THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO 55 OF 2022

(Original Economic case no. 42 of 2020 in the Resident Magistrate Court of Morogoro at Morogoro)

MARKBRUNO ZAKARIA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

Date last order: 20/03/2023

Date of Judgement: 05/05/2023

MALATA, J

In the Resident Magistrate Court of Morogoro the appellant together with other two namely Shabani Hamisi Mbaga and Maneno Yahaya Bakari were charged with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap 16 R. E. 2019 (The penal code).

It was alleged that the appellant and two others, on 12th April, 2018 at ASASI GAS Msamvu Mazava area within Municipality and District of

Morogoro Region robbed a firearm make short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security which was in possession of its Security guard one YAHAYA KALINGA ALPHONCE and immediately before such robbery, they assaulted the said YAHAYA KALINGA ALPHONCE with panga and iron bar in order to obtain the said firearm.

The appellant was also charged with another count of unlawful possession of firearm contrary to section 20 (1) (2) of the Firearms and Ammunitions Control Act read together with paragraph 31 of the first schedule to and section 60 (1) of Economic and Organised Crime Control Act, Cap 200 R.E 2019. Where it was alleged that on 8/9/2018 at Kihonda Kilimanjaro area within the District and Morogoro Region the appellant was found in the possession of a firearm make short gun Pump Acton no. 007713312 TZ CAR 102745 without authorisation.

All the accused's pleaded not guilty to the charges, to prove the case the prosecution produced six witnesses, Assistant Insp Hamis Nnunguye (PW1), Godfrey Fulgence Shayo (PW2), Yahaya Alphonce (PW3), Issa Juma Mohamed (PW4), PF 1869 A/ Insp. Hamza (PW5) and Beatha Yohana Richard (PW6).

In nutshell the testimonies by both sides were as briefly summarized hereunder, PW1, testified that, on 8/9/2018 at 7:00 pm while at his office received a phone call from an informant, that the accused they have been looking for by the name of Markbruno Zacharia (the appellant herein), was seen around Kihonda-Morogoro. PW1 connected the informer with his team and they arrested the Markbruno at a bar around Kihonda.

Interrogation was conducted and admitted that he is was involved in criminal acts and mentioned his colleagues; Shabani Hamis and Maneno Yahaya. PW1 further stated the appellant took them to a place where he kept a gun in a village but before going there, PW1 asked the village chairman Mr. Godfrey Shayo (PW2) and some other citizens of that area including one woman by the name of Emiliana Hamza, to join them. PW1 testified that the appellant took them to a certain bush and showed them a gun which was kept together with two caps commonly known as "Mizula". The gun was Shotgun Pump Action No. 007713312 TZ CAR 102745. PW1 prepared a certificate of seizure which was signed by the PW1, appellant, PW2, witnesses and one police officer. The certificate of seizure and the gun were admitted as Exhibit P1 and P2 respectively. One piece of "Kitenge", two caps and one jacket were collectively at the same

place and admitted as exhibit P3. PW1 pointed the appellant as the one issue.

PW2, chairman of Kihonda- Kilimanjaro Street from 2014 to 2019, testified that, on 8/9/2018 at 21:45hrs he received a phone call from a police officer by the name of Hamis and asked him to join them to a certain area within the street where he said that the police officer told him there was an accused person who has hidden a gun. PW2 joined them and met with an accused person one Markbruno Zakaria, who took them to certain bush showed them a gun which was kept in a yellow "khanga" and there were two caps commonly known as "Mizula" and also that there was one jacket grey in colour. PW2 stated that, they took all those things to where they parked the car and he was given a certain paper to sign (exhibit P1).

PW3, testified that, on 12/4/2018 about 18:00hrs he went to his office at Quick Security and took a gun "Pump Action" which was handed over to him by store keeper one Issa Juma and then he went to the yard. On his way, he was invaded by four persons at ASAS GAS area, who threatened to kill him because he stopped them from stealing at the yard. They attacked him, hit him with a bar, and that he lost conscious. When he regains conscious, he found out that, they had broken his two hands and took his gun, phone, small radio makes OGAN, and Tshs 10,000/= from

him. PW3 rushed to his working place and met a person by the name of Hezron Luyiingo and, after explaining to him as to what happened, Hezron phoned to a police station and many police officers went there and took him to Morogoro Central Police Station and letter on to Morogoro Regional Hospital because his two hands were completely broken. PW3 stated that he was able to Identify only one bandit at the scene who is the first accused here in court. PW3 identified one accused (appellant) because he was so close to him and it was not the first time to see him. PW3 further stated that, he also managed to identify him in the identification parade conducted at the Central Police on 29/9/2018 at 13:15hrs. PW3 said the Gun that was taken from him is Action Pump with serial No. 007713312.

PW4 testified that on 12/4/2018 at about 18:00hrs' he gave a Gun Pump Action with serial No 007713312 to their security guard (PW3) and recorded the handing over in a certain 'counter-book' (exhibit P4). He said that, on the same day, at about 20:30hrs, he received a call from the driver and he was informed by him that PW3 has been robbed and the gun was taken away and that PW3 was taken to Morogoro Regional Hospital.

PW5 testified that on 29/9/2018 at about 00:00hrs he was at his office and was assigned to conduct an identification Parade in respect of the

three accused persons. He said that he prepared 12 participants and informed them the purpose and their rights. He stated that the identifying witness (PW2) only managed to identified Markbruno (the appellant). PW5 prepared form No. PF186 and the appellant signed it. The form was admitted and marked exhibit P5.

PW6 stated that on 1/10/2018 at about 13.00hours she was in her office at Urban Primary Court when the appellant was brought to her office by one police officer who asked her to record the appellant extra-judicial statement. She stated that she asked the police officer to get out of her office and that she remained with the appellant only. She stated that she introduced himself to the appellant as a justice of peace, explained his rights to him and asked him if he was ready to offer his statement. In response thereto he was ready. PW6 examined his body and found out that he had wounds in his two legs. PW3 further testified that the accused offered his statement willingly and admitted that he showed gun to police officers after they threatened to kill him. PW6 read over the statement to the accused person and they both signed. The extra-judicial statement was admitted as exhibit P6.

The prosecution case ended with sic (6) witnesses and closed the case. Thereafter the court made a ruling and found out that the second and

third respondents had no case to answer and they were accordingly acquitted whereas the prima facie case was established against the first accused (the appellant herein).

The appellant testified as DW1 and in his testimony he stated that on 08/09/2020 at about 10.00 am four police officers arrested him, he was then charged with armed robbery. DW1 stated that the fact that he showed the police officers the gun is a lie because the police are the ones who put the gun in the bush. He further stated that PW3 failed to identify him in court while testifying, moreover PW3 stated that he recorded his statement on 19/09/2018 while the statement was recorded on 13/04/2018, PW3 failed to prove that he was really employed as alleged. DW1 further attacks the evidence of PW2 that he didn't conduct search on the police officers before he was taken to the bush, it means the police officers had the gun with them. DW1 further stated that PW4 failed to prove that he was employed, his evidence shouldn't be believed. He further stated that the prosecution failed to bring the owner of the gun and call the exhibit keeper. He further testified that he recorded the extra judicial statement after being beaten and threatened by the police officers.

Lastly DW1 testified that the prosecution failed to call the prosecutor, he prayed to be acquitted because the prosecution failed to prove the case against him. DW1 tendered the complainants' statements, the same was admitted as D1.

After a full trial, the court found the appellant guilty of all offences convicted and sentenced him to serve thirty (30) years imprisonment for the offence of armed robbery and twenty years' imprisonment for the offence of unlawfully possession of firearm. Dissatisfied with conviction and sentence the appellant appealed to this court armed with ground of appeal

1. That, the learned trial SRM erred in law and fact by convicting and sentence appellant failed to consider that variance between charge sheet and prosecution evidence registration number of alleged gun.
2. That, the Learned trial SRM erred in law and fact by convict and sentence appellant based on poor visual identification of PW 3 which was unsatisfactory.
3. That, the Learned trial SRM erred in law and fact by convict and sentence appellant based on exhibits P1 and P2 failed to consider chain of custody as per procedure of the law.

4. That, the learned trial SRM erred in law and fact by convict and sentence appellant without considering that the prosecution failed to summon some important witness/ ballistic expert and owner of quick security to testify.
5. That the Learned trial SRM erred in law and fact by convict and sentence appellant based on exhibit P5 Identification parade register without considering that was not conducted as per procedure laid down in PGO NO 232.
6. That the learned trial SRM erred in law and fact by convict and sentence appellant based on unreliable and incredible evidence of PW 3 which was sworn as farmer while in his evidence stated that he is a security guard
7. That the learned trial SRM erred in law and fact by convict and sentence appellant-based exhibit P6 (extra judicial statement) that was recorded illegally by PW 6 and uncorroborated with prosecution evidence.
8. That the learned trial SRM erred in law and fact by convict and sentence appellant while there is no factual of legal points of determination in accordance with mandatory provision of criminal procedure Act (Cap 20 R.E.2022)

9. That the learned trial SRM erred in law and fact by convict and sentence appellant when failed to consider the appellant defence and no analyse and evaluation of the whole evidence.

10. That, the learned trial SRM erred in law and fact by convict and sentence appellant relied on incredible unreliable and contradictory evidence of prosecution witnesses.

11. That, the learned trial SRM erred in law and fact to convict and sentence appellant failed to consider the prosecution case was never proved beyond reasonable doubts against the appellant.

Based on the grounds of appeal the appellant prays that this Honourable Court be pleased to allow his grounds of appeal, quash the conviction, set aside the sentence and set him free

When the appeal came for hearing the appellant appeared unrepresented while the respondent was represented by Mr. Emmanuel Kahigi, learned State Attorney.

The appellant did not make any submission in support of the appeal but prayed the court to consider his appeal based on the grounds of appeal and allow the appeal. He however reserves his right to make a rejoinder.

In reply to the appeal Mr. Kahigi learned State Attorney informed this court that the appellant was convicted and sentenced with two offences

namely; Armed robbery and unlawfully possession of firearm made short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security. Mr. Kahigi stated that the republic doesn't resist the appeal in respect of the first count of armed robbery on reasons that, the appellant was not properly identification where he stated that PW3 and PW5 who were the key witnesses contradicted themselves on the identification of the appellant. PW3 in cross examination at page 39 of the typed proceedings stated that he doesn't remember how the appellant wear on the day of the incident and didn't provide any description to the police officers. Further at page 44 of the court typed proceedings PW5 testified that PW3 made description of the appellant, while in fact he didn't. it is not clear therefore if the appellant was really identified at the scene of the crime. Mr. Kahigi submitted that the evidence in support of count of armed robbery is not sufficient and do not meet the standard of proof required in proving criminal offences based on identification.

Mr. Kahigi further submitted that there was no immediate reporting of the appellants action to relevant state organ or other people. He supported his argument with the case of **Jaribu Abdallah vs. Republic** [2003] TLR 271, where the court held that in matter of identity it is not enough merely to look at facts favouring accurate identification equally is credibility of

the witness has to be looked into and ability to name the offender by the witness at the earliest possible moment is a reassuring though not decisive fact.

Based on the afore stated evidence and submission the respondent was of the opinion that the prosecution side did not meet the standard of proving the case in respect to the first count. Therefore, the appellant not properly convicted and sentenced, he succumbed.

As to the second of count of unlawfully possession of firearm, the learned State Attorney submitted that the offence was proven beyond reasonable doubt. He referred this court to the evidence by PW1, PW2 and PW6 proved the offence to the standard required by the law. In PW1's testimony at page 27 of the proceedings, he explained that the appellant pleaded guilty and led them to where he had hidden the firearm. This evidence is corroborated by the evidence of PW2 at page 34 and 35 of the proceedings. Evidence by PW6 the justice of peace where the appellant wrote his statement confessed to have been found with unlawfully possession of firearm. It is undoubtedly that the appellant was a free agent when he gave the statement before a justice of peace.

Mr. Kahigi further submitted that, it is alleged that there was variance between the charge and the evidence, where the appellant states that

there was contradiction between PW3 and PW4 on the registration number of the firearm. It is not true that there was contradiction, PW1 named the registration number of the fire arm TZ CAR 102745 while PW3 and PW4 identified the firearm by serial number 00771312, thus there was no variance.

As to the allegation of convicting the appellant using exhibit PE1 and PE2 while the chain of custody wasn't followed, it was the learned State Attorney's submission that the exhibit can't be able be tempered in any way by the state organs. It is the same item contained in PE1 with serial number and registration number signed by the appellant found in possession by the appellant. It was the appellant who led the police to where the firearm was hidden. There is no possibility of tempering with the exhibits and there is no any indication or doubt raised that the exhibits were tempered in any way.

On the allegation that the appellant's evidence was not considered at the trial court is uncalled for. The answer is at pages 9, 10 and 11 of the judgement where the trial court considered the appellant's evidence and weighed against the prosecution evidence and noted that it did not expose any doubt to the prosecution evidence which proved the offence beyond reasonable doubt.

Mr. Kahigi by way of closing his submission he stated that, there are no sufficient grounds to fault the trial courts conviction on the second count of unlawfully possession of firearm, he prayed the court to reject the appeal on the second count but allow it on the first count of armed robbery.

By way of rejoinder, the appellant had this to say, it is alleged that the firearm belonged to Quick Security, the prosecution side didn't state the specific area the firearm was found, they didn't specifically state who was the owner of that house, he further stated that he was not found in possession of the firearm.

He prayed the court to allow the appeal, quash the conviction, set aside the sentence and set him free.

Having heard the rival submission from both parties to this appeal, I am humbled to gather issues for determination as follows: -

1. Whether the evidence on record proved the first count of Armed robbery against the appellant
2. Whether the evidence on record proved the second count of unlawful possession of firearm against the appellant.

As put in nutshell herein above both Respondent and appellant share similar stand that the first offence was not proven beyond sane of doubt. Basically, for reasons that, ***one***, PW3 did not name the appellant at the earliest possible opportunity, ***two***, there was no description given before identification parade, ***three***, there was contradiction between PW3 and PW5 on fact on description, and ***four***, credibility of PW3 was not considered on this piece of evidence in particular on identification.

This court has gone through the evidence on record and noted that, ***one***, on the fateful date PW3 (the victim) was holding a short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security, ***two***, PW3 was attacked and beaten by four bandits of people, ***three***, the bandits attacked him with a bar and lost conscious, ***four***, the bandits managed stole among other things, the short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security, ***five***, the bandits broke the two hands of PW3 which led to admission before Morogoro Regional Hospital, ***six***, PW3 identified the first accused (the appellant herein), ***seven***, the Appellant was identified by PW3 as he was so close, ***eight***, PW3 used to see the appellant on several occasions because they used to go to where PW3 was guarding, ***nine***, incidence was reported to the police who invoked investigation machinery, ***ten***, the appellant herein was

arrested and on inquiry he pleaded accountable to the incidence and did lead the investigators with other civilians people to where he had hidden short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security, ***eleven***, the robbed short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security was then retrieved, ***twelve***, the appellant confessed before a justice of peace to have led the investigator to where he had hidden the short gun Pump Action No. 007713312 TZ CAR 102745 the property of Quick security, ***thirteen,*** the certificate of seizure and shot gun were tendered and admitted as **Exhibit P1 and P2** and ***fourteen,*** Extra Judicial Statement by the appellant herein was tendered unopposed and admitted as **exhibit P6.** The evidence by PW1, PW2, PW3, PW4, PW5 and PW6 confirm all what is stated herein above.

For the offence of Armed robbery to be established and proved, what is stated in section 287A of the Penal Code Cap.16 R.E.2022 must be established and proved. The section provides that;

> *"A person who steals anything, and, at or immediately before or after stealing is* ***armed with any dangerous*** *or* ***offensive weapon*** *or* ***instrument*** *and at or* ***immediately before*** *or* ***after stealing*** *uses or threatens to use violence to any person* ***in order***

to obtain *or* ***retain the stolen property****, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment.*"

What I have gathered from the provision above as ingredient of armed robbery are; ***one,*** a person must be armed with any dangerous or offensive weapon or instrument, **two**, possession of dangerous or offensive weapon or instrument must be used immediately before or after stealing, ***three***, he must have used to or threatened to use violence to any person and ***four***, the intention of using it must be to obtain or retain the stolen property. In short these are the ingredients of the offence of armed robbery.

In the case at hand therefore, it is not in dispute that; **first**, as PW3's testimony that, the appellant used a bar to attach PW3, **second**, the appellant through attacking broke two hands of PW3, ***third***, appellant took short gun Pump Action No. 007713312 TZ CAR 102745 from PW3, ***forth***, the short gun Pump Action No. 007713312 TZ CAR 102745 was found with the appellant, ***fifth***, PW3 identified the appellant as one of bandits who attacked him and that PW3 knew the appellant as on several occasions used to go to where PW3 was guarding.

Based on the evidence on record, the evidence of identification was of no use given the plausible evidence that the appellant is the one who was found with a short gun Pump Action No. 007713312 TZ CAR 102745. The said firearm was robbed from PW3 after attacking PW3 and broke his two hands. The trial court had nowhere to rely upon in disbelieving this piece of evidence as to how PW3's hands get broken.

This court find that PW3 is credible witness and nothing wrong for all what he has so far testified at the trial court. The trial court was told how the hands of PW3 were broken that is by using a bar which evidence has not been contradicted but corroborated with the rest of the evidence on record by the prosecution witnesses.

Therefore, it is my settled view that, the offence of armed robbery was proven beyond sane of doubt. In that regard, I disagree with the position put forward by both Mr. Emmanuel Kahigi learned State Attorney and the appellant. The first issue is thus resolved in affirmative.

Reverting to the second count of being found in unlawfully possession of fire arm, the cardinal principal is that he who alleges existence of a certain fact must prove its existence. This can be ascertained from the provisions of the TEA as well as the case law. Section 110(1) of TEA provides that,

"...Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. . ."

In criminal cases the burden of lies to the prosecution side to prove the case beyond reasonable doubt as they are the ones who always alleges the occurrence of a criminal offence. In the case of **Mohamed Haruna @ Mtupeni & Another vs. Republic**, Cr. Appeal No.25 of 2007(unreported) where the Court of Appeal held,

"... the burden is always on the prosecution. The standard has always been proof beyond a reasonable doubt."

Thus, the prosecution has the duty to prove all the ingredients of the offence as provided for under Section 20 (1) (2) of The Firearms and Ammunition Control Act which provides

*20(1) a person shall not **possess** firearm or firearm part unless he*

(a) Holds a dealer's, manufacturer's or a gunsmith's license or an import, export, on transit or transporter's permit issued under this Act, or

(b) Is authorized to do so under any other written Law

(2) A person who contravenes this section commits an offence and is liable upon conviction, to imprisonment for a term of five years.

The Economic and Organized Crime Control Act, included the offence under section 20. 21 or 45 of the Fire Arms and Ammunition Control Act to be economic offences under Paragraph 31 of the first Schedule to the Act, hence Section 60 of the Act come in to provide for the sentence which is not less than twenty years and not exceeding thirty years.

In the instant case, the duty of the prosecution side before the trial court was to prove all the ingredients of offences which the appellant stood charged. In the first count, the prosecution side was supposed to prove beyond any reasonable doubt second, that the appellant was in unlawful possession of firearms and, two that he had no permit from an authorized officer.

Possession is first ingredient, and the need to prove the same is inevitable. The first question is whether the appellant was in possession of the said firearm. In the case of **Moses Charles Deo vs. Republic** (1987) T.L.R. No. 134 the court held that

"For a person to be found to have possession, actual or constructive of goods, it must be proved either that ***he was***

aware of their presence and that he exercised control over them ...."

Upon arrest of the appellant, he volunteered to show where he had hidden the gun, the police officers together with the chairman of that area and other civilian went with the appellant where he showed them a gun, the gun was short gun Pump Action No. 007713312 TZ CAR 102745. PW1 filed the certificate of seizure (Exh.P1) where the appellant, the chairman, police officer signed it.

It is undisputed that, the appellant is the one who exhibited the police where the gun was, he was aware of the presence of that gun as there is no other explanation of how it came to the appellant knowledge and possession and is the same gun which was robbed from PW3 being the property of quick security.

The prosecution's evidence is based on the appellant's confession which led to the discovery of firearms, the appellant confessed before PW1 and led the police together with other people including PW2 to the place where the alleged gun was concealed. Thus, the information by the appellant was relevant to determine where the stolen gun was.

in this case section 31 of The Evidence Act is relevant and it provides;

31. When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.

But, further to that it is the stance of the law that, confession leading to discovery is reliable. In the instant case confession of the appellant led to the discovery of the gun which he unlawfully possessed. The principle of confession leading to discovery is not all about mentioning that there was a confession leading to discovery but furthermore that the found items were properly and adequately identified to have been the subject matter of the charge as in this case. In the case of **John Peter Shayo and 2 others vs. Republic** (1998) TLR quoted in **Tumaini Daudi Ikera vs. Republic**, Criminal Appeal no. 158 of 2009 (unreported), the court observed as follows;

(i) Confession that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that, ***such discovery supply a guarantee of***

the truth of that portion on the confession which led to it.

The appellant admitted to have been arrested, but denied to have any involvement with the offence and the gun was put in the bush by the police and they asked him to show it in front of the street chairman.

Further, the appellant confessed before the justice of peace to show the police where the gun is, in the extra judicial statement the appellant stated that;

> *Mnamo tarehe 8/9/2018 nilikuwa maeneo ya Mazimbu road, wakatokea maaskari wamevaa kiraia wakanikamata.* ***Baada ya kunikamata wakasema tunataka silaha la sivyo tunakuua. Walivyoniambia hivyo mimi nikawapa silaha aina ya pump action baada ya hapo wakanipeleka kituoni,*** *hayo ndiyo maelezo yangu.*

I took time to go through the trial court proceedings to satisfy if the procedure for taking the confession by the justice of peace were followed and I am satisfied that there is no procedure irregularity in the whole process of taking and the exhibits.

Though the appellant in a quest to discredit the evidence of prosecution he testified that he told the justice of peace that he was beaten, and he recorded the statement after he was beaten by the police. The statement didn't show the allegation of the appellant that he was beaten, I have no reason to doubt the magistrate that he recorded something out of what was stated by the appellant. In addition to that, even if there was a threat there is no logical explanation why the applicant knew the place the gun was hidden and presented the police to the exactly same gun stolen.

The above analysis of evidence answer ground 7 where the appellant attacks the legality credibility of exhibit P6.

The appellant's another grievance is that there is variance between the charge and evidence, PW3 and PW4 evidence contradicts each other on the registration number of the fire arm. Particulars of the offence in the charge sheet show that the firearm is short gun Pump Action no. 007713312 TZ CAR 102745. PW3 while giving his testimony he identified the gun as Action Pump with numbers 007713312 on the other side PW4 he testified that he gave PW3 A short gun Action with serial number 007713312, and he further stated that he can recognize the firearm.

In the case of **Mohamed Said Matula vs. Republic** 1995 T.L.R. 3 it was held

"Where the testimonies by witnesses contains inconsistencies and contradiction the court has a duty to address the inconsistency and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradiction are only ***minor or whether they go to the root of the matter."***

To answer the grievance by the appellant, in the said firearm There are identification numbers, there is registration number which is TZ CAR 102745 and the serial numbers that is, 007713312, both registration and serial numbers are reflected in the charge sheet, thus for PW3 to identify the firearm by serial numbers and PW4 to identify by using serial numbers is in not a contradiction at all as one identified by serial number and the later by registration number but both numbers are of the same stolen gun. Therefore, the complaint is unfounded.

Further, the appellant alleged that the trial magistrate erred in convicting him based on exhibits P1 (certificate of seizure) and P2 (firearm), failed to consider the chain of custody as per procedure of the law. It has been a well-established position of the law that for a substance to relied upon by the court to convict the accused person its chain of custody from the time of its seizure to when it is tendered in court as an exhibit has to be

satisfactory established. The rationale being ***first***, to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tempered with, ***two***, to establish that the alleged evidence is in fact related to the alleged crime in which it is being tendered, see **Chukwudi Denis Okechukwu & 3 others vs. The Republic**, Criminal Appeal No.507 of 2015, CAT(Unreported).

The question that follow is whether the chain of custody of Exhibit P2 was well established by the prosecution and is in line with the law. In order to establish a chain of custody I had to revisit the trial court evidence as follows; PW1 the police officer who arrested the appellant, filed the certificate of seizure at the scene of crime which was signed by the appellant, another policeman and the independent witness took the appellant and the exhibit to police station where the exhibit was handed the exhibit-to-exhibit keeper who marked it as Reg. 298/ 2018. The exhibit was later produced in court by PW1 and admitted as exhibit P2. Both exhibits were admitted un objected.

Following the events from when the firearm was detained, it has passed through the hands of PW1 and the exhibit keeper. More so the firearm cannot change hands easily as they are identified by registration numbers and serial numbers, it can't be easily changed or tempered through

change of hands, this is opposed to other exhibits such as narcotic drugs. The position was correctly elaborated in the case of **Joseph Leonard Manyota vs. Republic,** Criminal Appeal no. 485 of 2015 (unreported) where the court of appeal held;

> *It is not every time when the chain of custody is broken, then the relevant item cannot be produced and accepted by court as evidence, regardless of its nature. We are certain that this cannot be the case say where the potential evidence is not in the danger of being destroyed or polluted and / or in any way tempered with.*

In the light of the above judicial precedent and since in this case the item to be produced is the firearm which cannot easily changed from hands of one person to another and cannot be easily tempered with. The chain of custody then, even if broken, due to the nature of the object tendered to the court there is no possibility of it being changed or tempered with. This ground therefore has no merit.

The appellant also challenged the credibility of evidence of PW3 on the sixth ground and further on the tenth ground he stated that the trial magistrate entered conviction against him based on unreliable and incredible evidence. The appellant alleged that PW3 was sworn as a farmer

while in his evidence he stated he is a security guard, and on the tenth ground the appellant complained that the prosecution relied on the incredible, unreliable and contradictory evidence of the prosecution.

It is clear that the conviction of the appellant is based on the credibility of the prosecution witnesses, as to whether it was the appellant who was found in unlawfully possession of the firearm. We are also alive to the principle that in a first appeal, such as the present one, the court has the duty to re-evaluate the evidence of the trial court and arrive at its own conclusion. Also, it was stated by the court of appeal in **Omary Ahmed vs. Republic**, Criminal Appeal [1983] TLR 32,

> *The trial Courts finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court for re assessment of credibility.*

The credibility of witnesses is the domain of the trial court, where the witnesses testified and the magistrate can assess the demeanour of the witness in relation to the evidence he gives before the court. When determining the issue of credibility of a witness the Court of Appeal of Tanzania in the case of **Nyakuboga Boniface vs. Republic**, Criminal Appeal No 434 of 2016 (unreported) the court said that;

"There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the Judge/ magistrate, and the assessment which is made to the evidence which he/she gives in court'

With regard to the evidence of PW3, it is true that by the time the incident happened PW3 was the security guard, and he testified to this court as what happened while he was at his area of work. As to when he changed from being a security guard to farmer is immaterial to this case. The important thing is he testified what happened on the day of the incident and his evidence. As to the rests of the witnesses who were at the scene of the crime when the appellant showed the police where hid the gun, that is PW1 and PW2 the court assessed their credibility and came to the conclusion that the same is credible as their testimonies were coherent and cogent and thus reliable, and upon evaluation of their evidence this court find no reason to fault with the trial court's findings.

On the issues of evidence, the appellant further in the fourth ground faults the trial magistrate to convict him without taking into consideration the prosecution failed to summon important witnesses, ballistic expert and the owner of the quick recovery.

It is a trite law that failure to call material witness in prosecuting of a case can draw an adverse inference against the calling party. In the case of **Aziz Abdalah vs. Republic** (1991), CAT The court held;

> *In general, and well-known rule is that the prosecutor is under prima facie case to call those witnesses, from their connection with the transaction are able to testify the material facts. if such witnesses are within reach but not called without sufficient reasons, the court may draw adverse inference on the prosecution.*

The issue for determination is whether the witness ought to have been called as alleged by the appellant are material witnesses to the case. It is undisputed that the appellant is charged with the offence of unlawfully possession of firearm, the evidence to establish is that of possession and the prove that the appellant owned the gun unlawfully. The owner of Quick Security is not a material witness, to prove the identity of the gun or firearm that it belonged to Quick Security can be done by any personnel responsible for safe keeping of the firearms at the company as PW4 did in this case. Further there was no need to call the ballistic expert, the gun was found and PW3 and PW4 identified it to be the gun stolen from PW3.

The appellant's eighth and ninth ground of appeal are argued together and these grounds criticize failure of the trial court to consider the appellants defence and failure to analyse and evaluate the whole defence the trial court judgement for lacking factual and legal issues for determination in accordance mandatory provision of criminal procedure act.

By that the Appellant is referring to noncompliance with section 312(1) of the CPA, Section 312 of the CPA provides:

> *"(1). Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the Court, and shall contain the point or points for determination, the decision thereon, and the reasons for the decisions and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open Court.*
>
> *(2). In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

The gist of the appellant's complaint is that the trial court's judgment did not contain factual and legal points for determination.

What this means in judicial proceedings is that, in writing a judgment the judge or magistrate will not only have to summarise and analyse the body of the evidence and the law, but also to evaluate in order to determine its worth, credibility or believability and significance by using the legal standards of admissibility, burden and standards of proof and weight of such evidence, for both the prosecution and the defence in criminal cases, and the parties in civil cases. This is what is referred to as critical analysis See **Amiri Mohamed v Republic**, (1994) TLR 138. The position was succinctly put by this Court in **Leonard Mwanashoka v Republic**, Criminal Appeal No. 226 of 2014 (unreported) in the following words:

> *"It is one thing to summarise the evidence for both sides separately and another to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain... Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

What section 312 (1) of the CPA requires, in ordinary language, is both an analysis and evaluation of all the relevant evidence or material necessary to resolve the issue that call for determination in a criminal case. The style of writing can be different as every magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients should be there, and these include analysis of both the Prosecution and the defence evidence and ratio decidenti.

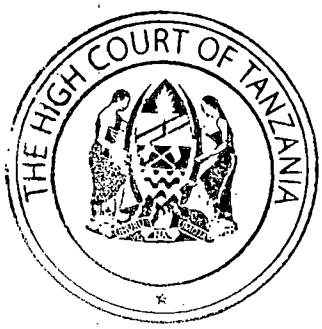
In the present case the judgement ***first***, it contains summary of evidence of both sides, ***second***, it contains issues for determination although the trial magistrate didn't mention or shortlist them before analysing each issue. But there are issues raised and within the issues raised by the trial magistrate did evaluate the evidence of each side and arrive at decision that the offence is proven beyond reasonable doubt against the appellant.

After revaluating the evidence on record, I have come to the conclusion that, the trial court did properly assess the evidence and credibility of witnesses, and so arrived at a right conclusion leading to a conviction of the appellant. Under the circumstances I see no reason to fault the finding of the trial court in respect of conviction and sentence.

Consequently, I hereby dismiss the appeal in its entirety for want of merits.

IT IS SO ORDERED.

DATED at **Morogoro** this 5th May, 2023

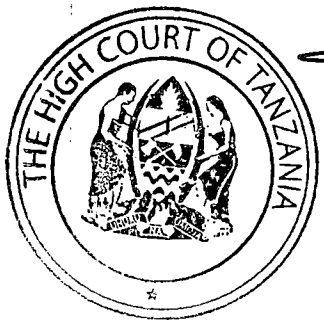


G. P. MALATA

JUDGE

05/05/2023

Right to appeal explained to the parties



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JUDGE

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