.IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

ECONOMIC APPEAL NO. 2 OF 2005

1. MOHAMEDI JUMA @ RAHALEO
2. NESTORY JOSEPH @ BALINGA .....APPELLANTS

VERSUS

THE REPUBLIC

Date of Last Order 15/2/2007
Date of Judgment 21/2/2007

JUDGMENT

MIHAYO,J.

The two appellants Mohamed Juma @ Rahaleo and Nestory Joseph @ Balinga were convicted by the District Court of Morogoro for the offence of being in unauthorized possession of a firearm contrary to section 13 (1) of the Arms and Ammunition Ordinance Cap 223 as read together with para 20 of the First Schedule to and section 59 of the Economic and Organized Crime control Act. 1984. Each one of them was sentenced to 7 years imprisonment. They are dissatisfied and have now appealed to this court against both conviction and sentence. They are unrepresented.

The prosecution case at the trial was that the appellants were traveling in a Sadiq Line Bus to Dar es Salaam on 27/12/98 " with properties stolen at Masika Area on 23/12/03." No.C.231 D/Sgt Burhani (PW1) arrested them and took them to police. They

admitted to have indeed broken in house of one Mrs Msuya and to have stollen various items therefrom. PW1 told the court that the appellants took him to Dar es Salaam, where they had hidden the stolen items. The appellants are alleged to have also volunteered information to (PW1) of their possessing a fire arm that they use in the robberies. The appellants took PW1 to where the gun was hidden. Pw1 called two civilians one Hidaya Omari and one Constantino Mgumia who acted as witnesses when the appellants took PW1 to the place they hid the gun. The gun was unearthed and latter tendered in court as an exhibit. The appellants told PW1 that they stole the gun after breaking into container at Transit Inn. The owner, one Boni Mkenda told PW1 that indeed the gun is his and that it was stolen from his broken container. On 30/12/98, the appellant's caution statements were recorded and latter tendered in evidence as exhibits.

The appellants did not defend themselves. They had walked out of court when PW1 took the witness box. However, the hearing proceeded under the provision of section 226 of the Criminal Procedure Act. At the end of which "Ruling" was written and conviction entered against the appellants.

The 1st appellant did not seek to be present at the hearing of the appeal. The 2nd appellant Nestory Joseph @ Balinga appeared and said he was taken to the police station on another matter of

quarrelling with a fallow trader. He was surprised when a charge of being found with a firearm was read. He told this court that this case was a mere frame up.

The Respondent Republic was represented by Mh. Mwipopo, learned state attorney. Arguing grounds one and two of the grounds of appeal, Mr Mwipopo told this court that it was correct for the trial court to invoke section 226 of the Civil Procedure Act to proceed with the case when the appellants walked out. And in answer to ground four, he said the evidence against the appellants was corroborated with the production of the gun.

In ground five, the appellants had complained that the provision of section 38 (3) of the Criminal Procedure Act had not been complied with. This subsection has this to say:-

> *" 38 –(3) where anything is seized in purchance of the powers conferred b y subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner of the premises and those of witnesses of the search, if any."*

The learned state attorney said in answer to this ground that not always is a police required to have a search warrant wherever conducting a search. He referred the court, to section 24 (b) of the Criminal Procedure Act [Cap 20 RE.2002] (the CPA).

In arguing the sixth ground of appeal, the learned state attorney told the court that it is true the court did not warn itself when dealing with the caution statements of the accused persons, but the trial magistrate had believed the caution statements to have been properly made.

The learned state attorney concluded by not supporting the conviction because of failure to call the appellants to defend themselves at the close of the case for the prosecution. Mr Mwipopo said it was not proper for the trial magistrate to write "ruling" before calling the appellants to defend themselves.

I must say from the start that magistrates should always be governed by the Criminal Procedure Act and the Evidence Act wherever they are hearing Criminal Cases. The procedural law is sacrosanct, it must be followed. In the present appeal, looking at the record leaves a lot to be desired. The trial left too many holes such that a conviction cannot stand.

Let me start with the "ruling" written by the trial magistrate. At the end of any trial in the subordinate court, section 235 of the CPA comes into play. It says:-

> *"235. the court having heard both the complainant and the accused person and their witnesses and evidence shall convict the accused and pass sentence upon or make an order against him according to law*

or shall acquit him, or shall dismiss the change under section 38 of the Penal Code"

Now the decision can only be communicated in a judgment which is defined in the Black's Law Dictionary Seventh Edition as:-

"A court's final determination of the rights and obligation of the parties in a case "

And a "**judgment of conviction"** is defined in the same dictionary as:-

"The written record of a criminal judgment, consisting of a plea, the verdict or findings, the adjudication and the sentence"

And likewise a judgment of acquittal is defined as:-

"A judgment rendered on the defendant's motion or Court's own motion that acquits the defendant of the offence charged when the evidence is insufficient".

A trial magistrate cannot chose to "head" his decision any how. In the present matter, the learned trial resident magistrate "headed" his decision as "ruling" which although not fatal, is improper.

Was there evidence to sustain the conviction? This is what I now turn to. Let me start with ground of appeal number five. There is merit in this ground. There is no receipt issued acknowledging seizure of the gun in question. The gun was therefore improperly

admitted in evidence. This is fortified by the fact that two alleged witness to the search, Constantino Mgumila and Hidaya Omari were not called to testify, which reduced the case for the prosecution to hallowstory.

The trial magistrate appears to have placed a lot of reliance on the caution statements. But reading through them and assessing them objectively, gives me the impression that they are doctored and not genuine. When answering one of the questions for example, the 2nd appellant is quoted to have said, inter alia:-

"Na baada ya kufahamiana na kusimuliana ndipo tulipoanza na biashara yetu haramu tunayo ifanya"

This type of language is suspicions as one would not normally reveal a criminal behavior so directly in a statement. Moreover the two so called *"caution statements"* are in fact interrogations. Had the trial magistrate noted all these observations, he would have come to a different conclusion. Therefore, grounds of appeal No. 5 and 6 are meritorious and I hereby sustain them.

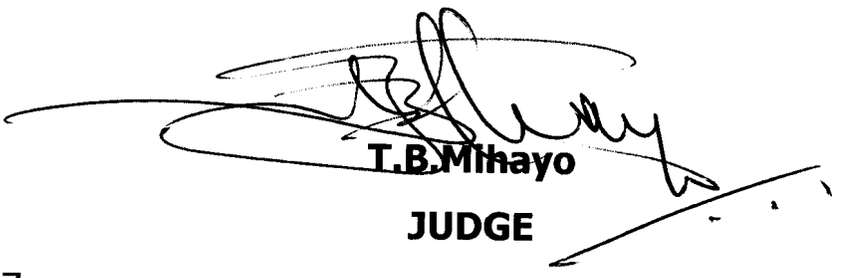
Secondly, as rightly observed by Mr Mwipopo, the appellants should have been called to defend themselves at the and of the case for the prosecution. The appellants had protested at PW1 giving evidence, they had not refused to defend themselves. Failure to hear the case for the defence is failure of justice.

Taking the evidence as a whole, and taking into account the time the appellants have stayed in prison, I do not think this is a fit case to order retrial. I allow the appeal, quash the conviction and set aside the sentence. The appellants are to be set at liberty unless otherwise lawfully held.

T.B.Mihayo

JUDGE

Judgment delivered this 21st day of February, 2007



T.B.Mihayo

JUDGE

21/2/07

For Appellants 1st Appellant – Absent unrepresented

2nd Appellant – Present unrepresented

For respondents: - MS Mwanda