IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 371 OF 2016

(DAR ES SALAAM REGISTRY)

(Originating from The District Court of Kinondoni at Kinondoni, Criminal Case No 9 Of 2015 Before: Hon. Kuppa– RM Dated 07th June, 2016)

DEUS JOSIA KILALA---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Last order date: 13th June, 2018
Judgment date: 21th June,2018

MLYAMBINA, J.

Before the District Court of Kinondoni at Kinondoni, the appellant was convicted of unlawful possession of Fire Arms and Ammunitions contrary to section 4 (1) and 2 of Arms and Ammunition Act Cap 223 Act (R.E.2002) and sentenced to serve a term of ten (10) years imprisonment. Being aggrieved with the conviction and sentence, the appellant lodged this appeal on four grounds namely; -

1. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant in a case where the prosecution did not tender a certificate of seizure duly signed by both parties to fortify seizure of exh. P1 and P2 in compliance with mandatory requirement.

2. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant on basis of unjustified corroborated prosecution evidences.
3. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant in a case where the prosecution failed to prove his guilty beyond any shadow of doubt as charged.

WHEREOF, the appellant prayed that this Court to allow this appeal, quash the conviction and set aside the sentence.

In addition to the afore grounds of appeal, the appellant lodged 8 supplementary grounds of appeal, namely; -

1. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on exh. P2 collectively guns makes mark IV, two magazines and one SMG (at page 14 line 5-7 and exh.P3 black bag at page 15 line 4-9) while the prosecution side failed to prove the chain of custody on the alleged fire arms exh.P2 collectively as it failed to tender a search warrant, certificate of seizure and a certificate of handing over between PW1, PW2, PW3, PW4 and PW7 (Police Officers) contrary to the procedure of law.
2. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on exh. P2 (the fire arms mark IV, two magazines and SMG (and exh. P3 a black

bag) at page 15 line 4-9 and page 14 line 5-7 which were un-procedurally tendered by PW1 (Police Officer) who stated to have no search warrant when he searched the appellant at page 16-line 13-14 contrary to the procedure of law.

3. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on exh. P1 (certificate of seizure) which was un-procedurally tendered by PW1 under sworn affidavit at page 13 line 5-6 while the same certificate of seizure it was already tendered as exh. P3 in Criminal Case no.392/2014 (Criminal Case No 219/2014) at page 5 in the copy of judgment before Hon. Kiliwa- RM as it was approved by the trial Court and the PP (at page 11 line 12-17 and page 8-line 12-15) contrary to the procedure of the law which prevent an exhibit not to be tendered twice into different cases.
4. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on retracted and repudiated caution statement exh. P5 which was recorded as exhibit P2 (at page 20 line 2- 4) while the trial Court erroneously admitted in evidence as exhibit while it failed to conduct an enquiry hearing to determine its voluntariness before relied upon as basis of conviction as the appellant objected the same (at page 19 line 12-13).

5. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on retracted and repudiated statement exh.P5 (exh.P2) (at page 20 line 2-4) which was un-procedurally tendered by PW2 after the expiration of the prescribed period by law of four hours while it failed to read over the statement (exh.P5) to ascertain its credibility before relied upon as a basis of conviction contrary to the procedure of law.
6. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on the discredited testimony of PW5 and PW6 who merely stated police to have their Pistol only (at page 34 line 2, 8-9) contrary to PW3 F.3931D/Surgent who told the court that they were not less than 8 police officers and they had Pistol and SMG (four fire arms) (at page 24 line 9-11).
7. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on exh.P8 (P5) (One spent) cartridge by mark IV and two spent cartridge by SMG) (at page 38 line 6-14) and exh.P9 (P6) Ballistic report) at page 39 line 1-6 while PW7 (Inspector Paul Methusela Mugema) failed to prove the chain of custody on the alleged fire arms (A) SMG no. 13975, 7.62MM Calibers (B) Riffle mark IV with no number 30-06 Caliber (C) 11 rounds of SMG/ SAR7.6MM caliber and (D) four rounds riffle mark IV

30-06 caliber at (D) 4 rounds of riffle mark IV 30-06 caliber (at page 37 line 1-4) contents of exh.P2 collectively (at page 14 line 5-7) as the prosecution side failed to tender before the trial court a certificate of handing over exhibits between PW7 and PW4, PW3 and PW1 contrary to the procedure of law.

8. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant relying on weakness of the defence testimony at page 42-45 while sentencing the appellant a term of custodial imprisonment first without fine contrary to the procedure of law while the trial court lacked a jurisdiction as the offence stated to have occurred at Yombo Kilakala within Temeke District while the charge frequently was withdrawn and substituted (at page 2-5) contrary to the procedure of law.

WHEREFORE the appellant prayed; -

(a) That, the appeal be allowed, quash the conviction and set aside the sentence and leave the appellant free at liberty.

(b) That, the appellant be present at the hearing of the appeal.

At hearing, the appellant simply told the Court that he is ignorant of the law. The appellant therefore prayed all his

grounds of appeal be considered, the conviction and sentence be set aside so that he can be set at liberty and join his family to develop the nation.

In reply, Christin Joas supported the conviction. The learned State Attorney submitted that the prosecution case was proved beyond any shadow of doubt. That, PW1 and PW3 proved that they arrested the accused, went to his home in the presence of PW5 (the Ten Cell Leader) and the accused Landlord (PW6). They witnessed search of the accused room. That, all of them proved that during search fire arms and ammunitions were found. The Police prepared search warrant which was admitted as exhibit P1.

The learned State Attorney went on to submit that, thereafter the accused was taken to police for caution statement by PW2 surgent Mussa. The Caution Statement was not read but there is still another strong evidence.

The learned State Attorney did submit that, after seizure, the fire arms and ammunitions were taken to the forensic bureau where PW7 is the expert who did examinations, tendered the fire arms and ammunitions and forensic report. The same were admitted as exhibit P5 without any objection from the appellants herein (page 38 of the proceedings).

It was the submission of the learned State Attorney that the Court convicted the appellant for unlawful possession of fire arms of which he was found with.

On the point of chain of custody, the learned State Attorney was of reply submissions that the law does not require chain of custody in cases of this nature. The fire arms do not need chain of custody. PW7 proved that he received the exhibit from PW3 (Inspector Thabit). There was also a chain of custody.

On the second ground of appeal concerning lack of search warrant (page 16), the learned State Attorney invited the Court to read page 16 line 12-14 where the witness said that he prepared temporary emergence search warrant of which it is permitted under Section 38 (3) of Criminal Procedure Act, cap 20 (R.E. 2002).

With regard to the allegation that the appellant objected the caution statement and there was no inquiry, the learned State Attorney was of reply that at page 19 of the proceedings it is revealed that PW2 while tendering the caution statement, the accused never objected its tendering. That, what he objected was of not been taken to Kawe Police Station.

The learned State Attorney added that at page 43 line 12 in his defence under oath, the accused admitted that the

appellant was arrested and taken to Kawe Police Station. It was a contradiction of his evidence. There was no reason as to why caution statement should have not been admitted.

The learned State Attorney was of conclusion that the Republic proved its case beyond reasonable doubt. The respondent therefore prayed the appeal not be granted.

In rejoinder, the appellant was of submission that, the learned State Attorney objected the first supplementary ground, but to the knowledge of the appellant, police are guided by PGO 229 which require police officers to fill PF16 and PF145 when handing over exhibit to store officers in order to remove doubts to the trial court.

The appellant rejoined further that the republic never complied with the requirement set out under PGO 229 from page 521-525.

On the point of caution statement, the appellant was of rejoinder that from page 20 line 2-4 the appellant objected for the statement to be admitted. That, the trial court ought to have a trial within a trial to the contrary it was not done so.

The appellant went on to rejoin that the trial court never read the caution statement for inquiry contrary to the law.

On chain of evidence, the appellant was of rejoinder that, PW5 and PW6 informed the trial court that the police officers appeared at the locus with only one fire arm (Pistol) which is contrary to the evidence of PW3 who informed the Court that they were 8 persons with a pistol and SMG. That, such evidence was in array with the evidence of PW5 and PW6.

According to the appellant, the evidence of PW7 (page 38 line 6-14), (page 39 line 1-6), this witness told the Court that he is the ballistic expert "*mtaalamu wa milipuko*". He never informed the Court on whether the fire arms had finger prints of the accused. That, even the expert never connected the evidence with that of the appellant. The expert merely stated that the fire arms were functioning. There was no any connection with the appellant.

On exh.P1 certificate of seizure, the appellant was of rejoinder that, the court relied on that exhibit illegally because such exhibit was tendered in criminal case no. 392 of 2014 before the Kinondoni District Court as it was proved by the State Attorney in that case and verified by the Court at page 5 of its judgment and page 11 line 12-17 of the proceedings and page 8 line 12-15 whereby such exhibit was already used in another case. Thus, the court erred in admitting the exhibit already admitted in other cases.

The appellant was of further rejoinder that case no. 392/2014 involved the appellant. But the appellant was acquitted in that case.

On the 8th ground of appeal page 42-45, the appellant was convicted on imprisonment only but the law has two options, either to be imprisoned or pay fine.

In considering the grounds of appeal, I should point out clearly that at appeal stage, it is not necessary that every decision must be turned down. The grounds for the appellate court to look upon are *inter alia* that there are legal and factual anomalies in the decision sought to be challenged. In the case of **Peters v. Sunday Post Ltd. (1958) EA 424** where the Court of Appeal for East Africa set out the principles in which an appellate court to interfere with the lower court decision. It stated: -

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved,*

or has plainly gone wrong, the appellate court will not hesitate so to decide".

In the instant matter we are of increasing view that this is not one of cases whose decision is to be interfered. In reaching to such finding, the Court shall address itself on five issues to be derived from the appeal grounds and submissions of the parties. These are: **One**, whether the appellant was found in possession of fire arms: **Two**, whether the law requires proof of chain of custody in cases involving possession of fire arms and ammunitions: **Third**, whether section 38 (3) of criminal procedure act, Cap 20 (R.E. 2002) permits the use of temporary emergence search warrant: **Four**, whether the prosecution side proved their case as per the requirement of the law: **Five**, whether non reading of the caution statement in this case renders the whole decision a nullity.

As regards the first issue of possession of the fire arms and ammunitions, it is the well settled principle that the evidence should not leave any doubt. (**See Kisinza Richard Vs Republic 1989 TLR 143**). Indeed, the Court of Appeal of Tanzania in the case of **Majuto Lungwa vs the Republic Criminal Appeal No. 269 of 2015 (unreported)** while dealing with an appeal of this nature it clearly observed that *"without resolving contradictions in the evidence of witnesses on*

how the gun and ammunition was actually found in possession of the appellant we cannot say that the evidence on possession was proved beyond reasonable doubt".

As opposed to the facts in this case as correctly argued by the learned State Attorney, PW1 and PW3 proved that they arrested the accused, went to his home in the presence of PW5 (the Ten Cell Leader) and the accused Landlord (PW6). They witnessed search of the accused room. That, all of them proved that during search fire arms and ammunitions were found. It is true the appellant objected tendering of the fire arms mark IV, two magazines and SMG as well as the seizure report. But there were no justifiable reasons been adduced. That is why the same were admitted as exhibits P1 and P2 respectively (page 13 and 14 of the typed proceedings).

On the second issue, PW1, PW3, PW5 and PW6 were the important witnesses in proving possession of the fire arms and ammunitions, the evidence showed that the appellants were found possessing the same. In the case of **Simon Ndikulyaka vs the Republic, Criminal Appeal No. 231 of 2014 Court of Appeal of Tanzania** discussed the issue of possession at page 6 when refereeing to the case of **Mosses Charles Deo vs the Republic (1987) TLR 134** and held; -

"for a person to have possession actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them..."

The appellant in this case was found in actual possession of the firearms and ammunitions. There was no defence that he was not aware of the same. The only defence was that the said exhibits were also tendered in another Criminal case involving him, the allegation of which was over ruled during admission of exhibit P1. There is no strong evidence to the contrary to disprove that the firearms and ammunitions were not in the possession of the appellants.

As far as the third issue is concerned, the proviso of Section 38 (1) of the Criminal Procedure Act, Cap 20 (R.E.2002) apart from the search warrant the law permits any written authority to any police officer to do search if there is satisfaction that life or property would be in danger. Therefore, we find nothing wrong for the copy of search warrant to have been used in the circumstances of this case.

The fourth issue is on proof of the prosecution case. We are of fortified view that the prosecution side proved their case beyond reasonable doubt.

On the fifth issue, the appellant has two assertions. One, that the trial Court erred in admitting the caution statement without

been read. Two, that the appellant had objected the tendering of the caution statement, thus the trial Court ought to have conducted a trial within a trial. The learned State Attorney has conceded that the caution statement was not read to the appellant prior its admission.

Upon going through the records, I noted true that the caution statement was not read. Therefore, its admission was against the law. In the case of **William Lengai (Appellant) v Republic Criminal Appeal No. 203 of 2007 Court of Appeal of Tanzania at Dodoma (Msoffe J.A, Rutakangwa J.A and Bwana J.A)** held *inter alia* that: -

> *The way the cautioned statement was recorded neither shows that the appellant was given an opportunity to agree to be recorded, nor was it read over to him after the recording. All these irregularities in respect of the cautioned statement should have led the two courts "a quo" not to rely on it, let alone to admit in evidence....in absence of the said statement, the prosecution case did not have a strong legal leg to stand on, leading to the conviction of the appellant..."*

It follows therefore that the caution statement of the appellant was admitted without adhering to the legal procedure. On the point of conducting a trial within a trial before the RMs Court, I don't share the view of the appellant that upon the caution

statement been rejected by the appellant the trial Court ought to have conducted a trial within a trial. There is no mandatory procedural legal requirement of conducting a trial within a trial in the Resident Magistrate Courts. *In the case of* ***Kulwa Athumani @ Mpunguti 2. Hamisi Juma shoka 3. haruna hassani @ kichwa 4. ramadhani salum @ babu msenda versus the republic criminal appeal no. 29 of 2005 court of appeal of tanzania (unreported),*** it was held;

> *"unlike the practice applicable in the High Court, where a trial within a trial is held in order to establish the voluntariness of a disputed statement in the subordinate courts, no such practice is applicable. In that case, an enquiry on the voluntariness or otherwise of the statement can be ascertained from the evidence on the record...."*

Needless the afore findings, the case of William Lengai is distinguishable to this case on one important aspect. Whereas in William Lengai case the prosecution side had no other strong evidence to convict the appellant, in this case there are other strong evidences to convict the appellant as found herein above.

In the circumstances of the afore findings, the decision of the trial Court was reached upon the prosecution side proving their case as per the requirement of the law. Therefore, the appellant

appeal is dismissed, the trial court conviction and sentence are upheld respectively. It is ordered accordingly.

Y. J. Mlyambina

Judge

21/06/2018

Dated and delivered this 21th day of June, 2018 in the presence of the appellant in person and learned State Attorney Monica Ndakidemi for the respondent.

Y.J.Mlyambina

Judge

21/06/2018