**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: LUANDA, J.A., MWARIJA, J.A. AND MKUYE, J.A.)**

**CRIMINAL APPEAL NO. 492 OF 2015**

**EZEKIEL S/O KAKENDE.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

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

**(Mrango, J.)**

**Dated 16th day of October, 2015**

**In**

**DC. Criminal Appeal No. 172 of 2015**

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## JUDGMENT OF THE COURT

2nd & 11th August, 2017

**MWARIJA, J.A:.**

The appellant and another person, Fatuma Kasindi (the appellant's wife) were charged in the District Court of Kibondo with the offence of unlawful possession of firearms and ammunition contrary to section 4(1) and 34(2) of the Arms and Ammunition Act [Cap. 223 R.E.2002] (hereinafter "the Act") read together with paragraph 19 of the First Schedule to and section 57(1) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002]. It was alleged that on 7/11/2008 in the night at Bukililo village within Kibondo District, Kigoma Region, the

appellant and his wife were found in possession of fifteen bullets of SMG (Semi-Automatic Machine Gun) without license or permit.

At the trial, the prosecution relied on the evidence of three witnesses, a police officer, Assistant Inspector Rogers (PW1), Arisen Luhiga (PW2) and Kagoma Paulo (PW3) who were the Ward and Village Executive Officers respectively. Their evidence was to the following effect: On 6/12/2008 at about 22:00 hours, PW1 received instructions from his superior, the OC-CID to go to Kazilimihunda village to attend to the complaint that there was a person in that village who appeared to have a suspicious criminal conduct. The suspect was the appellant. Having arrested him at the house of his brother in-law, PW1 sought the assistance of PW2 and PW3 and proceeded to conduct a search in the residences of the appellant at Bukililo and Gwanumpu villages.

In his residence at Bukililo, fifteen bullets were found. They had been kept in a black socks and hidden at the top corner of one of the walls of his house. It was PW1's evidence that after the search, the appellant signed a search warrant. The bullets and the search warrant were admitted by the trial court as Exhibits P.01 and P.02 respectively.

At the close of the prosecution case, the learned trial Resident Magistrate found that the prosecution had failed to establish a *prima facie* case against the appellant's wife. She was found to have no case to answer. She was not however, acquitted as required by section 230 of the Criminal Procedure Act [Cap.20 R.E. 2002] (the CPA). That omission is, in our view, curable under S. 388 of the CPA. On his part, the appellant was found to have a case to answer.

In his defence, the appellant did not deny that the bullets were found in his house. He however dissociated himself from them contending that although he signed the search warrant, he did not do so voluntarily. According to his evidence, he initially refused to sign the warrant but following threats exerted to him, he was compelled to sign it.

Having considered the prosecution evidence and the appellant's defence, the learned trial Resident Magistrate was of the view that the prosecution had proved its case beyond reasonable doubt. The appellant was consequently sentenced to fifteen (15) years imprisonment.

Dissatisfied with the conviction and sentence, the appellant appealed to the High Court. His appeal was dismissed hence this second appeal.

In his memorandum of appeal, he basically raised five grounds of appeal which in substance can be paraphrased into three grounds as follows:

1. That the learned High Court judge erred in law in upholding the appellant's conviction which was based on a defective charge.
2. That the learned High Court judge erred in law in failing to find that the prosecution did not prove the case against the appellant beyond reasonable doubt.
3. That the learned High Court judge erred in law and fact in failing to find that the search which was conducted at the appellant's house was illegal because the area's ten cell leader was not involved.

In the 2nd and 3rd grounds, the appellant raised three matters, firstly, that the evidence of PW2 and PW3 was contradictory because each one of them was described as VEO. Secondly, that there was no evidence of

a ballistic expert proving that what were found in the appellant's house were bullets and whether they were for SMG or SAR (Semi-Automatic Riffle) and thirdly that the search was illegal because it was not witnessed by his ten cell leader.

At the hearing of the appeal, the appellant appeared in person, unrepresented. On its part, the respondent/Republic was represented by Ms. Juliana Moka, learned Senior State Attorney. When he was called upon to argue his grounds of appeal, the appellant opted to hear first the respondent's reply submission and said he would thereafter make a rejoinder as he would deem necessary.

In her submission, the learned Senior State Attorney opposed the appeal. With regard to the 1st ground of appeal, she argued that the appellant was properly charged because S.4 (1) of the Act prohibits possession of firearms and ammunition without licence or permit and so, when a person is found in unlawful possession of either of the two, it is under that provision the charge should be brought.

As for the 2nd and 3rd grounds of appeal, she submitted that the grounds concern credibility of witnesses and sufficiency or otherwise of

the evidence on which the appellant's conviction was based. On that, we agree with Ms. Moka. Matters of contradictory evidence or that a certain person was not called as a witness are matters which relate to the weight of evidence. Similarly, the omission to call the ten-cell leader to witness the search is not a matter of law. It is a matter of fact touching on the credibility of evidence.

In her submission, the learned Senior State Attorney argued that the witnesses were credible and the tendered evidence proved the offence against the appellant beyond reasonable doubt. According to her, although PW2 was described as VEO instead of WEO, the misdescription did not render his evidence contradictory to that of PW3. As for the evidence of a ballistic expert and the complaint that the search was conducted without involving the ten cell leader, Ms. Moka submitted that these grounds are also without merit. She submitted that the evidence of a ballistic expert would have been necessary if the matter had involved an explosion and the arising issue was the kind of the firearm or ammunition used. On the assertion by the appellant that the prosecution did not prove whether the bullets were for SMG or SAR,

she submitted that the evidence that the bullets were for SMG was not disputed by the appellant during the trial.

After she had concluded her submission in reply to the grounds of appeal, the Court required the learned Senior State Attorney to comment on the propriety or otherwise of the sentence of 15 years imprisonment imposed on the appellant. In response, Ms. Moka conceded that the sentence, which is the maximum penalty provided for the offence, was improperly imposed because in awarding it, the trial Magistrate exceeded his sentencing power as provided under S. 170 (1) of the CPA. She added that unless an offence carries a maximum sentence, the subordinate courts' powers are limited to award an imprisonment term not exceeding five years.

In response, apart from agreeing with the learned Senior State Attorney's submission that the trial magistrate exceeded his powers of sentencing, the appellant did not have anything in response to the submission made against the appeal.

In considering the appeal, we intend to deal first with the first ground concerning the charge. The gist of the appellant's complaint in

this ground is that whereas the act which is the subject of the charge is unlawful possession of ammunition (the fifteen bullets), the charge sheet shows that he has been charged with unlawful possession of firearms and ammunition. We agree with the learned Senior State Attorney that the appellant's complaint is devoid of merit. It is clear that the contention is based on misconception of the scope of S.4 (1) of the Act, understandably because the appellant is a lay man who did not have the services of a lawyer. The provision prohibits any person from using, carrying or having in his possession a firearm or ammunition without license or permit. It states as follows:

> *"No person shall use, carry or have in his possession or under his control any firearms or ammunition, except in a public or private warehouse, unless he is in possession of an arms licence issued under this Act."*

The appellant was charged under the above quoted section because it is the provision which also, as stated above, prohibits *inter alia*, possession of ammunition. It is clearly stated in the particulars of

the offence that the appellant's act constituting the offence was possession of ammunition, that is, fifteen bullets. The particulars of the offence state as follows:

> *"EZEKIEL S/O KAKENDE and FATUMA D/O KASINDI on 7th day of November, 2008 at Bukilolo Village within Kibondo District Kigoma Region,* ***were jointly and together found in possession of fifteen bullets of SMG*** *gun, without any valid licence of (sic) permit to possess the same."*
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> [Emphasis added].

For these reasons, we find that this ground of appeal is devoid of merit and hereby dismiss it.

We now turn to consider the 2nd and 3rd grounds of appeal. As intimated earlier, the appellant is faulting the learned judge for upholding the conviction contending that the prosecution did not prove the case beyond reasonable doubt. We pointed out above that the appellant premised this ground on the three matters stated above which are matters relating to the credibility of witnesses and weight of the

evidence upon which the appellant's conviction was founded. It is clear from the record that after having heard the prosecution and the defence witnesses, the trial court was satisfied that the case against the appellant was proved beyond reasonable doubt. Upon re-evaluation of the evidence, the High Court upheld the findings of the trial court. By raising issues concerning the weight of evidence and credibility of witnesses, the appellant is in essence, asking the Court in this second appeal, to evaluate the evidence afresh and come to its own conclusion.

As a principle the Court is not, under the circumstances of this case, entitled to do so. This is because, it is trite principle of law that in a second appeal, the Court is not entitled to interfere with the concurrent findings of facts by the two courts below unless in rare occasions where it is shown that there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice. In the case of **William R. Gerison v. The Republic,** Criminal Appeal No. 69 of 2004 (unreported) the Court re-iterated that principle in the following words:

> *"On a second appeal, an appeal lies to this Court only on a point of law or points of law in terms of section*

*6(7) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. It is settled law that very rarely does higher appellate court interfere with the concurrent findings of fact by the courts bellows."*

The conditions under which the second appellate court may so interfere were stated in the case of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149. The Court stated as follows:

*"Where a second appeal is brought under S.5 (7) of the Appellate Jurisdiction Act, 1979 on a point of law the second appellate court can evaluate evidence afresh and make its own findings of fact where there are misdirections or non-directions by the first appellate court".*

Having considered the points raised by the appellant in the 2nd and 3rd grounds of appeal and the submissions made by the learned Senior State Attorney, we have failed to find any misdirection or non-direction in the decision of the 1st appellate court. We agree with Ms. Moka that

the points raised by the appellant do not satisfy the conditions warranting this Court to interfere with concurrent findings of facts by the two courts below. We find that the appellant's contention is devoid of merit and as a result, we also dismiss these grounds of appeal.

That said and done, we revert to the issue concerning propriety or otherwise of the sentence. As stated above, the Court raised *suo motu* the issue whether or not the trial magistrate properly exercised his powers of sentencing. The Court was prompted to raise the issue because the trial magistrate sentenced the appellant to 15 years imprisonment the penalty which is the maximum prescribed for the offence under S.34 (2) of the Act. As argued by Ms. Moka, according to the provisions of S. 170 (1) of the CPA, the trial magistrate exceeded his sentencing powers. The provision states as follows:

> *"170.*
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> *(1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences.*

*(a) Imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the schedule to the minimum sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment...."*

In this case, the offence for which an option of fine is provided does not carry a minimum sentence. The learned trial magistrate did not therefore have power to impose to the appellant, an imprisonment term exceeding five years. The requirement of abiding by the provisions of S. 170 (1) of the CPA was underscored in the case of **Amani Ramdhani v. The Republic,** Criminal Appeal No. 219 of 2007 (unreported). In that case, the trial magistrate sentenced the appellant who was convicted of rape to 20 years imprisonment. The offence was, at the time, not specified and did not therefore attract a minimum sentence of imprisonment. Considering the sentence in terms of S. 170 (1) of the CPA, the Court held as follows:

*"That being the position of the law the sentencing power of a subordinate court in 1996 in cases of this nature was limited to five (5) years imprisonment as prescribed by S. 170 (1) of the criminal Procedure Act .... That sentence was ultra vires the sentencing power of the learned trial magistrate."*

The Court quashed the sentence but after having considered the circumstance of the case, it enhanced the punishment from five years imprisonment for which the subordinate court had power to award and imposed the sentence of 20 years imprisonment.

Since in this case, the trial magistrate exceeded his powers of sentencing, in the exercise of the Court's revisional jurisdiction under S. 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], we hereby quash and set aside the sentence of 15 years imprisonment imposed on the appellant by the trial court. Having done so, we remain with the task of determining the appropriate sentence for the appellant. In so doing, we have considered that according to the record, the appellant was a first offender and that S.34 (2) of the Act provides for option of payment

of a fine. We have also considered that the appellant had since completed serving the term of imprisonment of the five years, the maximum term which the trial magistrate had power to award. In our considered view, taking into consideration the above stated factors, the imprisonment term hitherto served by the appellant has met the justice of the case. We therefore substitute the sentence of imprisonment that shall result in the immediate release of the appellant from custody.

In the event, we order that the appellant be released from prison unless he is otherwise lawfully held.

**DATED** at **TABORA** this 9th day of August, 2017.

B. M. LUANDA
**JUSTICE OF APPEAL**

A. G. MWARIJA
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

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

P.W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL.**