

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

HC. CRIMINAL APPEAL NO. 48/2016

(Arising from the District Court of Ngara Criminal No. 83/2011)

1. MANILAMBONA S/O ATHANAS	}	-----APPELLANTS
2. NIYONGABO GILBERT		
3. NKURUNZIZA FEREDINA		

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

12/07/2018 & 19/07/2018

Kairo, J.

On 12/7/2018, the court allowed the appeal, quashed the conviction and set aside the sentence imposed on all of the Appellants. The court

further ordered the Appellants be released from the prison forthwith unless held for other legal cause.

The court reached the said decision following the Respondent's support to the grounds of appeal. Besides, before the oral submission from both parties, the court had the opportunity to go through the grounds of appeal, and the court record generally and had a settled mind that the prosecution failed to prove their case beyond reasonable doubt. Thus joined hands with the parties. However the court reserved the reasons for the said Judgment which is now set to give as hereunder.

The Appellant were not amused by the decision of the trial court in Criminal Case No. 83/2011, Ngara District thus decided to file this appeal to challenge the same. According to record, the Appellants were charged with five counts;

- First being in unlawful possession of Round of ammunition c/s 4(1) and 34 (2) of the fire arms and ammunition Act No 2/1991.
- Second count being in unlawful possession of fire arms c/s 4 (1) (a) and 34 (2) of the fire arms and ammunition Act No. 2/1991.
- Third count being in unlawful possession of public store c/s 312 A (1) (2) (3) (4) AND 35 of the Penal Code Cap 16 RE 2002.

- Fourth count being in unlawful possession of part one poison medicine without license c/s 37 (1) of Pharmaceutical and poison Act No. 9/1978 and
- Fifth count of conspiracy to commit an offence c/s 384 of the Penal Code Cap 16 RE 2002.

Upon adducement of evidence, the court found that the Appellants were all guilty of the 1st, 2nd and 3rd counts and entered conviction accordingly. However the court discharged all of the accused against the 4th and 5th counts after reaching a finding that the prosecution failed to prove the same.

It was alleged by the prosecution that on 19/7/2011 about 10:30 hours at Rulenge village within Ngara District in Kagera Region, all of the accused were found in possession of 163 round of ammunition of SMG/SAR, five round of ammunition of G.3. one fire arm make (sub machine Gun) with Reg. No. 3011059, three empty Magazine of SMG, four pairs of Uniform of TPDF, one Poison of medicine to wit one bottle of quinine sulphate tablets, five boxes of paracetamol tablets, ten bottles of quinine injection and five packets of amodiaquine tablets without having a permit or license. The prosecution also contended that on the same date and time and place, all of the three accused did conspire to commit the offence of armed robbery. They all denied the

counts. However were found guilty, of the three counts as earlier stated, convicted and sentenced to serve five years imprisonment in total. This is the decision aggrieved the Appellants, hence this appeal raising the following grounds of appeal:-

1. That the trial Court erred in facts and law by relying on the Caution statement taken by appellants before the Police men in 2011 as narrated by Pw5 on page three of the copy of Judgment rather than the order of the High Court Tanzania Bukoba to restate afresh case (Criminal Appeal No. 27/2013).
2. That the trial Court erred in facts and law by passing a Conviction and Sentenced on a falsified cases as the incidence took place in the village and it was said that, it was reported first at ward office but funny enough no any civilian was called to testify even the Ward Executive Officer but only members of Police.
3. That the trial erred in facts and law by imposing a conviction and sentence basing on contradicted evidence from the prosecution side as follows:-
 - a. That the prosecution failed to show exactly what kind of uniforms was found with the appellants (they contradicted themselves) at page two of the copy of judgment is shows that, the appellants were found with TPDF uniforms while at page three third paragraph as testified by PW6 D. 4768 S'Sgt Hamza

told the court that the uniform found with appellants were of Burundi Army.

- b. That at page two paragraph 4, PW2 and PW3 testified that after suspecting and asking the appellants where they were coming from and going they suddenly threw their luggage and run away while at the same page and the same paragraph they testify that after reporting the incidence to ward office and to Police station, they returned to the scene and saw 1st, 2nd and 3rd accused.
- c. That at page two of the copy of judgment PW2 testified that a gun, Magazine and a box of different medicines were shown where the same were hidden by the 1st and 2nd accused while at page three of the same copy of judgment Pw6 Confirms to find 3rd accused who was arraigned to Police station by the Village with medicine.

The Appellants were self represented while the Respondent was being represented by Mr. Kahigi, the Learned State Attorney.

When the appeal was scheduled for hearing, the Appellants prayed the Republic to start by replying to the grounds of appeal raised and that they will make their rejoinder later. The prayer was not objected and the court accordingly granted the same. The State Attorney started by

informing the court that, the Respondent generally concedes to the grounds of appeal. Starting with the 2nd ground, Mr. Kahigi contended that, the Appellants argue that they were convicted basing on falsified evidence as there was no villager or village authority who testified in court apart from the police officers. Mr. Kahigi went on that, though the offences concerns to be found or possess some items unlawfully but there was no evidence to show in what circumstances the Appellants were found with the alleged items.

He went on arguing that, there was no certificate of seizure which is contrary to section 38 (3) of the CPA Cap 20 RE 2002 adding that the provision require the officer to issue a receipt when seizing any property which omission creates doubts.

Going through the court record, it is true that no certificate of seizure was issued in respect of the seized item as required by section 38 (3) of Cap 20 (supra). The said provision which was couched in mandatory way provides as hereunder;

38 (3) *“Where anything is seized in pursuance of the powers conferred by sub section (1) the officer seizing the **thing shall issue a receipt acknowledging the seizure of that thing**, bearing the signature of the owner or occupier of the premises or his near relative or other person*

for the time being in possession or control of the premises, and the signature of witnesses to search, if any” (emphasis mine).

The word possession has been defined under section 5 of the Penal Code Cap 16 RE 2002 and in the circumstances of this case section 5 (a) is relevant which encompass actual or constructive possession as follows: possession *“to be in possession of or have in possession includes*

(a) not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not for the use or benefit of oneself or of any other person”.

The records reveals that the prosecution witnesses (police officers) testified that they were told where the said ammunition were which means they could have gone with certificate of seizure to where they were told the ammunition were so as to fill the same as required under section 38 (3). However, it is surprising and no reason was given as to why there was an omission of such an important document during the process of seizing the items so as to prove either actual or constructive possession. **[Refer the case of Moses Charles Deo vrs R [1987] TLR 134.** It is therefore the finding of this court that there is no proof that the

Appellants were found in possession of ammunition as alleged. The basis of faulting the 2nd ground is also applicable in respect of ground no 3 (b) and (c). Further the said omission creates doubts as to whether the Appellants were found in the possession of the alleged items as per the charge. The cardinal principle in case of doubts is that doubts are to be resolved in favor of the accused who are the Appellants in this matter.

The Appellants also has contended that there are contradictions on the prosecution witnesses. The Learned State Attorney also supports ground 3(a) to which I also do. The Appellants were charged with unlawful possession of public store according to the 3rd count. According to the particulars of the offence, it was alleged that, the Appellants were found with TPDF Uniforms, the property of the United Republic of Tanzania. However the witnesses on the prosecution testified that the Appellants were found in unlawful possession of the Burundi Army Uniforms. (Pw1 and Pw3 testimonies at pages 11, and 14 in enquiry). Looking at the two contentions, it is crystal clear that the evidence doesn't support the offence as per the charge. It goes therefore that the court's conviction was an error.

Mr. Kahigi in his reply to the 1st ground of appeal has contended that, the referred case doesn't concern the appeal before this court to which I agree. Thus the same is irrelevant.

All in all, it is the finding of this court that the Republic has failed to prove its case beyond the required standard which in Criminal Cases is beyond reasonable doubt. [Refer the cases of **Said Hemed VR [1987] TLR 117** and **Mohamed Matula VR [1995] TLR 3**.

In that regard therefore, I hereby quash and set aside both the conviction and sentence of the trial court. I further order the release of

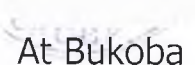
1. Manilambona s/o Athanas
2. Niyongabo Gilbert and
3. Nkurunziza Feredina.

Forthwith from the prison unless held for other legal cause.

It is so ordered.

Appeal Allowed.


L.G. Karro
Judge


At Bukoba

19/07/2018

Date: 19/07/2018

Coram: Hon. L.G. Kairo, J.

1st Appellant: }
2nd Appellant: } Present
3rd Appellant: }

Respondent: Absent with notice – Mr. Kahigi

B/C: Peace M.

Court: The case was scheduled for reading the reserved reasons for the Judgment delivered on 12/07/2018. The said reason are ready and the same are read over before the all of the Appellants but in the absence of Mr. Kahigi the State Attorney for the Respondent who gave a notice of absence in open court today 19/07/2018.


L.G. Kairo

Judge

19/07/2018