IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 290 OF 2016

JILALA MANGWANA @ JOSEPH KALIDUSHU ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania At Shinyanga)

(Makani, J.)

Dated the 6th day of May, 2016
in
DC Criminal Appeal No. 150 of 2015

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JUDGMENT OF THE COURT

29th August & 7th September, 2018.

MWAMBEGELE, J.A.:

The appellant Jilala Mangwana @ Joseph Kalidushu was arraigned before the District Court of Bariadi for a charge comprising two counts; **first**, being in unlawful possession of a firearm contrary to sections 4 (1) and (2) and 34 (1) and (2) of the Arms and Ammunition Act, Cap. 223 of the Revised Edition, 2002 and, **two**, being in unlawful possession of ammunitions contrary to sections 4 (1) and (2) and 34 (1) and (2) of the

Arms and Ammunition Act, Cap. 223 of the Revised Edition, 2002. He pleaded not guilty to the charge and after a full trial, he was found guilty as charged, convicted and sentenced to seven years in jail in respect of each count. The sentences were ordered to run concurrently. His first appeal to the High Court was unsuccessful, for, Makani, J. dismissed it entirely on 06.05.2016, hence this second appeal.

When the appeal was called on for hearing before us on 29.08.2018, the appellant appeared in person, unrepresented. Mr. Solomon Lwenge, learned Senior State Attorney and Mr. Shaban Juma Massanja, learned State Attorney, joined forces to represent the respondent Republic.

When we called upon the appellant to argue his appeal, fending for himself, he adopted his Notice of Appeal and the Memorandum of Appeal he earlier filed as well as the Supplementary Memorandum of Appeal filed with leave of the Court at the hearing. Having so done, the appellant opted to rest his case and reserved his arsenals after the response of the respondent Republic, if need to unleash them would arise.

Responding, Mr. Lwenge, for the Republic, supported the appellant's conviction and its flanking sentence. In his response, Mr. Lwenge was very brief but focused. He submitted that Hollo Mbuga (PW1) testified that the appellant who was in company of others brought a sack at her home which was later found by the police to contain a firearm and rounds of ammunition, the subject of the present charge. The evidence brought to the fore by PW1 was sufficient to mount a conviction against the appellant, he submitted. The learned Senior State Attorney cited and supplied our decision in **Michael Mathias v. Republic**, Criminal Appeal No. 9 of 2007 (unreported) wherein we observed at page 9 of the typed judgment that a conviction can be founded on the uncorroborated evidence of an accomplice where the court finds it to be true and warns itself of the danger of conviction on uncorroborated evidence of an accomplice. To the learned Senior State Attorney, PW1 was an accomplice whose evidence needed corroboration but that the trial court rightly convicted the appellant on the strength of only her evidence. He prayed that the present appeal be dismissed.

On his part, the appellant, fending for himself, initially, reiterated his story he canvassed in both lower courts to the effect that the whole thing

stemmed from a struggle over his girlfriend; a certain Wande, between him and Park Rangers who were making amorous advances against her and later, having failed in their endeavours, decided to manufacture this case against him. However, upon reflection, having realized upon being prompted, that the episode would serve no useful purpose in this appeal, the appellant discarded it and asked the Court to peruse and consider both sets of his grounds of appeal and set him free.

We have considered the arguments of both sides. As rightly stated by Mr. Lwenge, this case stands or falls on the testimony of PW1. She was the only eye witness. However, as bad luck would have it, we think, this witness is one with interest of her own to serve. Mr. Lwenge thought she was an accomplice but with unfeigned respect, we think there is no evidence, apart from speculation, to suggest that she was one. The only evidence available in her testimony is that, at the time she testified, she was a prisoner. There is also evidence to the effect that she was arrested on the material day in connection with the offence after the appellant, allegedly, ran away in escape but there is nothing in evidence to suggest that she was ever charged with the offence. Thus, it has not come out clearly in evidence as to whether she had been sent to jail in respect of the

very offence with which the appellant was charged. Therefore, the question of PW1 being an accomplice does not arise. However, we admit that the principles of evidence applicable in respect of the value to be attached to evidence of an accomplice are on the same footing as those applicable with respect to a witness with interest of his/her own to serve.

In the case at hand, the appellant was convicted on the strength of the evidence of PW1. It is in her evidence that she was a prisoner at the time she testified. She testified that it is the appellant (who was friends with her husband) who, in company of a certain Sangayi, brought the sack; a polythene bag, at her home on 05.12.2012. She testified that at a later stage, the police came and upon search, they found the sack to contain the firearm and the rounds of ammunition. That the appellant and Sangayi ran away, leaving her behind after which she was arrested. It is on this evidence on which the appellant was convicted. We are disinclined to agree with Mr. Lwenge that PW1 was an accomplice but we think, as a witness with interest of her own to serve, must be treated on the same footing as that of an accomplice. She was arrested on the day when the police searched her house after the appellant and his friend Sangayi allegedly escaped.

We are alive to the legal position that a conviction based on the uncorroborated evidence of an accomplice or a witness with interest of his own to serve is not necessarily illegal. However, prudence has it that the same should be corroborated by other independent evidence. In the case at hand, the trial court addressed its mind to this legal position as follows:

> *"PW3 and PW4 on the other hand corroborated PW1's testimony that on 5/11/2012 they invaded PW1's house and the accused escaped as when they arrived the dog. They ran after him but they could not manage to arrest him. They saw him as there was moonlight and PW1 confirmed that it was the accused who ran away. They confirmed PW1's evidence that the gun was retrieved at her house."*

The trial court also referred to the evidence of No. E 2878 D/Corporal Dominic (PW5) who allegedly previously arrested one Masanja Maguzu; PW1's husband in possession of a firearm, who told them that the same belonged to the appellant.

We are of the view that despite the trial court convicting the appellant on the strength of PW1's testimony allegedly corroborated by the

testimony of Magembe Malato (PW3) and Christian Mrema (PW4); both Park Rangers, we think the corroboration did not go to the offence the appellant was charged with. We say so because the firearm and the rounds of ammunition were found in the house of PW1. The fact that the appellant ran away after PW3 and PW4 stormed into the house of PW1, is not strict proof that the appellant is the one who possessed the firearm and the rounds of ammunition. After all, PW1 being a person with interest of her own to serve, could not be expected to say anything other than that which would exculpate her from liability. The firearm and the rounds of ammunitions, as already said, were found in her house, beneath her bed. In the circumstances, only evidence that would exonerate her from liability would, ordinarily, reign from her. We think it could have been sufficient corroboration if the corroboration related to the appellant bringing the sack containing the firearm and rounds of ammunition at PW1's residence. In the premises, we think the evidence of PW1; a witness with own interest to serve was not corroborated and the trial magistrate did not warn himself of the dangers of entering a conviction on uncorroborated evidence of the said PW1. This was highly inappropriate and prejudiced the appellant as

the facts of the case as they currently stand, do not eliminate the possibility of the firearm and rounds of ammunition belonging to PW1.

As an extension to the foregoing arguments and finding, we are surprised why Masanja Maguzu; PW1's husband, was not called to testify. PW5 testified that they had arrested and prosecuted the said Masanja Maguzu and that he told them that the gun was brought to his residence by the appellant. This was a crucial witness for the prosecution who ought to have been fielded in court. The fact that Masanja Maguzu was not called to testify for the prosecution and no reason has been given for not doing so the Court is entitled to draw an adverse inference against the prosecution that they feared that he might have testified against their case – see: **Azizi Abdalah v. Republic** [1991] TLR 71.

In addition to the above, it is disquieting if the gun would have remained at the house of Maguzu at the time claimed by the prosecution witnesses while Maguzu was arrested and prosecuted in its connection some time before. This doubt must be resolved in favour of the appellant.

Much worse, it is doubtful if PW3 and PW4 managed to identify the appellant at the time they stormed into the house of PW1 when the appellant and Sangayi allegedly ran away. That was at about 21:00 hours; at night. While PW1 testified that the appellant and Sangayi ran away, PW4 states that during the incidence "one person ran away" and PW3 claims to have identified the appellant with the help of moonlight and a flash light. No description is given as to the attire or distance between PW3 and the appellant. In sum, we think, the possibilities of mistaken identity were not eliminated. It appears PW3 banked on the statement of PW1 who said it was the appellant and Sangayi who ran away. If anything, a lot of doubts surround the prosecution evidence which doubts must be resolved in favour of the appellant.

The foregoing said, we think the evidence brought to the fore by the prosecution was not sufficient to prove the case against the appellant beyond reasonable doubt. He should have been acquitted.

In the upshot, we allow the appeal. The judgment of the trial court and that of the first appellate court are quashed. The sentence meted out to the appellant by the trial court and upheld by the first appellate court is

set aside. Consequently, we order that the appellant Jilala Mangwana @ Kalidushu be forthwith released from prison unless held there for some other lawful cause.

Order accordingly.

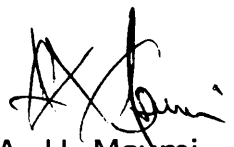
DATED at **TABORA** this 5th day of September, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL (T)