

IN THE HIGH COURT OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 11 OF 2020

*(Originating from Criminal Case No. 5 of 2019 at the District Court
of Tabora)*

LUHENDE S/O JAMES @ JACKOB APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 15/10/2021

Date of Delivery: 05/11/2021

AMOUR S. KHAMIS, J.

Luhende James Jackob was charged with the offence of unlawful possession of firearm contrary to section 20(1) and (2) of the Firearms and Ammunition Control Act (Act No. 2 of 2015) read together with paragraph 3(1) of the 1st Schedule and Section 57(1) and 60(2) as amended by Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

A brief background leading to this appeal goes that, on 16/03/2019 a police officer at Uyui District got information from an informer that the appellant had a gun at his home.

The Policemen and his colleagues went to appellant's house and conducted a search in absence of the appellant.

After the search, a muzzle gun was discovered under ground in the appellant's farm. The same was seized in presence of the

appellant's wife and village leaders. Records shows that, it was the appellant's wife who told Policemen that the muzzle gun belonged to her husband.

Upon the matter being fully heard, the appellant was convicted and sentenced to serve twenty years (20) imprisonment.

Aggrieved with both conviction and sentence, the appellant appealed to this Court pointing out six grounds of appeal, namely.

1. *That, the trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant while the prosecution failed to discharge the burden of proof against the appellant beyond reasonable doubt.*
2. *That, records do not show whether there was compliance with the requirement of section 130(3) of the Evidence Act, Cap 6 R.E 2002 as regards to the testimony of PW4 the appellant's wife.*
3. *That, exhibit P1 and P2 did neither touch nor link the appellant with the crime at any rate.*
4. *That the trial magistrate did grossly error in not directing his mind on the fact in order to observe that the case upon the appellant was fabricated because there is no cogent evidence implicating the appellant as to:*
 - *Why the prosecution side failed to tender the certificate of seizure (of the muzzle gun) which related to the appellant.*

- *Why the prosecution did not tender in court the certificate of search warrant in order to prove their case against the appellant.*

5. *That, the trial magistrate highly overlooked in both point of law and fact in holding that the appellant is guilty without credible evidence to support the findings at the crime. The trial magistrate slipped into error to make a finding of facts basing on its opinion instead of the strength of the evidence adduced.*

6. *That, these are widely trough hood facts which explain themselves to how the prosecution purposely tried their level best to fabricate and incriminate the appellant in this matter as widely shown in the court judgment. The prosecution side failed to prove the charge beyond all reasonable doubt against the prosecution and he should carry the benefit of doubt from the prosecution.*

At the hearing of this appeal, the appellant appeared in person while Mr. Deusdedit Rwegira, learned State Attorney appeared for the respondent.

Opposing the appeal, Mr. Rwegira stated that the appellant was found in constructive possession not actual possession. He added that the evidence of PE2 and PW3 who searched the appellant's house in his wife's presence and that of Village leaders, the firearm was found hidden underground outside the appellant's house and that the same was corroborated by PW5 (village chairman) and appellant's wife (PW4).

Further, Mr. Rwegira argued that the appellant was questioned by PW1 and his in statement (exhibit P1), admitted that the weapon was found in his land.

Finally, he contended that, as per Section 130(3) of the Evidence Act, Cap 6, R.E 2019, the prosecution had a duty to inform PW4 that she is competent but not compellable to testify against her husband.

Mr. Rwegira settled that the prosecution did not comply with Section 130(3) of the Evidence Act and therefore prayed that evidence of PW4 be expunged from the record. It was his argument that the remaining evidence is sufficient to enter conviction.

On part of the appellant, he adopted his Petition of Appeal and submitted that, the gun was not his at all. He moved the Court to allow the appeal and release him from prison.

I have painstakingly gone through the record of appeal and submissions made thereof, the issue for determination is whether the prosecution case was proved beyond reasonable doubt.

To begin my analysis, I opt to start with the forth ground of appeal on whether the requirements of Section 130(3) of the Evidence Act were complied with. The record does not show anywhere that PW4 was availed with that information.

The law is clear that, a witness who is a spouse of the accused person is competent but not compellable. Section 13(0) and (3) of the Evidence Act states that: -

“Where a person charged with an offence is the husband or the wife of another person that other person shall be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section

(3) where a person who the Court has reason to believe is husband or wife, in a polygamous marriage, one of the wives of a person charged with an offence is called as a witness for the prosecution the Court shall, except in the cases specified in subsection (2), ensure that that person is made aware, before giving evidence, of the provisions of sub-section (1) and the evidence of that person shall not be admissible unless the Court had recorded in the proceedings that this subsection has been complied with”

From the wording of the above quoted provision of law, it is clear that when the Court records the evidence of one spouse against the other it must make sure that compliance to Section 130 is recorded in the proceedings.

In the case at hand, PW4 testified against her husband without being addressed on the terms of Section 130(3) of the law.

Consequences on failure to comply with those legal requirements, were stated in the case of ***Matei Joseph v Republic [1993] TLR CA 152*** where in it was held that;

“The evidence of a spouse who has been compelled to testify against another spouse in a criminal case contrary to the provisions of Section 130 of the Evidence Act, 1967, is inadmissible and of no effect.”

On account of being illegally obtained, the evidence of PW4 is hereby expunged from the records. Having expunged out that evidence, the question is whether the remaining evidence is sufficient to sustain the appellant’s conviction.

As per the impugned judgment, the trial magistrate relied on testimonies of PW1, PW2 and PW3 and corroboration by PW4 in convicting the appellant. Since PW4’s evidence has been expunged, the evidence of PW2 and PW3 remains uncorroborated and loses weight.

The trial magistrate also relied on some exhibits tendered in convicting the appellant. The certificate of seizure as admitted by the Court indicates that it was PW4’s house that was searched.

The search conducted as availed in the Court record show that it was done in absence of the appellant who was in custody at a Police Station. The remaining prosecution evidence did not show as to how the muzzle gun was found in the appellant’s possession.

Another doubt on the prosecution’s evidence is on the appellant’s alleged confession. It was contended by the prosecution that the appellant confessed to have committed the offence, allegedly as contained in his confession statement.

Records show that the appellant repudiated the confession statement and thus corroboration was required before its contents could be concluded to be true. This position of law was stated in **ALI SALEHE MSUTU VR (1980) TLR 1.**

In his testimony, DW1 LUHENDE JAMES stated that:

“.....they boarded me at motorcycle up to Police, they kept into lockup, when reached 01:00 hours midnight they came with gun, and asked if I knew the game, I denied. When reached in the morning they stated writing my statement, they told me about gun, I denied. One police took “pingu” tied me and started beating me because of pain I admitted to possess gun, but was left by one person. Later they went on beating me. On the next day they sent me to primary Court magistrate asked me about gun. I denied and told her that I had a lot of pain

From the excerpt above, the appellant (DW1) was taken to a justice of peace immediately after recording a cautioned statement. However it is not clear as to why the prosecution did not lead evidence in respect his confession to a Justice of Peace which would have corroborated contents of the cautioned statement.

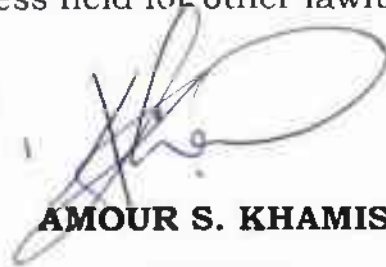
In the case of **NDOROSI KUDEKEI V REPUBLIC CRIMINAL APPEAL NO. 318 OF 2016**, the Court of Appeal of Tanzania held that:-

“What was placed before the court in evidence was the cautioned statement only (exhibit P1), whereas the whereabouts of the extra-judicial statement which was made to the justice of peace was nowhere to be seen. With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to have killed the deceased or not”

For the aforesaid reasons, I am not convinced that the appellant really confessed before a Police Officer, which doubt, must benefit the appellant.

In the upshot, I find merits in this appeal which is thus allowed. Consequently, a conviction and sentence meted against the appellant are set aside. The appellant should be released from prison forthwith unless held for other lawful reason(s).

It is so ordered



AMOUR S. KHAMIS

JUDGE

05/11/2021

ORDER:

Judgment delivered in chambers in the presence of the appellant in person and Mr. D. Rwegira, State Attorney, for the Republic.

Right of Appeal explained.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the seal and extends to the right.

AMOUR S. KHAMIS

JUDGE

05/11/2021