IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KWARIKO, J.A, LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 328 OF 2021

MASANJA MALIASANGA MASUNGA.....1ST APPELLANT

LUSASU MPEMBA @ ZENGO.....2ND APPELLANT

IGEMBE MAYUNGA MASANO.....3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 25th day of June, 2021

in

Consolidated Criminal Appeals Nos. 165, 172 and 182 of 2020

.....

JUDGMENT OF THE COURT

2nd May & 26th October, 2023

LEVIRA, J.A.:

The appellants, Masanja Maliasanga Masunga, Lusasu Mpemba @ Zengo and Igembe Mayunga Masano, were charged and tried by the District Court of Manyoni at Manyoni (the trial court) in Criminal Case No. 34 of 2017. They were initially jointly charged with Issa Nkubha @ Mbusule. However, in the course of the trial, charges against the latter were dropped, such that the case proceeded to its finality with only the above three appellants. The basis of the eleven-count charge against the trio were essentially four offences which were; **first**, leading organised

crime contrary to paragraph 4 (1) (a) of the First Schedule to, and sections 57 (1) and 60 (1) and (2) of the Economic and Organized Crime Control Act, (the EOCCA), which offence was a subject of count No. 1; the **second** offence was unlawful dealing in Government trophy, contrary to sections 80 (1), 84 (1), 111 (1) (a) and 113 (1) and (2) of the Wildlife Conservation Act, 2009 (the WCA), read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (1) and (2) of the EOCCA. This offence was in respect of counts No. 2, 3, 4 and 5; the **third**, was unlawful possession of weapons in certain circumstances contrary to section 103 of the WCA read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (1) and (2) of the EOCCA; this offence related to counts No. 6, 7 and 8 and; the **fourth**, was unlawful possession of firearms, contrary to sections 20 (1) (a) and (2) and 113 (1) and (2) of the Firearms and Ammunition Control Act, 2015 (the FACA), read together with paragraph 31 of the First Schedule to, and sections 57 (1) and 60 (1) and (2) both of the EOCCA; this offence was charged in counts No. 9, 10 and 11.

The appellants denied the charge such that the matter had to proceed to a full trial. Consequently, the trial court acquitted all the three appellants of the charges in respect of counts No. 1, 2, 3, 4, 5, 6, 7 and

8 on account of the prosecution's failure to prove the case against them beyond reasonable doubt. Nonetheless, they were all convicted of unlawful possession of firearms in terms of counts 9, 10 and 11 and were accordingly sentenced to twenty years imprisonment on each count, with orders that the sentences shall run concurrently. They were aggrieved and each of them lodged a separate appeal to the High Court (the first appellate court). The appeals were Criminal Appeals No. 165, 172 and 182 all of 2020, which for convenience purposes were consolidated as indicated in the caption above and heard together. Nevertheless, the first appellate court dismissed the consolidated appeals and upheld the decision of the trial court, hence the present appeal.

The facts relevant to this appeal according to the prosecution, are that, at around 07:30 hours on 3rd June, 2017 at Vidoletisa Village within Sikonge District in Tabora Region, the first appellant was found in unlawful possession of one Sub Machine Gun (the SMG) with registration No. 786320 without any licence from a lawful authority. This allegation was the substance of count No. 9 in the charge sheet which was against only the first appellant. As for counts 10 and 11 which were charges against the second and third appellants, the prosecution's position was that on 3rd June, 2017 at 10:30 hours at Majojolo Village in Ipembe Sub

Village within Manyoni District in Singida Region, the second and third appellants were found in unlawful possession of one SMG with registration No. 19546959 and one rifle with Registration No. 6666 without any licence from a lawful authority. However, as intimated earlier on, although the appellants denied the charges, the trial court found them guilty, convicted and sentenced them accordingly, which decision was upheld by the first appellate court. Aggrieved, the appellants have preferred this appeal.

In protesting the decision of the first appellate court, the first appellant lodged a memorandum of appeal on 20th September, 2021 with 6 grounds of appeal. In addition, the said appellant lodged a supplementary memorandum of appeal on 30th August, 2022 adding 5 more grounds of appeal. The second and third appellants lodged a joint memorandum of appeal containing 14 grounds of appeal to challenge the decision of the first appellate court. In total, we have 25 grounds of appeal to consider in this appeal which can be paraphrased in the following complaints:

1. *That, their case was not procedurally tried in terms of sections 9 (3) and 10 (3) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA).*
2. *That, the charge was omnibus.*

3. *That, the trial court erroneously relied on the doctrine of recent possession to find them guilty without establishing ownership of the firearms.*
4. *That, the evidence of the prosecution witnesses was not signed.*
5. *That, the evidence of PW1 and PW2 was contradictory.*
6. *That, the cautioned statements, exhibit PXI, PXII and P13 were not valid.*
7. *That, the District Court of Manyoni had no jurisdiction to try them because the offence was committed in Tabora.*
8. *That, the section under which the appellants were convicted of was not disclosed, hence noncompliance with sections 235 (1) and 312 (2) of the CPA.*
9. *That, various exhibits admitted during trial were not read over to the appellants.*
10. *That, their defences were not considered by both the trial court and the first appellate court.*
11. *That, exhibit P15 was improperly admitted during trial.*
12. *That, PW8 was a witness with an interest to serve.*
13. *That, the appellants were not given legal representation during trial.*
14. *That, the case was not proved beyond reasonable doubt.*
15. *That, the charge was not proved beyond reasonable doubt against the appellants.*

At the hearing of the appeal, the appellants appeared in person without any legal representation, whereas the respondent Republic had the services of Mr. Ahmed Hatibu assisted by Ms. Sara Anesius, both learned State Attorneys. The appellants being lay persons, adopted their grounds of appeal and prayed that we consider their appeal based on the grounds as presented, in which case we called upon the respondent's side to reply to the appellants' complaints.

In reply, Mr. Hatibu submitted in respect of the first complaint that the case was not procedurally tried in terms of sections 9 (3) and 10 (3) of the CPA to the effect that, as the second and third appellants did not request for any statements of witnesses, they cannot challenge the trial court for having not ordered that the statements of witnesses be supplied to them. He argued that, since the witnesses were called and cross examined by the complaining appellants, it cannot be said that a failure of justice was occasioned on their part by failure to supply them with the statements of witnesses.

On this complaint, we will start with section 10 (3) of the CPA which provides that:

"(3) Any police officer making an investigation may,

subject to the other provisions of this Part, examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined".

The above provision of the law, simply permits a police officer who is charged with carrying out investigation of a crime, among other things, to record statements of witnesses. In this case, the obligation was accomplished because various statements of witnesses were recorded accordingly. Thus, it cannot be said that this provision was, in any way, offended. Next is section 9 (3) of the same Act. That section provides that:

"(3) Where in pursuance of any information givenunder this section proceedings are instituted in amagistrate's court, the magistrate shali, ***if the person giving the information has been named as a witness,*** *cause a copy of the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith".*

[Emphasis added].

According to this provision, if the informer or person who makes a complaint which gives rise to a charge is named as a witness, then the

court is duty bound to supply a statement of that witness to the person or persons against whom the charge is brought. In this case, Assistant Inspect Kaitira, PW2 at page 47 of the record of appeal testified as follows:

> *"... I was at Rungwa with my fellow D/C Chacha and others, I got information that there were two persons (Igembe Mayunga and Masanja Maliayasanga) were dealing in Government trophies. The secret informer said that, Igembe was at Rungwa so we went to arrest Igembe..."*

According to the above part of PW2's evidence, the complainant was a secret informer, who throughout the proceedings was not named. In other words, the complainant was not only not named as a witness but also, he or she was not named at all. As indicated, the statement which needs to be supplied to the person or persons charged is that of the person who complained to the Police, who in this case was not named as a witness, which means, section 9 (3) of the CPA was not at all breached. In the circumstances, the appellants' complaint regarding breach of sections 9 (3) and 10 (3) of the CPA has no merit and it is hereby dismissed.

Regarding the second complaint that the charge was omnibus, Mr. Hatibu submitted that the charge was not omnibus because the offences were separate although they were committed in the same transaction. According to the decision of the Court in **Kauto Ally v. R** [1985] T.L.R. 183, a charge is duplex or omnibus if more than one offence is lumped together in one count of the charge. In this ground of appeal, we will therefore examine whether counts 10 and 11 upon which the second and third appellants were convicted, had more than one offence in them such that they were omnibus. Consideration of this ground will entail quoting of the two counts which are to the following effect:

STATEMENT OF "10TH COUNT

FOR THE FIRST AND SECOND ACCUSED PERSONS

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF FIRE ARM; ....

PARTICULARS OF OFFENCE

IGOMBE S/O MAYUNGA MASANO and LUSALU S/O MPEMBA @ ZENGO on 3d day of June, 2017 at around 10:30 hrs at Majojolo Village, Ipembe Sub Village within Manyoni District, in Singida Region were ***found in unlawful possession of firearms, to wit; One (1) Sub Machine Gun***

(SMG) with Registration Number 19546959 without licence from the lawful authority.

11TH COUNT

FOR THE FIRST AND SECOND ACCUSED PERSONS

OFFENCE

UNLAWFUL POSSESSION OF FIRE ARMS; ....

PARTICULARS OF OFFENCE

IGEMBE S/O MAYUNGA MASANO and LUSALU S/O MPEMBA @ ZENGO on 3rd day of June, 2017 at 10:30 hrs at Majojolo Village, Ipembe Sub Village within Manyoni District, in Singida Region ***were found in unlawful possession of firearms, to wit, One (1) Rifle with Registration Number 6666 without a licence from the lawful authority".***

[Emphasis added]

With respect to the second and third appellants, the above counts detail only one offence in each count. In count No. 10, the offence was just one; to be found in unlawful possession of one Sub Machine Gun Registration No. 19546959 and in count No. 11 was to be found in unlawful possession of one Rifle with Registration No. 6666. In the

circumstances, the appellants' complaint that the charge was omnibus has no merit and we dismiss it.

In the third complaint the appellants claimed that, the first appellate court erred when it failed to note that the trial court relied on the doctrine of recent possession to find them guilty without establishing ownership of the firearms. In particular, they challenged the involvement of Robert Samwel Katwila (PW9) during search and seizure of the alleged firearms as an independent witness. In reply to that complaint, Mr. Hatibu submitted that, the appellants were charged with unlawful possession of fire arms in counts 9, 11 and 12. According to him, the evidence of Athuman Bahati, PW1 and PW2 clarified very well that the appellants were found in unlawful possession of the firearms. He added that PW9 and Masele Jidai Tinya (PW10) were independent witnesses who witnessed recovery of the firearms. He submitted further that indeed, the case was proved beyond reasonable doubt against the appellants.

On our part, we have carefully scrutinized the record of appeal particularly the judgment of the trial court, and we find nothing suggesting that the second and third appellants were found guilty and convicted based on the doctrine of recent possession of the firearms. We

have also strenuously studied the second and third appellant's petitions of appeal before the first appellate court at pages 206 and 208 of the record of appeal and we find no complaint on being convicted based on the doctrine of recent possession. We also agree with Mr. Hatibu, that the appellants were found in unlawful possession of the firearms which were tendered in court without objection. We do not agree with the appellants that PW9 was not an independent witness. That witness was a resident of Vidoletisa and he was called by the search team to accompany them to the first appellant's farm where the latter located a place where a short gun with registration No. 786320 was recovered, as it can be seen at page 126 of the record of appeal. We must state also that it is not necessary that an independent witness must necessarily be a local leader; any reliable person with ability to adduce evidence may act as independent witness for purposes of search. In our view, therefore, there would be no basis to fault the first appellate Judge on something that neither transpired in the trial court, nor was complained of before her on appeal. Thus, we find this complaint without basis and we dismiss it.

We now proceed to consider the appellants' complaint that the evidence of the prosecution witnesses was not signed. In reply to that

complaint, Mr. Hatibu submitted that the record of the evidence of all witnesses was signed, and that if the appellant' complaint is that the witnesses did not append their signature after they had testified, then that is not a requirement of the law. In view of this complaint, we agree that, indeed, section 210 (1) (a) of the CPA provides that:

> *"210 (1) in trials, other than trials under section 213, by or before a Magistrate, the evidence of the witness shall be recorded in the following manner - (a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence* ***and shall be signed by him*** *and shall form part of the record;*
>
> *and (b) .... N/A."*
>
> [Emphases added]

The above provision means that, a magistrate who records evidence must append his signature after the evidence he records. However, in this complaint, the issue we need to resolve is whether the above provision was complied with. We have reviewed the record of appeal from page 47 to 138 where the trial court recorded the evidence, and as Mr. Hatibu submitted, we did not trace any part of the evidence

that was not appended with the magistrate's signature. Thus, this complaint has no merit. We dismiss it.

Regarding the fifth complaint, the appellants complained that the prosecution witnesses gave contradictory evidence that, the evidence of PW1 and PW2 was contradictory because whereas PW1 testified that on 3rd June, 2017 they arrested three suspects, PW2 stated that on that day they arrested four suspects. Although Mr. Hatibu argued this complaint together with other complaints stating that there was no contradiction in prosecution evidence, we think, the complaint is distinct and specific such that it needs to be dealt with on a standalone basis. The issue for resolution in this ground calls for investigation on the record on two aspects; **one**, did PW1 and PW2 differ on the number of suspects they arrested on 3rd June, 2017? and; **two**, if so, was the inconsistence materially adverse to the case of the prosecution? After a thorough review of the evidence of PW1 who was an exhibits keeper at KDU Manyoni, it became clear to us that; first, PW1 did not participate in arresting any suspect, he only received exhibits and kept them in the exhibits store at KDU Manyoni after he had received them from PW2 and; second, it is true that PW2 mentioned three suspects Igembe

Mayunga, Lusasu Mpemba Zengo and Masanja Maliasanga. However, at page 49 PW2 stated:

> *"We left at 14.00 hours 3/6/2017. At Manyoni Police station I handed over the report of what I did on that day. Then* ***I took the three suspects to KDU Manyoni with exhibits at 20.28 hours.*** *I went with PC Chacha and others. On that date the exhibits keeper was Athuman Bahati (PW1)".*

In view of the above, we find nothing contradictory in the evidence of PW1 and PW2. Whereas PW1 stated that when PW2 went to him, he was with three suspects and handed over to him the exhibits, which is the exact statement of PW2. We therefore find no contradiction or inconsistence in the substance of their evidence as far as the number of suspects that PW2 went with to PW1 is concerned. Both mentioned three as the number of suspects in that respect. Therefore, we find the fifth complaint with no substance and we dismiss it.

Next is the appellants' complaint regarding validity of the cautioned statements, exhibits PXI, PXII and P13 which were admitted at pages 64, 77 and 96 of the record of appeal, respectively. In particular, the appellants' complaints are as follows; **one,** that the suspects were not

given an opportunity to call their relatives or lawyers to be present as their cautioned statements were being recorded at the Police Station and that their statements were not made voluntarily; **two,** that the cautioned statements were recorded beyond the statutory time provided by the CPA for recording such statements; **three,** that the first appellant was not taken to the justice of the peace after recording his cautioned statement at the Police and; **four,** that there was a violation of section 169 (1) of the CPA in recording the cautioned statement.

In reply to those complaints, Mr. Hatibu submitted that the above complaints are misplaced because all procedures were followed and each cautioned statement was taken within the time frame set by the CPA. We will start with exhibit PXI and the evidence of Detective Sergeant Beatus (PW3) who recorded the statement of the first appellant. According to the record of appeal, the first appellant was arrested on 2/6/2017 at around 14:00 and was taken to Manyoni Police Station. Upon arrival, his cautioned statement was recorded on the same day at around 18:10 hours according to the evidence of PW3 at page 63 of the record of appeal, which in our considered view, is well within four hours of his arrest as per the requirements of section 50 (1) (a) of the CPA. This we say having considered that the time mentioned was not precise

and also the time spent in the movement from the scene of crime to the police station was not mentioned. However, for the sake of argument, even if we take that there was a delay of ten minutes, still expunging this exhibit from the record would not exonerate the first appellant from liability as his conviction was not based on that exhibit but the fact that he was found in possession of firearms without license. Without prejudice, in the cautioned statement found at page 153 of the record of appeal, it is recorded that the first appellant opted to have his evidence recorded in the absence of any advocate or relative. Therefore, the first appellant's complaint in this regard is unfounded.

We will now proceed to exhibit PXII, the cautioned statement of the third appellant. The said exhibit was tendered by PC Juma (PW4). Before the same was admitted, the issue of voluntariness was raised and the same was resolved when the trial court conducted an inquiry and was satisfied that the same was procured voluntarily. According to PW2, the third appellant was arrested on 2/6/2017 at around 6:00 hours as it can be seen at page 47 of the record of appeal. His cautioned statement was recorded on the same day. PW4 testified at page 71 of the record of appeal that he recorded the third appellant's cautioned statement from 18:20 hours to 19:50 hours and at page 164 of the record of appeal, this

means that it was recorded within time. It is recorded also that, the third appellant opted to have his statement recorded in the absence of any of his relatives or lawyer. We therefore do not find merit in this complaint.

It is now opportune to turn to exhibit P13, the cautioned statement of the second appellant. According to that exhibit, the appellant opted not to have any relative or lawyer around when recording the statement, at page 173 of the record of appeal. Further, this exhibit was tendered and admitted after an inquiry was conducted and the issue of voluntariness duly resolved. As to time, at page 49 of the record of appeal, PW2 testified that the second appellant was arrested on 3/6/2017 at 14:00 hours and his cautioned statement was recorded on the same day from 18:00 hours to 19:45 hours, well within time in terms of section 50 (1) (a) of the CPA. Generally, we do not find merit in appellants' complaint regarding the validity of their respective cautioned statements.

The complaint that the District Court of Manyoni had no jurisdiction to try the appellants because the offence was committed in Tabora, was raised by the second and the third appellants. In respect of this complaint, Mr. Hatibu submitted that the second and third appellants were arrested at Manyoni in Singida which means their trial in Manyoni

was lawful and offended no law. According to the charge sheet in counts 10 and 11, the two appellants committed the offence at Majojolo Village, Ipembe sub-Village within Manyoni District in Singida Region. Section 180 of the CPA provides that one of the places to institute a charge against a suspect, is a place where the offence was committed. In this case, the charge indicates in the 10th and 11th counts that the offence was committed in Manyoni District, where the case was also instituted. At page 47 of the record of appeal PW2 testified to the effect that:

> *".... **We continued with our journey to Manyoni.... We arranged for job plan safely to arrest the said firearms**. We invited the OC-CID and DC Chacha. On 3/6/2017 we started the mission of looking for the said firearms.... **We used two cars. The journey was from Manyoni Police Station to Madoletisa village** and we were led by Masanja Mliyasanga. .... The gun I seized was SMG No. 786320.... We continued with our journey to Majojolo.... Lusasu went to his farm and showed us the guns, one rifle and SMG with magazine.... The guns we found and seized were rifle 6666 and SMG No. 19546959".*
>
> [Emphasis added]

We note that PW2 was not cross examined by the appellants regarding the place of recovering the said firearms and thus it remained as an established fact that it was in Manyoni. In the circumstances, the appellants' complaint regarding the jurisdiction of the trial court is without merit and we dismiss it.

The next complaint is in respect of the manner in which the appellants were convicted. The appellants complained that the section under which they were convicted of was not disclosed contrary to the requirements of sections 235 (1) and 312 (2) of the CPA. In reply, Mr. Hatibu submitted that at page 197 of the record of appeal the trial Magistrate indicated that the appellants were convicted of counts 9, 10 and 11 which had the provisions of the law they were charged with. Therefore, he argued, they were not prejudiced although the specific provisions were not mentioned at the end. However, he submitted, the omission is curable under section 388 of the CPA.

We have reviewed the record of appeal; it is true that the trial court did not cite the law under which the conviction was entered. However, as submitted by Mr. Hatibu, the learned trial Magistrate stated that the appellants were convicted of the offences in the 9th, 10th and 11th counts. Those counts indicate the laws under which the appellants

were charged and lastly sentenced. In any event, such a minor lapse is curable under section 388 of the CPA, as the law was mentioned at the beginning of the judgment - see the case of **Mabula Makoye and Another v. R.,** Criminal Appeal No. 227 of 2017 (unreported). Therefore, we find no merit in this complaint and the same is hereby dismissed.

Regarding the complaint that various exhibits admitted between pages 50 and 55 were not read over to the appellants, Mr. Hatibu admitted that indeed the documents at those pages were not read, so he prayed that the same be expunged from the record.

We have reviewed the record of appeal and we agree that the search order exhibit P5, the certificate of seizure exhibit P6, the certificate of seizure, exhibit P7 and the search order admitted as exhibit P8 were not read after they were admitted in evidence. The position of the law as expounded in many decisions of the Court is that, generally where a document has been admitted, the same must be read to the accused for him to be acquainted with the actual contents of the document. The other position is that, if that is not done, the document in question must be expunged from the record or disregarded. Based on that position of the law, exhibits P5, P6, P7 and P8 are hereby expunged

from the record, and accordingly, we allow the appellants' complaint in respect of those exhibits. However, in passing, we wish to note that oral account of prosecution witnesses particularly, PW2 regarding the finding and seizure of firearms remains unshaken.

Another complaint was that the appellants' defences case were not considered by the trial court and the first appellate court. Replying, Mr. Hatibu supported the complaint as far as the trial court is concerned, that indeed, their respective defences were not considered. However, he disagreed with the appellants that the first appellate court did not consider the defence case. He referred us to pages 234 to 238 of the record of appeal where the first appellate court considered the defence cases. We agree that where the trial court or the first appellate court does not consider a party's defence, it is an irregularity but the same is curable. The first appellate court has to consider the defence as a remedy and if it does not, the second appellate court has a duty to consider the defence and make a decision. In this case however, we do not agree with the appellants because, having noted that the trial court did not consider their defence, the first appellate court considered it at pages 234 to 238 of the record of appeal but did not find that consideration of the defence could have changed the course that was

taken by the trial court. Therefore, this complaint is unmerited and we dismiss it.

Subsequent, is the complaint that the learned first appellate Judge erred in law by failing to note that the trial magistrate improperly received exhibit P15 which was a trophy valuation certificate which was seeking to prove count 9 of the charge. The first appellant alleges that there was no material evidence to connect him with possession of any Government trophy. With respect to the first appellant, this ground of appeal has no substance because; **first**, the 9th count in the charge did not relate to any Government trophy. It was in relation to unlawfully being in possession of firearms. **Second**, the first appellant was never convicted of being found in possession of Government trophy. In other words, the complaint that the trophy valuation certificate was irregularly admitted in evidence such that such admission adversely affected the first appellant leading to his conviction is not supported by the record of appeal for his conviction was unlawful possession of a firearm which was abundantly proved. The offence was not proved by placing reliance on the trophy valuation certificate. Thus, the complaint of the first appellant is misplaced and we dismiss it.

In respect of the complaint that PW8 was a witness with interest to serve, Mr. Hatibu submitted that PW8 was initially one of the accused persons. However, the Director of Public Prosecutions (the DPP) decided to withdraw his charge and he was made one of the prosecution witnesses. According to him, this witness was giving evidence for his own benefit. He thus urged us not to consider the evidence of PW8 as even the lower courts did not consider it. Despite that, he submitted that the prosecution proved the case against the appellants beyond reasonable doubt.

We have thoroughly reviewed the record of appeal; we agree with the submission by Mr. Hatibu that PW8 was one of the accused persons but his charge was withdrawn under section 91 (1) of the CPA and he was discharged as it can be seen at page 119 of the record of appeal. Later, at page 120 of the record of appeal, he testified as PW8. It has to be noted that it is upon the prosecution to decide who to charge depending on the circumstances of the case. Besides, the DPP has power to decide not to prosecute an accused person and to make him or her a witness. There is no law which forbids an accused person whose charge was withdrawn to be called as a witness in the case which he was an accused. Apart from that, PW8's evidence was not relied on by the trial

or first appellate court to either convict or sustain the appellants' convictions. As regards who is a competent witness, section 127 of the Evidence Act [Cap 6 R. E. 2019] provides as follows:

> *"127.- (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause".*

Therefore, we find that PW8 was a competent witness despite the fact that his evidence was not relied upon by the trial court to ground the appellants' conviction. In **Splendors (T) Limited v. David Raymond D'Souza & 2 Others**, Civil Appeal No. 7 of 2020 (unreported), we held that competence of a witness is not measured by a position he holds in a trial but his capability of understanding the questions put to him or of giving rational answers to those questions. In the present case, we do not find any prejudice on the part of the appellants for PW8 to be called as a witness. As a result, this complaint fails and we dismiss it.

Regarding the complaint that the appellants were not given legal representation during trial, Mr. Hatibu submitted that the law requires legal representation in capital offences. However, since the offences with which the appellants were charged were not among the capital offences, there was no such legal requirement. Apart from that, he added that the appellants did not request to be represented. He urged us not to consider this complaint.

We agree with Mr. Hatibu that the offences with which the appellants were charged do not attract automatic provision for legal representation. Section 310 of the CPA provides that:

> *"310. Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate".*

The law as quoted above provides for a right of an accused person to be defended but it does not make it a mandatory requirement and thus it is upon an accused person, if he so wishes, to request for that service. In terms of section 33 (1) (a) and (b) of the Legal Aid Act [Cap 21 R. E. 2019], the trial magistrate is only required to assess the

situation and see if at all an accused person requires legal representation then make an order to that effect and/ or upon prayer by the accused person as it was decided in **Maganga Udugali v. Republic,** Criminal Appeal No. 144 of 2017 (unreported).

We have reviewed the record of appeal but we could not locate the appellants' prayers to be represented. We noted that, only on 23/06/2017 when the case was called on for mention, advocate Kuwayawaya appeared for the appellants. The record is silent as to why he appeared only once and whether he was assigned by the court or was hired by the appellants. All in all, under the circumstances of this case one could not expect the trial court to offer such assistance without being moved and the circumstances of this case do not suggest that they were in need of such assistance. Notwithstanding our observation, we do not find any prejudice on the part of the appellants as the record speaks for itself. The appellants were fully involved throughout the trial, they had opportunity of cross-examining prosecution witnesses and they made their respective defences before being convicted and sentenced. In the circumstances, we do not find merit in the appellants' complaint that they were not given legal representation and we hereby dismiss it.

Finally, is the appellants' complaint that the charge was not proved beyond reasonable doubt against them. Responding to this complaint, Mr. Hatibu submitted that the charge against the appellants was proved beyond reasonable doubt. Expounding, he stated that the appellants were convicted of being found in unlawful possession of firearms by all prosecution witnesses except PW8. They were arrested by PW2 who went together with PW9 and PW10 to the farm where the said firearms were hidden and witnessed when the appellants were directing where they hide those firearms. They found them, recorded the numbers and seized them. He added that those exhibits are not easily changing hands and they did not pass in the hands of many witnesses. The numbers of the said firearms were mentioned during trial and PW1 tendered them as exhibits in court without objection from the appellants.

We agree with the submission by Mr. Hatibu that the appellants were convicted of being found in unlawful possession of firearms which ultimately were tendered in court as exhibits by PW1 without any objection from the appellants. According to the oral account of PW2, PW9 and PW10 the said exhibits were two Sub Machine Guns with Registration Nos. 19546959 (exhibit PII) and 786320 (exhibit PIV), and one Rifle with Registration No. 6666 (Exhibit PIII). The appellants did

not cross examine PW2 on account of what they found and seized from them and they did not produce any licence to justify possession of the same. We have as well considered our deliberations on other grounds of appeal and we find that the prosecution proved the charge against the appellants beyond reasonable doubt.

All said and done, this appeal has no merit and we dismiss it in its entirety.

DATED at **DAR ES SALAAM**, the 20th day of October, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 26th day of October, 2023 in the presence of the appellants in person, via video link from High Court Dodoma and Ms. Prisca Kifagile, learned State Attorney for the respondent/Republic, via video link from High Court Dodoma, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL