

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

**(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)
CRIMINAL APPEAL NO. 382 OF 2015**

MAZIKU SHIJA @ KIMUMUAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khaday, J.)

**dated the 30th October, 2014
in
Criminal Appeal No. 33 of 2012**

JUDGMENT OF THE COURT

16th February, & 19th 2016

KILEO, J.A.:

In the Resident Magistrate's Court of Bukoba at Bukoba, the appellant was charged with, and convicted on three counts. On the first and second counts he was charged with and convicted of being in unlawful possession of fire arms and ammunition contrary to sections 4 (1) and 34 (2) of the Arms and Ammunition Act, Cap 223 R. E. 2002 as amended by Act No. 17 of 2010. On the third count he was charged with and convicted of being in possession of house breaking instruments contrary to section

298 (d) of the Penal Code. He lost his appeal to the High Court and he is now before us on his second appeal.

At the hearing of the appeal the appellant appeared in person with no legal representation. The respondent Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney. The appellant listed three grounds on his memorandum of appeal:

- 1. That, the Hon. Trial (sic) judge failed to consider the contravention of section 38 (3) of the CPA cap 20 R. E. 2002*
- 2. That, the Hon. Trial judge erred by relying on PW5's (Mathias) evidence of dock identification.*
- 3. That, the Hon. Trial judge misdirected herself when re-considered the expunged evidence i:e EXH P6 and 7.*

In order to get a proper appreciation of this matter which we consider to be rather curious we consider it pertinent at this point to give a short background of the circumstances leading to this appeal.

It was the evidence of PW1, Assistant Inspector Haji that on 08.02.2011 he was assigned to investigate the killing of a person known as Mabruki who owned a filling station in the municipality of Bukoba. Together

with three other policemen they followed on a lead in the form of a telephone number registered in the name of one Zudus Humud. According to PW1 he had a print out of all call logs made from that number and it turned out that the telephone number was being used by the appellant to communicate with his wife Jane Samwel. In the course of their investigation along with the RCOat around 2.00 am they went to a certain residence at Kyazi Rwamishenye where they ambushed the appellant and had him arrested. A search of that residence was conducted but nothing was found. On 09.02.2011 the same police officers went to Chato and according to them the appellant led them to a certain mango tree in a farm belonging to PW5. A digging ensued and in the course weapons and ammunitions, the subject of the charges, were found wrapped in a reflex jacket, black jacket, rain coat and yellow piece of cloth. PW5 testified to have been present when the appellant led the policemen to the mango tree under which the incriminating exhibits were dug. On the same day the appellant is alleged to have made a cautioned statement to PW7 D/Sgt Cosmas which was tendered in court as exhibit P7. About 19 days later the appellant was taken to a justice of the peace (PW6) who is claimed to have recorded his confession. The appellant was taken to court on 03/03/2011. It is to be observed that the crime to which the appellant allegedly confessed

before PW6 was murder, not the crime that he was charged of having committed in the matter at hand. In the cautioned statement, exhibit P7, he was cautioned that he was faced with armed robbery, so if anything he confessed to a crime that he was not charged with in the matter which led to this appeal. In spite of this, the trial court convicted the appellant. We are mindful of the fact that the first appellate judge expunged both exhibit 6 and exhibit 7 from the record. However we have been compelled to mention them in order to show how the whole case was riddled with abnormalities from the very beginning.

In his defence the appellant denied the charges and complained bitterly that the case against him was fabricated. He denied to have ever led the police to the place where the weapons and ammunition were hidden. He also claimed that the police took away his valuables and was kept in police custody for over 23 days while being taken to different places and at the same time being tortured, a fact which necessitated him being treated as per medical reports which he tendered in court. He also wondered how come it was he who was arrested instead of Zudus Humud who was the person the police had been looking for.

At the hearing the appellant opted to let the learned Principal State Attorney address us first.

Resisting the appeal Mr. Ngole asserted that none of the grounds of appeal could be sustainable. To start with the third ground he submitted that it was not maintainable because the learned appellate judge expunged the cautioned statement and the extra judicial statement and did not base her finding on those exhibits. Mr. Ngole was right on this. As for the second ground the learned Principal State Attorney submitted that identification by PW5 was not dock identification and that even if his evidence was to be disregarded there was ample evidence connecting the appellant with the commission of the crime.

Citing **Kalebi Elisamehe v. the DPP**, Criminal Appeal No 315 of 2009 and **Sonda Deus ` Mayombi v. R.** Criminal Appeal No.75 of 2009 (both unreported), Mr. Ngole argued that since the witnesses were found to be credible by both courts below the Court would not be justified to interfere with the findings of those courts with regard to credibility.

Responding to ground 1 Mr. Ngole argued that section 38 of the Criminal Procedure Act was not applicable since it was the appellant

himself who led the police to the place where the weapons and ammunition were found. He made reference to **Charles Mvaiponya v. R**, Criminal Appeal no 185, 186 & 187 of 2008 (unreported) in support of his contention.

In response to Mr. Ngole's submission the appellant maintained that the case against him was a frame up. He argued that credibility of the witnesses especially PW5 could not be relied upon considering that the appellant was denied the right to cross question him on his paper that he signed at the place where the weapons were allegedly found. The appellant also wondered how come the sketch map showed that PW5's house was just about 105 meters from the spot where the weapons were found while PW5 himself had said that the area was for cultivation only and no people lived there.

We said earlier on that this is a rather curious case. Indeed it raises more questions than answers. Due to the unusual circumstances of the case and for the ends of justice, we will address ourselves generally to the matter and will not necessarily confine ourselves to the grounds of appeal filed by the appellant who is a layman with no legal representation.

One of the issues that has given us some concern is the fact that the appellant was in police custody for over three weeks before he was taken to court. Apart from the fact that this was a contravention of the law, there was not the slightest attempt at explaining why this was so. On the other hand, the appellant claims that the charges against him were framed up. Mr. Ngole conceded that the police overstayed with the appellant in their custody. In such circumstances we think that the appellant's complaint raises some doubt as to the genuineness of the case for the prosecution against him. Under the criminal justice system, for a case like this one, where there is doubt such doubt is to be resolved in favour of the accused.

Another aspect is the fact that initially the prosecution witnesses were looking for one Zudus Humud in connection to murder, yet it was the appellant who is not Zudus Humud who was arrested. We wonder when the police parted ways with Zudus Humud on suspicion of murder and took on board the appellant for the crimes he was alleged to have committed - i.e unlawful possession of fire arms and ammunition and being in possession of housebreaking instruments.

Mr. Ngole argued that as a second appellate court we are not entitled to interfere with the finding of the subordinate courts on the question of

credibility. We are mindful of the previous decisions of this Court on this issue. However, we are also mindful of the fact that an appeal court may interfere with a trial court's finding as to credibility where there are circumstances on an appeal court on the record which call for a reassessment of their credibility- see **Omari Ahmed v. Republic** (1983) TLR 52. With due respect to the learned Principal State Attorney, we are convinced that in the circumstances of this case a reassessment of the credibility of the witnesses is warranted. For example, the trial magistrate considered PW6, the justice of the peace to have been a truthful witness. The appellant questioned his credibility and we think rightly so. At page 64 of the record the appellant in his defence said:

"Even the witness told the court that when I was taken before him I had no injury in my body of which at the police I was given PF3 on 25.02.2011 and I was taken to the justice on 28.02.2011."

If the appellant was given a PF3 on 25.03.2011 it means that on 28.022.2011 he had injuries already and the justice of the peace ignored that fact. We think that the trial magistrate failed to analyze the evidence, and the High Court unfortunately upheld the decision of the lower court. At

page 54 Of the record the trial magistrate made the following statement in response to the appellant's complaint that PW6 was telling lies:

".....And if that was the case, the police officers too have powers under the CPA to receive confession of any accused suspect, then how comes they failed to exercise their power towards the accused instead went to use the power of the justice of peace. Also on the issue whether the accused was injured or not what matters is when he was taken before justice of peace was he under any threat because the accused among others of his rights one is to tell if he has been forced to go there to confess, but the accused does not saying (sic) if at all he did tell PW6 that he was forced or threatened to confess, neither he does not tell if the injures he alleges was inflicted on him before the justice of peace. He could have been injured may be during his arrest or while in police lock up but that has no any link what forever with the confession made before the justice of peace unless the accused proves that the injury was forced on him as threat the make him confess before justice of peace....."

We think this was an unfortunate statement by the trial magistrate. It goes without saying that in a criminal matter like this one an accused need

not prove his innocence. It suffices for him to raise some reasonable doubt and his burden will have been discharged. Again at page 109 of the record the trial court assumed its own facts. The record reads:

"DW1 was arrested while at Bukoba and as he said that he has been tortured by police officers from the date of arrest it means it is the police officers of Bukoba not Chato.....DW1 tendered PF3, X-Ray report together with medical letters from Bukoba prison dispensary and government hospital to show that he was injured, however per PW1 and PW4's testimony they both said that DW1 fallen down on his attempt to escape the arrest when he jumped the fence he was given PF3 for treatment"

It is our considered view that even if PW1 and PW4 tried to explain how the appellant sustained the injuries, it will baffle any one's imagination as to why the PF3 was given to him on 25. 02.2011 and not immediately following his arrest or immediately after he had led the police to the place where the weapons were alleged to have buried - 09.02.2011. We have no doubt in our minds that the trial magistrate as well as the High Court judge misapprehended the evidence of PW6. We are aware that the extra judicial statement was expunged from the record but what we are saying is that if

there was a misapprehension of the evidence of PW6, what is there to prevent misapprehension of the rest of the evidence particularly when the whole circumstances of the case are considered? Another point on credibility worth mentioning regards the evidence of PW4 who tendered the sketch map, Exh. P5. As pointed out by the appellant, the sketch map showed that PW5's house was 105 meters from the spot where the incriminating exhibits were found while PW5 himself said that the area was in the forest and was just for cultivation. He stated at page 49 that the village was far from the farm which had no people living there. There was obviously a material contradiction between the evidence of PW4 and PW5 and PW5 must have signed the sketch map that was contrary to what he himself stated in court.

Apart from our observations above there is also the fact that the appellant was denied the right to test the credibility of PW5. This comes out from what is reflected at page 40 of the record, part of which reads:

"...I knew that your name is Maziku. I signed to a paper they wrote that the guns were found hidden to my shamba.

ACCUSED:-

Your honour I pray the accused (sic) to tender the paper he signed.

PA- Your honour this is not the stage of the witness to tender documents.

Court

The accused duty at this (sic) is to examine the witness and not to bring exhibit. Prayer rejected."

We think the appellant was denied a fair hearing in that he was not allowed to test the credibility of the witness by referring to a previous statement that the witness had signed. Bearing in mind that the appellant is a lay person the trial magistrate was obliged to ensure that he was availed of all his rights pertaining to the conduct of the prosecution against him. We note that Mr. Ngole agreed that the appellant was entitled to see the paper that he demanded to be tendered by the witness.

We note also at page 59 of the record that when the appellant applied for copy of proceedings so that he could prepare his defence the trial magistrate declined outright. The following is what transpired:

"Accused- I pray for copy of proceeding from the first stage till today so that I can prepare my defence.

Court- Prayer rejected, there is no such procedure in conducting the cases. The case has been closed for the prosecution and it cannot be agreed that the file be placed at (sic) before the typist for typing

where as there are a lot of already decided cases waiting to be typed that this file be joined to that forum thereafter unknown period it be returned back for proceeding with the defence case."

We think this was an unfortunate remark. The appellant who is a lay person said that he needed the proceedings so as to enable him to prepare his defence. Though the magistrate said that there was no such procedure it is equally true that there is no procedure for denying a lay accused person a copy of proceedings when he requires the same for preparation of his defence. In fact, for justice to have been done and seen to be done, the trial magistrate ought to have acceded to the appellant's request notwithstanding the constraints faced by the justice administration system. It was not absolutely necessary that the appellant should have been given typed proceedings. A certified photocopy would have sufficed in our view. Furthermore, the appellant being a lay person, and being faced with a serious offence it cannot be ruled out that he required the proceedings so that he could place them before someone with legal knowledge for advice.

In view of our considerations above and the many questions that came to light we are of the settled view that it was very unsafe, bearing in mind the principles pertaining to the criminal justice administration system,

to have entered a conviction against the appellant on any of the charges that were laid against him.

In the end result, we find the appeal by Maziku Shija @ Kimumu to have been filed with sufficient cause for complaint. We, in the event allow it and order that the appellant be released from custody forthwith unless he is therein held for some lawful cause.

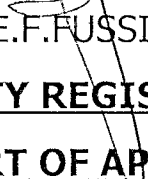
DATED at **BUKOB**A this 18th day of February, 2016.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL