

IN THE HIGH COURT OF TANZANIA
AT IRINGA

(DC) CRIMINAL APPEAL NO. 40 OF 2012
(Originating from Criminal Case No. 97 of 2012
of the District Court of Njombe District
at Njombe

Before J.S.K. Hassan – S.R.M.)

1. FRANCE SIMON NJAVIKE JUMA } APPELLANTS
2. VENANCE BABU MBARUKU }

VERSUS

THE REPUBLIC..... RESPONDENT

3/5/2014 & 6/6/2014

JUDGEMENT

MADAM SHANGALI, J.

The appellants Francis Simon Njavike Juma and Venance Babu Mbaruku were jointly and together charged and convicted by the trial District Court at Njombe on three counts namely; Conspiracy to commit offence c/s 384 of the Penal Code, Cap. 16; Unlawfully possession of firearm c/s 4 (1) (a) and Section 34 of the Arms and Ammunition Act, Cap. 233 and Unlawful possession of ammunition c/s 4 (1) (a) and 34 of the Arms and Ammunition Act, Cap. 223. On the first count

the appellants were both sentenced to serve three years imprisonment and on second and third counts they were each sentenced to serve seven years imprisonment on each count. The trial District Court ordered the sentences to run concurrently.

Dissatisfied with that decision the appellants have preferred this appeal.

The salient facts giving rise to this appeal are not very clear because the language used by the trial resident Magistrate is somehow incomprehensible. As a result, this being the first appeal and being aware of the trite principle that an appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of vitiating nature to which the trial court did not address properly, I decided to take pain to scan the whole evidence critically in order to make my own assessment and conclusion.

The facts of the case may briefly and conveniently be stated as follows; PW.2, Emmanuel Method was employed as a driver in the offices of one Mtewe. On 21/3/2012 he (PW.2) was telephoned through his mobile phone by the 2nd accused/appellant Venance Babu Mbaruku @ Muba who was familiar to him asking for a short talk or discussion. PW.2 promised to meet the 2nd appellant on the next day 22/3/2012. On 22/3/2012 they met at the Dispensary area

and the 2nd appellant revealed to PW.2 that he was in need of assistance from him because he was intending to steal money from Mtewele offices where he (PW.2) was working as a driver. PW.2 was shocked by the news but decided to encourage the 2nd appellant in order to know the whole plot. In their conversation, the 2nd appellant informed PW.2 that he was intending to carry out the plan with his friend who owns a pistol. PW.2 promised to assist them and they agreed to meet on the following day i.e. 23/3/2012 together with the alleged friend.

From there PW.2 went straight to his boss and informed him about the plot. The matter was reported at the police station Njombe and immediately the OC-CID - SP Kamugisha (PW.4) started to set a trap in order to arrest the culprits. Several police officers were involved in the exercise including PW.3 D/Sgt. Stanslaus, PW.5 D/Sgt. Sankey and PW.6 PC. Adam.

On 23/3/2012 the 2nd appellant informed PW.2 that their intended meeting could not be held because his friend had special matter at Mafinga. The meeting was adjourned to 24/3/2012. On the early morning of 24/3/2012 the 2nd appellant informed PW.2 through the mobile phone that the alleged friend had arrived and that he should proceed to collect him with his motor vehicle at Monica Hotel where he was lodging.

At this time PW.2 was also communicating with PW.4 (OC-CID) through the mobile phone on the progress of the plot. PW.2 then proceeded to the said Monica Hotel while driving his office motor vehicle to collect the alleged friend in that early morning.

On reaching at Monica Hotel, PW.2 saw a person who straight followed his motor vehicle, opened the door and jumped in. The man happened to be the 1st appellant. Then PW.2 informed the 2nd appellant through the mobile phone that he had already picked the alleged man at the Hotel. The 2nd appellant directed PW.2 to proceed to his house (2nd appellant's) at Mjimwema area. While on the way to Mjimwema, PW.2 had an opportunity of having a short discussion with the man (1st appellant) and witnessed him busy preparing his pistol while boasting to accomplish the mission successfully.

When they reached at the house of the 2nd appellant, they picked him in the motor vehicle and proceeded to Mteweke offices where PW.2 showed them the premises and how to enter to the required office. At that time PW.2 declined to continue to use his office motor vehicle in the execution of the plot. As a result and while they were waiting for the offices to be opened the 2nd appellant decided to rush away to hire a motor cycle for the exercise. PW.2 and the 1st appellant proceeded to a nearby Turbo Hall for breakfast. At that time

PW.4 and a good number of police officers were taking their position within the vicinity of Mteweke offices in order to arrest the culprits in action.

The 2nd appellant managed to hire a motor cycle Reg. No. T 762 BTT from PW.1 Geoffrey Mgya. He then proceeded to pick the 1st appellant and proceeded to accomplish their illegal mission but when they reached at Mteweke offices they saw a parked motor vehicle known to have been owned by one police officer. They smelt a rat. Suddenly the appellants turned their motor cycle and speed off from the scene. The police started to search for them. PW.2 managed to contact the 2nd appellant through the mobile phone. PW.2 joined the police in another motor vehicle and managed to arrest the appellants at Sido Street. During the arrest the 1st appellant attempted to resist the arrest and in that fracas he drew his pistol and eventually dropped it. The pistol was quickly picked by PW.2 who handed it over to PW.5 D/SSgt. Sankey. PW.7 Agness Mtenga, an attendant at the Mteweke offices testified on how he saw the appellants and PW.2 at the office area in the early morning of 24/3/2012, when she was cleaning the offices. She also confirmed to have witnessed a good number of police officers within the office area on the same day.

PW.8 Eliada Mtwewe an attendant at Monica Hotel confirmed to have received and attended the 1st appellant who occupied room No. 12 at the Hotel from 23/3/2012. The

prosecution case was also supported by the 1st appellant's Caution Statement (*Exhibit P.1*) which was recorded by PW.3 D/SSgt Stanslaus and the 2nd appellant's Caution Statement (*Exhibit P.7*) which was recorded by PW.5 D/SSgt. Sankey. The pistol, Browning make No. 049215 made in Czechoslovakia was marked Exhibit PW.2 while the six round of ammunition found in the said pistol were marked Exhibit P.3 collectively. The motor cycle hired from PW.1 was marked Exhibit P.4.

In their defences both appellants flatly denied to have committed any offence. The 1st appellant claimed that his name is Juma Nkwabi and that he went to Njombe and slept at Monica Guest House. Then, the 2nd appellant who was his partner in spareparts business sent him a car to pick him in order to meet at a certain garage. That, while at the said garage they were both arrested by the police, searched and later charged. The 1st appellant claimed that the testimony of PW.2, PW.3, PW.4, PW.5, PW.6, and PW.7 against him is nothing but pure lies because he was not arrested with any weapon. He also stated that the alleged caution statement was not read to him and that he was forced to sign it.

The 2nd appellant claimed that on 24/3/2012 at about 07.00 a.m. PW.2 asked him to meet at the back of Dispensary area. That when he reached at the dispensary area he met PW.2 who was in the company of a man who was introduced

to him as his friend Francis Njavike (*1st appellant*). The *2nd* appellant claimed that PW.2 was in need of his motor vehicle but he (*2nd appellant*) told him that his motor vehicle was not mechanically fit and it was in the hand of one Magoda. The *2nd* appellant stated that it was his first time to meet the *1st* appellant and he has never conspired with him to commit any offence. He claimed that when they were at the garage the police arrived and arrested them. The *2nd* appellant testified to the effect that during the arrest there was a commotion between the *1st* appellant and the police because the *1st* appellant was attempting to resist the arrest. That, in that fracas the *1st* appellant dropped a pistol from his coat and the police picked it. He also claimed that while at the police station they were tortured.

Basing on that evidence the trial Resident Magistrate convicted and sentenced the appellants as aforesaid.

In this appeal each appellant has raised his memorandum of appeal containing several grounds of appeal, but the main ground of appeal from both memorandums is that there was no sufficient prosecution evidence to warrant a conviction against them. The *1st* appellant also complained that the trial Magistrate refused to give him an opportunity to call his witness who was present at the time of his arrest. The appellants also complained that their caution statements were not obtained voluntarily because they were tortured, intimidated and forced to sign the same.

During the hearing of the appeal the 1st appellant claimed that he was not arrested in possession of any weapon and that the alleged robbery offence was fabricated by the police against him. He claimed that during the arrest they were beaten and tortured and eventually forced to sign the caution statements. He stated that his witness was not given an opportunity to adduce evidence and that his PF.3 was confiscated by the police who forced him to sign the caution statement on 28/3/2012.

The 2nd appellant claimed that PW.2 was telling lies against him because he was not arrested in possession of any weapon or ammunition. He also claimed that his witness, the garage owner was refused to testify although he was present in court on 13/8/2012.

In response, Ms. Maziku, learned State Attorney who represented the respondent/Republic supported the conviction and sentence imposed against the 1st appellant on both counts. Regarding to the 2nd appellant the learned State Attorney supported the conviction and sentence on the first count only and categorically stated that there is no evidence to show that the 2nd appellant was found in possession of any firearm or ammunition. She submitted to the effect that the prosecution case was proved beyond reasonable doubt and the testimony of PW.2 indicate clearly that there was a conspiracy between the appellants to commit a serious offence of robbery.

The learned State Attorney insisted that the evidence of PW.1, PW.2, PW.3, PW.4, PW.5, PW.6, PW.7 and PW.8 is duly supported by the caution statements of the appellants which were not objected during their production and admission as exhibits in court. She further stated that, the allegation that the appellants were tortured, intimidated and forced to sign the caution statements were not raised during its production and therefore the appellants can not raise them now.

Having dispassionately studied the available prosecution evidence vis-avis the defence evidence I am constrained to agree with the learned State Attorney that there was sufficient and credible prosecution evidence to connect the 1st appellant with both three counts. PW.2 was invited to join the conspiracy to commit the offence of armed robbery by the appellant. PW.2 decided to report the matter to his boss and eventually to the police. The police used him in their trap as their informer in order to arrest the appellants. Unfortunately the appellants managed to unset the trap when they saw the vehicle commonly used by the police parked at the scene. They speedily drove their motor vehicle away. However, the evidence indicate that they were followed up and later arrested through the efforts of PW.2 who was still communicating with them through the mobile phone. During the arrest the 1st appellant attempted to resist the arrested and in the fracas he drew his pistol which fell on the ground and immediately was picked up by PW.2. The available prosecution evidence is

enough to sustain conviction and sentences against the 1st appellant but then there is more evidence from defence side supporting the prosecution evidence. This is the evidence from the 2nd appellant who admitted to have witnessed the fracas between the 1st appellant and the police to the extent of 1st appellant dropping his pistol.

The learned State Attorney is also correct that the caution statements of the appellants were recorded in accordance to the law and that there was no objection raised by the appellants during their production and admission. The allegation that the appellants were tortured, intimidated and forced to sign the caution statements are being raised at the appellate stage. During the trial the appellants claimed that they were forced to sign the caution statements but they never stated or described the type of force used against them. In my considered opinion, the issue of torture, intimidation and beatings is nothing but an afterthought. Both caution statements were voluntarily made by the appellants.

Again, on the basis of the available evidence I agree with the learned State Attorney that there is sufficient evidence to sustain conviction and sentence against the 2nd appellant on the first count of conspiracy. It was through conspiratorial exercise between the appellants that brought PW.2 to the picture hence the police intervention and the failed trap. In my considered opinion, the available prosecution evidence and

the sequence of events clearly show that the case against the appellants was not a fabricated story.

I have also considered the complaint that the appellants were not afforded an opportunity to call their witnesses or that their witnesses were refused to adduce evidence. This complaint have no merits because there is no evidence on the trial court's record of proceedings showing that the appellants were denied their right to call witnesses or their witnesses were available in court but refused to testify. The record is clear that during the Preliminary hearing there was no list of defence witnesses and during trial there was no application to call any defence witness.

On the basis of the same available evidence, I concur with the learned State Attorney that there was no sufficient prosecution evidence to convict the 2nd appellant on the 2nd count of unlawful possession of firearm and 3rd count of unlawful possession of ammunition. The person who was found in possession of firearm and ammunition is the 1st appellant.

In the upshot and for the reasons demonstrated above, I am satisfied that the appeal by the 1st appellant was lodged without sufficient grounds and it is hereby dismissed in its entirety on both counts. The appeal against the 2nd appellant on the first count of conspiracy is equally dismissed; but the

appeal against 2nd count and 3rd count is allowed. In the result the conviction and sentences imposed against the 2nd appellant on 2nd and 3rd counts are quashed and set aside.

M. S. SHANGALI

JUDGE

6.6.2014

Judgement delivered todate 6/6/2014 in the presence of Ms. Kasana Maziku, learned State Attorney representing the respondent/Republic and in the presence of the appellants in person.

M. S. SHANGALI

JUDGE

6.6.2014

Court:- Right of appeal explained.

M. S. SHANGALI

JUDGE

6.6.2014

M. S. SHANGALI
JUDGE
24.6.2012