

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 258 OF 2013

ABDALLAH SAID MWINGEREZA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Msuya, J.)

**dated the 08th day of May, 2013
in
HC. Criminal Appeal No. 161 of 2012**

JUDGMENT OF THE COURT

13th & 16th July, 2015

KILEO, J.A.:

The appellant along with another person who was subsequently acquitted, appeared before the Resident Magistrate's Court of Dar es Salaam at Kisutu to answer two counts of unlawful possession of fire arms contrary to sections 4 (1) and 34 (1) (2) of the Arms and Ammunition Act, Cap 223 R.E. 2002 read together with Act No. 17 of 2010. He was found guilty and convicted accordingly. Being aggrieved by his conviction the

appellant preferred an appeal to the High Court which was unsuccessful hence this second appeal.

The background to this appeal is simple and straightforward. According to the prosecution witnesses at the trial sometimes in the small hours of 1st June 2011 the appellant who had been drinking at a bar called Advera was found with a loaded pistol make Makarov, which had no serial number. PW2 who was at the time an assistant manager at the said bar noticed the appellant having a pistol hanging from his waist. The matter was immediately reported to the police who went to the scene, searched him and found him with the type of pistol mentioned above. As it transpired that he had no license for the weapon he was taken before the law.

In his defence the appellant stated under affirmation that he had nothing to say and knew nothing about the case.

The appellant appeared in person, unrepresented at the hearing of the appeal. The respondent Republic was represented by Mr. Credo Rugaju, learned Senior State Attorney.

The appellant's memorandum of appeal listed four grounds as reproduced hereunder:

1. *That the learned Senior Resident Magistrate and the Appellate Judge erred in law and in fact by convicted and holding into conviction the appellant in charged case that was not proved beyond reasonable doubt that the appellant was neither cautioned nor taken caution statement before he was brought into trial court.*
2. *That the learned senior resident magistrate and the appellate judge erred in law and in fact when convicting the appellant in charged case that the evidence was not clear, properly an sufficient to establish the conviction of the appellant.*
3. *That the learned senior resident magistrate and the appellate judge erred in law and in fact when convicting the appellant while the charged offence was not proved in trial as the PW2 was not identify either the sized pistol or the certificate of seizure that was tendered and Admitted as Exhibit P1 and Exhibit P3.*
4. *That both learned senior resident magistrate and the appellate judge erred in law and in fact when convicting the appellant while the witness the arresting officer never testify in trial pursuant to section 38 (3) of CPA Cap 16 R.E 2002. (sic!)*

In addition to asking us to adopt the grounds he had filed he submitted that there were contradictions in the testimonies of the witnesses as regards the time the incident took place which ought to have been resolved in his favor. He also argued that the failure by the prosecution to call other customers at the bar weakened its case. When

responding to the learned Senior State Attorney's submission he claimed that he was not given the right to be heard.

Submitting in resistance to the appeal Mr. Rugaju submitted that none of the grounds had any substance. Regarding ground one he observed that the appellant's conviction was not based on any cautioned statement and as such any reference to a cautioned statement was a futile struggle. We need not tarry on this ground. Indeed as submitted by Mr. Rugaju the appellant's conviction was not based on any cautioned statement. His conviction was based on direct evidence. We accordingly find ground number one to be lacking in merit.

On grounds two and three which attacked the subordinate courts for basing their decision on unclear and insufficient evidence Mr. Rugaju argued that the grounds also lacked substance as the lower courts found the witnesses to have been reliable. We also need not be detained on these grounds. The case for the prosecution essentially centred on credibility. The trial court was the best placed to assess the witnesses who appeared before it. In **Omari Ahmed v. Republic** [1983] TLR 52 (CA), **Ali Abdallah Rajab v Saada Abdallah Rajab and Others** [1994] TLR 132 (CA) and in a number of other Court of Appeal decisions it was held that a

trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility. On credibility of the witnesses in so far as this case is concerned, we cannot fault the assessment of the trial court. At page 54 of the record the learned trial Senior Resident Magistrate stated:

"Let me hasten to point here that the recorded evidence is very much base on the demeanor of witnesses. I find that, PW1 is the police officer he and accused persons had not known each other, PW2 also he is a civilian his earning base on business in fact there is no quarrel that I alleged by any. I find no reason for me to base and say that the evidence of the two prosecution witnesses was motivated by ill-will or bad motive. On that basis I am of the firm view that these two prosecution witnesses (PW1 and PW2) have told the court true story of what they had witnessed and I believe the story that really the exhibit P1 and P2 was found in possession of the 1st accused and that the same accused had no license..."

In short, we see no reason to disturb the trial magistrate's finding with regard to the trustworthiness of the witnesses who appeared before him.

The appellant complained in ground 3 that PW2 did not identify either the seized pistol or the certificate of seizure. This ground is also wanting in merit. Having noted that the appellant had in his possession a pistol PW2 called the police who went to the scene. PW1 is the one who prepared the seizure certificate which was tendered in court without objection as exhibit P3. A perusal of this exhibit reveals that it was signed by the appellant Abdala Said Mwingereza, PW1 and two witnesses one of whom was Hamza Shabani (PW2). In his defence the appellant never denied to have signed the seizure certificate. It may be observed however that normally, under section 38 (3) of the Criminal Procedure Act seizure receipts are issued following issue of search warrants. But even if the seizure certificate were to be ignored still there was sufficient evidence from PW1 and PW2 which proved that the appellant was found with the pistol and seven rounds of ammunition. We will leave the issue of the certificate of seizure at that.

Having discussed ground 3 as above ground 4 becomes obsolete. Addressing us the appellant claimed that the failure to call other customers to testify on behalf of the prosecution weakened their case. In our considered view in the circumstances of this case the failure to call other customers to testify for the prosecution did not prejudice its case. The three witnesses who testified and who were found credible sufficiently established the case for the prosecution. As for the complaint concerning contradictions with regard to the time of the incident we are settled in our minds that the inconsistency was so minor and could not affect the prosecution case. There was ample evidence that in the early hours of 1/6/2011 the appellant was found with a pistol and seven rounds of ammunition.

The appellant was not ready to give up easily. Responding to the learned Senior State Attorney's submission he raised an additional ground that was not raised in his appeal to the High Court or in his memorandum of appeal. He claimed that he was not given the right to be heard. The record however rules out this claim as it is very clear that he was given an opportunity not only to cross examine the witnesses but also to give his defence.

In view of the above considerations we are satisfied that the appeal was filed with no cause for complaint. Consequently we dismiss it in its entirety.


DATED at DAR ES SALAAM this 14th day of July, 2015.

E. A. KILEO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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


P. W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL