IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 135 OF 2021

(Arising from District Court of Tarime at Tarime in Economic Case No 95 of 2018)

MWITA KERYOBA MWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

15th February & 7th March 2022

F. H. MAHIMBALI, J.:

Mwita Keryoba Mwita, the appellant was arraigned before District Court of Tarime charged with two offences: firstly being in unlawful possession of fire arm, secondly being in unlawful possession of ammunition both being offences contrary to section 20 (1) and (2) of the Fire Arms and Ammunition Control Act, Act No.2 of 2015 read together with paragraph 31 of the First Schedule to and Section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2019 for the first offence and contrary to section 21 of the Fire Arms and Ammunition Control Act, Act No.2 of 2015 read together with paragraph 31 of the First

Schedule to and Section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2019 for the second offence.

It has been alleged by the prosecution that on the 8th day of December, 2018 at Getenga village within Tarime District in Mara Region, the appellant was found in unlawful possession of one fire arm to wit Pistol make CZEKA with serial number g.1384 without licence for the first count and on the same date and place was found in unlawful possession of three rounds of Pistol Ammunition. He denied the both charges levelled against him.

The trial court heard the parties and at the end, the appellant was convicted on both counts and was sentenced to serve 20 years imprisonment for each offence. The sentences were ordered to run concurrently.

The material facts leading to this appeal can be stated as follows. The appellant who is a resident of Getenge village within Tarime District was on 3rd December, 2018 arrested on allegation that he was in possession of fire arm unlawfully. Upon his arrest and interrogation, he admitted to be in possession of the said firearm where he led police to his home and recovered it together with its three ammunitions being in the

magazine at the nearby farm. The said search was witnessed by local leader (VEO). The search certificate, the said pistol (firearm), three rounds and one magazine were collectively admitted in court as exhibits PE1 and PE2 respectively. PE1 was for the search certificate and PE2 was for the said pistol, magazine and three ammunitions. The said search was well witnessed by PW2 – John Obert @ Ondeba who dully signed the certificate of seizure. The appellant also made confession before justice of peace (PW4 and Exhibit PE3).

PW5 – DC John testified that on 9th Feb, 2018 he drew the Sketch Map plan of the scene of crime as directed by the OC-CID. The same was admitted by the trial court as exhibit PE4. D/CPL Mustapha testified as PW6 that he recorded the cautioned statement of the accused person which the same was not admitted as exhibit for want of time limit.

On the other hand, the appellant fended for himself and stated that he was arrested by police just on his way at the village and ordered to board into the said Police vehicle. While in, he was asked about other persons how he knows them. As he denied knowing them, he was tortured to the maximum. That he was searched by police and recovered from him the firearm and ammunitions, he disputed them all. He also disputed to

have recorded his confession statement (extra judicial statement) before PW4. In essence, the appellant denied any participation into the said charged offence.

Upon hearing of the case, the trial court convicted the appellant and sentenced him to 20 years imprisonment for first and second counts respectively and ordered the sentences to run concurrently.

Dissatisfied by both conviction and sentence, the appellant preferred this appeal armed up with a total of five grounds of appeal in his petition of appeal as follows:

1. That, the Honourable trial Magistrate erred in law and facts when she reached her decision without complying to the requirements of the Law as the said Learned Trial Magistrate did not inform each witness in the said case including the appellant that they were entitled to have their evidence read over to them.
2. That the Trial Magistrate erred in law and facts to reach her decision without availing the appellant an opportunity to give his adduced evidence which ought to have been recorded by the Court in compliance to the requirement of the law.
3. That, the Honourable Trial Magistrate erred in Law and Facts to

convict and sentence the appellant on the ground that he admitted to have committed the offence charged against him before the Justice of Peace on the 22nd Day of July, 2019 while in the actual sense, he never so admitted to the said Justice of Peace because he was never taken before the said Justice.

4. That, the Honourable Trial Magistrate erred in Law and in Facts to reach her decision on conviction relying on the contradictory evidence adduced by the Prosecution Witnesses.
5. That the Honourable Trial Magistrate erred in Law and Facts when she reached her decision without critically analyzing the evidence of the accused of the accused person herein referred to as the appellant, particularly on admission of the certificate of seizure in respect of Exhibit P1 and P2 collectively.

Basing on these grounds of appeal, the appellant prays that this appeal be allowed, conviction quashed, and sentence meted out be set aside.

During the hearing of the appeal, the appellant appeared in person and unrepresented whereas the respondent was dully represented by Mr. Malekela, learned state attorney.

In arguing his appeal, the appellant prayed that his grounds of appeal be adopted by this court to form part of his submission. He further submitted that the arresting officer who arrested him didn't come to court to testify how he arrested him. In addition, he argued that he was recorded his statement on the fifth day of his arrest. He argued that was improper as per law and that this matter was not properly investigated as there is no sufficient incriminating evidence against him. He therefore, prayed that this Court to allow his appeal, quash conviction and set aside the sentence.

Replying to the grounds of appeal, Mr. Malekela learned state attorney replied that having read the grounds of appeal and the submission of the appellant, he resists the appeal on its entirety and submitted as follows.

On the first ground of appeal, he replied that it is true that as per section 210 (3) of CPA, Cap 20 R.E 2019, it requires that the trial magistrate upon recording the whole evidence of any witness, to read over and explain to the witness himself and to comment whether the evidence has been properly recorded. As per trial court's records, it is clear that at the end of every witness, the trial magistrate complied with that legal

requirement. See pages 35, 42, 44, 46, 52, 54, 63, 69 of the typed proceeding to mention a few. Thus, this argument does not hold water. Even if, assuming that it was not read out (contrary to what is appearing in record), What is the legal effect. In the case of **Stanley Muritu Mwaura vs Republic,** Criminal Appeal No. 144 of 2016 CAT at page 23, held that omission under section 210 (3) of CPA is not fatal. This is because: it does not occasion failure of justice. And even if it occasioned failure of justice, the same is curable under section 388 of CPA for the appellate court to order retrial.

On the second ground of appeal, he is of the opinion that it is replica to what is stated in ground no 1, that the same is curable if occasioned failure of justice in terms of section 388 of the CPA.

On the third ground of appeal that the trial magistrate erred in considering the testimony of Justice of Peace, he replied that according to page 41 of the typed proceedings, it is clear that the appellant himself first stated before the Hon. DPP and RCO (during prison visit) that he wanted to be sent to Justice of Peace for purposes of being recorded his confession statement. The testimony of PW3 and Pw4 are clear on that (page 41 – 43

of the typed proceedings). Thus, this ground of appeal is totally a lie as is contradictory to what is stated in the typed proceedings.

With the fourth ground of appeal, he replied that in his reading of the prosecution evidence in whole, there is no any contradictory evidence by the prosecution. From what PW1 narrated how the appellant was arrested being with the said pistol with Reg. No. KE ap G. 1384 (page 33). PW2 – John Obert Odenda is the VEO. He testified how he witnessed the search and seizure of the said pistol (pages 33 -36). At page 41, PW3 testified how he escorted the appellant to Justice of Peace. With PW4, (J/P) testified how he recorded the extra judicial statement of the appellant freely. What PW5 stated is that he drew the sketch map plan of the scene of crime. PW6 stated how he recorded the cautioned statement of the accused person. In essence what is testified by PW1 – PW5, there is no any contradiction in it as alleged. Therefore, this ground of appeal is valueless and the same be dismissed.

On the fifth ground of appeal, the grief that the trial court erred in law for failure of analyzing the prosecution evidence, in his consideration, there is nothing valuable. The trial court record is clear that in reaching that verdict, the prosecution as well as the defense evidence was evaluated and

finally analyzed. The argument that it was not established is wanting. He added further that Exhibit P1 and P2 were properly admitted by the trial court. Having said that, he is of the firm view that this ground of appeal is also baseless and it be dismissed.

In totality of the evidence in record, it is his humble submission that the appeal be dismissed in its entirety as it is baseless and bankrupt of any merit. Conviction and sentence by the trial court meted out be upheld and confirmed.

In his rejoinder submission, the appellant while reiterating his submission in chief, argued further that he finds the prosecution evidence as not connected and the same being contradictory is unworthy of credit. That he was directed or advised by the DPP to go to Justice of Peace is not true as there is no evidence on that account. On the issue of VEO, he insisted that he was not VEO as he had not established any ID that he is VEO during his testimony. He added that there has neither been evidence from the owners of the farms if there was any weapon recovered from that farm. The testimony of PW3 was not a proper as he was not one of the witnesses listed at preliminary hearing stage. That was all.

Having heard the submissions from both parties, it is now high time I determine if this appeal is meritorious.

With the first ground of appeal, the appellant's moan is this that the trial magistrate did not after she had recorded the witnesses' evidence read the same to the parties. The respondent's attorney replied that the appellant's argument seems to be interesting however the trial records don't support his allegation. In buttressing his point, the learned state attorney referred this Court to the typed proceedings of the trial court in pages 35, 38, 42, 44, 46, 52, 54, 63 and 69. What the law says upon the magistrate has recorded the evidence of any witness in criminal proceedings shall inform each witness that he/she is entitled to have his/her evidence read over to him/her and if a witness comments anything the magistrate shall record that comment. The trial court record exhibits that the trial magistrate complied with what the law under section 210(3) of the CPA has directed. According to the trial record it appears every witness who testified at the trial court in respect of this case was his evidence recorded down and dully read over. However, there has been no any comment from any of the seven witnesses who testified at the trial court upon inquiry by the trial magistrate pursuant to section 210(3) of the CPA. Mr. Malekela is of the

firm view that, the trial court's record is self-explanatory that there was compliance as per law. The Court of Appeal in **Halfan Sudi Vs. Abieza Chichili** [1998] T.L.R 527 at page 529 stated that: -

> *"We entirely agree with our learned brother, MNZAVAS, JA, and authorities he relied on which are loud clear that "A court record is a serious document. It should not be lightly impeached..... There is always the presumption that a court record accurately represents what happened."*

That in mind, I am also in one voice that, a court record is presumed to represent the truth of what happened. Unless there are plausible explanations by the appellant that during his testimony, he was not given the said right of his evidence being read out as alleged by the trial magistrate. Relying on the doctrine of presumption of genuineness of the trial court record, I am not in a position to buy his stand as it is not supported by any evidence and it is contrary to what is displayed in the trial court record. That said, this ground of appeal fails.

With the second ground of appeal, that the Trial Magistrate erred in law and facts to reach her decision without availing the appellant an opportunity to give his adduced evidence which ought to have been recorded by the Court in compliance to the requirement of the law. In

replying, Mr. Malekela learned state attorney for the respondent is of the opinion that this ground of appeal is replica to what is stated in ground no 1. However, he added that the same is curable if occasioned any failure of justice in terms of section 388 of the CPA. I am in one stance with Mr. Malekela that this ground of appeal is either replica to ground no. 1 or not well established for it to be meaningful. I have nothing valuable to comment more.

On the third ground of appeal, the appellant disputes that he admitted to have committed the offence charged against him before the Justice of Peace on the 22nd Day of July, 2019 while in the actual sense, he never so admitted to the said Justice of Peace because he was never taken before the said Justice. This argument has been rightly countered by Mr. Malekela that according to the typed proceedings on pages 41- 43, the testimony of PW3 and PW4 are clear that no one forced him to confess before the PW4 (Justice of Peace). Proceedings on pages 41 – 44 (of the typed proceedings) are clear. I agree with what Mr. Malekela that the appellant's version is unsupported and it is hard to believe. Court's witnesses must be given credence. For us to believe otherwise, there must be cogent reasons to do so which have not been stated in the

circumstances of the present matter. It is a great accusation that PW4 (Magistrate at Primary Court) testified falsity against the appellant. I must be the last person to give credence to the appellant's accusation in the circumstances of this case. That said, this ground of appeal fails.

On the fourth ground of appeal, the appellant argues that the prosecution's evidence is contradictory. How is it contradictory, there is nothing established by the appellant to state the said contradiction. I have digested the prosecution's evidence on record, I agree with Mr. Malekela learned state attorney that from the prosecution's case, there is nothing contradiction stated. PW1 (at page 33) narrated how the appellant was arrested being with the said pistol with Reg. No.KE AP G1384. PW2 – John Obert Odenda is the VEO. He testified how he witnessed the search and seizure of the said pistol (pages 33 -36). At page 41, PW3 testified how he escorted the appellant to Justice of Peace. With PW4, (Justice of Peace) testified how he recorded the extra judicial statement of the appellant freely. What PW5 stated is that he drew the sketch map plan of the scene. PW6 stated how he recorded the cautioned statement of the accused person though the same was not admitted for legal compliance. In essence what is testified by PW1 – PW5, there is no any contradiction in it as

alleged. Therefore, this ground of appeal is baseless for want establishment and the same is dismissed.

Lastly is on the fifth ground of appeal. The grief that the trial court erred in law for failure of analyzing the prosecution and defense evidence in my observation is unfounded claim. The trial court record is clear that in reaching that verdict, the prosecution as well as the defense evidence was well analyzed and properly evaluated (see pages 13 – 15 of the typed proceedings). The trial magistrate analyzed properly the prosecution's case as well as the defense case and on the basis of strength of the prosecution's case, the verdict was based. The argument that it was not established is wanting.

I am also of the view that Exhibit P1 and P2 were properly admitted by the trial court. For an exhibit to be not admitted there must be sound legal objection which is upheld by the trial court. However, a mere wish of a party for it not being admitted is not a legal objection. Therefore this ground of appeal also fails and it is dismissed.

That said and done, appeal is dismissed in its entirety. Conviction and sentence upheld. The same being economic offences pursuant to

paragraph 31 of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2019, the sentences imposed are as per law.

It is so ordered.

DATED at MUSOMA this 7th day of March, 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 7th day of March, 2022 in the presence of Mr. Frank Nchanila, state attorney for the respondent, Mr. Gidion Mugoa, RMA and the appellant being absent.

F.H. Mahimbali

Judge

07/03/2022