

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

**(CORAM: MKUYE, J.A., GALEBA, J.A. And KIHWELO, J.A.)**

**CRIMINAL APPEAL NO. 310 OF 2019**

**RENATUS S/O ATHANAS @ KASONSO ..... APPELLANT**

**VERSUS**

**DPP ..... RESPONDENT**

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

**(Mashauri, J.)**

**dated the 2<sup>nd</sup> day of July, 2019**

**in**

**Criminal Appeal No. 124 of 2018**

.....

**JUDGMENT OF THE COURT**

8<sup>th</sup> & 15<sup>th</sup> February, 2022

**MKUYE, J.A.:**

The appellant, Renatus Athanas @ Kasonso was charged before the District Court of Sumbawanga at Sumbawanga with two counts, to wit, in the first count, unlawful possession of firearms contrary to section 4 (1) read together with section 34 (2) of the Arms and Ammunition Act, [Cap 223 R.E. 2002]. In the 2<sup>nd</sup> count, he was charged with unlawful possession of Public Stores contrary to section 312A (3) read together with section 35 both of the Penal Code, [Cap 16 R.E. 2002; now R.E. 2019]. Upon a full trial the appellant was convicted and sentenced to 15

years imprisonment for the 1<sup>st</sup> count; and 2 years imprisonment for the 2<sup>nd</sup> count which sentences were ordered to run concurrently.

Aggrieved by that decision, the appellant appealed to the High Court but his appeal was dismissed. Still disgruntled, he has lodged this second appeal to this Court.

The facts leading to this appeal are as follows:

The appellant was a former militiaman whose services were terminated prior to the commission of this offence. He lived at Kipeta village with his family. On the material date, that is, on 1<sup>st</sup> December, 2016 the appellant was asleep with his wife at home. At about 03:10 hrs some people who introduced themselves as policemen together with a village Chairman (PW3) visited the appellant's home. On their arrival, PW3 knocked the door. The appellant's wife opened the door and awakened her husband. Upon entry, the police told the appellant the purpose of their visit that was to search for firearms illegally possessed by him. A search was conducted in the appellant's residence whereby he was found possessing two muzzle loading guns without licence. He was also found with police belt, body armor and a military hat/barret. A search warrant was prepared and signed by people who were there including the appellant.

Thereafter, the appellant was arrested and taken to the police station. He was ultimately charged and convicted as alluded to earlier on.

In his memorandum of appeal, the appellant has fronted five grounds which can be extracted as follows: **One**, the charge was not proved beyond reasonable doubt; **two**, no independent witness was called to authenticate that the appellant was searched and found with the said items; **three**, the High Court judge based on the prosecution evidence without observing that it was contradictory, problematic and lacked material fact to amount to conviction. **Four**, the High Court relied on the cautioned statement which was taken out of time; and **five**, the High Court relied on the search warrant (Exh. P1) which was not properly admitted in court as the appellant was not given opportunity to say whether he objected to its admission.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented; whereas the respondent Republic had the services of Mr. Paschal Marungu, learned Principal State Attorney assisted by Ms. Hongera Malifimbo and Mr. Gregory Muhangwa, both learned State Attorneys.

Before the hearing of the appeal could commence in its earnest the appellant prayed to withdraw his appeal on the 2<sup>nd</sup> count and upon there

being no objection from the respondent Republic, we marked it withdrawn in terms of Rule 78 (3) of the Tanzania Court of Appeal Rules, 2009. We, thus, remained with an appeal in respect of the 1<sup>st</sup> count.

Thereafter, the appellant prayed to the Court to adopt his memorandum of appeal in respect of the 1<sup>st</sup> count and beseeched the Court to let the State Attorney respond first while reserving his right of rejoining later, if need arises.

On being given the floor to respond to the appellant's appeal, Mr. Muhangwa prayed and leave was granted for him to raise a legal issue. He prefaced his submission by stating that the appellant was charged under a dead law. In elaboration, he contended that in the 1<sup>st</sup> count the appellant was charged with an offence of unlawful possession of firearms contrary to section 4 (1) and 34 (2) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002]. However, he submitted, when the offence was committed, the law under which the appellant was charged had been repealed by section 73 of the Firearms and Ammunition Control Act, 2015 (No. 2 of 2015) which came into force on 22<sup>nd</sup> May, 2015 vide G.N. No. 22 of 2015. In the circumstances, it was his argument that the appellant ought to have been charged under section 20 (1) (a) and (b) of the Firearms and Ammunitions Control Act. On that basis, he said, the

appellant was charged, tried, convicted and sentenced illegally. To bolster his argument, he referred to us the case of **Thomas Lugumba @ Chacha v. Republic**, Criminal Appeal No. 400 of 2017 (unreported). Mr. Muhangwa went on arguing that this irregularity was incurably fatal. He, therefore, prayed to the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 [R.E. 2002; now R.E. 2019] (the AJA) and nullify the proceedings and judgments of both two courts below, quash the conviction, set aside the sentence and release the appellant forthwith.

On his part, the appellant concurred with what was submitted by the learned State Attorney. He then implored the Court to allow the appeal and set him free.

We have dispassionately considered the uncontested submission by the learned State Attorney and we agree with him that, that is the position. It is undisputed fact that the appellant, in the first count was charged with unlawful possession of two muzzle loading guns contrary to section 4 (1) read together with section 34 of the Arms and Ammunition Act. It was alleged in the particulars of offence that the appellant, Renatus s/o Athanas @ Kasonso, on 1<sup>st</sup> of December, 2016 at Kipeta Village within Sumbawanga District in Rukwa Region was found by Insp. MWAMPAMBA

in unlawful possession on two muzzle loader guns (Gobore) without a valid licence. It should be emphasized that the offence was committed on 1<sup>st</sup> December, 2016. However, by that time the Arms and Ammunition Act had already been repealed by the Firearms and Ammunition Control Act, 2015 (No. 2 of 2015) which was operationalised on 22<sup>nd</sup> May, 2015 through G.N. No. 22 of 2015.

The appellant as shown in the charge sheet committed the offence on 1<sup>st</sup> December, 2016. He was arraigned before the trial court on 30<sup>th</sup> December, 2016. Looking at the sequence of events, it is undisputed that the appellant having committed the alleged offence on 1<sup>st</sup> December, 2016, by the time the offence was committed the Arms and Ammunition Act, Cap 223 R.E. 2002 was non-existent.

This is not the first time the Court is facing this situation. In the case of **George Moshi v. Republic**, Criminal Appeal No. 516 of 2017 (unreported) the appellant was equally charged under the repealed Arms and Ammunition Act. The Court grappled with that situation and then it said as follows:

*"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 the 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."*

A similar position was taken in **Thomas Lugumba @ Chacha** (supra) which was decided later. In that case we went ahead to declare that the appellant was unfairly charged and prosecuted and that even the sentence was illegal, a position to which we subscribe.

Given the circumstances of this case, we are of the considered view that, failure to cite the proper and valid law rendered the appellant to be charged and prosecuted unfairly, and that even his conviction and sentence was illegal.

With regard to the way forward, we have considered the learned State Attorney's proposition that we invoke section 4 (2) of the AJA and nullify the proceedings and judgments of the Courts below and set the appellant free. In both **George Moshi** (supra) and **Thomas Lugumba**

@ **Chacha's** cases (supra) the Court considered the fact that the appellants in the respective cases had already served substantial term of imprisonment on illegal sentences and that had they been charged within the proper law, they would have finished their sentences.

In this case the appellant was charged on 30<sup>th</sup> December, 2016 and sentenced to fifteen years imprisonment on 15<sup>th</sup> June, 2017. Until to date, he has served an illegal custodial sentence for more than 4 years (4 years and 8 months). Conversely, had he been charged and sentenced under the valid law, he would have completed to serve a maximum custodial sentence of five years as it stands now under section 2 (2) of the Firearms and Ammunition Control Act which states:

*"A person who contravenes this section commits an offence and is liable upon conviction, to imprisonment for a term of five years."*

For the foregoing, it is our considered view that the charge and prosecution of the appellant under the dead law was a fatal irregularity which is incurable under section 388 (1) of the CPA and hence, it vitiated the entire trial. In the event, in exercise of our revisional jurisdiction bestowed on us under section 4 (2) of the AJA, we nullify the proceedings and judgments of both the trial court and the 1<sup>st</sup> appellate court.



Consequently, we quash the conviction and set aside the sentence meted out against the appellant. We further order that the appellant Renatus Athanas @ Kasonso be released from custodial prison forthwith unless he is held for other lawful reason(s).

It is so ordered.

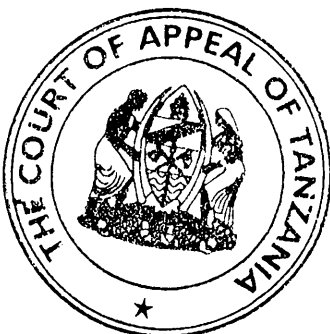
**DATED at MBEYA** this 12<sup>th</sup> day of February, 2022.

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

Z. N. GALEBA  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

Judgment delivered this 15<sup>th</sup> day of February, 2022 in the presence of the Appellant in person and Ms. Safi Kashindi Amani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**