IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

DC CRIMINAL APPEAL NO. 31 OF 2023

(Arising from the Decision of the Resident Magistrates' Court of Tabora in Original Economic Crime Case No. 64 of 2021)

ABAS S/O RAPHAEL ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 02/10/2023
Date of Judgment: 20/10/2023

KADILU, J.

In the Resident Magistrate's Court of Tabora, the appellant was charged with, and convicted of unlawful possession of firearms contrary to Section 20 (1) and (2) of the Firearms and Ammunition Control Act, No. 2 of 2015 read together with paragraph 31 of the First Schedule to and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E, 2002] as amended by the Written Laws (Misc. Amendments) Act No. 3 of 2016. It was alleged in the particulars that on 19/09/2021, during morning hours at Isegenezya Village within Mlele District in Katavi Region, the appellant was found in unlawful possession of a firearm to wit, muzzleloader gun commonly known as *gobore*.

After a full trial, he was sentenced to 20 years imprisonment. Aggrieved by both the conviction and sentence, the appellant preferred an appeal to this court consisting of the following grounds:

(i) *That, the prosecution did not prove the case against the appellant beyond a reasonable doubt.*

(ii) *That, the trial court entertained the matter without having jurisdiction as the charged offence was allegedly committed in Katavi Region, outside the trial court's territorial jurisdiction.*

(iii) *That, the search conducted at the house of the appellant was bad in law for want of an independent witness.*

(iv) *That, there was no evidence that the appellant exercised control of the farm where exhibit P2 was allegedly discovered, more so because he denied having taken PW1 and others to the purported farm. He also disowned his purported signature on exhibit P1 and that the independent witness did not testify.*

(v) *That, the learned trial Magistrate did not address his mind to the appellant's defence that the case against him was concocted upon him by the alleged independent witness.*

The appellant prayed for this court to allow the appeal, quash the conviction, set aside the sentence, and order his release from prison. During the hearing of this appeal, the appellant appeared in person, without legal representation. When he was called upon to argue his grounds of appeal, he opted to hear the respondent's reply thereto and later make a rejoinder. On the other side, the respondent was represented by Ms. Suzan Barnabas and Mr. Steven Mnzava, the learned State Attorneys.

From the outset, Ms. Suzan informed the court that the respondent was in full support of the appeal. She continued to submit that it is true the Resident Magistrate's Court of Tabora had no jurisdiction to try the case since the offence was committed in Katavi Region. To support her argument, Ms. Suzan cited Section 180 of the Criminal Procedure Act, Section 5 (1) of

the Magistrates' Court Act, and the Government Notice No. 68 of 1981. On the effect of lack of jurisdiction, the learned State Attorney referred to the case of ***Richard Julius Rukambura v Isaack Ntwa Mwakajila & Another*** [2007] TLR 91.

She explained that during the trial, the appellant raised the issue of jurisdiction, but as indicated on page 7 of the trial court's judgment, the learned Magistrate overruled it. She invited this court to read Section 12 (3) of the Economic and Organized Crime Control Act which is about the certificates conferring jurisdiction to subordinate courts to try economic offences.

Replying on the 3rd and 5th grounds of appeal, the learned State Attorney submitted that reading on page 15 of the trial court's proceedings, indeed the independent witness did not testify before the trial court. According to her, Section 38 (3) of the Criminal Procedure Act was violated during the search of the appellant's premises because the alleged independent witness who signed a seizure certificate was not summoned to testify. Regarding the essence of an independent witness, Ms. Suzan cited the case of ***DPP v Mussa Hatibu Sembe***, Criminal Appeal No. 130 of 2021, Court of Appeal of Tanzania at Tanga and ***Amos Alexander @ Marwa v R.***, Criminal Appeal No. 513 of 2019, Court of Appeal of Tanzania at Musoma. She elaborated that the appellant told the trial court in his defence that he quarreled with the purported independent witness, but unfortunately, the defence was turned out by the court.

Concerning the appellant's lamentation that the case against him was not proved to the standard required by the law, Suzan replied that the case was proved beyond reasonable doubt, but the procedures were flouted. She holds this view because according to her, exhibit P1 (seizure certificate) was improperly admitted by the court. She added that the appellant denies his signature on the grounds of appeal although he did not raise any objection in the trial court when exhibit P1 was sought to be tendered. Furthermore, all exhibits were admitted without any objection from the appellant. Ms. Suzan opined that though the appellant's cautioned statement was not produced in evidence, the offence against him was proved. She urged this court to allow the appeal for the reason that legal procedures were not complied with in this case.

On his part, the appellant was very brief. He maintained that he did not commit the alleged offence as he was not found with any weapon. He added that the whole saga was triggered by a land dispute between the alleged independent witness and him. He informed this court that during the trial, he was suffering from hearing impairment which is why he did not object to the admission of the exhibits or raise anything regarding his signature. He narrated that his hearing disease and disorders disappeared just a few days before the appeal was called on for disposal.

Having considered the grounds of appeal and the submissions by the parties, the issue to decide is whether the appeal is meritorious or not. In my determination, I will start with the 2nd ground of appeal in which the

appellant claims that the trial court lacked territorial jurisdiction to try the alleged offence. Section 5 (1) of the Magistrates' Court Act provides that the Chief Justice may, by order published in the Gazette, establish courts of a resident magistrate which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction in such areas as may be specified in the order.

Thus, the Resident Magistrate's Courts are established by the Magistrate's courts (Court of a Resident Magistrate) (redesignation) Order, Government Notice No.68 of 1981 which specifically provides as follows:

> *"The Government Notice establishes courts of Resident Magistrates which exercise jurisdictions in the specified areas."*

In the case of Tabora, it is the court of the Resident Magistrate of Tabora Region that was established by the above-cited legal instrument. This court has its offices at Jamhuri Street within Tabora Municipality for the time being. Ordinarily, a court should inquire and try every offense within the local limits where it was committed. Section 180 of the CPA in that regard provides as follows:

> *"Subject to the provisions of Section 178 and to the powers of transfer conferred by Sections 189, 190, and 191, every offence shall be inquired into and tried, as the case may be, by a court within the local limits of whose jurisdiction it was committed or within the local limits of whose jurisdiction the accused person was apprehended, or is in custody on a charge for the offence,*

or has appeared in answer to a summons lawfully issued charging him with the offence."

According to Section 3 (1) (3) (a) and (b) of the EOCCA, the court with jurisdiction to try economic offences is the High Court. However, Section 12 (3) of the EOCCA, authorizes the DPP or an officer authorized by him to direct such cases to be tried by a subordinate court. It provides that:

"The Director of Public Prosecutions or any other State Attorney duly authorized by him, may in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the High Court under this Act, be tried by such court subordinate to the High Court as he may specify in the Certificate."

In the instant case, the appellant testified that he was arrested in Mlele District within Katavi Region and brought to Tabora where he was locked up and later on tried for the charged offence. Before his trial, the State Attorney in charge of Tabora issued a certificate conferring jurisdiction to the Resident Magistrate's Court of Tabora to try the appellant. Section 29 (1) of the EOCCA provides that upon the arrest of a person in respect of the commission of an economic offence, he should be charged in the District Court or the Court of Resident Magistrate within whose local limits the arrest was made. Notwithstanding, the record is silent as to why the certificate issued by the State Attorney in Charge was not directed to the District Court of Mlele or the Resident Magistrate's Court of Katavi to try the appellant. This

is the basis of the appellant's lamentation in the second ground of appeal where he is challenging the trial court's jurisdiction to try him for the offence purported to be committed beyond the trial court's geographical boundaries.

I am aware of Section 387 of the CPA which stipulates that no finding, sentence, or order of any criminal court should be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed, took place in a wrong region, district or other local area, unless it appears that such error has occasioned a failure of justice. Further, the Court of Appeal was faced with a similar situation in the case of ***Makoye Masanya & 3 Others v R.,*** Criminal Appeal No. 29 of 2014 and it observed that:

> *"... even if there was a district court in Meatu, the offence was committed in Meatu, and the appellants were arrested there, their trial in the District Court of Bariadi is not necessarily an incurable irregularity unless they can show that by so doing some injustice has been occasioned to them. The appellants have not suggested so in their grounds of appeal or in their oral submissions in Court. We therefore reject that ground of appeal."*

In the matter at hand, it cannot be said that the trial of the appellant in the Resident Magistrate's Court of Tabora did not occasion a miscarriage of justice to him because he told the trial court in his defence that up to the time of the trial, his relatives were not aware of his whereabouts. Additionally, as opposed to what happened in the case cited above, the appellant herein raised the question of jurisdiction both during the trial and

in his grounds of the appeal filed before this court. I am therefore persuaded that the Resident Magistrate's Court of Tabora tried the appellant without having the requisite jurisdiction. Consequently, I allow the second ground of appeal.

Another complaint by the appellant is that the search conducted at his house and its resultant exhibit P1 are bad in law for want of an independent witness. He explained that the local authority leader was not involved in the search. Scrutiny of exhibit P1 (seizure certificate) reveals that Ferdinand Edward was named as a witness to the search. However, he did not sign the certificate. The appellant and one Albert Chiza did not sign as well. As correctly argued by the State Attorney, this was a clear contravention of Section 38 (3) of the CPA which compels the search and seizing officer to issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

In ***Selemani Abdallah and Others v R.***, Criminal Appeal No. 384 of 2008 it was stated that upon completion of the search, if any property is seized, a receipt must be issued which must be signed by the occupier or owner of the premises, and the witnesses around, if any, as required under section 38 (3) of the CPA. The whole purpose of issuing a receipt for the seized items and obtaining signatures of witnesses is to make sure that the property seized came from no place other than the one shown therein. The

court elaborated that if the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized.

Regrettably, during the evaluation of the evidence about exhibit P1, the learned trial Magistrate did not state anything concerning the apparent anomaly regarding the signatures. In my view, the defect cannot be taken as a slip of the pen in respect of the absence of some of the signatures of witnesses which is apparent in exhibit P1. The muzzleloader gun was allegedly found after searching the appellant. He nevertheless stated that he was not searched rather, the alleged gun was retrieved from the search officers' vehicle. He also refuted to have signed anywhere on exhibit P1.

I think that the complaint of the appellant in his defence that the search was fabricated because there was no independent witness and the seized weapon was not found in his house, cannot be treated lightly more so where the purported independent witness was not summoned to testify. The appellant was thus denied an opportunity to cross-examine the alleged independent witness. For the stated reasons, the third ground of appeal succeeds. Having found so, I now resolve the first ground of appeal in which the appellant alleges that the prosecution did not prove the case against him beyond reasonable doubt. Regarding this ground, Ms. Suzan argued that the prosecution proved the case against the appellant beyond reasonable doubt, but the procedures were not followed. With due respect to the learned State Attorney, in criminal cases, the prosecution must prove not only that the

offence was committed, but also that it was the accused/appellant who committed it. In my considered opinion, the proof is both substantive and procedural. In ***Magento Paul & Another v R.,*** [1993] TLR 219, the Court held that:

> *"For a case to be taken to have been proved beyond a reasonable doubt by the prosecution, its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

It is evident that the standard of proof in criminal cases cannot be met without full compliance with the rules of procedure. Based on the deliberations I have made above and submissions from the parties, I hasten to state that the prosecution evidence was tainted with glaring doubts hence, the case against the appellant was not proved to the standard required by the law. Accordingly, I allow the appeal. The conviction of the appellant and the sentence imposed upon him are hereby quashed and set aside. I order his immediate release from prison unless held for some other lawful cause. The right of appeal is fully explained.

It is so ordered.

THE HIGH COURT OF TANZANIA

KADILU, M.J.,
JUDGE

20/10/2023

Court:

Judgment is delivered in the presence of the Appellant and in the absence of the Respondent.

J. MDOE

AG. DEPUTY REGISTRAR

20/10/2023

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
TABORA