**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)**

**CRIMINAL APPEAL NO. 400 OF 2017**

**THOMAS LUGUMBA @ CHACHA ..... APPELLANT**

**VERSUS**

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

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

**(Maige, J.)**

**dated the 22nd day of March, 2017**
**in**
**Criminal Appeal No. 288 of 2016**

.....

# JUDGMENT OF THE COURT

3rd & 6th May, 2021

## MWAMBEGELE, J.A.:

The appellant Thomas Lugumba was arraigned before the District Court of Musoma for the offence of unlawful possession of ammunitions contrary to sections 4 (1) and 34 (2) of the Arms and Ammunition Act, Cap. 223 of the Revised Edition, 2002 (henceforth "the Arms and Ammunition Act"). It was alleged in the particulars of the offence that on

28.11.2015, at Nyamsisi area within Butiama District, Mara Region, the appellant was found in unlawful possession of thirty (30) rounds of ammunition. He pleaded not guilty to the charge and a full trial ensued. At the end of the trial, the appellant was convicted of the offence as charged and sentenced to a jail term of fifteen (15) years. That was on 29.06.2016.

The appellant was aggrieved by the conviction and the attendant sentence. He thus preferred an appeal in the High Court to assail his conviction and sentence. However, luck was not on his side, for Maige, J. dismissed his appeal on 22.03.2017 and upheld the sentence meted out to him by the trial court. Still protesting his innocence, he has come to this Court on second and last appeal. In an endeavour to vindicate his innocence he has lodged four grounds of complaint. However, for reasons that will come to light in due course, we shall not reproduce them here.

The appeal was argued before us on 03.05.2021. At the hearing, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Juma Sarige, learned Senior State Attorney, Ms.

Sabina Choghoghwe, learned State Attorney and Mr. Yese Temba, also learned State Attorney.

When we called upon the appellant to argue his appeal, he simply adopted the four ground memorandum of appeal and preferred to first hear the response of the Republic. He reserved his right of rejoinder, need arising.

Responding, Mr. Sarige supported the appellant's appeal, not from the grounds in the memorandum of appeal but from a different dimension. His support for the appeal was premised on a purely legal basis. He submitted that the appellant was charged under a dead law. He clarified that the Arms and Ammunition Act, under which the appellant was charged, was repealed and replaced by the Firearms and Ammunition Control Act, 2015 (henceforth "the Firearms and Ammunition Control Act") which came into force on 22.05.2015 vide GN No. 22 of 2015. The appellant is alleged to have committed the offence on 28.11.2015, well after the Firearms and Ammunition Control Act was operational. The learned Senior State Attorney argued that the appellant was thus unfairly

charged and prosecuted. The proper law with which the appellant should have been charged is the Firearms and Ammunition Control Act, he contended.

In view of this, Mr. Sarige argued that the proceedings in the trial court were a nullity. So were the proceedings in the High Court as they stemmed from nullity proceedings. Thus, he implored us to nullify the proceedings of both courts below. He supported his argument with our decision in **George Moshi v. Republic**, Criminal Appeal No. 517 of 2016 (unreported) in which we grappled with a similar situation.

With regard to the way forward, Mr. Sarige, again relying on **George Moshi** (supra), was unwilling to pray for a retrial on a proper charge. He premised his reluctance on the reason that the appellant has served an illegal sentence for almost five years; since his conviction by the trial court on 29.06.2016. Like was the case in on **George Moshi** (supra), he prayed that the appellant be set free.

Given the response by the learned Senior State Attorney, the appellant had nothing in rejoinder. He simply asked the Court to set him free.

We have considered the learned arguments by Mr. Sarige. Having so done, we think we should state at the very outset of our determination that we are legally unable to disagree with him. As Mr. Sarige rightly put, the Arms and Ammunition Act was repealed by section 73 of the Firearms and Ammunition Control Act. As the appellant was charged for contravening the provisions of section 4 (1) and 34 (2) of the Arms and Ammunition Act on 28.11.2015 while that law was put to rest on 22.05.2015 when the Firearms and Ammunition Control Act which repealed it became operative vide GN No. 22 of 2015, it is crystal clear that he was charged under a dead law. What is the effect of charging a person under a dead legislation? We grappled with a similar scenario in **George Moshi** (supra), the case cited and supplied to us by the learned Senior State Attorney. The facts of the case in that case are in all fours with the facts in the case at hand. In that case, the appellant was charged with contravening section

4(1) of the Arms and Ammunition Act. It was alleged in the particulars of the offence that he committed the offence on 29.09.2015. He pleaded not guilty after which a full trial ensued. At the conclusion of the trial, he was found guilty as charged, convicted and sentenced to pay a fine of Tshs. 3,000,000/= or serve a prison term of fifteen (15) years. He could not afford to pay the fine imposed, hence his imprisonment.

He was aggrieved by both the conviction and sentence, he unsuccessfully appealed to the High Court. Still dissatisfied, he preferred a second appeal to the Court. We cited an excerpt from the decision of a three panel bench of the High Court of Kenya in **Republic v. Kenya Anti-Corruption Commission and Others Ex parte Okoth** [2006] 2 E.A. 275 as depicting the correct position of the law on what is the effect of a repealed statute. The excerpt, we think, merits recitation here:

> *"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 dosed,* ***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 in **Kenya Anti-Corruption Commission and Others Ex parte Okoth** (supra)]

We subscribed to the foregoing position expounded in **Kenya Anti-Corruption Commission and Others Ex parte Okoth** as depicting the correct position of the law in our jurisdiction as well. Thus, we went on in **George Moshi** (supra) to find and hold that the appellant was unfairly charged ad prosecuted. We premised our course to set him free on, *inter*

*alia*, the fact that the appellant therein had already served close to four years of an illegal sentence and that had he been properly charged and convicted a maximum custodial sentence of five years would have been imposed.

We are guided by the position we took in **George Moshi** (supra). The appellant herein, having been charged, prosecuted, found guilty, convicted and sentenced to a prison term, was unfairly tried. The consequent sentence was also illegal. It is unfortunate that the mishap escaped the eye of the first appellate court. For the legal reason brought to the fore by the learned Senior State Attorney, we allow the appeal.

Regarding the way forward, we agree with the learned Senior State Attorney that ordering a retrial will be tantamount to persecuting, rather than prosecuting, the appellant. We say so because, if the appellant would have been rightly charged and convicted, he would have been sentenced to a maximum prison term of ten years in terms of sections 21 and 60 of the Arms and Ammunition Act. As a first offender and taking into account the one-third remission of sentence in terms of section 49 of the Prisons

Act, Cap. 58 of the Revised Edition, 2002, he probably would have finished his prison term by now. We thus desist from ordering a retrial on a proper charge.

For the reasons stated, we find the ailment of charging and prosecuting the appellant under a repealed law incurably fatal. The shortcoming vitiated the whole trial. In the premises, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 41 of the Revised Edition, 2019 to nullify the proceedings before the trial court. We also nullify the proceedings before the first appellate court having emanated from nullity proceedings. Consequently, we quash the judgment of the trial court as well as that of the first appellate court and set aside the sentence of fifteen years imposed on the appellant by the trial court and upheld by the first appellate court. As the appellant has served an illegal sentence for close to five years since his conviction on 29.06.2016 and has been behind bars for about six years and four months since his arraignment on 07.01.2015, we agree with Mr. Sarige that ordering a retrial on a proper charge will not be appropriate. Instead, we think justice

will triumph if we set the appellant free as we hereby do. We order that the appellant Thomas Lugumba @ Chacha be released from prison custody immediately unless held there for some other lawful cause.

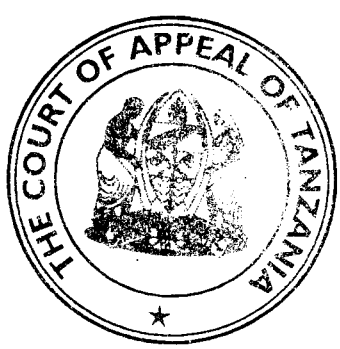
**DATED** at **MWANZA** this 5th day of May, 2021.

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

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

The judgment delivered this 6th day of May, 2021 in the presence of the appellant in person, and Miss Sabina Choghoghwe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**