

IN THE HIGH COURT OF TANZANIA
AT SONGEA

CRIMINAL APPEAL NO. 10 OF 2006
(ORIGINAL TUNDURU DISTRICT COURT CRIMINAL
CASE NO. 13 OF 2006)

ALBERTO HASSAN APPELLANT

VERSUS:

THE UNITED REPUBLIC RESPONDENT

26/11/2007 HEARING CONCLUDED

03/1/2007 JUDGMENT DELIVERED

J U D G M E N T :

KAGANDA, J.

The appellant was charged and convicted of two counts, (a) Being in possession of firearm and (b) Unlawful entry in Tanzania. He was sentenced to seven years jail for the first Count and one year for the second count. Sentence were ordered to run concurrently. Being aggrieved to both Judgment and sentence he now appeals to this Court.

The appellant has advanced five grounds of appeal which I summarize in the following manner. That, the cautioned statement did not contain his statement due to misunderstanding of the language used by the maker and the writer. Second, that he was not found in possession of any firearm. Third, that his entry permit plus other personal belongings were confiscated by the police on arrest.

to be found in actual possession of the subject matter; but there must be evidence to at least suggest that the accused participated in possessing it. In the case at hand no witness testified to the effect that the appellant was seen sending the firearm to the second accused or handing it over. Or even, that it was seen in his hands and later found with the second accused. The Court relied on the co-accused's confession which ought to have been taken with caution because as an accomplice he had some interest to serve. The judgment of the trial court did not indicate that the magistrate had warned himself of acting on such evidence.

On fifth grounds of appeal Mr. Manjoti, learned State Attorney correctly submitted that the charge was bad in Law due to duplicity. The two counts are distinctive in Law because one falls under the immigration Act and the other under the firearms. Worse still the later has been charged under wrong Law, the gun being used by the military; then the offence falls under the Armaments Control Act Cap. 246 [RE. 2002] sections 11 and 18. That Law provides that:-

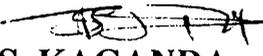
- (i) "Subject to this section no person shall, after the commencement of this Act, except under and in accordance with the terms of an authorization in the prescribed form granted by the Board, carry, convey or have in his possession or under his control any armaments".

According to P.W.I detective Dadi, the gun tendered in Court which was also found in possession of the second accused, is used by military force and not Civilian. Being a member of the Police Force and conversant to the arms there was no doubt by the trial magistrate on the truth of it.

Indeed the proceedings had several defects which should have been noticed by the trial magistrate but were not. The failure to take action on those defects render the whole proceedings against the appellant to be unfair. That is, the failure or the lumping together of separate and distinct offences in one charge sheet. The failure to conduct a trial within trial on the appellants cautioned statement. The failure to take with caution the second accused's confession against the appellant and the failure to provide for an interpreter to the appellant by the police who recorded the appellants statement. In the analysis I find that the proceedings were unfair and I by quash the judgment and set aside sentences there to. After serving a good term of his sentence, I do not find it just to order for a re-trial. I therefore order for an immediate release of the appellant and his deportation to Mozambique by the Immigration Officers.

I uphold the District Courts orders for confiscation of the gun.

Appeal allowed.


S.S. KAGANDA

JUDGE

3/1/2007.

Right to appeal explained.

SSK/PJL.

The learned State Attorney in reply argued that there was no record of the appellant demanding for an interpreter before the police who recorded his statement. After examining that document I totally agree with the learned State Attorney on that the author did not indicate of such a demand. The appellant anyhow disclosed that he was a mozambiquecan, and even before this Court and the District Court he demanded for an interpreter, I therefore believe that, even though it was not put on record, the appellant needed such service because his knowledge in, Swahili language is minimal. Further, it is clear on record to the trial courts proceedings, that the appellant raised an objection to the admission of his statement but the court dishonored his argument. P.W.4 Detective Nicodemus having given his evidence on oath was ordered by the court to read aloud the appellants cautioned statement. The appellant told the Court that, the signature to the statement was his, but the contents therein were not made by him. I believe he had a better chance of understanding that statement because there was an interpreter one Raya Ally. The interpretation was made from Swahili to Kiyao language. The trial Magistrate did not even comment on the objection but just proceeded to hear the case. What actually transpired was as follows:-

Prosecutor: I ask the witness to read the statement of the 1st accused in Court.

Court: Read it in the hearing of the accused.

Prosecutor: I pray this statement in Court as evidence.

1st accused: The signature is mine but the contents are not mine.

Court: Received as exhibit P.B.

The procedural Law requires that, when an accused objects to the statement then the Court ought to conduct a trial within trial before admitting or rejecting the statement. Procedural Laws should be respected as Werema J. in Justice Mtalemwa V.R. Crim. Appeal 18/2006 (Unreported) pointed out that:-

“Procedural Laws are safeguards which filter and avoid victimization and ensure that, convictions are based on valid evidence. The checks and balances between the procedural rules and substantive Law are meaningful and a cornerstone for the rule of Law”.

The denial of the contents of the cautioned statements by the appellant was tantamount to an objection of its tendering as such the trial Magistrate ought to have conducted a trial within trial. In the case of Masanja Mazambi V.R. [1991] TLR. No. 200 the CAT had this to say:-

- (i) “A trial within a trial has to be conducted whenever an accused person objects to the tendering of any statement he has recorded”.

In the case at hand the statement was recorded without an interpreter as such the Court should not have relied to it. I do agree with the learned State Attorney Mr. Manjoti on his fair reasoning on that the document in such circumstances was illegally admitted.

On fourth and third grounds, the comment made by the learned State Attorney is correct in a way on that, there is no Law which require a suspect