

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 47 OF 2018

(Original Criminal Case No. 98 of 2015 from Mpanda District Court)

VICENT YUSUPH..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

MRANGO, J

25th February – 25th March 2020

This appeal arises from the decision of the District Court of Mpanda at Mpanda (henceforth the trial court). The accused persons, namely Vicent Yusuf and Mkuki Juma were jointly stand charged in Criminal Case No. 47 of 2017 with the offences comprised of two counts, one count being unlawful possession of firearm c/s **4 (1) (2)** and **section 34 (1) (2)** and second count, unlawful possession of ammunitions **C/S 4 (1) (2) of the Arms and Ammunition Act, Cap 223 RE. 2002**. They were all convicted and each sentenced to ten years imprisonment or each to pay a fine of seven million Tanzania shilling.

It appears that, the original record of the case has been misplaced, however the affidavits of Hon. Gosper Bernard Luoga – Resident Magistrate Incharge of Mpanda District Court and that of Yusuph Adam Mohamed – Court Clerk as then was of Mpanda District Court may assist in nutshell to state the facts of the case.

The appellants, namely Vicent Yusuf and Mkuki Juma were jointly charged before the District Court of Mpanda for the offence of unlawful possession of fire arm and ammunitions contrary to **section 4 (1) (2) , section 34(1) (2)** and **section 4 (1) (2), section 34 (1) (2)** respectively of the **Arms and Ammunition Act, Cap 223 RE 2002**. After full trial the trial court found them guilty, convicted and eventually sentenced each to custodial sentence of 10 years imprisonment jail or each to pay a fine of seven million Tanzanian shilling.

Aggrieved by the trial court decision, the appellant, Vicent Yusuf lodged five (5) grounds of petition of appeal. However after I read them, I found basically the appellant's complaint is one, whether the case against him was proved beyond reasonable doubt.

When the appeal was called on for hearing, the appellant opted not to appear before the court as he has been transferred to Ukonga Prison, Dar es Salaam for attending medical treatment; whereas the respondent *cum* republic had the legal service of Mr. Saraji Iboru – Senior State Attorney.

Arguing in support of the appeal, the learned state attorney said the matter is for hearing today. Thus he said the appellant prayed for the matter to proceed in his absence.

He argued that the appeal was lodged in this court without attaching necessary documents. He said there is affidavits indicating the misplacement of the original record Criminal Case No. 98 of 2015 Mpanda District Court. The affidavits is that of Gospar Bernard Luoga DRM i/c Mpanda District Court and Yusuph Adam Mohamed the Court Clerk of the said court. He said into that effect, the only document available is the judgment.

Mr. Saraji informed the court that taking into that consideration, the Court of Appeal, has ordered the court to proceed with the case using the available documents as per the decision in **Criminal Appeal No. 486 of 2015, Robert Madolio VS. Republic (CAT) at Tabora** (unreported).

It is his prayer that this court to use the copy of judgment which is available.

He further said, the appellant has lodged five (5) grounds of appeal.

In analyzing the grounds of appeal, he said the first ground of appeal is to the effect that the prosecution has failed to prove the case beyond doubt and the third ground and the fourth ground are identical and thus he prayed to argue these grounds of appeal together.

He went on saying these grounds of appeal are meritless, as they support the conviction since the Republic proved the offence beyond all reasonable doubt.

To fortify his position he added that four (4) prosecution witnesses testified and the two witnesses were police officer and two were independent witnesses. All the prosecution witnesses testified that on 21.03.2015 testified that the appellant was arrested at Bugamba Bar having a bag and after a search, he was found in possession of a gun of which its barrel was cut and he had nine (9) rounds of ammunition. A search order was prepared and signed by PW2, PW3 and the appellant. PW2 and PW3 and the appellant. PW2 and PW3 were independent witness.

All the four (4) prosecution witnesses were firm with what they witnessed. There is no cogent evidence to default what they have testified.

Coming to the 2nd ground of appeal, the available record is silent as to whether the certificate of seizure was signed at the Police Station and not at the scene of event as alleged by the appellant. PW2 and PW3 said that the certificate of seizure was signed at the scene. They were independent witnesses and they are credible and reliable witnesses. What is stated by the appellant in this ground of appeal is an afterthought.

On the fifth grounds the appellant is alleging that he was not accorded legal representation. The offence of which the appellant was charged and convicted does not require the Republic to provide legal representation. That is personal arrangement.

He further said at page 13 of the judgment the trial magistrate indicated that this court therefore finds the accusations against the 2nd accused persons, being proved beyond reasonable doubt. It finds him guilty and convicts him **u/s 235 of the Penal Code Cap. 16 RE: 2002.**

Mr Saraji informed the court that he is aware of convicting and accused with the offence of which he was not charged. However the decision of

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Court of Appeal in **Imani Charles Chimango V.R.** Criminal Appeal No. 382 of 2016 (unreported) at Pg. 10 the court said since the word convict is in the judgment that amounts to proper conviction. Thus he prayed for the appeal to be dismissed.

Having gone through the trial court's judgement, submission by Mr. Saraji, and grounds of Appeal, I have one issue to resolve that is whether the case was proved beyond reasonable doubt by the prosecution.

As it can be scanned from the trial court judgement that PW1, a police officer along with two other police officers conducted a search in the presence of civilians (independent witnesses), who are PW2 and PW3 where a short gun and 9 round of ammunitions were retrieved from the bag which was held by the appellant and his fellow. In the record of the copy of judgement, PW1 and PW3 described themselves as motorcycle riders (bodaboda) when they were testifying before the trial court.

In their testimonies before the trial court, PW1 and PW3 said on the 21st day of March 2015 at around 15:30hrs they were at Bugamba bodaboda post. They saw two persons coming and sat on the bench. The shorter one had a bag. After a shorter while they saw three people coming,

who were later identified as police officers. The police officers told the two persons that they were suspecting them over their bag after introducing themselves as police officers. The police officers seized the bag, opened it and eventually conducted a search in front of them, where a short gun and ammunitions were retrieved among other things. The police officers took the suspects into the van along with them to the police post station. They told the trial court that they were able to identify their signatures on the seizure form.

Other witnesses, PW1 and PW4 who are police officers also testified the same as witnesses PW2 and PW3 told the trial court. They told the trial court that after receiving the information from the informer they started making a follow up of the suspects who were ailing from Mwanza to Mpanda. They suspected accused person along with the appellant who had a bag and while moving together. The suspects went to sit a Bugamba Bar. They asked some civilians (PW2 and PW3) to accompany them. They told the suspects that they are suspicious of the gun inside their bag which was with the appellant. As the suspects denied they conducted a search where a short gun and 9 round of ammunitions were found (exhibits P2, P3 respectively). PW1 told the trial court that he signed the search warrant

together with PW2 and PW3 who were there at the scene. Then they took the accused persons to the police post station.

Having analyzed the above testimonies of PW1, PW2 and PW3 it is obvious one can see the contradiction as to the place where the certificate of seizure was signed by the appellant, PW2, PW3 (civilians) and the police officer (PW1). PW1 informed the trial court that the seizure form was signed at the area of scene before moving to police post while PW2 and PW3 all informed the trial court that after police have conducted a search to a bag where a short gun and the 9 round of ammunitions were found, they were taken to the police post station to write and sign what appeared to have transpired at the area of scene.

Resolving the inconsistency of the testimonies of the witnesses is very crucial on the side of the prosecution out of that the testimonies is not to be relied upon by this court.

PW4 said that he interrogated the 1st accused person (appellant) who admitted to have committed the offence. PW4 further informed the trial court that he wrote the cautioned statement of the appellant which was admitted by the trial court as exhibit P7. However, in one of his complaint

appellant said he did not admit the commission of the offence levelled against him. In the absence of the original document in this appeal, this court fall short in assessing the credibility of the tendered cautioned statement. There are questions left unanswered in the absence of the trial court record. Whether the cautioned statement was made freely and voluntarily. Whether the cautioned statement was recorded within prescribed period of time, whether the cautioned statement was properly admitted in evidence by following laid down procedure or not. Whether the appellant had a chance to raise an objection to the admitted cautioned statement or not. Whether it was actually tendered before the trial court as evidence. All these issues were to be resolved by this court by considering the records of the trial court. A copy of judgement alone cannot be of any assistance or suffice to determine fairly the issues pointed out and other complaints as raised by the appellant in his petition of appeal.

It is my firm view that the complaints as raised by the appellant in this appeal are to be answered affirmatively, short of that the appellant has successfully casted doubt on the prosecution case. Reality of what transpired in the trial court is unknown before this court in the absence of the trial court record. Assuming that the proceedings were improper before

the trial court, I think will make a bad precedent as well against the established law and practice. The law is very clear that standard of proof in criminal cases is that of that of proof beyond reasonable doubt. What the accused has to do is to cast doubt on the prosecution case. If he succeed the accused is entitled some benefit of doubt. See the Court of Appeal Case of **Mohamed Said Matula versus. R, [1995] TLR 3.**

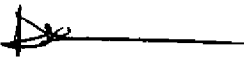
However, I am aware of the argument as raised by the Senior State Attorney that failure to convict the person to the section of which he was charged is not fatal and as well amount to proper conviction where trial court clearly and specifically use the word "*convict*" in the judgement as per case of Imani **Charles Chimongo vs. Republic (CAT) Criminal Appeal No. 382 of 2016** (Unreported) where Hon. Mziray, JA was interpreting **section 235 (1) of Criminal Procedure Act, Cap 20 RE 2002.**

Taking into consideration complaints as raised by the appellant and as well discussed by this court, I am of the settled mind that the charge against the appellant person was not proved beyond reasonable doubt.

Sufficient doubt ought to have resolved to the benefit of the appellant. He therefore accorded with such benefit.

Having said above, I allow the appeal, quash the conviction and set aside sentence with an order for the appellant's immediate release from prison unless is otherwise lawfully held.

It is so ordered.


D. E. MRANGO
JUDGE
25. 03. 2020.

Date - 25.03.2020
Coram - Hon. D.E. Mrango – J.
Appellant - Absent
Respondent - Mr. Simon Peresi – State Attorney
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 25th day of March, 2020 in the
absence of the Appellant and in the presence of Mr. Simon Peresi
– Learned State Attorney for the Respondent/Republic.

Right of Appeal explained.


D.E. MRANGO

JUDGE

25.03.2020