THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 326 OF 2017

RAMADHANI MBOYA MAHIMBO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Moshi)

(Sumari, J.)

dated the 27th day of June, 2016
in
DC Criminal Appeal No. 25 of 2016

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JUDGMENT OF THE COURT

20th September & 1st October, 2021

KOROSSO, J.A.:

In the District Court of Moshi at Moshi, the appellant herein stood arraigned on two counts, in the 1st count for the offence of unlawful possession of ammunition, a bullet, contrary to section 4(1) and (2) of the Arms and Ammunition Act, Cap 223 R.E 2002 (the Act) and in the 2nd count for the offence of unlawful possession of ammunition, 3 bullet cartridges, contrary to section 4(1) and (2) of the Act. It was the case for the prosecution that on 10/7/2014 at Kisangesangeni Kahe area within the District of Moshi, Kilimanjaro Region, the appellant was found in possession of one bullet and also three cartridges. The appellant denied the charges.

Briefly, the facts leading to the arraignment of the appellant for the charges stated herein are that in the evening hours on 10/7/2014, the appellant was arrested suspected of committing the offence of theft and he was interrogated. During interrogation he revealed that he possessed ammunitions and offered to show the police and hand over the same to them. Subsequently, the appellant led Insp. PF.1794 Laban Sospeter (PW3), Mussa Kabora (PW1) and Patrick Elias Mlay (PW2) to a farmland owned by one Adamu in Kisangesangeni Kahe area in Moshi Rural and one bullet and 2 cartridges were retrieved. The search and retrieval were in the presence of various witnesses including PW1 and PW2, the Village Chairman and Ward Executive Officer respectively. Upon retrieval and seizure of the ammunitions, a search warrant was filled and signed by all those who witnessed including the appellant. The search warrant was later tendered and admitted in court as exhibit P1. The seizure of the one bullet and the 3 cartridges led to the arraignment of the appellant charged with the offences stated herein above.

To establish its case, the prosecution side paraded four witnesses supplemented by three exhibits. In his defence, the appellant relied on his own affirmed testimony calling no other witness and denied the charges, stating that on the fateful day while at farm at Kisangesangeni Kahe, police officers arrived there, stopped him, asked his name and he

duly responded. The police officers informed him that they were looking for him on suspicions of having committed an offence however, he denied doing anything wrong. He was then arrested and taken to the police station.

At the end of the trial, the appellant was found guilty as charged, the court finding that the prosecution had proven their case against the appellant. Upon conviction, the appellant was condemned to pay a fine of Tshs. 3,000,000/- failure of which to serve 15 years imprisonment. Dissatisfied by the decision of the trial court, his appeal to the High Court was unsuccessful.

The appellant still felt aggrieved and has come to this Court armed with five grounds found in the memorandum of appeal and compressed essentially state thus: **One**, reliance on incredible, uncorroborated and inconsistent prosecution evidence to convict the appellant. **Two**, chain of custody of the exhibits not established. **Three**, failure to call essential witnesses to testify such as the ballistic expert. **Four**, prosecution failure to prove the case to the standard required; and **five**, failure to properly analyze exhibit P1 and propriety of its admissibility in court

At the hearing, the appellant appeared in person unrepresented whilst the respondent Republic was represented by Ms. Verediana Peter

Mlenza, learned Senior State Attorney assisted by Ms. Grace Kabu and Ms. Nitike Emmanuel, both learned State Attorneys.

The appellant commenced by adopting his grounds of appeal and preferred to let the respondent Republic's side to respond to the grounds of appeal and retained the right to rejoin if the need will arise.

Ms. Mlenza who took the lead in submission, onset, intimated to the Court that the appeal was not resisted. She then informed the Court further that, in responding to the grounds of appeal she will concentrate on the ground two, that is, whether or not the chain of custody of the exhibits was broken in the instant case. The learned Senior State Attorney contended that the intactness of the chain of custody for exhibits P2 and P3, the bullet and the cartridges respectively was not proved to the required standard. She argued that there was no evidence to show who was in custody of the said exhibits at the time of seizure, since the evidence of the person who seized them is not very clear. Ms. Mlenza reasoned that, upon being seized, there is no evidence presented on where the bullet and the 3 cartridges were stored and who was the custodian up to the time when they were tendered in court at the trial.

According to the learned Senior State Attorney, PW4's evidence only alludes to the fact that he received a file of a case relating to the offence of unlawful possession of firearm on the 10/10/2014, which in essence means he was handed the file and the exhibits two days after being seized, thus the question remains where they were kept and who was the custodian. Additionally, she argued that the fact that PW1 and PW2 were not led to identify the tendered bullet and the 3 cartridges as items they witnessed being seized from the appellant on the fateful day meant there was no clarity on whether what was tendered in court and admitted as exhibit P2 and P3 were in fact the same as those which were allegedly seized at the scene of crime.

Ms. Mlenza argued further that, the prosecution side failure to prove that the chain of custody of the exhibits was intact, an important component in proving the offence charged against the appellant, undoubtedly, should lead the Court to find that the case against the appellant was unproven. To reinforce her assertions, she cited the case of **DPP vs Sharif Mohamed @ Athumani and 6 Others**, Criminal Appeal No. 74 of 2016 (unreported).

The learned Senior State Attorney was also unimpressed with the propriety of admitting the search warrant admitted as exhibit P1. She

contended that there was another infraction in the procedure for admissibility of the exhibits, since exhibit P1 was not read out in court upon being admitted and urged us to expunge exhibit P1 from the record. She reasoned that upon being expunged, it will mean that the prosecution case will further be dented as against the appellant. The learned State Attorney concluded by praying that the appeal be allowed and the appellant be set free.

When accorded an opportunity to rejoin, the appellant apart from supporting the submissions by the learned Senior State Attorney had nothing substantive to submit before us.

We have decided to start with ground two of appeal similar to how the learned Senior State Attorney proceeded and determine it together with ground 4 on complaints that the case against the appellant was not proven to the standard required. Ground two challenges the intactness of the chain of custody for exhibits P1, P2 and P3, that is, the search warrant, the bullet and the 3 cartridges. Starting with exhibit P1, as rightly alluded to by the learned Senior State Attorney, the record of appeal reveals (at page 15) that the search warrant was tendered by PW3 and admitted without objection and marked as exhibit P1. However, upon being admitted the exhibit was not read out in court.

Numerous decisions of the Court have deliberated on this infraction and also expounded the remedy available. In **Jumanne Mondelo vs Republic,** Criminal Appeal No. 10 of 2018 (unreported), the importance of reading a document after being admitted as an exhibit was emphasized and that failure to do that occasions a serious error amounting to miscarriage of justice. (See also, **Robinson Mwanjisi and Three others vs Republic** [2003] T.L.R. 218 together with unreported cases of **Sunni Amman Awenda vs Republic**, Criminal Appeal No. 393 of 2013; and **Sijali Shaban vs Republic**, Criminal Appeal No. 538 of 2017, (all unreported)).

We need not spend much time on this issue since for reasons stated hereinabove, the record of appeal clearly shows exhibit P1 was not read out upon being admitted and thus renders it to be improperly admitted. Thus, hereafter, exhibit PI shall be disregarded in the determination of this appeal. On exhibit P2 an P3, there is no dispute that to prove the case against the appellant, establishing the fact that the chain of custody for the two exhibits was intact was essential. In **Onesmo Mlwilo vs Republic**, Criminal Appeal No. 213 of 2010 (unreported), the Court having failed to found proof of the chain of custody of the items found, with regard to the person who took care of the items from where they were found up to the point when they were

tendered as exhibits P3 and P4 at the trial court, concluded that without proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence. The Court referred to its decision in **Illuminatus Mkoka vs Republic** [2003] TLR 245 where it held:

> "*.. in view of those missing links in the instant case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 an P4 leaves open the possibility for those exhibits being concocted or planted in the house of the appellant*".

The above excerpt reiterates the position stated in various decisions of the Court on the importance of proper chain of custody (see **Paulo Maduka and Others vs Republic**, Criminal Appeal No. 110 of 2007 and **Hassan Barie and Meshaki Abel Ezekiel vs Republic**, Criminal Appeal No. 297 of 2013 (both unreported).

In the case before us, the record of appeal, as rightly argued by the learned senior State Attorney, reveals that the prosecution witnesses, PW1, PW2 and PW3 who were at the scene of crime, whilst their testimonies relate to having witnessed the retrieving of a bullet and 3 cartridges and signed a search warrant, they did not testify who took the retrieved items, nor did they identify exhibit P1 and P2 in court.

Their connection to the two exhibits is mainly exhibit P1 which we have already discounted as incompetent evidence. PW4's testimony on this issue was that:

> *"I remember 12/7/ 2014 I did receive file concerned unlawfully possession of Ammunition, for investigation the suspect was in police lock up and he was known as Ramadhani Mboya Mahimbo. Also I took the exhibits which were 3 bullets cover (sic) and one bullet and put in police store."*

We are alive to the fact that according to the testimonies of prosecution witnesses the seizure of the exhibits took place on 10/7/2014 and PW4 took the relevant file and items on 12/7/2014. Taking that into account, there is no doubt there is a gap of two days where it is not shown where the exhibits were kept. There was no witness who testified on the whereabouts of the bullet and the 3 cartridges prior to PW4 taking them. There was also no evidence of handover of the said exhibits. To culminate the said gaps in evidence, there was also no evidence that showed how the two exhibits reached the court before being tendered and any related handover.

What can be gleaned from perusal of the judgment of the first appellate court is that the evidence which was relied upon by both the

trial and first appellate courts to display an unbroken chain of custody of the two exhibits was not properly analysed irrespective of the fact that it was one of the grounds of appeal (the 4th ground). Having considered all the above circumstances, with due respect, we are of the view that had the first appellate court properly analysed the relevant evidence, it would have found that there was a break in the chain of custody of the two exhibits which dented the prosecution case against the offence charged.

In the premises, we are of the firm view that taking into account what we have raised above, there are a lot of doubts on the unbrokenness of the chain of custody of exhibit P2 and P3.

Having said that, the fact is, considering the charge against the appellant, that is, unlawful possession of the bullet and the 3 cartridges, clearly, exhibit P2 and P3 ground the said charge. Thus, having found that the chain of custody was broken, raises serious doubts in the prosecution case and we agree with the learned Senior State Attorney that this renders the charge against the appellant unproven. Thus, essentially grounds two and four have merit.

Having regard to the above, we find no necessity to confront and determine the remaining grounds of appeal, since what we have determined is sufficient to dispose of this appeal.

For the above reasons, as rightly contended by the learned Senior State Attorney, the appeal is meritorious and we thus allow the appeal. Consequently, we quash the conviction, set aside the sentence and orders. The appellant is to be released from custody immediately unless otherwise lawfully held.

DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL
W. B. KOROSSO
JUSTICE OF APPEAL
P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 1st day of October, 2021 in the presence of the appellant in person and Ms. Tusaje Samuel, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL