the trial magistrate to have acted on the said caution statement as evidence for convicting the Appellant.

Though the trial magistrate in convicting the Appellant he stated that the major part of the evidence supporting the prosecutions case went uncontroversial or undisputed, this was not true. As I have already demonstrated above the Appellant had categorically objected to the production and admission of the caution statement produced by PW.4 in the trial court. The said caution statement constituted the main piece of evidence that the trial magistrate relied upon to convict the Appellant on the premise that in the said caution statement the Appellant had admitted to be in unlawful possession of the gun. I find and hold that grounds 1 and 4 of the Petition of Appeal have merit.

In the upshot, given the procedural irregularities as well as the defective charge sheet I have demonstrated above and the shortfalls in the evidence of the prosecution side as above stated, I am of the firm view that the prosecution side in the trial court had misevably failed to prove its case against the Appellant to the required standard. Having considered and determined grounds 1 and 4 of the appeal above plus the procedural irregularities, I need not labour on the remaining grounds of appeal filed by the Appellant in his Petition of Appeal.

Therefore, the appeal filed by the Appellant has merit. I hereby allow it. I hereby quash and set aside the conviction and sentence imposed on the Appellant by the trial magistrate. The Appellant is hereby set free unless lawfully held under the law. It is so ordered.

F.A.R. JUNDU

JUDGE

20/10/2006

Right of Appeal Explained.

F.A.R. JUNDU

JUDGE

20/10/2006

20.10.2006

Coram: F.A.R. Jundu, J.

For the Appellant: present

For the Respondent: Miss Rugaihuruza, State Attorney

C/C: Muyungi

Court: Judgment delivered in the presence of the Appellant and in the presence of Miss Rugaihuruza, learned State Attorney for the Respondent/Republic.

F.A.R. JUNDU

JUDGE

20/10/2006

AT MOSHI