IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL No. 110 OF 2017

ALOYCE MAANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 24/08/2018.
Date of Judgment: 23/11/2018

BEFORE: S.C. MOSHI, J.

The appellant was arraigned before Simanjiro District Court at Orkesumet, Manyara Region on three counts as follows: - First count: Use force in defence contrary to **section 18B (2)** and **35** of the **Penal Code**, second, count Reckless and negligent act contrary to section **233 (g)** and **35** of the **Penal Code** and third count was Malicious damage to property contrary to section **326 (1)** of the **Penal Code**. The appellant pleaded not guilty to the charge hence the case went to a full trial whereby the court found the accused guilty of the second count and third count.

The appellant was convicted of the second and third count accordingly and he was sentenced to serve four months in prison for second count whereas the court ordered a conditional discharge for a period of one year for third count; and it ordered the appellant to pay back the loss i.e. T.shs. 230,000/=.

Aggrieved by the decision, the appellant appealed on the following grounds: -

1. *That, trial court erred in law and fact after convicted, sentenced and fined the appellant basing on flimsy evidence.*
2. *That, trial court erred in law and fact to convict the appellant with defective charge.*
3. *That, trial court erred in law and fact in convict and sentenced the appellant, while the prosecution side failed to proof the case beyond reasonable doubt.*

Before me the appellant was represented by Mr. Ngeseyan advocate whereas the Republic was represented by Mr. Nuda State Attorney. The appeal was disposed of by way of written submissions.

First of all, I wish to point out at the outset the errors that I noted in the judgement. The judgement shows that the court dismissed the first count. However, the trial magistrate did not

indicate the law which empowered her to dismiss the offence the way she did in her judgement. The trial magistrate was supposed to analyse the evidence before her; and make a finding if there was sufficient evidence to prove the offence on the required standard. Then make a finding whether the accused was guilty or not guilty of the offences as charged, depending on the weight of evidence before her. However, the magistrate did not do so, she just stated thus and I quote: -

> *"The first count is offence is(sic) dismissed and this is by considering what was stated by the prosecutor in their final submission"*

It is evident that her decision was not based on evidence. Also she did not say what the prosecutor stated. Actually, her reasoning was not backed by any evidence.

Now coming to the grounds of the appeal, I will deal with the first ground and the third ground of appeal together.

In regard to the first ground, that the trial court erred in law and fact by convicting and sentencing the appellant basing on flimsy evidence Mr. Ngeseyan submitted that, the trial Magistrate convicted the appellant on 1st and 3rd counts on the evidence

which is difficult to believe and rely upon to convict the accused person. The Trial Magistrate convicted the appellant on circumstantial evidence as she admitted so in her judgment specifically on page 4 of the typed judgment. At page 4 line 6 – 7 of the typed judgment, the magistrate reasoned that:

> ***"Though no one saw him discharging the bullet/ammunition in dispute But we have circumstantial evidence which proves the same"***

Further at page 4 lines 9 – 11 of the typed judgment, the magistrate continues to reason that the appellant had been convicted with the 2nd and 3rd counts as charged as they had been proved beyond reasonable doubt. She said that: -

> ***"It is the 2nd and 3rd counts offences which this court is dealing with and which are same found to have been proved beyond the reasonable doubt".***

He said that, this means that the trial Magistrate is satisfied that, on 2nd and 3rd counts the respondent herein had proved beyond reasonable doubt the commission of the offence charged through circumstantial evidence. The circumstantial evidence relied by trial Magistrate to convict the appellant on 2nd and 3rd counts is provided for at page 4 line 13 – 14 of the typed judgment. The trial Magistrate reasoned that the appellant

confession statement made at the police station and evidence of PW2 [John Lukio Pangyo] is taken into account to establish the offences charged on count 2 and 3.

He argued that, there are serious discrepancies on the said evidence that is relied by the trial Magistrate to convict the appellant and indeed it is flimsy evidence because the reasoning of the Magistrate is not coherent on the circumstantial evidence she relied upon to convict the appellant. This is because at page 4 line 3 – 4 of the typed judgment, the magistrate reasoned that she is not taking into account on the confession statement of the appellant on her judgment. The relevant part reads;

> ***".....the caution statement of accused is not made party to the findings in this judgment."***

He said that, this means that in delivering her judgment she would have neglected the caution statement that is purported to be made by the appellant at the police station. There is no reason on doubting on the position taken by trial magistrate on refusing to consider the same in her judgment. But surprisingly at line 12 – 14 of page 4 of the typed judgment, she says, circumstantial

evidence she uses in the findings of her judgment comes from the appellant and PW2 evidence which she says is the confession.

He submitted that, this is a contradiction because in the first instance, the trial Magistrate reasoned that she will not consider confession statement on her finding to the judgment, but as it had been shown, she had used it, it is indeed absolutely a contradiction.

He also contended that, the evidence of PW2 is called a confession. What is called a confession is found at page 5 lines 19 – 23 of the typed proceedings. The relevant part of the proceeding provides that;

> ***"Aloyce told me that, there were mad dogs that invaded his home, he fired/discharge bullets so as to chase them but unfortunately the bullets reached his neighbour's home and the stated neighbour informed police so as to get help."***

This is what PW2 said to have been told by the appellant when tendering his evidence. How this could be called a confession while the appellant denies. At page 24 line 4 – 6 of the typed proceedings, the appellant denies to have discharged the bullet while cross – examined the appellant said that: -

"I did not know the thing damaged them even I do not know when they got damage".

He said that, looking at what the appellant was setting as a defence, was the denial of involvement on discharging a bullet. That looking at PW2's testimony at page 5 line 15 – 23 of the typed proceeding; is reporting on what he purports to have been told by the appellant when he went to the police station on 15/11/2016 which was the following day after the accused has been arrested. This cannot be taken to be a confession; it is a piece of evidence tendered by PW2 on the involvement of the accused person. He said that regarding confession statement, the position of the law is as stated in the case of **Hemed Abdallah Vs. Republic (1995) TLR No. 172**. In this case the Court of Appeal held inter alia that: -

"It is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied that the confession must be true."

He contended that, the same position was reiterated in the case of **Republic Vs Isaya Much @ Shauri @ Michael,** Criminal Session Case No. 11 of 2015 (unreported).

He also argued that, on 23rd day of March, 2017, the prosecution side substituted the charge sheet as seen at page 8 of the typed proceedings of the trial court. At this time PW1 and PW2 had already testified, however they were not summoned to justify the offences as per new charge sheet, thus these witnesses had never testified after charge amendment. However, the trial court decided the matter based on the evidence tendered by PW2 among others. But conversely the test required for in proving through circumstantial evidence has not been met, therefore it was improper for trial magistrate to relay on circumstantial evidence for it is indeed flimsy evidence.

On third ground he said that, the prosecution failed to prove their case beyond reasonable doubt; that the prosecution had failed to prove the two counts on the required standard of the law on criminal cases. It is trite law that the burden of proof in criminal cases is always on the prosecution and it never shifts; per **section 3(2)** of the **Tanzania Evidence Act, [Cap. 6, and R.E. 2002].** The evidence in record is weak to convict the appellant. The evidence of PW3 and PW5 do not corroborate any evidence and was wrongly thought so by the Magistrate. He said that,

furthermore there is no single witness who saw the appellant committing the offence as charged on 2nd and 3rd counts which were the basis for conviction of the appellant.

He submitted further that, PW1 testified that four police men went to her home while PW3 and PW5 said that they were three policemen and their names are F. 8637 D/C JOHN, H. 3797 D/C SAID and E. 9338 JOSSA. This is absolutely inconsistence and contradictory evidence on the prosecution side, taking into consideration that all these are eye witnesses. He also said that, another contradictory evidence on the side of the prosecution is that, PW1 and PW5 stated that the police officers had only one gun while the PW3 stated that all of them i.e. the three of them had guns. He argued that, the contradictory evidence absolutely shakes the credibility of the witnesses.

He again said that, in addition to that, PW4 stated at 3rd line up 7th line on page 12 of the proceeding that *he* received the exhibits from Simanjiro District on 13/02/2017 and the same witness stated on page 15, at the two last lines up to the 1st line of page 16 of the proceedings that, he remembered that he received the

letter and exhibits from Simanjiro District on 13th but did not remember the month or the year. He said that, this is a pure contradiction as at the same time he gave his testimony and at the same time he stated that he didn't remember what he stated a short time (few minutes) ago. This is totally confusing and not reliable witness.

He contended further that, nothing was found or collected by the prosecution side at the scene of crime which was connected to the accused person and the same taken to be inspected by the forensic bureau at Dar es Salaam, apart from what they collected from the house/home of the accused person. PW5 stated that they didn't get bullet cartridges at the scene of crime this is as per line 29 up to 33 on page 16 of the typed proceedings; and there was no evidence to show that the alleged properties were damaged on that day as the damage could have happened long time ago.

He again cited the case of **Mohamed Said Matula Vs R. [1995] T. L. R. 3 where it was held that: -**

> ***"Where the testimonies by witness contain consistencies and contradiction the court has a duty to***

address the inconsistencies and try to resolve the where possible; else the court has to decide whether the inconsistencies and certainties are .....or whether they go at the root of the matter. The evidence involving inconsistencies and contradictions, evidence unreliable incompletely worthless."

He said that, the evidence as adduced by the witnesses of the prosecution such as **PW1, PW2, PW3, PW4 and that of PW5** are full of contradictions which led the case not to be proved according to the standard required by the law in criminal cases, that is beyond reasonable doubt. Responding to appellant's submission in respect of the first ground of appeal and the third ground of appeal Mr. Nuda submitted among other things that, the trial court convicted the appellant on 2nd count basing on relevant and sufficient evidence produced by PW2, the police and the exhibits produced before the court which was tendered without any objection from the defence. According to PW2 and the police, they said that, the accused confessed to have discharged the ammunition; that he intended to chase mad dogs. The accused was in possession of a short gun, pump action with serial number R 21 6283; this is according to PW1 testimony and the testimony of the police. Hence the evidence is clear that,

the accused committed the offences charged. The trial Court convicted the accused basing on circumstantial evidence together with the available evidence that supported the circumstantial evidence.

That was it from the parties; starting with ground number one and ground number three. It is obvious that the trial magistrate reasoned that the conviction of the appellant was based on a confession and circumstantial evidence. However, there is no evidence which show that the appellant confessed. The record shows that the caution statement that the accused made at the police was admitted for identification and it was never admitted in court as exhibit; even the magistrate at one stage pointed out in the judgement that she would not consider the accused person's caution statement; therefore, it was not part of the evidence. What the trial magistrate referred to as a confession is evidence of pw2 who said that the appellant had told him that he had fired a gun to scare dogs. However, the appellant denied to have told PW2 so. Looking at the evidence, there is no confession that could be relied upon by the court to find a conviction.

Regarding circumstantial evidence; there is forensic evidence indicating that the cartridge (exhibit P.3) was fired from the gun (Exhibit P.2). However, there is no evidence connecting the gun with the crimes that the appellant is charged with. According to PW3, all the exhibits were found with the accused person. Nothing was recovered from the scene of crime. There is no evidence at all that connect the damaged properties at the complainant's (PW1) home with the gun, cartridges and the bullets that were collected from the appellant's home and which were later taken to a ballistic expert for testing. Even PW1, in her testimony said that,

> ***". also police came with a bullet cover saying, they got it from the accused...".***

Regarding the contradictions and inconsistencies in evidence; it is evident that there are contradictions and inconsistencies regarding the number of police who came at the scene and contradictions on whether all police officers were carrying guns when they came to the crime scene or whether only one of them was carrying a gun. These witnesses claimed that they were at the crime scene. Evidently their testimonies raise

doubts as they claim that they were at the crime scene but they tell different stories.

Having reasoned as I did, I allow the first and third grounds of appeal.

Coming back to the second ground of appeal; Mr. Ngeseyan submitted that, the appellant on count two had been convicted on a defective charge. He said that this count falls short of legal requirement since the drafted charge did not establish elements of the offence charged, that is **RECKLESSNESS AND NEGLIGENCE.**

He said that, in this count [second count] the appellant was charged under section **233(g)** and **35** of the **Penal Code [Cap. 16 R.E. 2002]** for being reckless and negligent.

The particulars of offence were that:

> ***"Aloyce Mwaana, charged on 14/11/2016 at Boman Street Orkesumet within Simanjiro District in Manyara region, did discharge a fire arm Reg. Na. R. 216 make SHORT GUN PUMP ACTION, in such a reckless and negligent.***

He said that, looking clearly between the lines of section **223(g)** of the **Penal Code, Cap. 16 R.E. 2002**, the elements of the offence are missing which renders the charge to be defective. He quoted the provisions of section 233 which read thus: -

Section 233 Reckless and negligent Act.

Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person-

(a)-(h)

(g) does any act with respect to, omits to take proper precaution against, any probable danger from any machinery of which he is solely or partly in charge, or

He contended that it is clear from the provision that negligence or recklessness itself is not an offence until it is likely to endanger life or likely to cause harm to any person. However, the appellant was charged for reckless and negligent which do not cause any harm to any person nor was there any person named on this count to be harmed by the reckless and negligent act of the appellant. He contented that, in short in this count the prosecution did not allege anything that endangered human life

or was likely to cause harm to any other person which is the catchword in the paragraph.

In this regard he referred to the case of **Mussa Mwaikunda Versus Republic [2006] TLR at page 392,** where it was held thus: -

> ***"It is always required that an accused person must know the nature of the case facing him and this can be achieved if the charge discloses the essential element of the offence charged."***

He also cited the case of **Robert Mneney Versus Republic, Criminal Appeal No. 341 of 2015, CAT at Arusha (unreported)** where it was held:

> ***"On a defective charge the law is settled that the particulars of the offence must state and include all essential ingredients of the offence failure of which would render the charge to be defective."***

He submitted that count two is defective and it was wrong for the trial Magistrate to convict the appellant basing on a defective charge.

Replying to the appellant's submission in respect of the second ground of appeal, Mr. Nuda submitted that, it is true that the charge was defective, because it did not disclose the elements of

the offence that the appellant was charged with, but the accused understood the nature of the offences he was charged. The appellant answered the charge and he defended himself which shows that he understood the charges against him. Therefore, the defectiveness of the charge did not occasion any failure of justice because the appellant fully understood the substance and the essence of the charge against him. In this respect he cited the case of **AVON Vs UGANDA (1969) EA 129**, where in the Appeal the Court held that:

> ***"these were serious defects, which however did not occasion any failure of justice because the appellant fully understood the substance of the charge and the essence of the charge against him and so the defects were curable."***

Mr. Nuda said that in this case they are of the opinion that, the appellant was not prejudiced nor was there any failure of justice because he knew the nature of the charge he was facing that is; Negligence or Reckless act. He also cited the case of f **MUSSA MWAIKUNDA Versus REPUBLIC (2006) TLR 387** where the appellant was charged with the offence of attempted Rape; Contrary to Section 132(1) of the Penal Code. In this case the particulars of the

charge omitted the word 'threatening' which is an essential ingredient of the offence of Attempted Rape. The court held that:

> ***"The minimum standards which must be complied with for an accused person to undergo a fair trial are: he must understand the nature of the charge, he must plead to the charge and exercise the right to challenge it, he must understood the nature of the proceedings to be an inquiry into whether or not he committed the alleged offence, he must follow the course of the proceedings, he must understand the substantial effect of the evidence that may be given against him, and he ....."***

He contended that the mere fact that in the charge sheet there was omission to mention the said words which were an essential ingredient of the offence did not prejudice the appellant nor did it cause any kind of injustice.

I have considered both side's submissions in regard to the second ground of appeal. It is my view that Mr. Ngeseyan's argument is at the upper hand due to the fact that the charge sheet in the second count did not disclose an important element. It was not a mere omission as suggested by Mr. Nuda because the particulars of the offence read that,

> ***"Aloyce Mwaana, charged on 14/11/2016 at Boman Street Orkesumet within Simanjiro District in Manyara region, did discharge a fire arm Reg. Na. R. 216 make SHORT GUN PUMP ACTION, in such a reckless and negligent"***

whereas the law provides that;

> **"Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person-**
>
> **(a)-(h)**
> **(g) does any act with respect to, omits to take proper precaution against, any probable danger from any machinery of which he is solely or partly in charge, or "**

Reading through the quoted provision of the law it is absolutely true that the charge omits a very essential element of the offence. It does not show if the negligent or reckless act endangered human life or was likely to cause harm to any person. It is therefore apparent that the charge sheet was defective in respect of the second count. It is my view that the defect prejudiced the appellant's rights and led to miscarriage of justice because the charge did not disclose the essential element of the offence that he was charged with. In this respect the case of **Mussa Mwaikombo Versus Republic** (Supra) is relevant. In this case the court held that a charge that does not disclose any offence in

the particulars of the offence is manifestly wrong and incurable. Likewise, in this case I find that the charge in respect of second count is incurably defective. That said, I expunge the second count from the record and I consequently quash the conviction in respect of the second count. In the event the second ground of appeal is allowed.

All in all, having found as I did, it is my view that there is a lot to be desired in prosecution's evidence. Hence I find that the case was not proved on the required standard. The benefit of doubt always goes to the accused person. I therefore quash the conviction, I set aside the sentence and I also set aside the compensation order. Therefore, the appeal is allowed basing on the afore said.

Right of appeal is explained.

S.C. MOSHI.

JUDGE.

28/09/2018.