IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 32 OF 2020

[Originating from Criminal Case No. 03 of 2018 at the Resident Magistrates' Court of Tabora at Tabora]

NGASA MANDEGE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Submissions: 11/07/2022
Date of Delivery: 12/07/2022

AMOUR S. KHAMIS, J.

Before the Resident Magistrates' Court of Tabora, the appellant Ngasa Mandege was charged and convicted for the offence of unlawful possession of firearms c/s 20 (1) and (2) of the Firearm and Ammunitions Control Act No. 2 of 2015 read together with paragraph 31 of the 1st schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 and sentenced to serve fifteen(15) years in jail.

Aggrieved by both conviction and sentence, he appealed to this Court armed with Six grounds of appeal, to wit,

1. That, the trial court erred in finding that the prosecution case was proved beyond reasonable doubts.
2. That, the firearm (exhibit P4 Muzzle Gun), the subject matter of the charge was not identified satisfactorily as the prosecution did fail to tender any examination report from the ballistic expert to support, and confirm that the item allegedly found in possession of the appellant was a firearm.
3. That the certificate of the seizure and Caution statement (exhibit P1 and P2) were useless and liable to be expunged from the record as the same were not read aloud in the hearing of the appellant to reveal its contents.
4. That the trial court erred in law and the fact that the issue of possession of the firearm is very serious, therefore in the absence of any other independent evidence, the evidence of PW1, PW2, PW3, and PW4 remained extremely weak to ground a conviction.
5. That the trial Court did failure observe that the prosecution side failed to prove the charge against the appellant beyond a reasonable doubt, as the whole case was not investigated and had no police investigator who appeared in court to testify, and the appellant was the victim of that weakness from the prosecution and he should carry the benefit of the doubt from the prosecutrix.
6. That the trial court erred in law to reject the appellant's strong and probative defence without assigning a solid ground behind its verdict.

When the appeal was called up for hearing, Mr. Deusdedith Rwegira, learned Senior State Attorney appeared for the Republic while the appellant appeared in person.

In support of the appeal, Mr. Rwegira generally did without referring to the specific ground of appeal. He submitted that the appellant was charged with the offence of unlawful possession of the firearm and sentenced to serve fifteen (15) years in jail plus forfeiture of the firearm and motorcycle.

He pointed out several irregularities in the proceedings of the trial court.

The first irregularity, according to Mr. Rwegira, is on the admission of exhibit P4. He contended that exhibit P4 was tendered by PW4 Cpl Charles who was neither a seizurer nor custodian of the gun.

His argument was premised on the reason that, PW4 did not tell the Court as to how it came into his possession, and all the witnesses who testified did not tell the Court as to how the exhibit was kept until production in Court.

The learned State Attorney referred to the case of **Yusuph Masalu @ Jiduvi & 3 Others vs. The Republic, Criminal Appeal No. 163 of 2017 (Unreported)** the Court of Appeal at Tabora held that;

> *".....chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of*

custody is to establish that the alleged evidence is related to the alleged crime....."

The second irregularity is to the effect that the appellant's caution statements (Exhibit P2) on page 43 of the proceedings show that the appellant stated that he was not found with the alleged gun and motorcycle. Mr. Rwegira argued that the appellant objected but the trial court ruled out that objection overlude without conducting a trial within a trial as the law requires. He went on to submit that the trial magistrate misdirected himself.

The next irregularity advanced by the learned State Attorney is to the effect that failure by the prosecution to summon any independent witness prejudiced its case. The learned state attorney was of the view that the appellant was arrested in a Somali village and therefore some independent witnesses were required taking into account that police were informed in advance about the incident.

He argued that the independent witness was to witness who filled in a seizure certificate. The evidence on record is not sufficient because only policemen and militia (mgambo) testified.

Finally, the learned State Attorney submitted that the prosecution case was not proved beyond reasonable doubts.

The appellant adopted the submission of the learned Senior State Attorney for the Republic and prayed for the appeal to be allowed as presented.

I have read the record of the trial court and also the grounds of appeal. The appellant did not submit much but the learned Senior State Attorney led the court to the relevant area to verify

the findings of the court. I am satisfied that the prosecution, in convicting the appellant relied much on the caution statement and certificate of seizure which were tendered as Exhibits.

It is settled law that whenever there is such an objection, the court must conduct an inquiry or a trial within a trial in order to ascertain the voluntariness of the statement. This is a requirement under section 27(2) and (3) of the Evidence Act, Cap 6 R.E 2022.

In the case of **Twaha Ally and 5 Others v. Republic,** Criminal Appeal No. 78 of 2004, (unreported) the Court stated:

> *"...If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession; the court must stop everything and proceed to conduct an inquiry or trial within trial into the voluntariness or otherwise of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

In this case, the record on page 43 of the proceedings shows that when the appellant's cautioned statement was sought to be tendered in court, it was objected by the appellant that he was not found with the alleged gun, axe, and motorcycle, then the trial magistrate ruled in favour of the prosecution and admitted it as Exh. P2 without the trial within a trial being conducted. This was definitely wrong as I have stated herein above. The omission rendered it to lack evidential value.

It was held in the case of ***Robinson Mwaniisi and Three others Versus. The Republic,*** *[2003] T.L.R. 220 where the court expunged the appellant's caution statement because the issue of voluntariness of such statement was not properly resolved for failure to conduct a trial within a trial.*

Another aspect of the case which the court below ought to have considered with circumspection was failure by the prosecution to summon the independent witness who informed about the incident, and an independent witness who witnessed filling in of a seizure certificate.

I am mindful of the provisions of Section 143 of the Evidence Act which provides that no particular number of witnesses shall, in any case, be required for the proof of any fact.

However, in the circumstances of this particular case, 1 am satisfied that it was necessary for the prosecution to summon an independent witness to reinforce its case.

Another issue is incompetency of PW 4 in tendering the exhibits In **Hamisi Saidi Adam Versus Republic Criminal Appeal No. 529 of 2016** Court of Appeal, had this to say;

> *"Person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit, therefore, is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question. "*

It is on record as shown at page 44 of the trial court's typed proceedings that PW4 was neither a seizurer nor custodian of the

gun. The witness did not tell the Court how it came into his possession. This being the fact, I am of the firm view that the chain of custody was broken.

For these reasons, the appeal has merit and the same is allowed. The judgment of the Resident Magistrate's Court of Tabora (Honourable Millanzi, R.M) is quashed, the sentence is set aside and the appellant should be released forthwith unless otherwise he is lawfully being held. It is accordingly ordered.

AMOUR S. KHAMIS

JUDGE

12/07/2022

ORDER

Judgement delivered in Chamber in presence of the appellant in person and Mr. Deusdedit Rwegira, Senior State Attorney for the Republic.

Right of Appeal is Explained.

AMOUR S. KHAMIS

JUDGE

12/07/2022