

IN THE HIGH COURT OF TANZANIA
AT Mtwara
CRIMINAL APPEAL NO. 119 OF 2006
ORIGINAL CRIMINAL CASE NO. 94 OF 2006
OF NEWALA DISTRICT COURT
AT NEWALA

JUMA MOHAMED @ DORIA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

DATE OF LAST ORDER – 31/5/2007

DATE OF JUDGMENT – 11/6/2007

JUDGEMENT

MJEMMAS, J.

The appellant one Juma Mohamed @ Doria was convicted of being in unlawful possession of offensive instrument contrary to section 298(c) of the Penal Code, chapter 16 of the laws. He was sentenced to serve a five year term of imprisonment.

The appellant was aggrieved by the conviction and sentence hence this appeal. He has raised two main grounds of appeal. The first ground relates to the contradictions or discrepancies among the prosecution witnesses. Some prosecution witnesses said that when he was arrested he was sitting alone in a bar while others said that he was sitting with other people. The second ground of his appeal is that the trial court refused his request to call or summon one of the bar attendants to show/testify if they saw him with a piece of iron bar.

Mr. Luena, learned State Attorney for the Respondent – Republic did not support the conviction nor the sentence imposed on the appellant. The learned State Attorney joined hands with the appellant on the question of the number of people who were found with the accused person during his arrest. According to Mr. Luena, PW.1, PW.3 and PW.4 said that the appellant/accused was sitting alone when they went to arrest him. However PW.2 said that the accused was sitting with three other people. The learned State Attorney submitted that under such circumstances the evidence of those four witnesses is doubtful because all of them claimed

but why the discrepancy? Mr. Luena was of the opinion that such contradictions could have been resolved by calling an independent witness.

Another ground which was raised or rather given by the learned State Attorney for not supporting the conviction of the appellant is that there was no proper description of the alleged iron bar which was found by the accused person. He was of the view that before the said piece of iron bar was produced for identification by witness in court, it was important for the said witness to describe it in detail, but that was not done.

I have listened carefully to both sides. I concur with the accused person and the learned State Attorney that there are obvious contradictions or discrepancies among the prosecution witnesses. The discrepancies relate to the question whether or not at the time of arrest the accused person was alone or with some other people? I asked Mr. Luena why he considered the discrepancy to be fundamental in the case. He replied that it destroyed the credibility of the witnesses. In the case of **JUMA KIBOKO @ MSAFIRI JAMES v.R. Criminal Appeal No.65/2001 (HC) Mwanza**

my brother Justice Masanche had an opportunity to comment on the issue of discrepancies in witness's, evidence. He referred to Sarkar on "The Law of Evidence" 10th edition, Volume I at page 46 where it is stated;

"..... trifling discrepancies should be ignored as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in the weighing of evidence"

As in this matter, whether there were four people or none at the time of arrest of the accused person is immaterial at this point. The presence of other people when the accused person was being arrested becomes important with regard to the issue whether or not he (the accused) had in his possession the said piece of iron bar. The accused person denied to have been found in possession of the said piece of iron bar. However, all four prosecution witnesses testified that he was in possession of a piece of iron bar and that was the reason for his arrest. The accused person has submitted that the trial court refused to summon one of the bar attendants to testify whether or not he had a piece of iron

bar in the bar. With due respect, I have gone through the record of the case but I was not able to find anything to support the appellant's allegation. What is clear from the record is that he was given opportunity to summon his witness called Mahamudu Mkuchika (DW.2). He indicated that he will have one witness during the preliminary hearing and that witness gave evidence on 13/11/2006. Therefore he cannot be heard to say that he was denied opportunity to be heard or to call his witness.

What comes to light as to whether or not the accused person was found in possession of the piece of iron bar is that the prosecution witnesses did not tell the truth. I understand that the first court or rather trial court is in a better position to assess the credibility of witnesses than the appellate court which looks at the court record. However, there are circumstances where an appellate court is entitled to look at the relevant evidence and make its own findings of facts, refer to the cases of **OMAR HEMED v.R [1983] TLR.52** and **AUGUSTINO KAGANYA AND TWO OTHERS v.R [1994] TLR.16**.

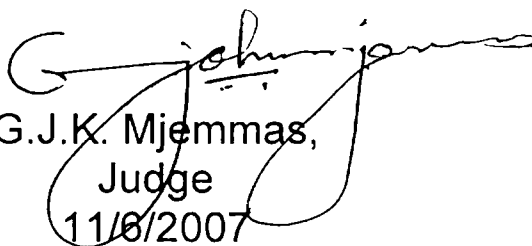
In the present case the trial Magistrate believed all four prosecution witnesses who said that they found the accused person with a piece of iron bar. However when you review and analyse the evidence you find that the credibility of those four witnesses is in doubt and that's why the appellant raised the point of calling one of the bar attendants to testify. The accused or appellant raised the issue as if he was denied opportunity to summon one of the bar attendants as his witness or that it was the duty of the court to summon such witness. That's where the appellant went wrong but otherwise one would have expected the prosecution side to summon one of the people who were around the bar as an independent witness to show that the accused was found in possession of a piece of iron bar (offensive weapon). The prosecution did not do that. Another omission by the prosecution side is that according to PW.1 it was the Village Chairman, one Yahaya Salum who informed him that there was someone at Laskino bar who was suspected to have a weapon. The said Village Chairman was not called to testify. One wonders why such a vital witness was not summoned because he would have informed the court how he saw the suspected weapon/piece of iron bar and why he suspected the accused person.

When PW.2 – MG.363265 was being cross-examined by the accused person he said that they had a report that the accused person was needed by Police at Newala. Now if that was the case why didn't they arrest him before they were informed by the Village Chairman or Village Executive Officer that there is a person who is suspected to have an offensive weapon?

From the foregoing I quash the conviction of the appellant, set aside the sentence imposed and order that he be set free forthwith unless lawfully held for some other cause.

GIVEN IN MTWARA this 11th day of June, 2007.




G.J.K. Mjemmas,
Judge
11/6/2007