

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

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 67 OF 2018

GAUDENCE MPEPOAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

dated the 8th day of December, 2017

in

(DC) Criminal Appeal No. 109 of 2017

JUDGMENT OF THE COURT

19th & 23rd April, 2020

KWARIKO, J.A.:

Gaudence Mpepo, the appellant together with his brother Steven Alfred Mpepo and his sister-in-law Teddy Papias, the first and second accused respectively, who are not parties to this appeal were arraigned before the Resident Magistrate’s Court of Tabora at Tabora. They were charged with the offence of unlawful possession of firearm contrary to section 20 (1) and (2)

of the Firearms and Ammunitions Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [CAP 200 R.E. 2002] (the Act) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. They denied the charge but at the end of the trial the first and second accused persons were acquitted while the appellant was convicted and sentenced to twenty years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court of Tanzania at Tabora. He is thus before this Court on a second appeal.

The evidence which led to the appellant's conviction is as follows: On 11th October, 2016 Anyambwile James Mwamaswa (PW1), a Game Warder was patrolling at Ugala Game Reserve when he got information that the first accused, a resident of Usinge Village was in possession of a gun without lawful permit. Together with Inspector Kelvin Kapinga (PW2) from Tabora Regional Crimes Office, they arrested the first accused and reported the matter to the village chairman one Nahenyele Kazi

and all went to the first accused's house and found his wife, the second accused.

Upon inquiry, the second accused's wife said the gun was there but it was taken away by the appellant, her brother-in-law. When the officers found the appellant, he admitted to have received the gun which he kept in the farm. He led the search party and the firearm make muzzle loader was found hidden about 800 metres from his home. The appellant failed to show a lawful permit to possess the firearm.

However, Chenyele Charles (PW3) testified as the village chairman who witnessed the search and seizure of the said firearm. During the trial, the muzzle loader gun, register book and requisition issue voucher were admitted in evidence as exhibits P1, P2 and P3 respectively.

In his defence, the appellant denied the charge. He testified that upon arrest on 17th October, 2016 at night hours he was taken to the second accused's house and both of them were later taken to the anti-poaching office where the charge against them was prepared.

In its judgment, the trial court was satisfied that the appellant was found in possession of the firearm without permit, was convicted and sentenced as shown above. This finding was upheld by the first appellate court.

Before this Court the appellant raised four grounds of appeal which we have paraphrased into the following three grounds.

- 1. The prosecution did not prove that the appellant was found in unlawful possession of the gun.*
- 2. The sentence meted out against the appellant was illegal.*
- 3. The appellant's conviction was illegal as it was based on the evidence of the co-accused.*

At the hearing of the appeal, the appellant appeared in person without legal representation, whilst the respondent Republic was represented by Ms. Juliana Moka, learned Senior State Attorney.

When he was called upon to argue his appeal, the appellant only adopted his grounds of appeal and preferred the

learned Senior State Attorney to begin her address, reserving his right of rejoinder, if the need to do so would arise.

For her part, Ms. Moka made her stance clear of supporting the appeal. Arguing the first ground of appeal, the learned counsel submitted that though PW1, PW2 and PW3 said they found the appellant in unlawful possession of muzzle loader gun there was no any receipt issued of the seizure and signed by the parties concerned to authenticate the allegations as required under section 38(3) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). The learned counsel fortified her contention by our earlier decisions in **Paulo Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007 and **Seleman Abdallah & Two Others v. Republic**, Criminal Appeal No. 384 of 2008 (both unreported).

It was Ms. Moka's further argument that the prosecution evidence would have been meaningful even in the absence of the certificate of seizure but it suffers one ailment. She submitted that there is contradiction as to who the independent witness was at the alleged seizure of the gun. She explained that, while PW1 said the village chairman one Nehenyela Kazi

witnessed the seizure, Chenyela Charles (PW3) said he was the village chairman who witnessed that process.

In relation to the second ground of appeal, the learned Senior State Attorney argued that the sentence meted out against the appellant was legal in the wake of the amendment of the Act by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 which included the offences under sections 20, 21 and 45 of the Firearms and Ammunitions Control Act (supra) as economic offences. The amending Act became operative on 8th July 2016 whereas the appellant was alleged to have committed the offence on 12th October 2016. In the circumstances, she argued that, the case of **Mwanzo Wilson @ Bunga v. R**, Criminal Appeal No. 267 of 2016 (unreported) which was relied upon by the appellant is distinguishable because it followed the provisions of Act No. 2 of 2010 which had previously removed the offence of unauthorized possession of firearms and ammunitions from economic offences, thus at that time the sentencing powers of magistrates remained subject to the provisions of section 170 of the CPA.

As regards the third ground of appeal, Ms. Moka argued that the appellant was convicted on the basis of the prosecution evidence and not on the basis of the evidence of the co-accused.

On being probed by the Court, on whether the defence evidence was properly taken, the learned Senior State Attorney submitted that the court record does not show that the appellant and co-accused were given opportunity to cross-examine each other when they gave their defence. She argued that the omission amounted to unfair trial which vitiated the appellant's conviction. Following the stance taken by the respondent, the appellant had nothing to add in rejoinder.

We have dispassionately considered the grounds of appeal and the parties' submissions; we are thus enjoined to decide a germane issue whether the prosecution case was proved beyond doubt to warrant the appellant's conviction. It is common ground that the two courts below made concurrent findings of facts that the appellant was found in possession of firearm without permit. It is trite law that, the second appellate court as in this case, is not entitled to interfere with such

findings unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice. See for instance the Court's decisions in the cases of **Mbaga Julius v. R**, Criminal Appeal No. 131 of 2015, **The Director of Public Prosecutions v. Simon Mashauri**, Criminal Appeal No. 394 of 2017 and **Thobias Michael Kitavi v. R**, Criminal Appeal No. 31 of 2017 (all unreported).

We are now set to decide whether the courts below correctly appreciated the facts of the case. In so doing, we will consider the appellant's grounds of complaints. However, before we determine the grounds of appeal, we find it appropriate to start with the issue we raised *suo mottu* regarding the manner in which the defence evidence was taken. As rightly submitted by the learned Senior State Attorney, the appellant and co-accused were not given opportunity to cross-examine each other when they gave their defence evidence. While we appreciate that the trial court erred in the way it received that evidence, we are of the view that the omission did not prejudice the appellant or the co-accused because none of them implicated another in their evidence.

Now, as regards the first ground of appeal, we are in agreement with both parties that the prosecution ought to prove that the appellant's alleged possession of firearm was conducted legally. The evidence shows that the muzzle loader gun was found in possession of the appellant by PW1 and PW2 in the presence of the village chairman as an independent witness. However, the presence of the independent witness is doubtful in the sense that while PW1 said the village chairman who witnessed the search was Nehenyela Kazi, according to his evidence, Chenyela Charles (PW3) said that he was the person who witnessed the seizure in his capacity as the village chairman. It follows that in the absence of the evidence to show that the two are the same and one person, we find it doubtful that there was independent witness during the seizure, which under section 38 (3) of the CPA is a legal requirement.

It is a settled principle of law that where the evidence contains contradictions and inconsistencies the court is duty bound to address them and decide whether they are minor or they go to the root of the case. Underscoring this principle in

the case of **Mohamed Said Matula v. R** [1995] TLR 3, the Court held inter alia that:

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

Following this authority, we find that the two courts below ought to have considered the said contradictions and decide whether they were minor or not. That was not done. On our part, we have considered the contradictions and found that they are going to the root of the matter thus creating doubt on the prosecution evidence in relation to the possession by the appellant of the firearm.

On further consideration, we have found that the arresting officers did not issue a receipt to acknowledge the seizure of the firearm from the appellant. This was in clear contravention of section 38 (3) of the CPA which provides thus:

"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

It is thus clear that, had the officers issued the receipt, the doubt concerning independent witness would have been cleared because the appellant and witnesses would have signed it. See for instance, the case of **Paulo Maduka & Four Others** (supra).

From the foregoing analysis, we find merit in the first ground of appeal. We are thus of the view that since the prosecution evidence concerning the appellant's unlawful possession of firearm is wanting, it goes without saying that the charge against the appellant was not proved beyond reasonable doubt. On that note, we do not find need to determine the remaining grounds of appeal.

Consequently, we find the appeal meritorious and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellant. We further order his immediate release from prison unless his continued incarceration is related to other lawful cause.

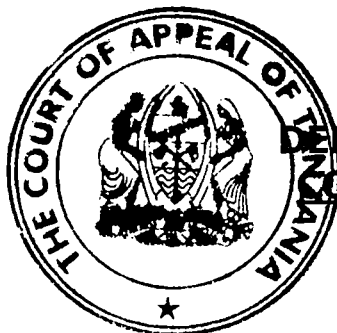
DATED at TABORA this 22nd day of April, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of April, 2021 in the presence of the Appellant in Person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL