IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 517 OF 2016

GEORGE MOSHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

dated the 24th day of October, 2016
in
Criminal Appeal No. 207 of 2017

JUDGMENT OF THE COURT

6th & 11th December, 2019

LILA, J.A.:

The appellant George Moshi was arraigned before the District Court of Nzega sitting at Nzega (the trial court) for the offence of being in possession of a firearm contrary to section 4(1) of the Arms and Ammunition Act, Cap. 223 of the Revised Edition of 2002 (the AAA). It was alleged in the charge that on 29/9/2015 at about 06:00hrs at Mambali village within Nzega District in Tabora Region the appellant was

found in possession of one locally made firearm known as "gobore" without permit or license. He denied the charge. Trial ensued and at its conclusion, he was convicted and sentenced to pay a fine of TZS. 3,000,000/= or serve fifteen (15) years imprisonment. He could not afford to pay the fine which led to his being incarcerated in prison. Aggrieved by both the conviction and sentence, he unsuccessfully preferred an appeal to the High Court at Tabora. Still dissatisfied, he preferred the instant appeal.

To appreciate the essence of the present appeal, we hereunder refresh the material background facts of the case that were before the trial court. The prosecution case was founded on the evidence of two witnesses. On 29/09/2015 at about 06:00hrs, Insp. B. L. Chitanda (PW1) was at his home. He heard a commotion which suggested that a thief was being chased. Being head of the Mambali Police Post, he left to his office. No sooner had he arrived there than he saw a certain person carrying a luggage containing plastic shoes commonly known as "yeboyebo" on his bicycle running to the police station for refuge. Just about five meters from the door of the police station, he dropped the luggage. A "gobore" (exhibit P1) was found in the luggage. That person

turned out to be the appellant. Upon PW1 enquiring from the appellant what was the matter, he said he with his associate one Kulwa had stolen the luggage at Mbutu and had used the gun. The appellant led PW1 and his company which comprised three police officers to Mambali where they managed to arrest Kulwa. Kulwa admitted participation in two robbery incidents.

The appellant's cautioned statement was recorded by D639 DSSGT Pius (PW2) in which he confessed being found in possession of the "gobore" of which its admission as exhibit was objected to by the appellant on allegations of threat and torture before it was taken. However, after an inquiry, a finding that the cautioned statement was voluntarily taken was made and the "gobore" was admitted as exhibit P2.

In his defence, the appellant distanced himself from all the prosecution's allegations. He claimed that he was arrested at Mambali on 29/09/2015 where he went on 28/09/2015 to meet his girlfriend. He denied being arrested having the gun as well as writing a cautioned statement despite being subjected to torture for three days at Nzega police station.

At the conclusion of the trial, the presiding magistrate was convinced that the prosecution had proved the charge against the appellant beyond reasonable doubt and proceeded to convict him as charged and sentenced him as indicated above.

The conviction and sentence aggrieved the appellant consequent upon which he immediately preferred an appeal to the High Court which was, however, not successful.

Undeterred, he preferred the present appeal in which he raised substantially three grounds of grievance. We shall not, however, recite them for a reason soon to be uncovered.

At the hearing of the appeal, the appellant was unrepresented. He fended himself. On the other hand, Mr. Tumaini Pius, learned State Attorney, appeared representing the respondent Republic.

The appellant, after adopting his grounds of appeal, deferred his right to rejoin until after he had heard the learned State Attorney's submissions on the merits or otherwise of his complaints whereafter he would decide whether to rejoin or not.

Mr. Pius, consequent to the appellant's option, addressed us in response to the grounds of appeal. After painstakingly analyzing the

various complaints raised by the appellant and the settled legal positions obtaining in our jurisdiction in their respects, Mr. Pius came out with a firm finding that the appellant's appeal was unmerited. We, however, find no cause to rephrase the learned State Attorney's submissions for, before he put his case to rest, he brought to our attention a pertinent legal issue touching on the validity or otherwise of the proceedings before both courts below on account of the charge being founded on a repealed law. We found it, if established, a sufficient point of law to determine the appeal. We, therefore, allowed him to elaborate it.

Mr. Pius, eloquently, argued that the appellant, as per the charge sheet, was arraigned for the offence of being in possession of a firearm without permit which was a contravention of the provisions of the AAA. But, he charged, that law was repealed and replaced by the Firearms and Ammunitions Control Act, No. 2 of 2015 (the FACA) which, in terms of Government Notice No. 22 of 2015, came into operation on 22/5/2015. To substantiate his argument, he managed to electronically search for the relevant law and showed us. Elaborating further, he argued that since the accusations raised in the charge against the appellant were alleged to have been committed on 29/9/2015 and the

appellant was arraigned in court for the first time on 5/10/2015, then it was improper to anchor the charge on the AAA. Since the appellant was charged on a non-existent law, he summed up, the proceedings and judgment of both courts below were a nullity. He accordingly beseeched us to invoke the powers of revision bestowed upon the Court under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition 2002 (the AJA) to nullify the aforesaid proceedings and judgment quash the conviction and set aside the sentence meted out to the appellant by the trial court and maintained by the High Court. Regarding the way forward, initially, he was of the view that the Court should be pleased to order a retrial on a proper charge or the matter be left at the liberty of the Director of Public Prosecutions (the DPP) and the appellant, in the meantime, to remain in remand custody to await the initiation of a fresh trial. However, upon a glance on the sentence the appellant could have been sentenced to serve by the trial magistrate as being not more than five (5) if he was charged under the proper law and considering that he has already served about three years jail term, the learned State Attorney changed the goal posts and argued that prudence and justice demanded his being set free.

The issue raised by Mr. Pius, being a legal one, was beyond the appellant's comprehension he being a layperson. Relying on the outcome suggested by the learned State Attorney, he simply fully supported him and pressed that his appeal be allowed and he be set at liberty.

From the submissions made by the learned State Attorney, the crucial issue for our resolve is whether or not the charge was founded on a valid law.

As stated above, the charge against the appellant was based on section 4(1) the AAA. For ease reference we deem it appropriate to recite the charge leveled against the appellant.

"CHARGE

STATEMENT OF OFFENCE:-

BEING IN POSSESSION OF FIRE ARM: *Contrary to section 4(1) of the Arms and Ammunition Act Cap 223 [R. E. 2002]*

PARTICULARS OF OFFENCE:-

GEORGE S/O MOSHI *charged on 29th day of September 2015 at or about 06: 00hrs at MAMBALI Village within Nzega District in Tabora*

Region was found in possession of one fire arm known as Gobore without permit or license.

Dated at ***NZEGA*** *this 5th day of October, 2015.*

.....

PUBLIC PROSECUTOR."

The record of appeal bears out that the appellant was first arraigned in court on 05/10/2015. The learned State Attorney raised a point of law that the law under which the appellant was charged was however repealed when the FACA was enacted and became law on 22 May 2015 through Government Notice No. 22 of 2015 which was published in the Government Gazette of 22/5/2015.

Upon our research, we have found merit in the learned State Attorney's submissions on the validity of the charge. It is, indeed, clear that at the time the appellant was arraigned to answer the charge, the AAA had already been repealed by the FACA.

The provisions of section 73 of the FACA are unambiguous on the status of the AAA for, it stated that:-

"73. The Arms and Ammunitions Act is hereby repealed."

Further to the above, it is indicated that a notice indicating its operation date was published in the Gazette of the United Republic of Tanzania No. 22 vol. 96 dated 22/5/2015. Given this fact, as rightly argued by the learned State Attorney, on 05/10/2015, when the appellant was arraigned in court on an offence allegedly committed on 29/9/2015, the AAA had already been repealed.

A follow up issue would definitely be what is the effect of founding a charge on a repealed statute?

But, before we determine the above issue, we think there is need to expound the law on what are the effects of repealing a statute. The answer is not hard to find. We are highly persuaded by the discussion on the subject and excerpts in that respect quoted by the High Court of Kenya in the case of **Republic v Kenya Anti-Corruption Commission and Others Ex parte Okoth** [2006] 2 EA 275 which, for clarity, we propose to recite the relevant part wholesome thus:-

> *"It is the applicant's case that any liability or offence under the repealed Act cannot outlive its repeal. The applicant's contention is principally*

based on the common law because the rule at common law is that the effect of repeal was to obliterate the law as if it never existed, but subject to any savings in the repealing Act and also the general statutory provisions as to the effects of repeal. This position is borne out by ***Halsbury's Laws of England*** *(4ed) Volume 44(1) paragraph 1296 which states:*

*"**To repeal an Act is to cause it to cease to be part of the corpus juris or body of law.** The general principle is that except as to the transactions past and closed, **an Act or enactment which is repealed is to be treated thereafter as if it had never existed.** However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment and in most cases is also subject to the general statutory provisions as to the effects of repeal."*

From the above quotation the savings can either be made in the repealing Act or in a general statute.

The same point concerning the mode of saving is repeated and re-emphasized in the work

cited to us by the DPP that is, Principles of Statutory Interpretation by Justice Singh at 484-485 where it is observed:

"Under the common law, ***the consequences of a repeal of a statute are very drastic. Except as to transactions past and closed, a statute after repeal is as completely obliterated as if it had never existed. Another result of repeal...is to revive the law in force at the commencement of the repealed statute.*** *The confusion resulting from all these consequences gave rise to the practice of inserting saving provisions in repealing statutes."* (Emphasis added)

We are certain that the above stance provides a detailed and correct exposition of the law in our jurisdiction as we understand and accept it to be. We fully subscribe to it. That being the case, it is obvious, in the instant case, therefore, that the repeal of the AAA by section 73 of the FACA rendered the former Act inapplicable as on 22/5/2015 and at the same time the latter Act became operational. The provisions of section 4(1) of the AAA did not survive the repealing law

which, under section 74(a) and (b) only saved respectively, the subsidiary legislation made under the AAA and deemed them to have been made under the FACA until revoked by regulations or rules made under the FACA and all the officers appointed under the AAA to perform functions in relation to the manufacture, importation, safe storage, carriage, export or other dealings in the AAA until their tenure of office expires or their appointments are terminated whichever takes place earlier. Understandably so, the appellant was arraigned in court on a repealed law hence non-existent law.

Turning to the merits of the instant case, the provisions of section 135(a)(ii) of the CPA provides the procedure on how the charges should be framed. That section states:-

> *"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." (Emphasis added)

It is clear that the above section mandatorily directs that every charge must make reference to the relevant provisions of the law creating the offence. In the case under discussion, the charge cited the provisions of the AAA which were already repealed hence did not exist. Such provisions could not create the offence charged. The provisions under the AAA, at that material time, were not worth being based on in charging the appellant. In conclusion, the charge leveled against the appellant did not, therefore, accord with the imperative requirements of section 135(a)(ii) of the CPA.

In the light of the above findings, the issue that comes to the fore is, what are the consequences of non-compliance with the provisions of section 135(a)(ii) of the CPA? In resolving this issue we shall not pretend to be inventing the wheel. This Court faced an identical scenario in the case of **Abdallah Ally vs Republic**, Criminal Appeal No. 253 of 2013 (unreported) and provided the following guideline:-

> *"... Being found guilty on a defective charge based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below."*

Although in the cited case the issue before the Court was the propriety of the charging provision, we think the applicability of that legal proposition extends to situations where the cited statute on which the charge is founded was repealed hence non-existent.

We need not overemphasize that reference to a proper law (statute) in the offence section of the charge is very material in considering the propriety of the trial. We hasten to say that fair trial includes ensuring that convicted culprits are charged under the proper and valid law. Unfortunately, in the present case, the ailment of citing a repealed law obtained throughout the trial until when the appellant was sentenced. We, accordingly, agree with the learned State Attorney that failure to cite the proper and valid law in the charge was a fatal defect and could not be cured under section 388(1) of the CPA. The appellant's prosecution was therefore illegal and unlawful.

We have considered whether it is appropriate to order a re-trial. We are mindful that the learned State Attorney desisted from urging the Court to order a re-trial. He reasoned that the appellant has already served three and half year's illegal sentence which is a substantial part of the sentence of five years he would be jailed by a trial court in the event he would be found liable on retrial under the applicable law.

We are agreed with Mr. Pius that this is not a fit case to order a retrial. We are bent in that view for two major reasons. **One**, there is no proper charge on which a retrial can be commenced [see **Mayala Njigailele vs Republic**, Criminal Appeal No. 490 of 2015 (unreported)]. **Two**, as rightly argued by the learned State Attorney, the appellant has already served close to four years of an illegal sentence hence it would be very unjust to subject him to the intricacies of a new trial. We, for those reasons, refrain from taking that course.

We would have ordinarily ended here but for one thing which we find ourselves obliged to remind those vested with powers to admit the charge sheets. The provisions of section 135(a)(ii) of the CPA vests a magistrate with powers to satisfy himself either *suo motu* or upon

objection by the accused that a complaint or formal charge made or presented under this section does disclose an offence. In the event he finds otherwise, he is obligated to make an order refusing to admit the complaint or formal charge after recording his reason(s) for the order.

It is elementary to note here that the above is the very first act the court should do so as to ascertain if there is a triable offence as disclosed by the charge or complaint as drawn before any formal proceedings (see **Mohamed Koningo vs R** [1980]TLR 279).

For the foregoing reasons, we find the ailment of making reference to a repealed law in the offence section part of the charge was fatal and vitiated the whole trial. We hereby, considering that the above point of law was not canvassed in the grounds of appeal, invoke the powers of revision vested in the Court under section 4(2) of the AJA and proceed to nullify the proceedings and judgment of both the trial court and the first appellate court since they are founded on invalid proceedings and judgment of the trial court. The sentence meted out to the appellant by the trial court and maintained by the High Court is also set aside. The

appellant shall be set at liberty forthwith unless he is incarcerated for any other lawful reason.

DATED at **TABORA** this 10th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2019 in the presence of the appellant in person and Mr. Tito Ambangile Mwakalinga, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL