

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DISTRICT REGISTRY)

CRIMINAL APPEAL NO. 120 OF 2004

**(From Criminal Case No. 82 of 2004, RM'S Court of
Kibaha)**

P.W. Bampikya, RM

YAHAYA ABDALLAH @ DUNDAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

SHANGWA, J.

The Appellant Yahaya Abdallah @ Dunda was charged in the Court of the Resident Magistrate at Kibaha with the offence of being found in unlawful Possession of firearms c/s 4 (1) of the Arms and Ammunition Act, 1991 read together with paragraph 20 of the 1st Schedule to the Economic and organized Crimes Control Act, 1984, and the offence of conspiracy to commit an offence c/s 384 of the penal code. He was

convicted thereof and sentenced to 15 years' imprisonment on the former charge and on the latter change he was sentenced to three years, imprisonment.

Being aggrieved with both conviction and sentence, he has now appealed to this court. He raised two grounds of appeal which were presented by his lawyers **Messrs Mafuru and Company Advocates**. Both grounds appear to be interrelated, and can be reduced into one ground, namely, that the learned Resident Magistrate erred in law and in fact by convicting the Appellant on insufficient evidence.

For a better understanding of this case, I wish to lay down the facts which led to the Appellant's arrest by the police and conviction by the lower court. These are as follows: On 31.3.2004 at 3.00 P.m, P.W.2 C.7108 Sgt. Issa together with P.W.3 Nassoro Abdallah were on duty at Picha ya Ndege area, in Kibaha Region along Dar es salaam-Morogoro road. Both of them are Traffic Police Officers. While there, they saw a Motor Vehicle with registration No. T.537 ABF make Toyota Corrolla coming from Dar es salaam. P.W.2 C.7108 Sgt. Issa

stopped it. The one who was driving it is the Appellant. He was together with three passengers. After stopping, P.W.2 asked the Appellant to show him his driving licence. He replied that he did not have any. He then asked him about where they were going. He replied that they were going to attend a funeral at Sogha. P.W.2 then asked one of the passengers to come out of the car. He did so. He then asked him as to who had died. He replied that the one who had died is Abed. Thereafter, he put a similar question to another passenger who was sitting in front of the Car next to the Appellant. This passenger replied that the one who had died is Selemani. He then looked around inside the car from where he picked a pistol make star and four bullets wrapped in a plastic bag. He blew a whistle and the passenger run away. He chased them. P.W.3 also participated in chasing them together with some civilians. They were arrested and severely beaten by the mob. They were taken with the Appellant to the Police Station at Tumbi, Kibaha. They all died in Police custody.

On 5.4.2004, the Appellant was taken to the Court of the Resident Magistrate at Kibaha and joined with one

Shabani Hamisi@ White in a charge of being found in unlawful possession of Fire Arms and Conspiracy to commit an offence namely armed robbery. Both of them were charged as 1st and 2nd accused respectively.

During their trial, P.W.I D. 2411 D.C. John tendered in evidence the Pistol and four bullets which were admitted as exhibit P.1. He also tendered in evidence a motor vehicle with Reg. No. T. 537 ABF Toyota Corrolla which was admitted as exhibit P.2. Furthermore, he tendered in evidence a motor vehicle with Reg. No. TZ 98279 Mitsubishi Pick Up which was admitted as exhibit P.3. The said vehicle was found with the 2nd accused at Temeke in Dar es salaam after he had been mentioned by one Abdi Mohamed Shoo during interrogation by the Police that he was a party to the conspiracy to commit robbery at Sogha area. The said Abdi Mohamed Shoo is one of the Appellant's passengers who died in police custody two or three days after being arrested at Picha ya Ndege area together with the Appellant on suspicion that they are all robbers. At the close of the

prosecution's case, the 2nd accused Shabani Hamisi @ White was acquitted on grounds of no case to answer.

From the above mentioned facts, it can clearly be seen that the Appellant was arrested and charged with both offences on suspicion that he is a robber. There is no evidence on the trial court's record to show that before his arrest he had been involved in any robbery incident. In fact, there is no evidence to prove that the Pistol which was picked by P.W.2 from the car he was driving was his. Due to the fact that he had three passengers who had hired his car and who run away from his car when P.W.2 blew a whistle, no one can say for sure that the said Pistol - exhibit P.I belonged to him and not to his passengers. Unfortunately, the said passengers died in Police Custody due to severe beatings which they received from the mob at the time of their arrest.

In view of the fact that the pistol and four bullets

were wrapped in a plastic bag, it could not have been easy for the Appellant to know of its existence when the three passengers entered into his car with it. As a matter of fact, there is no independent evidence to prove that the Appellant run away from the Car together with those passengers when P.W.2 blew a whistle. I find therefore that the trial Resident Magistrate wrongly convicted him on the 1^{S*} count for the offence of being in unlawful possession of Firearms c/s 4 (1) of the Arms and Ammunition Act, 1991.

There is no evidence as well on the trial court's record to prove that the Appellant did conspire with anybody to commit the offence of armed robbery. Shaban Hamisi @ White with whom he was particularly charged to have committed this offence was acquitted on grounds of no case to answer. In fact, none of the three prosecution witnesses namely P.W.1 D. 2411 DC. John, P.W.2 C.7108 Sgt. Issa and

P.W.3 Nassoro Abdalla gave any clear and direct evidence to prove that the Appellant did conspire with Shaban Hamisi @ White or any other person to commit the offence of armed robbery. I hold that the testimony of No. E.8954 Detective Sergeant Revocatus who was called by the trial Magistrate as a court witness was wrongly relied upon in convicting him of that offence.

In his typed judgment at page 3 below, the trial Magistrate observed as follows and I quote:

*'The accused's caution statement is Les Ipsa loquitur in relation to what acts had been designed before his arrest... I find the accused did conspire to commit an **Offence as he is charged on the 2nd count and he wasn't forced to write the statement**'.*

First of all, the so called caution statement was not tendered in evidence. Secondly, the maxim **res ipsa loquitur** which means that the thing speaks for itself is not applicable in

Criminal matters. It is only applicable in Civil matters where it assists the plaintiff to discharge his burden of proving negligence in cases of accidents where the facts are such that the accident could not have occurred had the defendant not been negligent.

In Criminal matters, this maxim cannot be applied to assist the prosecution to discharge its burden of proving the charge beyond reasonable doubt where the facts are such that had the accused not admitted the charge he could not have criminally been found responsible.

All in all, the trial Magistrate was not legally justified to rely on a caution statement which was merely read in court by the Public Prosecutor and not tendered in evidence by the witness who wrote it namely No. E.8954 Det. Sgt. Revocatus, and without conducting any test to find out whether or not it was voluntarily made by the Appellant. Therefore, I find also that the trial Magistrate wrongly convicted him on the 2nd count for the offence of conspiracy to commit an offence c/s 384 of the Penal Code.

In general, it appears to me that the Appellant was wrongly convicted on both counts due to the trial Magistrate's failure to evaluate the evidence on record which is totally insufficient to base a conviction. For this reason, I hereby reverse his decision and quash the Appellant's conviction on both counts and set aside the sentence which was imposed on him on each count and order that he should immediately be released from prison unless otherwise he is lawfully held on any other charge.

A. Shangwa

JUDGE

16.9.2005

Delivered in Court this 16th day of September,

2005.

A. Shangwa

JUDGE

16.9.2005.