IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC. CRIMINAL NO. 08 OF 2021

(Originating from Economic Case No. 04 of 2019 in the District Court of Songea at Songea)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

JUMA SAID @ ALLY ..... RESPONDENT

JUDGMENT

Date of Last Order:15/7/2021
Date of Judgement: 02/8/2021
BEFORE: S.C. MOSHI, J.

The respondent Juma Said @ Ally was arraigned before the District Court of Songea for the offence of Unlawful possession of a firearm contrary to section 20(1) and (2) of the Firearms and Ammunition Control Act, 2015 read together with section 57(1) and Section 60(2) of the Economic and Organized Crimes Control Act, Cap. 200 R.E 2019 and paragraph 31 of the Economic and Organized Crimes Control Act Cap. 200 R.E 2019. The particulars of the offence show that on 23rd day of April 2017 at Wenge Village within Tunduru District in Ruvuma Region the respondent was found in unlawful possession of one Firearm make Riffle 375mm with serial number V 19743 without a valid licence or permit for the first count and Unlawful possession of ammunition contrary to section

21 and 60(1) of the Firearms and Ammunition Control Act of 2015 read together with section 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap. 200 R.E 2019 and paragraph 31 of the Economic Organized Crimes Control Act Cap. 200 R.E 2019 for the second count. The particulars of the offence read that on the 23rd day of April 2017 at Wenje Village within Tunduru District in Ruvuma Region the respondent was found in unlawful possession of six ammunitions of firearms make Riffle 375 mm without a valid licence or permit. When the charge was read to the respondent, he pleaded not guilty. The prosecution case was heard, at the completion of hearing the trial court ruled out that the prosecution failed to establish a prima facie case against the respondent; hence it proceeded to acquit him under section 230 of the Criminal Procedure Act Cap. 20 R.E 2019.

Aggrieved by the ruling the appellant has filed this appeal on the following grounds; -

1. *That, the trial Magistrate erred in law and facts by ruling that the Prosecution failed to establish a prima facie case hence the accused(respondent) has no case to answer, while the evidence adduced by Prosecutions particularly of G.3589 DC Mohamed (PW2), A/INS Aliko Mw3akalindile (PW4) and F. 5914 D/C Hafidhi (PW6) all circumstances of the case as it was stated by other*

witnesses were sufficient enough for the court to find the respondent with case to answer.

2. *That, the Trial Magistrate erred in law and facts by ruling that the prosecution witnesses who testified before the court were only Police Officers with no independence witness while in the face of law every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing such witness.*
3. *That, the trial Magistrate erred in law and facts by ruling that chain of custody of the said firearm was proved without chain of custody record while oral evidence is sufficient without paper trail movement to prove the fact.*
4. *That, the Trial Magistrate erred in law and facts for not considering the caution statement (Exhibit A2) by stating that PW2 failed to sign in each page while he signed some of the pages including the first page and at the end of the statement this shows no miscarriage of justice to respondent.*
5. *That, the trial magistrate erred in law and facts to rule out that there were two different signatures of the respondent in exhibit A2 and exhibit A3 while she is not an expert of hand writing and*

also the respondent did not object the admissibility of the said documents basing on such ground.

6. *That, the trial Magistrate erred in law and facts to rule that there were different names of the respondent in charge sheet and in exhibit A3 while respondent himself did not object his particulars to be known as Juma Said @ Ally, Juma Said Ally Karamali @ Mojabila and Juma Said @ Ally Kalamali @ Mojabila in exhibit A3.*

During hearing of the appeal, the appellant was represented by Ms. Amina Mawoko, state Attorney and Mr. Shaban Mwegole Senior State Attorney whereas the respondent appeared in person.

On the first ground of appeal Ms. Amina submitted that contrary to court's analysis, that there was no prima facie case, she was of the view that there was sufficient evidence to call the accused (respondent) to defend himself. She argued that, the testimony of PW2, PW4 and PW6 connected the accused to the offence, being found in possession of fire arm and ammunitions. She said that in exhibit A.2, a caution statement indicates that the accused confessed that he was found in possession of the fire arm and ammunitions which was supported by the testimony of PW4 who testified that he found the accused with the fire arm and ammunition and filled a certificate of seizure, exhibit A.3.

She argued that, a ruling on a case to answer does not connote that the accused is guilty, at that stage the court couldn't have directed itself to decide if prosecution's case is not sufficient to call the accused to defend himself as if the court was writing a judgment of final determination of the case. In support of her submission, she cited the case of **Rex V. Jagjiwan M. Patel and 4 others** (1948) TLR, 85.

On the second ground, she submitted that the court erred for failure to believe witnesses for the reason that they were all police officers. She said that every witness must be believed unless there is good reason for not believing him/her citing the case of **Goodluck Kyondo V.R,** (2006) TLR, 363. She admitted that the witnesses were police officers, however their testimony was never challenged, so the court ought to consider credibility of their evidence and not to consider the person who was called to testify. She added that, section 127(1) of the Evidence Act, Cap. 6 R.E. 2019 provides that every witness is competent to testify; it does not state who is to testify i.e., does not state the category like police officers, that these are not competent. Therefore, she said that there was no reason for the court not to believe them for the reason that they were police men.

Regarding the third ground she said that, there was no documentary evidence to prove a chain of custody of the exhibit. She contended that the court based its finding on a principle of law which has been varied by

many Court of Appeal decisions; she referred to **Paul Maduka and Four Others vs. Republic**, Criminal Appeal No. 110 of 2007 court of appeal sitting at Dodoma (Unreported). She said that, Paul **Maduka's** case is distinguishable for the reason that it involved notes which may change hands easily however in the case at hand the items were a fire arm and ammunitions which cannot change hands easily. She said that, chain of custody doesn't have to necessarily be proved through paper evidence. Oral evidence by witnesses who establishes how the exhibit was received, Kept and brought to court was sufficient evidence to show that a chain of custody wasn't broken. In this regard she referred to the case of Abas **Kondo Gede V.R,** Criminal Appeal No. 472/2017, Court of Appeal sitting at Dar es Salaam. (unreported), at page 22. She said that, in the present case, the court didn't find that there was no chain of custody but it needed paper evidence.

On the fourth ground she said that, the court found that exhibit P.2, the accused persons caution statement was not signed on each page. She contended that, this did not cause miscarriage of justice as the accused person signed on the first page and the last page; however, there is no law requiring a caution statement to be signed on each page.

On the fifth ground she said that, the court held that there were two signatures in exhibit P.2 and exhibit P.3 which were different. She

said that, the trial Magistrate is not a hand writing expert; secondly the accused did not object or deny that the signatures were not his. She argued that, even when the witnesses were tendering the exhibits, the appellant didn't cross examine the witness, she cited the case of **Martin Misara V.R,** Criminal Appeal No. 428/2016, Court of Appeal sitting at Mbeya which explains the effect of failure to cross examine.

Lastly, she said that, the court misdirected itself when it found that the name of the accused in the charge sheet is different from the name which is in the certificate of seizure. She pointed out that, in the charge sheet it reads **Juma Said @ Ally** while in the certificate of seizure it is **Juma Said Ally Karamali @ Mujabila** and **Juma Said @ Ally Karamali @ Mujabila.** She contended that the accused did not dispute the names, and he didn't object admission of exhibit P.3 on the ground that it was not his name.

She finally prayed that, the appeal be granted basing on the above grounds, and she proposed that the accused be called to defend himself so that the court can get a chance to analyze the evidence and reach at a just decision.

In reply the appellant submitted that, the reasons by the appellant be rejected because they have no basis. He prayed the court to uphold

the decision of trial court because the decision is correct and is based on law.

Upon perusal of the proceedings of the trial court while composing the judgement, I noted some procedural irregularities which are apparent on the record. The irregularities were not pointed out at the hearing of the appeal. Therefore, parties were called upon and invited to address the court on the issue. The irregularities relate to the procedure of tendering exhibits. It is apparent on the record that the exhibits were tendered by state Attorney and not the witnesses who were testifying. Therefore, the issue is whether the exhibits namely, one gun(riffle), six pieces of ammunition, a caution statement, a certificate seizure and a ballistic report were properly admitted in court.

Ms. Amina Mawoko addressing the court on the issue, agreed that the exhibits were tendered by State Attorney. She said that, it is settled law that it is the witness who is supposed to tender exhibits and not the state Attorney as the witness is the one who has knowledge of the exhibit. She conceded that the procedure was violated, hence the law on receipt of exhibits was contravened.

She however complained and contended that court's record, basically in law must be trusted but in this case it is questionable. She said that at the trial court she was the prosecuting State Attorney assisted

by Senior State Attorney Tulibake Juntwa. She however was disappointed as what is on record is not what transpired during the trial. She said they have lost trust to the extent that even if the hand written proceedings are to be looked at, will not be of assistance it won't help. She added that even at page 32 of the proceeding some procedures were skipped. She however prayed the court to order retrial as they conceded to the error.

In reply the respondent supported trial court's decision on the ground that there are errors which were committed by the prosecution. He conceded to the point raised by the court, and he prayed that the case be dismissed because the procedures were not followed.

Having gone through the evidence on record, the petition of appeal and submission by the parties, the issue for determination is whether a prima facie case was established against the respondent.

However, I will not deal with the grounds of appeal raised by the appellant following the anomaly I noticed in the trial court proceedings which has been conceded by the appellant. It is apparent on the record that all the exhibits were tendered by State Attorney and admitted by the court.

I would like to point out at the outset that the issue of court proceedings authenticity is out of context. The appellant had access to both proceeding and judgement even before preferring her appeal. The

issue was not brought to the attention of the court. She cannot now attempt to impeach the court's record at this stage. The record of the proceeding is apparent. Besides, court proceedings are presumed genuine unless proved otherwise, see section 89 of the Tanzania Evidence Act, Cap. 6 R.E 2019.

The law is very clear on who should tender the exhibits in court, it is the witness and not the prosecutor or advocate. The duty of the prosecutor is to lead the witness to tender the exhibit in court and not for herself/himself to step into the shoes of the witness and tender them. By doing so he turns himself into a witness which is wrong. In the case of **Haruna Mtasiwa vs. R,** Criminal Appeal No. 206 of 2018, Court of Appeal sitting at Iringa (Unreported) at page 16 the court made reference to its former decision in the case of **Aloyce Maridadi vs. R**, Criminal Appeal No. 208 of 2016 (unreported) in which the court echoed its previous decisions in **Frank Masawe vs. Republic**, Criminal Appeal No. 302 of 2012 and **Thomas Ernest Msungu @Nyoka Amkenya vs. Republic**, Criminal Appeal No. 78 of 2012 both unreported and observed that: -

> *"A prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect that was wrong because in the process the prosecutor was not*

sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the Criminal Procedure Act. As it is/ since the prosecutor was not a witness he could not be examined or cross- examined."

In the case at hand, the record is clear that it was the State Attorney, Amina Mawoko who prayed to tender all four exhibits. It appeared that the same State Attorney also appeared in the present appeal; when addressing the court on this issue she at the outset conceded that it was unprocedural for a prosecutor to tender exhibits. The typed proceeding of the trial court is evident, at page 32 she prayed to tender 1 gun/riffle and 6 pieces of ammunition, the same was admitted by the trial court as Exhibit A1. She again at page 33 prayed to tender a cautioned statement, the same was admitted by the trial court as exhibit A2 at page 36 of the typed proceedings. Also, at page 43 she prayed to tender a certificate of seizure which was admitted by the court at page 44 of the typed proceedings as exhibit A3. Lastly, at page 49 she prayed to tender a ballistic report, the same was admitted by the trial court at page 50 of the typed proceedings as exhibit A4.

Obviously, the procedure was violated. The record is clear that it was the State Attorney who prayed to tender all exhibits. In the case of

Frank Massawe vs. Republic (supra), it was among others held that since the person who tendered exhibits was not a witness in court, the exhibits were as good as if they were never tendered, hence they were expunged from the court records.

At this juncture, the issue is whether this court can order a retrial of the case as prayed by the appellant. The principle as to whether or not to order a retrial was laid down by the Court of Appeal in the case of **FateHali Manji vs. R** [1966] 1 EA 343 that: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

Also, in the case of **M'kaneke vs. Republic** [1974] EA 67, It was held that a retrial should not be ordered because of insufficiency of evidence, where it will obviously result into injustice that is where it will deprive the accused/appellant of a chance of an acquittal. Also, in the

case of **Merali and Others vs. Republic** (1971) HCD No. 145, the court of Appeal for East Africa made the following observation on retrial orders: -

> *"It is clear that the original trial was neither illegal or defective. It is well settled that an order for retrial is not justified unless the original trial was defective or illegal".*

Furthermore, the principles for ordering a retrial also featured in the case of **Ahmed Ali Dharamsi Sumar vs. R** (1964) E.A 481 in which the appellant challenged a retrial order issued by the High Court. The Court of Appeal of East Africa held thus: -

> *"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused".*

Again, in **Chacha Mati @ Magige vs R,** Criminal Appeal No. 562 of 2015 (Unreported) Court of Appeal added factors to be considered stated in the case of **FateHali Manji** (supra) thus: -

> *"We may add to these factors that an order for retrial would be made where on the whole of evidence, the conviction is unsustainable. This will guard against the*

It is so ordered.

Right of Appeal is Explained.

S.C. MOSHI

JUDGE

02/8/2021