THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 36 of 2022
(Originated from District Court of Mbozi at Vwawa in Criminal Case No. 163 of 2009)

ROBIN JAFARI MWATUJOBE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 22nd August, & 19th September, 2022

KARAYEMAHA, J

This is an appeal by Robin Jafari Mwatujobe against the decision of the District Court of Mbozi at Vwawa, convicting him of two offences (1) unlawful possession of the fire arms contrary to section 4(1)(a) and 34 of the Firearms and Ammunitions Act, Cap. 223 R.E 2002 (now 2019) as read together with Para 19 of the First Schedule to, and sections 57 (1) and 60(2) of the Economic and Organised Crimes Control Act, Cap 200, RE 2002; (2) Unlawful possession of ammunitions contrary to section 4(1)(a) and 34 of the Firearms and Ammunitions Act, Cap. 223 R.E 2002 Act Cap 223 RE 2002 as read together with Para 19 of the First Schedule to, and sections 57 (1) and 60(2) of the Economic and

Organised Crimes Control Act, Cap 200, R.E 2002. Initially, the appellant was charged jointly with Salum Sichalwe Mofati. The latter was acquitted.

The particulars of the charges alleged as follows:

1st count: unlawful possession of the fire arms;

> On 12/11/2009 at about 17:13hrs at Mwaka area, Tunduma within Mbozi District and Mbeya Region were jointly and together found in an unlawful possession of a local made gun commonly known as *"Gobore"* without a licence or permit.

2nd count: unlawful possession of ammunitions;

> On 12/11/2009 at about 17:13hrs at Mwaka area, Tunduma within Mbozi District and Mbeya Region were jointly and together found in an unlawful possession of two bullets of a short gun without a licence or permit.

The substance of the case laid against him, which the trial magistrate accepted, showed that on 12/11/2009 at about 17:30hrs, after Ally Wendo (PW2), the Tunduma OCS was tipped by the informer that the appellant was in possession of a gun, assigned E. 6654 DC

Deogratius (PW1) to go to the appellant's house for the purpose of searching his house. After arresting the appellant, PW2 was notified. Together with other police officers PW2 searched his house in the presence of Mahubiri Kibona (PW3). They retrieved from the room used by the appellant a gun make *Gobore* and two bullets of a shotgun. PW2 tendered the gun and bullets which were admitted as exhibit P1 collectively. PW2 tendered further a search order dated 12/11/2009 which was admitted as exhibit P2.

The learned Magistrate was of the view that there was convincing evidence that exhibit P1 was the was a gun and two bullets surely found in the appellant's house. He, however, found that, the appellant's allegation that he was arrested for being in possession of stolen properties did not weaken the prosecution case.

It was upon the above facts that the magistrate acted and convicted the appellant of the two offences. He, however, sentenced him as follows:

> *"The convict shall pay a fine of Tsh 500,000/= or four years imprisonment in default."*

Apart from the fact that the sentence was omnibus, the appellant was aggrieved hence preferred the present appeal which has 5 grounds

of appeal. It seems from the petition of appeal and from his oral submissions before this court that the appellant is seeking to impugn the factual as well as legal findings reached by the trial magistrate, and in light of the material on record that is understandable. Similarly, as I understood him, he is putting forth the argument that the trial Court lacked requisite jurisdiction to try economic cases and that procedures for conducting a sound search were not complied with because no search order was tendered. In case the search order in record is expunged, then the case against him was manufactured, he remarked.

There are, as far as I can discern, two material grounds on which the appeal from the convictions is based. As much as I understood the appellant's submission the 1st, 2nd and 4th grounds were abandoned after hearing Ms. Prostista's reply submission.

The third ground is in respect of the complaint that the appellant was convicted relying on exhibit P2 which was tendered without being read over after the trial court had admitted it as an exhibit. The fifth ground is that the prosecution failed to prove its case beyond reasonable doubt.

I will now proceed and address myself to the merits and demerits of those two arguments. With regard to the third ground, I entirely

agree with both the appellant who fended for himself and Ms. Prosista Paul, learned State Attorney, for the respondent that exhibit P2 was not read over in court after it was admitted in evidence. I have dutifully gone through the proceedings at page 33 and noted that after PW2 had prayed to tender the search order, the trial Magistrate admitted it. The record does not indicate that it was then read over.

The gravity of this infraction has been held to be a fundamental effect and the courts have not disguised their unhappiness about it. In **Robert P. Mayunga and Another vs. The Republic**, Criminal Appeal No. 514 of 2016 CA-Tabora dated 5th December, 2019 it was held:

> *"It is settled law in our jurisprudence which is not disputed by the Learned Senior State Attorney that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequence of being expunged from the record of proceedings."*

See also the case of **Robinson Mwanjisi vs. Republic** [2003] TLR 218.

I take inspiration from the foregoing decision to underscore my view that the trial was marred by irregularity with respect to admitted

search order and acting on it. Exhibit P2, therefore, suffers a natural consequence of being expunged from the record. It is, therefore, accordingly expunged.

Although Ms. Prosista proposed that exhibit P1 should be expunged, she was quick to submit that there was still strong evidence that the appellant was found with a gun and two ammunitions from PW2 and PW3. I agree with her that this was the evidence. I further agree with her that the appellant was well informed with those exhibits and was able to cross-examine. In view of that, she was, convinced that the prosecution case was proved beyond reasonable doubt.

Having expunged exhibit P2 we are remained with only oral evidence that exhibit P1 was found in the appellant's house. In proving these offences, the prosecution was duty bound to prove, **one,** that exhibit P1 was found in the appellant's house and two that he had no permit or licence. With respect to exhibit P1 being found in the appellant's house we have the key evidence from PW1, PW2 and PW3. All these were present when the gun and the ammunitions were found in the appellant's house. As already indicated, there was no search warrant or seizure certificate. Was this a fit case to dispense with these two documents?

I have considered the manner and circumstances in which the appellant was searched. It was not an emergency one. PW2 was tipped and made a plan on how to search his house. He organised a group of police officers who went and apprehended the appellant, called PW3 and eventually searched his house.

Section 38 (3) of the Criminal Procedure Act [Cap 20 R.E 2022] lays a mandatory requirement for issuance of a certificate of seizure and production thereof as an exhibit in Court, whenever the property said to be in unlawful possession of the accused person. As the trial Court's record stand to be clear, this was never produced in court, suggesting that none was available. Failure to produce it constituted a fundamental violation of the law which weakens the prosecution's case and rendering it unproven to the standard required by the law. This position is fortified by the holding in **Ridhiki Buruhani vs. Republic**, DC. Criminal Appeal No. 40 of 2011 (unreported). This Court (Teemba, J) held:

> *"According to the provisions of* ***section 38 (3)*** *of the* Criminal Procedure Act*, it is mandatory that the officer seizing the property must issue a receipt not only acknowledging that he seized the property but also to bear signatures of the persons present during the search and seizure... the issue here is, why did the police fail to issue a*

certificate of seizure? It is assumed here that, there was none and that is why it was never produced as exhibit to support the prosecution. ***For this reason, the prosecution case was not proved beyond reasonable doubt****. The allegations of search and seizure were not proved."*

As much as I subscribe to the foregoing decision, nothing prevented the police from complying with these requirements. I take inspiration from the reasoning in **Ridhiki Burhani's case** and hold that the trial court committed a serious error when it flinched its eye on this fundamental requirement.

In some occasions, the Court of Appeal has guided that the mandatory requirement producing the search warrant or seizure certificate may be dispensed with. However, there are conditions to act as such. In the case of **Rashid Sarufu vs. Republic**, Criminal Appeal No. 467 of 2019 CAT – Iringa (Unreported), it was stated at page 11 that:

"Apart from documentary evidence the oral evidence of witnesses is water tight. ***In this case while witnesses were testifying the accused failed to cross examine on important issues like confessing before them that***

drugs were hers and was begin to be forgiven. *Those witnesses are PW2, PW4, PW5 and PW6 who said the accused was interrogated shortly after her arrest and confessed that the drugs were hers and pleaded for forgiveness. Failure to cross-examine on this crucial point inclines this Court to believe that the accused accepted that account."* [Emphasis added].

I don't think the evidence in record meets the criteria laid down in the foregoing decision. The record is clear that when the appellant was asked to comment on admitting exhibit P1 he said he had no objection because they were not found in his house. There is no evidence that as soon as exhibit P1 was seized the appellant confessed. What PW2 told the trial Court was that on interrogating the appellant he said the gun belonged to Salum Sichalwe. While PW3 did not hear that stamen, PW1 did not as well, but testified that the appellant confessed in his cautioned statement. This document was not tendered. The prosecution did not lead evidence indicating that Salum Sichalwe was interrogated to verify the appellant's defence. I take guidance from the case of **Rashid Sarufu** (supra) to hold that the prosecution evidence was wanting leaving many questions unanswered.

On the totality of evidence, the search order and the seizure certificate were important documents to prove that the gun and bullets were found in the appellant's house. The importance of the search warrant was emphasized in the case of **Balidu Hanogi vs. Republic**, Criminal Appeal No. 118 of 2020 CAT – Mtwara.

> *"We think that procedure was purposely set out to avoid abuse of authority on the part of Police Officers for, it controls unauthorized and arbitral searches in premise that may be conducted by unscrupulous Police Officers and therefore avoid the possibility of fabrication of evidence by planting things subject of criminal charges."*

I find that this is a fitting circumstance under which the Court of Appeal's wisdom can be brought into application.

Overall, I find that the prosecution case became so weak and seriously wanting when it solely relied on the word of mouth from the witnesses who claimed they found a gun and two bullets in the appellant's house without producing a certificate of seizure to prove that those objects were actually found in the house of the appellant.

To cum it all, I join hands with the appellant and hold that charges against the him were not proved beyond reasonable doubt.

Accordingly, I find that the appellant's conviction and the resultant sentences are highly unsupportable and, therefore, irregular. Consequently, I allow the appeal, quash the conviction, set aside the sentence and set the appellant free, unless he is otherwise lawfully detained.

I so order.

DATED at **MBEYA** this **19th** day of **September, 2022**

J. M. KARAYEMAHA
JUDGE