IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 231 OF 2014

SIMON NDIKULYAKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Mjemmas, J.)

dated the 16th day of June, 2014
in
Criminal Appeal No. 71 of 2013
.....

JUDGEMENT OF THE COURT

11th & 17th February, 2015.

JUMA, J.A.:

According to the charge sheet, on 18th September, 2012 at Nyakahanga-Ruziba village in Biharamulo district, the appellant Simon s/o Ndikulyaka together with another Osward s/o Lugiga @ Silundi, were charged with the offence of unlawful possession of one home-made gun (gobore) contrary to sections 4 (1) and 34 (1) and (2) of the Arms and

Ammunitions Act 1991 **(Cap. 223)**. While his co-accused pleaded not guilty, the appellant pleaded guilty to the charge and accepted as correct, all the facts which the prosecution narrated in support of the charge. The learned trial magistrate (Mr. N.W. Mwakatobe-RM) duly convicted the appellant and sentenced him to pay a fine of Tshs. 3,000,000/=, failure of which to serve ten years imprisonment. On first appeal in the High Court, Mjemmas, J. dismissed his first appeal insisting that the appellant's conviction on his own plea of guilty, does not fall under any of the four criteria set by this Court in **Kalos Punda vs. R.,** Criminal Appeal No. 153 of 2005 (unreported), for interfering with convictions on plea of guilty.

Undaunted by the dismissal of his first appeal, the appellant preferred this second appeal predicated on a single ground, contending:

> "1. *THAT, The Hon. Judge of the High Court misdirected himself to comply with the trial court and disregard myself explanation to him and those in my petition of appeal."*

When this appeal came up for hearing before us, the appellant appeared in person while the respondent Republic was represented by Mr. Athumani Matuma, learned State Attorney. When the appellant was given time to expound his appeal, he had little to add other than to urge the Court to quash his conviction and set aside the sentence which the High Court had confirmed. On his part, Mr. Matuma initially made a half-hearted attempt, to support the appeal and push for a trial *de novo*. He was of the initial view that some of the facts which the prosecution narrated against the appellant were so mixed up with the facts which exclusively target his co-accused, that the appellant's guilty plea could not be a basis of a conviction. He urged this Court to overturn the conviction and order a full trial on basis of a plea of NOT GULTY. To appreciate the line of argument by the learned State Attorney, it would be necessary to reproduce the relevant facts of the case which were also read over to the appellant, underlining portions which he believes to be directed exclusively at the 2nd accused:

"FACTS OF THE CASE FOR 1st ACCUSED.

That name and address of the first accused as per charge sheet. That the accused at hand stand charged with one count of being in possession of firearm commonly known as gobore without licence.

On 18/9/2012 at about 15.30 HRS Police Officer went to the house of the 1st accused after they received information that the accused was in possession of firearm make gobore. After their arrival at the 1st accused house the 1st accused admitted that he owns the firearm but he kept it to the 2nd accused in this case. It was when the 1st accused led the police officer to the 2nd accused home where the gun was kept by him.

After their arrival to the 2nd accused they found the 2nd accused who again admitted that he was given the firearm by the 1st accused at hand and he also led the police where he kept the firearm which it was outside his house.

Thereafter police officers decided to call the neighbours so as to witness what was going on." [Emphasis added].

Since the underlined facts, he submitted to us, relate to second accused who unlike the appellant did not plead guilty, the appellant's admission of those facts should not have formed any part of the appellant's conviction on his own plea of guilty. When we pointed out to the learned State Attorney that the appellant has clearly admitted that he is in fact the real owner of the firearm (gobore) but his co-accused was merely holding its custody on the appellant's behalf, Mr. Matuma relented, coming round to finally support the conviction and the sentence.

On our part, we think the decisions of the two courts below are clearly borne out of the totality of the record of the trial proceedings. The narrated facts and we shall illustrate also, the cautioned statement, both indicate that although the firearm (*gobore*) was in the custody of his co-accused, the appellant in the eyes of the law still retained control over the weapon. As this Court said in **Moses Charles Deo vs. Republic** (1987)

T.L.R. No. 134: *"for a person to be found to have possession, actual or constructive of goods, it must be proved either that he was* ***aware of their presence and that he exercised control over them*** *....."* [Emphasis Added]. Again, the fact that some portion of the facts which the prosecutor narrated exclusively referred to the role which the 2nd accused played in hiding the weapon; it did not diminish the control which the appellant retained over that weapon.

It is also appropriate to mention that the appellant expressed no objection when the prosecutor while narrating the facts on 17/10/2012, proposed to tender his cautioned statement (exhibit P1):

> ***"P.P.:*** *I pray to tender the caution statement of the 1st accused and sketch map of the scene.*
>
> ***Accused:*** *I have no objection they are all correct.*
>
> ***Court:*** *Caution statement together with a sketch map are admitted and marked as exhibit P1 collectively.*
>
> ***P.P.:*** *I pray to read over before this court the accused caution statement.*

Court: *Prayer granted caution statement to be read over before this court.*

P.P.: *That is all.*

Court: *Do you understand well the facts read over to you?*

1st accused: *I do understand them correctly.*

Court: *Is there anything you disagree with the facts above?*

1st accused: *I admitted all facts above as they are true and correct, they are all true I have nothing to dispute.*

1st accused: *Sgd. Simon.*

P.P.: *Sgd. Insp. Bogohe.*

Sgd. N.W. Mwakatobe

RM

17/10/2012."

[Emphasis underlined].

In its essence and substance, the cautioned statement (exhibit P1) is as detailed, as it is confessional. It highlights the background of what really happened on 18/09/2012 when the appellant was at first arrested and accused of arson. At the police station, he explained that apart from

farming activities, he also engaged himself with poaching in Burigi Game Reserve using his home-made firearm (*gobore*) as his weapon of choice. He not only admitted in his cautioned statement that he had sometime in 2002, been imprisoned for being found with the *gobore*; but went further to admit that he was still in possession of the firearm which he kept in the custody of his co-accused, Osward s/o Lugiga @ Silundi at Nyakahinga-Ruziba. He even stated how he had earlier bought the *gobore* from one Mzee Mrefu of Kutireza village. The appellant also stated how he finally led the police to where his co-accused had hidden his weapon. Significantly, the appellant insisted to the police that the *gobore* was his own property.

With so such an array of facts disclosing the ingredients of the offence for which he was charged with, which he admitted as true and correct, this Court on second appeal, cannot fault the first appellate court in upholding his conviction on a plea of guilty. We note that in upholding the appellant's conviction, the learned first appellate Judge sought the guidance of the decision of the Court in **Kalos Punda vs. R.** which had affirmed the criteria for interfering with convictions that were based on

pleas of guilty which the High Court had identified in **Laurent Mpinga vs. Republic** [1983] T.L.R. 166. These criteria are:

> *1. that even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;*
>
> 2. *that the appellant pleaded guilty as a result of mistake or misapprehension;*
>
> 3. *that the charge laid at the appellant's door disclosed no offence known to law; and*
>
> *4. that upon the admitted facts the appellant could not in law have been convicted of the offence charged.*

The learned first appellate Judge was correct to conclude that the appellant's appeal cannot benefit from any of the four criteria to warrant any interference with his conviction following his unequivocal plea of guilty.

Finally, we address the question of sentence of a fine of Tshs. 3,000,000/= or ten years imprisonment in default imposed by the trial court, which the learned first appellate Judge confirmed. We would like to assume that the learned Judge was referring to the sentence that is provided for under section 34 (2) of Cap. 223. This is one of the provisions mentioned in the charge sheet that was read over to the appellant:

> ***34 (2).****-Any person who commits an offence under this Act shall upon conviction except where any other penalty is provided, be* ***liable to imprisonment for a term not exceeding fifteen years or to a fine not exceeding three million shillings or to both such fine and imprisonment****.* [Emphasis added].

We must at this juncture observe that later in 2007, section 6 of the Written Laws (Miscellaneous Amendments) Act, 2007 (Act No. 19 of 2007) amended section 34 (2) of Cap. 223 in the following way:

> *6. - The principal Act is amended in section 34 by deleting in subsection (2) the phrase* ***'for a term not exceeding fifteen years or to a fine not exceeding shillings three million or to both such fine and imprisonment'*** *and substituting for them the phrase* ***'and any other penai measures***

provided for under the Economic and Organized Crimes Control Act.'[Emphasis added].

This amendment effectively deleted the phrase- "*for a term not exceeding fifteen years or to a fine not exceeding three million shillings or to both such fine and imprisonment*" from subsection (2) in section 34, and following this change, section 34 (2) now reads as follows:-

> ***34 (2).-*** *Any person who commits an offence under this Act shall upon conviction except where any other penalty is provided,* ***be liable to imprisonment and any other penai measure provided for under the Economic and Organized Crimes Control Act****.* [Emphasis added].

Several salient matters immediately become obvious from the foregoing amendment. **Firstly,** the offence, subject of this second appeal was committed on 18/09/2012, and the appellant's plea was taken on 19/09/2012. This means the amendment of section 34 (2) by Act No. 19 of 2007 (assented to on 31/12/2007) affected the appellant in so far as punishment is concerned. **Secondly**, we cannot but express our wonder what the intention of the legislature was, to omit the specification of the

maximum sentence of fifteen year imprisonment which was a prominent part of the subsection before its amendment.

Thirdly, the phrase "*and any other penal measure provided for under the Economic and Organized Crimes Control Act*" gave the trial court discretion to impose additional penal measures as provided for under the Economic and Organized Crimes Control Act, 1984 (**Cap 200**). This implies that from 1/1/2008 when Act 19 of 2007 effectively amended section 34 (2) of Cap 223, until 1/1/2008 when Cap. 223 ceased to be part of "economic offences" when Act No. 2 of 2010 came into operation, it was logical for section 34 (2) to refer to Cap. 200 for additional sentencing support. Such sentencing support came in the form of sections 57 and 60 of Cap. 200 which provides:

> *57 (1).- With effect from the 25th day of September, 1984, the offences prescribed in the First Schedule to this Act shall be known as economic offences and triable by the Court in accordance with the provisions of this Act.*
>
> *(2) The Minister may, by order published in the Gazette, and with the prior approval by resolution of the National*

Assembly, amend or otherwise alter the First Schedule to this Act but no offence shall be removed from the First Schedule under this section except by an Act of Parliament.

60 (1).- Except where a different penalty, measure or penal procedure is expressly provided in this Act or in the statement of an offence, upon the conviction of any person of any economic or other offence falling under the penal jurisdiction of the Court, the Court may impose in relation to any person, in addition to any order respecting property, any of the penal measures prescribed by this section, but not any other.

(2) Subject to subsection (3), ***any person convicted of an economic offence shall be liable to imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penal measure provided for in this Act****.* [Emphasis added].

The brief link in so far as sentencing is concerned between section 34 (2) of Cap. 223 to sections 57 and 60 of Cap. 200 was cut short by the enactment of the Written Laws (Miscellaneous Amendments) Act, 2010 (Act No. 2 of 2010) which was assented to on 17/3/2010. Section 11 of

Act No. 2 of 2010 amended the First Schedule to Cap. 200 by deleting paragraph 19 which had designated offences under Cap 223 to be "economic offences".

In so far as offences under Cap. 223 are no longer "economic offences", the phrase "*any other penal measure provided for under the Economic and Organized Crimes Control Act*" under section 34 (2) are of no legal consequence. This redundancy becomes even more poignant when we consider the categorical language employed in section 57 (1) of Cap. 200 which states that Economic and Organized Crimes Control Act is designed to deal only with economic offences, which Cap 223 no longer is:

> *57 (1).- With effect from the 25th day of September, 1984, the* ***offences prescribed in the First Schedule to this Act shall be known as economic offences and triable by the Court in accordance with the provisions of this Act****.*

A purposive construction is the only way out till the legislature corrects the anomaly of removing the maximum prison sentence of fifteen

years which was part of subsection (2) of section 34 before its amendment by Act No. 19 of 2007. There are several examples where this Court invoked purposive construction of statutes to rectify legislative inadvertences or lapses. In **Augustine Lyatonga Mrema vs. R.**, Criminal Appeal No. 61 of 1999 (unreported) the Court referred back to its earlier decision in **Joseph Warioba v Stephen Wassira and Another** [1997] TLR 272 as an example when the Court adopted purposive approaches to interpretation by restoring "corrupt practices" back into section 114 of the Elections Act, 1985 after the legislature had inadvertently omitted it.

By invoking the purposive construction to omit the phrase linking Cap. 223 to Cap. 200, section 34 (2) shall now read:

> ***34 (2).*** *- Any person who commits an offence under this Act shall upon conviction except where any other penalty is provided,* ***be liable to imprisonment for a term not exceeding fifteen years.*** [Emphasis Added].

From our reading of section 34 (2) as amended, we see no reason to interfere with the sentencing discretion of the trial District Court of

Biharamulo to impose on the appellant, and the first appellate Judge to confirm; a fine of three million shillings or a ten year prison term in case of default.

In the upshot, we see no reason to interfere with the conviction and sentence. The appeal is hereby dismissed.

DATED at BUKOBA this 16th day of February, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL