IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM:MBAROUK, J.A., LUANDA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 267 OF 2016

MWANZO WILSON @ BUNGA ..... APPELLANT

VERSUS
THE REPUBLIC..... RESPONDENT

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

(Feleshi, J.)

dated the 17th day of October, 2014
in
Criminal Appeal No. 132 of 2013
.....

JUDGMENT OF THE COURT

21st & 26th October, 2016

MZIRAY, J.A.:

The appellant was arraigned in the District Court of Kigoma with the offence of being in unlawful possession of ammunition c/s 4(1) and 36 of the Arms and Ammunition Act No. 2/1991, R.E. 2002. He was convicted and sentenced to serve 13 years imprisonment. Discontented, he appealed to the High Court of Tanzania (Feleshi,

J.) where his appeal was dismissed. Aggrieved, he has preffered this second appeal.

The evidence which led to his conviction can be briefly put in this outline. On 2/4/2013 while PW1 SP Frank Wilson was in his office he received information that the appellant was seen around the main gate of Muharulo Secondary School with a plastic container suspected to have contained illegal materials. At the material time PW1 was the OCD of Buhigwe District in Kigoma Region. Acting on this information, he dispatched PW7 D/C Adent at the scene to investigate the allegation. Arriving at the scene, which was around 6:15 pm, he saw the appellant in the process of picking a plastic container which appeared to have been abandoned. Besides to where the appellant was standing, there was a motor cycle with registration number T 212 BUH parked. PW7 blushed the appellant and in an argument which ensured, the two were found to be in a scuffle and while that was happening, PW1 arrived at the scene and they managed to put the appellant under control. Shortly, PW2 Idd Vuguta arrived also at the scene and introduced himself to be the owner of the motor cycle and he informed the police that the

appellant had hired it from him for a short errand. It is in his evidence that the appellant admitted before the police that he was the owner of the seized plastic container.

A decision was then reached to open the container to know its contents. This was done in the presence of PW3 Anania Alfred, PW4 Violet Edward and PW5 Yavan Mamba. All these witnesses have confirmed in their testimonies that 1276 rounds of ammunition were retrieved from the opened plastic container. It is on the strength of this evidence that the appellant was charged.

In his sworn testimony the appellant emphatically denied the offence. He said that he had gone at the scene to see a person he had an appointment with. He hired a motor cycle owned by PW2 to reach at the scene. He was then arrested by PW7 while waiting for this person and implicated with the offence. He denied to be the owner of the plastic container seized. However, he admitted that the container was opened in the presence of PW1, PW2, PW3, PW4 PW6 and PW7 and some rounds of ammunition retrieved therefrom

but he repeatedly stated that the seized goods did not belong to him. In a nutshell that was his defence before the trial court.

In this appeal, the appellant appeared in person, unrepresented; whereas the respondent/Republic had the services of Ms. Jane Mandago, learned Senior State Attorney. At the hearing of the appeal the appellant opted to allow the learned Senior State Attorney to submit first and if a need arises he will respond later. He had earlier filed a Memorandum of Appeal containing five grounds.

The learned Senior State Attorney did not support the appeal and with the leave of the Court she first pointed some irregularities apparent in the Record of Appeal particularly at pages 12, 14, 18, 20, 23, 26 and 32 on which the trial magistrate cross-examined PW1, PW2, PW3, PW4, PW7 and DW1. She submitted that the intention of cross-examination essentially is to contradict, a domain which is exclusively on an adverse party to the trial and not the court.

Further to that, she stated that on going through the answers given in the said cross-examination in controversy, the questions put didn't appear to be seeking clarification within the parameters of section 176 of the Evidence Act. She pointed out that the cross-examination by the trial magistrate was in breach of sections 146 and 147 of the Evidence Act and much as the trial magistrate did so honestly but in the process it prejudiced both the prosecution case and the defence.

Another area which the learned State Attorney submitted on is on the punishment of 15 years imprisonment imposed against the appellant. She argued that while sentencing the appellant the trial court did not adhere to the requirement spelled in section 170 of the Criminal Procedure Act. (the CPA). Relying on that provision, she pointed out that the jail sentence of 13 years meted out to the appellant was manifestly excessive and the appropriate punishment would have been a jail term not exceeding 5 years.

Taking into account all what was submitted above, the learned Senior State Attorney was of the view that the breach of sections 146, 147 and 170 of the Evidence Act tainted the proceedings of the trial court and for that reasons she invited the Court to invoke its revisionary powers under S. 4(2) of Appellate Jurisdiction Act by quashing the entire proceedings and order for a retrial.

In the alternative, the learned Senior State Attorney opted to respond to the grounds of appeal in the appellant's Memorandum of Appeal. She combined grounds No. 1, 2, and 3 and argued them together. She vehemently denied the assertion that the proceedings in the trial court and those in the High Court were tainted with illegality for non- compliance of sections 12(3), 12(4) and 26(1) of the Economic and Organized Crime Control Act, (Cap. 200) R.E.2002 which seeks the consent of the DPP before such proceedings are initiated and in compliance with section 3 of the said Act the Court of first instance would have been the High Court. To correct the above assertion, she brought to the attention of the appellant the amendment of the Arms and Ammunitions Act made vide Written Laws (Miscellaneous Amendments) Act No. 2 of 2010 which

amended section 19 by deleting it. From that amendment, she argued, the consent of the DPP was no longer a requirement and the trial court was the appropriate forum. Having said that, she concluded that as the evidence adduced was overwhelming, then the appellant was properly convicted. She prayed for the conviction be upheld and the sentence be varied as stated earlier.

On his part, the appellant supported the submission of the learned Senior State Attorney on the aspect of irregularity caused by the trial court to cross-examine witnesses but on the grounds of appeal he defended them and asked the Court to disregard the respondent's submission. As the case is based on the credibility of witnesses, he argued the Court to treat the evidence of PW1 and PW7 who are police officers with caution as in the first place it was hearsay and secondly the two had an intention to put him in jeorpardy. On the remaining evidence, he argued that PW2 was forced to implicate him so that his motor cycle is released and on the other remaining witnesses who were at the scene did not tell the court the truth, he complained. He pleaded for the Court to consider his grounds of appeal and set him at liberty.

On our part, we have meticulously perused the case record and we agree with the learned Senior State Attorney that the trial magistrate did cross-examine some of the prosecution witnesses and the appellant when he was giving his defence. We are aware that magistrates or judges are not allowed to cross-examine witnesses as that is the domain of an adverse party to the proceedings. The duty of a magistrate or judge is to put questions to witnesses for clarification as the aim of cross –examination is basically to contradict, weaken or cast doubt upon accuracy of the evidence given in the evidence in chief. (See **Kulwa Makomelo And two other v. Republic**, Criminal Appeal No. 15 of 2014, **Mapuji Mtongashwinde v. Republic,** Criminal Appeal No. 162 of 2015 and **Mathayo Mwalimu and Another V. Republic**, Criminal Appeal No. 174 of 2008(All unreported). However, looking objectively at the trial magistrate and the answers given as shown at pages 12,14,18,20,23, 26 and 32 of the record of appeal, it is apparent that the answers emanating from the questions put

by the trial magistrate were aimed at seeking clarification from witnesses and not otherwise because in actual fact, no new matters were raised.

May be the question we should pose here is whether or not the procedural lapse went to the root of the proceedings. The answer is in the negative because as we stated earlier, the questions put to the witnesses were seeking for clarification and we are settled in our minds that the same did not prejudice the parties in the case. After all, no new matters were raised. What actually the trial court did was to comply to the provisions of section 176(1) of the Evidence Act which give court power to put questions to any witness about any fact relevant to the case. This sections reads in part:-

> *"176-(1) The Court may, in order to discover or to obtain proper proof of relevant facts, ask any question it desires, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant...."*

From the above, it is clear that the sphere of the court to ask questions to witnesses for the purpose of obtaining proper proof is not limited provided that such questions will assist in the proper determination of the issue before it. On that basis, with respect, we differ with Ms. Mandago, learned Senior State Attorney and we are firm that the irregularity is curable and the provisions of section 146 and 147 of the Evidence Act were not offended.

We now move to discuss the grounds of appeal. Ground No.1, 2 and 3 can conveniently be combined and argued jointly. What the appellant is trying to say here is that the consent of the DPP was not sought before initiating the trial and his second point is that the trial court had no jurisdiction to entertain the charge because the offence being an economic crime is triable by the High Court. I think the two points raised should not detain us because the learned Senior State Attorney's submission has articulated the law and put the issue in its proper perspective. As rightly argued, Written Laws (Miscellaneous Amendments) Act No. 2/2010 amended

section 19 of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] by deleting section 19 of the said Act. The effect of deleting this section is twofold. **One**, it removed cases involving arms and ammunitions in the list of economic and organized crimes and in doing so, it ousted the jurisdiction of the High Court as court of first instance to try such offences. With such move the power of trying such offences was vested in the subordinate courts. **Two,** the requirements of the fiat of the DPP in prosecuting cases involving firearms and ammunitions was no longer there. The appellant's notion as propounded in grounds 1, 2 and 3 in his Memorandum of Appeal is therefore a misconception based on ignorance of law.

The last issue raised by the appellant is on the credibility of prosecution witnesses. He has canvassed this issue in grounds No. 4 and 5 of his Memorandum of Appeal. He asked this Court not to believe the evidence of PW1, PW6 and PW7 and find that the appellant was not the owner of the plastic container on which the rounds of ammunition were retrieved.

It is true that in this case the basis of the finding by both the trial court and the High Court was on the credibility of the witnesses particularly PW1, PW2, PW3 and PW7. PW1 and PW7 established that the appellant was the owner of the seized exhibit. It is trite law that if the courts below completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction, this Court must in the interest of justice intervene. (See **Salum Mhando v. Republic** [1993] TLR 170, **DPP V. Jafari Mfaume Kawawa** (1981) TLR 149. The rationale behind the principle is clear that in the matters of findings based on credibility and demeanor of the witnesses, the trial court is best placed to assess them as it has the advantage of seeing and hearing them. [See **Seif Mohamed El- Abadan v. Republic,** Criminal Appeal No. 320 of 2009 (unreported).

In our case at hand, as the evidence depicts and correctly appreciated by the lower courts below, PW6 and PW7 established that the appellant was the owner of the seized exhibit having 1276 rounds of ammunition of SMG and SAR

firearms. In cross examination, those witnesses were not shaken. They were consistent that the appellant was the owner of the plastic container seized. For that reason, we are constrained to concur with the two courts below and Ms. Mandago learned Senior State Attorney that the witnesses were credible for the trial court to rely upon. We therefore find no justification to disturb the findings of the two courts below. The appellant's assertion that PW1 and PW7 are witness with interest to serve and that the remaining civilian prosecution witnesses are unreliable is baseless.

That being our position, we now come to the question of the propriety of the sentence which was meted out against the appellant by the trial court. Ms. Mandago, learned Senior State Attorney told this Court that the sentence imposed was manifestly excessive in the circumstance of this case as the trial court ought to have been guided by section 170(1) of the CPA which mandate the Court to give a punishment not exceeding five years. With greatest respect, we totally agree

that the sentence of thirteen years imprisonment by the trial court was on the high side. It was excessive.

In the event, and for the reasons stated above, we set aside the sentence of thirteen years imprisonment and substitute with a sentence of 5 years imprisonment. Appeal allowed to that extent.

DATED at **TABORA** this 24th day of October, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL