

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

**(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)**

**CRIMINAL APPEAL NO. 230 OF 2016**

**MOHAMED SAID @ MUDDI ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania  
at Mwanza**

**(Gwae, J)**

**Dated 04<sup>th</sup> day of May, 2016  
in  
Criminal Appeal No. 131 of 2012**

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**JUDGMENT OF THE COURT**

**27<sup>th</sup> Nov. & 10<sup>th</sup> Dec. 2018**

**MUSSA, J.A.:**

In the District Court of Sengerema, the appellant and another were jointly arraigned for two counts of being in unlawful possession of a sub-machine gun and sixty five (65) rounds of ammunition contrary to, respectively, sections 3(1) (3) and 13(1)(2) of the Arms and Ammunition Act, Chapter 223 of the laws as it was then in force. It is, perhaps, pertinent to digress here with an observation that the referred Act was repealed and replaced by the Firearms and Ammunition Control Act No. 2

of 2015 effective from the 25<sup>th</sup> April, 2015. But since, as will be seen, the alleged offence was committed prior to the enactment of Act No. 2 of 2015, the case under our consideration was brought into the fore and determined under the repealed Act which, for ease of reference, we shall hereinafter refer to it as "the Act". So much for the digression.

If we may resume our telling of the details of the charge sheet, the particulars of the first count were that on the 16<sup>th</sup> January, 2011, at Nyamtelela village, within Sengerema District, the appellant and his co-accused were found in unlawful possession of a sub-machine gun with serial No. UC 2805-1998. As regards the second count, the allegation was that on the same date as well as at the same place, the appellant and the co-accused were found in unlawful possession of sixty five (65) rounds of ammunition.

Throughout the trial, the appellant stood as the first accused whereas his co-accused, namely, Neema Paulo, who turns out to be his wife, stood as the second accused. Upon a full hearing, the learned trial Magistrate was satisfied that the case for the prosecution was established to the hilt

and, accordingly, the appellant and his wife were found guilty, convicted and each was sentenced to serve a term of ten (10) years imprisonment.

Both were aggrieved and, on the first appeal, Neema Paulo, the wife, was absolved of responsibility, whereas the appellant's appeal was dismissed in its entirety (Gwae, J.). Undaunted, the appellant presently seeks to impugn the decision of the High Court upon a memorandum of appeal which is comprised of six (6) points of grievance.

When the appeal was placed before us for hearing, the appellant was fending for himself, unrepresented, whereas the respondent was represented by Mr. Juma Sarige, learned Senior State Attorney, who was being assisted by Ms. Subira Mwandambo, learned State Attorney.

When he was called to elaborate his points of grievance, the appellant opted to fully adopt the memorandum of appeal without more. On his part, Mr. Sarige supported the appeal, albeit, for some other reason aside from those raised in the memorandum of appeal. To begin with, he drew our attention to the charge sheet which, in its statement of offence for the respective counts, made reference to sections 13(1) (3) and 13(1)(2) of the Act. The referred provisions, he said, made provision for

the deposit of imported arms and ammunition in a public warehouse and do not, for that matter, create the desired offences of being found in unlawful possession of arms and ammunition. The learned Senior State Attorney further submitted that the desired offences should have been appropriately preferred under section 4(1) of the Act which, as it then existed, provided thus:-

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

Mr. Sarige was of the firm view that the misdescription of the appropriate offence in the statement of the offence was incurably fatal to the extent that it rendered a nullity the entire proceedings of the two courts below. He thus, implored us to invoke the revisional jurisdiction of the court and quash the entire proceedings of the two courts below with an order for a retrial.

When we asked the appellant to comment on the learned Senior State Attorney's concern about the charge sheet, he was somewhat at a loss and, we should suppose, quite understandably, given the reality that

the shortcoming raised was too technical to be readily apprehended by a lay person.

On our part, we entirely subscribe to the submissions of the learned Senior State Attorney to the effect that the charge sheet is incurably defective on account of making reference to a completely inapplicable provision of the law in the statement of the offence. In this regard, section 135 (a) (i),(ii) and (iii) clearly sets out the mode in which a charge or information is to be framed:-

*"135. The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section-*

*(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*

*(ii) **the statement of offence shall describe the offence shortly in***

***ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;***

- (iii) *After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required."*

The bolded sub-paragraph (a) (ii) tells it all, in that statement of the offence ***shall contain a reference to the section of the enactment creating the offence.*** On the contrary, in the matter at hand, the reference on the statement of offence was with respect to a matter

completely unrelated to the desired offences of unlawful possession of a fire arm and ammunition. The charge was, so to speak, incurably defective and we, for that matter, unhesitatingly accept Mr. Sarige's advice that the nullification of the entire proceedings of the two courts below is unavoidable. Since the nullification would sufficiently dispose of this appeal, we need not recite the factual background giving rise to the arraignment and the ultimate conviction of the appellant. And needless for us to have to recite and belabour on the grounds of appeal raised by the appellant. It, however, remains to be considered whether or not an order for retrial is fitting in the circumstances of this case.

In this regard, we dispassionately pondered over the invitation from the learned Senior State Attorney for us to order a retrial but found ourselves far from being persuaded. If anything, the defect giving rise to the vitiation of the proceedings below squarely falls on the shoulders of the prosecution. In a corresponding case, the defunct Court of Appeal for Eastern Africa stated in **Ahmad Ali Dharamshi Sumar Vs Republic** [1964] EA [1964] EA:-

*"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the*

*prosecution is to blame, the court will not order a retrial”.*

To say the least, having found the charge sheet to be incurably defective, we are constrained to invoke the revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the laws and accordingly, nullify the entire proceedings of the two courts below. The appellant should be released from prison custody forthwith unless held there for some other lawful cause.

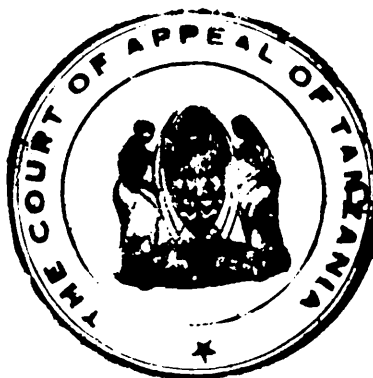
**DATED at MWANZA** this 7<sup>th</sup> day of December, 2018.


K. M. MUSSA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**