IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 50 OF 2022

(Originating from Economic Case No. 6 of 2021, Songea Resident Magistrate Court)

JUMA SAID ALLY KALAMALI @ MOJABILA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

15/02/2023 & 27/02/2023

E.B. LUVANDA, J.

The Appellant, Juma Said Ally Kalamali @ Mojabila was arraigned before Songea Resident Magistrate Court (herein after the trial court) for two counts; first count, for unlawful possession of fire arms contrary to section 20 (1) and (b) of Fire Arms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap 200 Revised Edition 2019]. Second count for the offence of unlawful possession of ammunition contrary to sections 21 (b) and 60 of the Firearms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crimes Act [Cap 200 Revised Edition 2019].

The Appellant was prosecuted, at the end of a day he was convicted and sentenced to a term of 20 years in jail. Being aggrieved by the decision of the trial court both conviction and sentence the Appellant lodged this appeal comprising eleven grounds. In the petition of appeal, the Appellant presented argumentative grounds of appeal, I rephrase as follows; One, the principle of chain of custody was not complied as no documentation was tendered; Two, the trial court erred in law and fact to rely heavily on inadmissible caution statement; Three, the prosecution failed to prove the time of arrest of the Appellant vis – à - vis time of commencement of interview; Four, the trial court erred in law and fact to convict the Appellant relying on doubtful evidence of PW3 and PW7 regarding who exhumed a gun on the ground; Five, the trial court erred in law and fact to convict the Appellant relying on the contradictory evidence of PW3 and PW7 regarding the number of people who signed a seizure certificate; Six, the trial court erred in law and facts to convict the Appellant basing on inadmissible evidence of PW3 who said WEO while the one who testified is VEO; Seven, how the Appellant could lead to a scene on the caravan while it was alleged that he boarded at the back of a car; Eight, PW3 and PW7 evidence were contradictory regarding the name of the Appellant; Nine, the trial court erred in law and fact for convicting the Appellant relying on exhibit PEZ

which PW7 was contradicting as to the people who signed; Ten, PW4 and PW5 were contradicting regarding the number of ammunition; Eleven, PW3 had no mandate to preserve a gun for two months.

At the date scheduled for the hearing, the Appellant appeared in person without any legal representative while the Respondent (the Republic) was represented by Ms Jenerosa Montano, learned State Attorney. The Appellant had nothing useful to add or explain in relation to his grounds of appeal but rather he just prayed to court to adopt his grounds of appeal and dispense justice and if it pleases to acquit him so that he can join his family and proceed to build the nation.

In response, the learned State Attorney opposed the appeal. It is the learned State Attorney opinion that first ground of appeal is baseless due to the facts that, in the case of **Paul Maduka** the chain of custody was in relation to cash money, but in this case it is pertain to a weapon and ammunition, which cannot exchange hands easily. Therefore, it is the learned State Attorney's prayer to the court to rely on oral evidence on custody of that exhibit, where all witnesses explained from the first to the last witness who tendered it in court. It is the learned State Attorney contention that there was no possibility of tempering with the exhibits. She further stressed that, the evidence adduced was enough to prove chain of custody. She cited the case of **Issa Hassan Uki vs**

Republic, Cr. Appeal No. 129/2017, CAT at Mtwara, page 11, 12 & 13, to support her argument and insisted that each case should be determinate on its own merits in consideration of whether the exhibit in question can change hands easily, referring the case of **Paul Maduka.**

The position of the law now is that paper trail is not the only evidence to prove chain of custody. In other words chain of custody can also be proved by oral testimony. As in the case of **Ernest Jackson @ Mwandikaupesi and Another v. The Republic**, Criminal Appeal No. 408 of 2019, Court of Appeal of Tanzania (unreported). In that regard **Paul Maduka** is no longer a good law, on that a call for paper trail is long overdue and the Apex Court made departure to it. Herein a chain was established by oral evidence where all witnesses who handled a gun Rifle 375 serial No. V19743 and six ammunition, exhibit PEA collectively, appeared in following chorological; Ins Aliko Mwakalindile (PW3) seizing officer, handed over to PC Said (PW2) thereafter PW3 retake it on 6/8/2017 then handed over to PC Katani (PW4) who submitted to ballistic expert DC Hafidhi (PW5), the later after laboratory testing handed over back to PW4 who in turn handed over to DC Triphone (PW1), the later preserved it, until when he tendered them in court. In this regard a chain of custody was not broken.

Therefore, the evidence adduced by the prosecution witnesses reveals and proves that the exhibit seized at the crime scene from the Appellant is the same exhibit which was analysed by the ballistic (PW5) then tendered to the trial court. Therefore, join hand with the learned State Attorney that the oral evidence of the prosecution witnesses was unbreakably clear, reliable, cogent and watertight. The first ground of appeal is unmerited.

Ground two and three, regarding a caution statement alleged to be out of time. The learned State Attorney submitted that, PW3 explained that he saw the Appellant already under police for another offence of government trophy and he interviewed orally, where the accused confessed to own a gun and ammunition and volunteered to lead where a gun and ammunition were kept, this was on 23/04/2017, he lead to the scene and arrived there at 13:00 hours and after resuming to police after procuring a gun and an ammunition rerecorded a caution statement at 17:30 hours by PW6.

The learned State Attorney acknowledged requirement of recording the statement of the person under restrain to be within four hours since he was arrested. In relation to this case she submission that, time for recording a statement commenced after the Appellant was

arrested with a weapon and not for government trophy section 50 (1) CPA, four hours are counted when he was under restrain. Section 50 (2) (a) CPA, time of 4 hours exclude time from the scene up to Tunduru Police Station. For the purpose of this case, the arresting officer was PW3 and not the one who arrested him for government trophy.

The law requires the person under restrain to be recorded his statement four hours after being arrested as per section 50 (1) of the Criminal Procedure Act [Cap 20 Revised Edition 2022]. Four hours has to be counted in exclusion of the time of investigation including any movement in relation to the offence laid against him, subsection (2) of the section 50 (supra) revealed. In case at hand four hours has to be counted immediately after the accused arrived at Police station after recovery of the exhibit. The evidence the accused arrived at Tunduru Police station. Thought there is no specific time mentioned during the hearing when the accused arrived at Tunduru Police Station but from the evidence of PW3 from Tunduru to the crime scene it takes about 1½ hours, because according to PW3 time for departure at Tunduru was 11:30 hours and time for arrival at the scene at Wenje Village was 13:00 hours. Plus time for logistic of collecting the independent witness and excavating, exhuming and seizing the exhibits, including time for resuming back at Tunduru Police Station, invariably could be not less

than three hours. Therefore at any rate a cautioned statement which was recorded from 17:30 hours, cannot be said to be out of time. To my view, the caution statement was recorded within the time prescribed by the law. The second and third grounds of appeal are baseless.

Ground number four, the learned State Attorney noted that indeed contradictions are there, but to her opinion the contradictions does not go to the root of a case, because the key issue here is that the accused is the one who lead and showed them where he hide those weapons and ammunition. It was the submission of the learned State Attorney that, memory differ from one person to another, arguing that witnesses testified after elapse of five years, therefore witnesses could not remember. He referred this court in the case of **Chukudi Denis Okechokwu & Others vs Republic**, Cr. Appeal No. 507/2015, CAT DSM.

The learned State Attorney submitted further that, ground five is in the sane line as ground four with a case cited to their opinion, she believes that such contradiction does not go to the root, what is important all witnesses said a certificate was predated and signed.

Ground number six, the learned State Attorney stated that it, was a mistake of PW3 regarding title of PW7 whether VEO or WEO. To her view, this contradiction does not go to the root of a case, because PW7

appeared to testify and said he was present and witnessed when the Appellant was showing where the buried gun and ammunition. According to her, WEO or VEO is a normal mistake.

It is true that there were discrepancies of testimony, where PW3 said the gun and ammunition were exhumed by S/Sgt Philibert, while the Appellant was handcuffed. PW7 said it was exhumed by the Appellant. But to my opinion these are minor discrepancies which do not go to the root of a case. This is because both PW3 and PW7 testified that the accused is the one who led them at the destination and specific points where a gun Rifle and six ammunitions were impounded. And there was no cross examination on that fact. Equally a fact that PW3 mentioned W.E.O instead of V.E.O, is immaterial, because PW3 also mentioned specific name of a particular officer by the name Chamba Ausi, who appeared and testified as PW7. The argument by the Appellant that PW3 said four people signed seizure certificate (exhibit PEZ) while PW7 said only two people signed, is unmerited. Because this fact alone does not make exhibit PEZ invalid. My undertaking is grounded on a fact that exhibit PEZ depict was signed by PW3, the Appellant and PW7, a fact which was not in dispute .

Also it is to be noted that, it took almost five years since the incident to the time when witnesses appeared to testify to court. in a

circumstances, minor contradictions are bound to occur due to the normal errors of observation, error in memory due to lapse of time, as it was decided in the case of **Marmo Slaa Hofu and 3 Others v. Republic**, Criminal Appeal No. 246 of 2011, Court of Appeal of Tanzania at Arusha. The discrepancies which raised by the Appellant cannot go to the root of the case, hence cannot flop the prosecution case, see the case of **Chukwudi Denis Okechukwu** (supra). Therefore, grounds four, five and six are not merited.

Arguing against ground number seven, the learned State Attorney submitted that, the Appellant was represented during the hearing, he ought to cross examine PW3 for him to clarify how he lead them to the scene because no one can answer that question for now. The learned State Attorney referred this court to the case of **George Maili Kimboge vs Republics,** Cr. Appeal no. 327/2013, CAT Mwanza. She insisted that Appellant failure to cross examine PW3 means acceptance of what PW3 said. This ground was taken into board when I was adjudicating ground number five above.

In relation to the ground number eight, the learned State Attorney opined it has no merit, because the Appellant apart from being identified by name, he was identified physically at the dock. She submitted that in the whole case the Appellant did not dispute his name; he did not cross

examine witnesses. The learned State Attorney submitted in reference to ground nine that the Appellant did not to cross examined PW7. Also, she insisted that the contradiction raised by the Appellant does not go to the root, what is important a seizure certificate was signed at the scene. She referred the case of **Chukwudi** *(supra).*

As rightly as submitted by the learned State Attorney on ground number eight and nine that the Appellant was in a position to challenge on cross examination the alleged names; that PW3 said Juma Said Ally Kalamali @Mojabila; PW7 mentioned Juma Said Kalamali, Juma Said and Juma Kalamali, all these ought to be put on cross examination, for PW3 and PW7 to explain. But the Appellant Counsel did not cross on that fact, and PW7 was not cross examined at all.

Also, the Appellant allegation that he was not identified properly to be among the person who signed the certificate of seizure is worthless. It is evident from the certificate of seizure that the Appellant herein is the one among who signed the certificate as depicted in exhibit "PE-Z". During the healing of the appeal the Appellant offer no any reason (s) as to why he failed to cross examine the witness on such issue. The argument of the Appellant that PW7 testified that he (PW7) did not sign the exhibit PEZ, is misleading. What is in the records, PW7 said exhibit

PEZ was signed by two people, nowhere PW7 dispelled signing exhibit PEZ. Importantly, PW7 was not cross examined at all. It is a cardinal law that failure to cross examine a witness on material facts means acceptance to what he said, and therefore the Appellant is estoped to challenge it at this stage.

As for the Ground number ten, the learned State Attorney submitted that, the evidence of PW5 explained why cartridges were three instead of two, because one cartridge was taken at the laboratory for analysis.

It is true that PW5 said he handed over to PW4 three spent cartridges and four ammunition. But later PW5 exhibited for identification two used cartridges and four alive ammunitions as the one he handed over to PW4, and there was no cross examination from the defence Counsel. PW4 also said he received three spent cartridges and four live ammunitions from PW5. But this discrepancy is cured by a ballistic laboratory report exhibit PEY, which depict that two spent cartridges labelled T1 and T2 were attached there, and this report was handed over by PW5 to PW4 along with exhibit PEA (a gun, two spent cartridges and four live ammunitions).

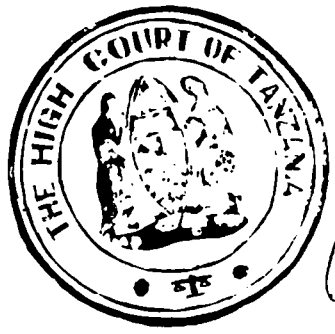
Ground number eleven, the learned State Attorney averred thought that, this ground is unmerited because any person who was a

custodian at the time he can preserve exhibits. PW3 was a custodian who preserved a gun and ammunition. The learned State Attorney explained further that, it is not necessary for the exhibit keeper to preserve exhibit, any person who is a custodian can preserve it. So far PW3 was a custodian he was capable to preserve them.

It is true that PW3 was not an exhibit keeper, but for all intents and purposes PW3 was a custodian for this matter. Above all, PW3 explained the reasons for him to keep the exhibit at his office in safe custody at Task Force office for two months, it is because immediately he was assigned to go for other operations in other regions. To my view, the reasons advanced by PW3 was justifiable.

The Appellant's appeal is dismissed for want of merit. The conviction and sentence imposed to the Appellant by the trial court are hereby upheld.

Order accordingly.



E. B. LUVANDA

JUDGE

27/02/2023