

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 165 OF 2022

(ORIGINATING FROM ECONOMIC CASE NO. 1 OF 2020 OF TEMEKE DISTRICT COURT)

MOHAMED KASSIM MUGALO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

Date of Last Hearing: 15/08/2023

Date of Judgment: 18/08/2023

JUDGMENT

MKEHA, J:

On the 01st day of July 2020 the appellant herein was arraigned before the District Court of Temeke being charged with an offence of unlawful possession of fire arm contrary to section 20 (1) (a) and (2) of the Fire Arms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act. The particulars of the offence charged were such that, on 07th day of April 2020 at Mbagala Kibondemaji

Area within Temeke District in Dar es Salaam Region, the accused/appellant, was found in possession of a pistol CAL 7.65 MM MODEL FATIH 13 with Serial No. T0620-13TF 00625 make TISAS without a permit or licence. When the charge was on 12/11/2021 read over to the appellant, he protested his innocence. However, upon full trial, the appellant was found guilty as charged, convicted and sentenced to be imprisoned for twenty (20) years. The present appeal seeks to challenge both, conviction and sentence.

The petition of appeal consists of seven (7) grounds of appeal. The grounds are the following:

1. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW1, PW2 and PW3 adduced in court which did not establish the appellant's guilt beyond reasonable doubt as the prosecution failed to prove the existence of actus reus and mensrea which is the basis of criminal conviction.
2. That, the learned trial magistrate erred in law and fact in convicting the appellant when the same erroneously failed to determine and consider the appellant's defence evidence which raised reasonable doubt on the prosecution case.

3. That, the learned trial magistrate erred in law and fact in convicting the appellant when the alleged search and seizure was unprocedural as the prosecution failed to call the independent witnesses who participated in the conduct of the said search and seizure without showing any sufficient reasons for the failure, the omission which casts doubt in the prosecution case.
4. That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no cogent and coherent evidence against the appellant as there was no evidence from the alleged place where PW2`s pistol was misallocated in order to confirm PW2`s story.
5. That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no evidence from a ballistic expert to prove whether or not the said pistol was functioning.
6. That, the learned trial magistrate erred in law and fact in convicting the appellant based on Exhibit P6 (Cautioned Statement) which was illegally recorded by violation of section 53 (c) (ii) of the Criminal Procedure Act (Cap 20, RE 2019) hence the appellant`s constitutional right of privacy was infringed during the said interview/interrogation.

7. That, the learned trial magistrate erred in law and fact in convicting the appellant in a case where the prosecution grossly failed to prove its charge against the appellant beyond reasonable doubt as mandatorily required by law.

As it can be seen, all the grounds of appeal revolve against one main complaint, that, the charges against the appellant were not proved by the prosecution to the required standard. As such, in the appellant's submissions, efforts were made to impress the court that the prosecution failed to prove the charges sufficiently because of absence of an independent witness during the search exercise and because of absence of a ballistic expert to prove that the said pistol was really functioning. The appellant went on to complain that, the defence case was not considered by the trial magistrate. The appellant complained further that, the cautioned statement upon which his conviction was based had been erroneously admitted into evidence.

Ms. Elizabeth Mkunde learned State Attorney submitted in reply that, the evidence adduced in court by PW1, PW2 and PW3 had proved beyond doubts that the appellant was actually found possessing a fire arm without having a licence or permit. The said pistol was identified

and tendered in court as Exhibit P1. The learned State Attorney further referred to Exhibit P6 (appellant`s cautioned statement). In the said statement, the appellant admits having been arrested while possessing a fire arm without having a permit authorizing him to possess the same. In the appellant`s defence, he admitted that he was found possessing a fire arm which he was about to report to the police as a found property. During cross examination, the appellant admitted that, while he found the fire arm on 07/04/2020 as a lost property, he was arrested by the police on the same day while possessing the same without permit. This happened to be the same fire arm lost by PW2 in March 2019. As the trial Resident Magistrate, I hold that the appellant`s guilt was sufficiently established. The conviction entered against the appellant is therefore sustained.

As to the sentence imposed, I hold a different view. The circumstances into which the offence was committed are such that, the appellant found the fire arm which had been recklessly left by its licence holder inside a public toilet room. The circumstances do not suggest that the appellant possessed the gun for purposes of endangering the public through the use of the same. In my considered view, the appellant was

a fit person to be sentenced under section 60 (7) (b) of the Economic and Organized Crime Control Act which provides that, in considering the propriety of the sentence to be imposed, the Court shall comply with the principle that, a person convicted of an economic offence may be sentenced with a sentence that is suitably deterrent. In my considered opinion, the circumstances into which the appellant committed the offence he was convicted of did not warrant imposition of a custodial sentence spanning to twenty years in prison. The appellant having been in prison since 26th May 2022, his sentence is reduced as to result in his immediate release from prison.

For the foregoing reasoning, while upholding the appellant`s conviction, I hereby reduce his sentence to that of one year imprisonment term. Since the appellant has already spent more than a year as a prisoner, I hereby order his immediate release from custody unless he is held therein for other lawful cause.

DATED at DAR ES SALAAM this 18th day of AUGUST 2023.

C. P. MKEHA

JUDGE

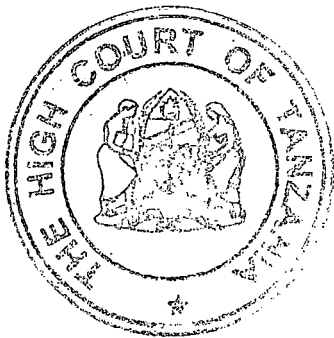



C. P. MKEHA

JUDGE

18/08/2023

Court: Judgment is delivered in the presence of the appellant in person and Mr. Adolf Kisima learned State Attorney for the Respondent.




C. P. MKEHA

JUDGE

18/08/2023