

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 382 OF 2017

YUGIN DOMINIC @ MWAKA..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Kisutu)

JUDGMENT

20.06.2018

A.Z.MGEYEKWA, J

In the Resident Magistrate's Court of Kisutu, Mr. Yugin Dominic @ Mwaka, the appellant was charged with the offence of unlawful possession of fire arm and unlawful possession of ammunition c/s 20 (1) and (2) and c/s 21 (a) of the Firearms and Ammunition Control Act No. 20 of 2015. The appellant was sentenced to five years imprisonment on each count, the sentence to run concurrently. The appellant is still dissatisfied, hence this appeal.

The facts of the case, in so far as they are relevant to this appeal, may briefly be stated. On 29.02.2016 AT Kimara Bonyokwa area within Kinondoni District in Dar es Salaam was found in possession of one firearm make shotgun cal 12 bore with serial No. 05071327 without a valid permit or license.

On the same date and place the appellant was found pending possession of a gun, had also four shotgun bullets cal 12 bore and six explosives make explosive TM V6 water get without valid permit or license. The appellant pleaded not guilty.

In the prosecution case, PW1 inspector Robert testified that on 29.02.2016 at about 12:00 noon he was informed that a person whom they were hunting for a long time has been seen at a bar located at Kimara Bonyokwa. They headed to the scene of the crime and arrested the appellant and send him to Chang'ombe Police station for interrogation.

PW1 further testified that they headed to the appellant premises and searched the house and the wife of the landlord witnessed the search. PW1 said that they found a bag with one shotgun, 4 rounds of ammunitions, 6 explosive wires, torch and a knife. The same was tendered before the court, admitted and marked as P1, P2, P3, P4, P5, P6 and P7 respectively.

PW2, E 6074 Detective Coplo Revocatus informed the court that on 09.02.2016 at 15 hrs they went to the scene of the crime and found the appellant was already arrested by other two police officers. PW2 testified that the appellant admitted to have the gun in his possession and when they searched his house and found the gun make shotgun without a base nor a pointer, six explosives (four small size and two big size), four rounds of ammunition for shotgun, one

torch, knife and wire all these were placed in the black bag (sack bag) then the appellant filled and signed the seizure form.

PW3 testified that he was the landlord of the appellant. He recalled that on 29.02.2016 around 21: 45 the appellant, his wife and six police officers entered the house for search whereas, the mjumbe's wife and PW3 had to witness. PW3 testified that during the search the police officers found a bag with a gun parts, knife, explosives, torch and ammunitions.

On defense case, DW1 the appellant denied committing the offence. He stated that it is not true that they have found him with the alleged items and that there were no fingerprints evidence report. He further stated that the search warrant tendered in court was illegal and the seizure note was forged.

Before this Court the appellant submitted seven grounds for appeal which can be crystallized as follows:-

1. That, your lordship the learned trial magistrate erred in law and fact when he believed that, the appellant was found in possession of exhibits P2, P3 and PW4 while the prosecution failed to produce the chronological documentation showing the seizer custody transfer and disposition to prove the legality of the discover of the shotgun, explosive and short gun bullet which alleged to have been found in the house of the appellant.

2. That, your lordship the learned trial magistrate grossly erred and misdirected to convict the appellant based on the evidence of recent possession in respect of exhibits P2, P3 and P4 disregarded were not supported by the evidence of the ballistic expert who was not called in trial in order to prove the material fact for uncountable reasons.
3. That, your lordship the learned trial magistrate misdirected and non directed in law to convict the appellant in a case which charge was not read over to the language which understood to the appellant.
4. That, your lordship the learned trial magistrate was totally wrong to convict the appellant in a case which was poorly investigated regarding the investigator was not summoned in trial court in order to establish how and why the appellant was arrested and connected by the offence charged.
5. That, your lordship the learned trial magistrate grossly erred in law and fact to convict the appellant relied on the testimonies of PW1 PW2 and PW3 who contradicted themselves as regard to the correct numbers of people who did participate on the house of the appellant on the material night.
6. That, the learned trial magistrate erred in law and fact to convict the appellant based on the evidence of PW1, PW2 and PW3 whose credibility was not assessed exhaustively before relied as basis of conviction against the appellant.

7. That the learned trial magistrate erred in law and fact by failure to observe the offence against the appellant was not proved beyond reasonable doubt.

At the hearing of this appeal the appellant appeared in person and defended for himself while Miss. Immelda, learned State Attorney represented the respondent.

Miss. Immelda Mushi, supported the appeal and stated that the trial court failed to establish the chain of custody starting from collection, preservation, transfer and disposition of the evidence as per exhibit P1 to P7. Instead the trial court issued the certificate of seizure that indicated the said items were seized from the appellant's house. In the case of **Paul Maduka & 4 others v R** Criminal Appeal No. 110 of 2007 the court understood the significance of a proper chain of custody that it is suppose to show the seizure, custody, control, transfer, analysis and disposition of evidence.

Failure to establish the chain of custody while the items caught were in possession of the appellant and the items were the base for his conviction then the respondent is required to expunge all the exhibits from P1 to P7 because the procedure of handling the chain of custody was not observed as per of s/c 38 (3) of the Criminal Procedure Act Cap. 20 [R.E 2002].

Further the learned State Attorney forcefully argued that the evidence collected from PW1 and PW3 were contradicting each other. PW1 testified that he found the bag that contained the firearm in the

bedroom of the appellant and that the bag was found in a big plastic basket of cloths (Tenga). While PW3 testified that the bag was found behind the door. Due to these contradictions it's clear that these testimonies are doubtful because both PW1 and PW3 were present during the search.

I have given due consideration to the argument of both sides. Now I proceed to determine the appeal, which is before me.

I have found that there is no need to address grounds two, three, and four of the appeal since the trial court followed the procedure properly. Therefore, these grounds should not tie us much, same lacks merit.

With regard to ground one of the appeal, the chain of custody was not well handled. The principle of chain of custody entails the court careful handling of what is seized from the accused up to the time when evidence is tendered in court. In order to maintain chain of custody, the appellant has to show affirmatively that tempering has taken place and the court must prove its chronological documentation that record the sequence of custody of evidence and the evidence collected needs to be preserved from the time it is collected to the time it is presented in court. The idea behind recording the chain of custody is to establish the alleged evidence is in fact related to the alleged crime. In the case of **Illumina Mkoka V. Republic, [2003] TLR, 245 (Unreported)** the court held that:-

"... the point that proper recording of the chain of custody of exhibits helps to establish that the alleged evidence (exhibits) is in fact related to the alleged crime."

Part of the items seized from the appellant were claimed to have been sent to the safe keeper for custody but it is not revealed how the seized items were kept. The trial magistrate admitted the exhibits and noted that the question of chain of custody is pertinent that it not to be disregarded. In the case of **Director of Public Prosecutions v Shirazi Mohamed Sharif Criminal Appeal No. 184 of 2005** the court stated that:-

"On the question of mishandling the exhibit ... the handling of the exhibit still it is the view of the court that it is the question of believing that PW4 and PW5 that what they found from the accused is what they gave to PW6, I cannot rule out completely the possibility of mixing up the exhibits, but in the absence of a clear evidence the court cannot merely rely on that omission to record, as also it is the view of this court that this is a minor irregularity of which in the absence of clear evidence, the court cannot rely on it that therefore they have been tampering with the exhibit by the police witnesses."

In the case of **Paul Maduka & 4 others v R** Criminal Appeal No. 110 of 2007 the court explained the main risk of breaking chain of custody, which is holding evidence that is inadmissible in court.

With regard to ground five and six of the appeal, which relates to the failure of the prosecution witnesses to state reliable evidence, there was a contradiction of PW1 and PW3 evidence. PW1 said he found the bag, which contains the firearm in a plastic basket of cloths while PW3 testified that the bag was found behind the door. Due to these contradictions it's clear that these testimonies are doubtfully because both were present during the search. In the case of **Leornard Zedekia Maratu v R** Criminal Appeal No. 37 of 2004 the Court of Appeal stated that:-

"The magistrate did not subject the evidence to close scrutiny. If he had, he would have found some glaring contradictions in the evidence for the prosecution."

If the lower court could scrutinize the testimonies made by PW1 and PW3 then it could determine that their testimonies were false, incredible and unreliable.

For the foregoing reasons, I allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison forthwith unless he is held for other lawful purpose.

It is so ordered.

DATED at Dar es Salaam this 21st day of June, 2018




A.Z Mgeyekwa

JUDGE

21.06.2018

Judgment Delivered in Court Chambers in the presence of the appellant and in presence of Ms. Immelda Mushi, the learned State Attorney this date 13.06.2018.




A.Z Mgeyekwa

JUDGE

21.06.2018