

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

CRIMINAL APPEAL No. 116 OF 2022

*(Arising from the District Court of Serengeti at Mugumu in
Economic Case No. 27 of 2020)*

1. **MUHUMBWA MUHUMBWA**

@ MATOKORE @ SAMWEL MUHUMBWA

2. **MANI MARWA MUGOSI**

@ MWITA MARWA MUGOSI &

3. **ISACK NYASWI @ MARWA**

..... **APPELLANTS**

Versus

THE REPUBLIC **RESPONDENT**

JUDGMENT

15.05.2023 & 18.05.2023

Mtulya, J.:

The **District Court of Serengeti at Mugumu** (the district court) on 8th June 2022 had resolved **Economic Case No. 27 of 2020** (the case) and found **Mr. Muhumbwa Muhumbwa @ Matokore @ Samwel Muhumbwa** (the appellant) guilty of two offences of unlawful possession of armament contrary to section 11 (1) of the **Armaments Control Act** [Cap. 246 R.E. 2002] (the Armament Act) read together with section 57 (1), 60 (2) and paragraph 32 of the Schedule to the **Economic and Organised Crime Act** [Cap. 200 R.E. 2019], as amended (the Economic Act)

and unlawful possession of ammunitions contrary to section 21 of the **Firearms and Ammunitions Control Act**, No. 2 of 2015 (the Firearms Act) read together with section 57 (1), 60 (2) and paragraph 31 of the Economic Act.

The district court finally had sentenced the appellant to serve twenty (20) years imprisonment for each indicated offence to be served concurrently. The reasoning of the district court in arriving at the decision is found at page 18 of the judgment, that:

...it is the prosecution witnesses on record stated that they went to the first accused person's premises and conducted a search after having the information that the first accused person posses a gun. They found a gun make AK 47 with Reg. No. 15213393 and eleven round bullets. The accused person had no any permit of possessing a gun and ammunitions. The first accused person being found with the exhibits one gun and eleven ammunitions, a search warrant was signed by the first accused person, independent witness and police officer who arrested the accused person. A search warrant was admitted here in court and marked as PE.1. Also,

*one gun make AK 47 with Reg. No. 15213393 was
tendered as exhibit and marked as PE.2.*

Both reasoning and decision of the district court had aggrieved the appellant hence approached this court and filed eleven (7) reasons of appeal in **Criminal Appeal No. 116 of 2022** (the appeal). The reasons were scheduled for determination in this court on 15th May 2023, and the appellant appeared through teleconference without legal services whereas the Republic had marshalled **Mr. Felix Mshama** and **Mr. Zarubaberi Ngowi**, learned State Attorneys.

In explaining the reasons of appeal, the appellant, as a lay person, had briefly submitted that; first, exhibit P.9 [Handling of Exhibit Form (exhibit PE.9)] was a wrong evidence as contradicted the particulars of offence in the charge sheet; second, the appellant was arrested without there being a certificate of seizure; third, the appellant was convicted and sentenced based on speculations; fourth, the rule on chain of custody of the exhibits was broken; fifth, the gun make AK 47 Reg. No. 15213393 (exhibit PE.2) was tendered in the district court by a police officer; sixth, the case against the appellant was not proved beyond doubts; and finally, the prosecution

failed to summon material witness hamlet chairman **Nyamhanga Ndera** who was cited by PW1 to be present at the scene of the crime.

Replying the reasons of appeal submitted by the appellant, Mr. Mshama stated that: first, the appellant did not protest admission of exhibit PE.9 and during cross examination he remained mute on the complaint of contradiction between the charge sheet and PE.9. Similarly, the appellant did not protest admission of exhibit PE. 2, as reflected at page 31, 32 and 44 of the proceedings of the district court. In the opinion of Mr. Mshama, the complaint of the appellant in ground number one of appeal is resolved by section 388 of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act).

On the second reason of appeal, Mr. Mshama submitted that the record of the district court shows, at page 100, 101 and 102, that Police Officer, Ernest (PW6) had produced a Certificate of Seizure and was admitted as exhibit PE. 17 and the appellant did not protest the same during admission. According to Mr. Mshama, the Court of Appeal had already stated in the case of **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007,

that failure to cross examine on important matters, it is assumed the appellant had admitted the facts.

Regarding the third complaint, Mr. Mshama submitted that the district court had decided the case according to the law basing on facts and evidences registered and there is nowhere in the record to show that the district court speculated or convicted the appellant on suspicions. According to him, court record is sanctity document and cannot be easily impeached as it was stated in the case of **Halfan Sudi v. Abieza** [1998] TLR 527. Concerning the fourth ground of appeal, Mr. Mshama prayed it to be resolved by his reply in the first ground of appeal.

Replying the fifth ground of appeal, Mr. Mshama contended that the answer is found at page 31 and 32 of the proceedings of the district court where police officer G. 3071, D/Cpl. Genuine (PW1) tendered exhibit PE.2 as a witness who was brought to court by the prosecution side. With the complaint on proof of criminal cases beyond doubt, Mr. Mshama submitted that the prosecution had proved its case beyond doubt as it brought into the court a total of six (6) witnesses and several exhibits which link the appellant with the convicted offences.

Finally, Mr. Mshama stated that material witness hamlet chairman Nyamhanga Ndera was present during the arrest of the appellant and seizure of PE.2, but could not be found during the proceedings in the district court. According to Mr. Mshama, the law in section 34B of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act) allows admission of witness statement and the respondent is reflected to pray the same at page 87 of the proceedings of the district court and the statement was admitted. Mr. Mshama submitted further that the appellant was granted ten (10) days leave to scrutinize and protest the statement, but declined to register any protest.

Rejoining the submission of Mr. Mshama, the appellant had briefly submitted that the district court was bias and did not grant him adequate time to enjoy the right to be heard in protesting the exhibits which were brought by the prosecution in the case. According to him, he cannot produce any statement with the cited provisions of the law in the Act and Evidence Act and the indicated precedents, because he is a lay person unaware of legal issues. Finally, the appellant submitted that hamlet chairman Nyamhanga Ndera was present in the Village during the proceedings at the district court, but the respondent

had declined to call him and forged the statement to fabricate the case against him.

I have scanned the record of the present appeal and found that the appellant was prosecuted in the case at the district court with two other persons in a total of six (6) offences. The two other persons were **Mr. Mani Marwa Mugosi @ Mwita Marwa Mugosi** (Mr. Mugosi) and **Mr. Isack Nyaswi @ Marwa** (Mr. Marwa). After registration of all materials in the case, the district court had acquitted Mr. Mugosi and Mr. Marwa for lack of evidences which connect the dual in the case and convicted the appellant. The reasons of convicting the appellant are found at page 18 of the judgment as indicated in the second page of this judgment. The reasons of declining conviction to Mr. Mugosi and Mr. Marwa are reflected at page 18 and 19 of the judgment that:

The first accused person upon interrogation, he confessed to cooperate [with] the second and third accused persons. The police officers went to the third accused person and conducted a search and nothing was found in his house. They arrested the two accused persons with the exhibits to police station and third accused was arrested by PW4 and brought to police station after searching him and

found nothing into his premises. The prosecution on their evidence did not prove to the court on the cooperation on criminal matters between the first accused and the other co-accused persons...the prosecution failed to prove the possession [of a gun and armaments] on the same to the second and third accused person.

The record shows further that the appellant was arrested at his residence on 6th May 2018 by police officers following information of an informer that the appellant possessed a gun and ammunitions unlawfully. Following the information, police officers, including PW1, Inspector Kweka, and Nyamiturumwa Hamlet Chairman, **Mr. Nyamuhanga Ndera**, went and searched the house of the appellant and found a gun make AK 47 numbered 15213393 with eleven (11) live bullets without any display of permit of the same. According to the evidence of PW1 as recorded at page 29 of the proceedings of the district court, which was not protested by the appellant during cross-examination, as reflected at page 46 of the proceedings of the district court, the gun and bullets were intended for hunting and killing elephants at Serengeti National Park.

Following the arrest of the accused and alleged weapons, the respondent had followed all necessary legal steps in taking the accused and items to the district court for the case. The record shows: first, a search warrant duly signed by Inspector Kweka and the appellant in the presence of independent witness Nyamhanga Ndera and G. 3071 DC Genuine and was produced and admitted in the case as exhibit PE.1 without any protest or cross examination from the appellant; second, a Certificate of Seizure showing the gun and bullets duly signed by the appellant and PW1 was tendered as exhibit PE. 4 without any protest or cross examination from the appellant; third, a Chain of Custody Record was admitted as exhibits PE.5 & PE. 9, without protest or cross examination; fourth, statement extracted from Assistant Inspector John Kweka of Mugumu Mjini on the narration of the allegation against the appellant was produced on record as exhibit PE. 8 without protest or cross examination from the appellant; fifth, a ballistic laboratory report on examination of the gun AK 47 serial number 15213393 caliber 7.62 mm and eleven (11) live ammunitions caliber 7.62mm which were found in good working condition was admitted as exhibit PE.12, without any protest or cross examination from the appellant; and finally, witness statement of **Mr. Nyamhanga Ndera @ Mang'era**

was tendered in the case and admitted as exhibit PE.16, with ten (10) days leave to the appellant to protest, but he declined to do and had also failed to cross examine PW6 on the subject.

The exhibit PE. 16 displays the whole story on what transpired on 6th May 2018, and at the second page of the exhibit, **Mr. Nyamhanga Ndera @ Mang'era**, narrated that:

Nilishuhudia katika upekuzi huo, nyara za serikali zikipatikana katika nyumba ya mtuhumiwa muhumbwa...ambapo katika nyumba ya nyasi ya mtuhumiwa ilikuwa bunduki ya kivita...ikiwa imefichwa kwenye paa la nyumba hiyo ya nyasi. Pia alipatikana na magazine moja ya bunduki hiyo ambayo nayo ilikuwa imefichwa kwenye paa la nyasi la nyumba ya mtuhumiwa na risasi zilizokuweco zilihesabaiwa na kupatikana risasi kumi na moja.

In replying the allegations levelled against him, the facts and evidences produced during the hearing of the matter, the appellant had testified, as reflected at page 110 of the proceedings of the district court, that:

On 06/05/2018, I was sleeping at my house and heard some people knocking my door and introduced to me that they were police officers. I opened a door and entered into my house and conducted a search. They did not find anything... on 14/05/2018, I was brought in court with my co-accused person and charge was read that I possessed a gun and head of elephant and 14 pieces of hippopotamus. I was not found in possession of a gun and there are no any pieces of meat of hippopotamus.

The district court, after considering all relevant materials produced in the case, had found the appellant guilty of the indicated offences. The finding is tested in this court. I have scanned the registered seven (7) reasons of appeal and found that the appellant is largely complaining on defects produced during hearing of the case at the district court. I will resolve, in brief, the complained defects.

The first complaint is on exhibits PE.2 & PE.9 in relation with the charge sheet. However, I have perused the exhibits and found that they mentioned the same thing as displayed in the charge sheet. The same exhibits had received the support of

exhibits P.1, PE.4 PE.12 & PE. 16. I am aware of the record, at page 33 of the proceedings, with regard to number of live rounds bullets had contradicted with the particulars of offence in the charge sheet. However, I consider it to be cured under section 388 of the Act. I have also read the record and found the second complaint has no merit as the certificate of seizure was admitted as exhibit PE.1 as reflected at page 31 of the proceedings and was supported by the handling of exhibits admitted in the case as PE.4 and chain of custody admitted as exhibit PE.4 as displayed at page 35 and 36 of the proceedings of the district court respectively.

I am aware that the appellant complained on tendering of the gun as exhibit PE.2 by the police officer G. 3071, D/Cpl. Genuine (PW1) who is part of the prosecution side. However, the record shows PW1 was brought to the district court as a witness, and not as a police officer and upon perusing the chain of custody record admitted in PE.5, PW1 rightly got into possession of the exhibit PE.5.

The record further shows that prosecution had summoned material witness hamlet chairman **Mr. Nyamhanga Ndera @ Mang'era** who is allegedly to be present at the scene of the

crime. However. Record shows, at page 93, 95 & 96 of the proceedings that **Mr. Nyamhanga Ndera @ Mang'era** could not be found and his statement was admitted as exhibit PE. 16 as reflected at page 97 of the proceedings. Record shows further that all exhibits were admitted in the case without any protest or cross examined by the appellant as per law in the precedent of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 210 supported by a bundle of precedents of the Court (see:**Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017; **Cyprian Athanas Kibogo v. Republic**, Criminal Appeal No. 88 of 1992; **Sebatian Michael & Another v. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018; **Masatu Webiro @ Nyamtenga Kitongoti v. Republic**, Criminal Appeal No. 123 of 2021; and **Mateso Juma v. Republic**, Criminal Appeal No. 12 of 2021).

It is unfortunate that the appellant was granted ten (10) days leave to protest PE.16, but had declined to do so. Therefore, the issue of right to be heard or alleging **Mr. Nyamhanga Ndera @ Mang'era** was available in the village, but the respondent had declined to summon him, cannot hold any merit.

In my considered opinion, and considering the materials registered by the respondent in the case at the district court, the prosecution had proved its case beyond reasonable doubt as required by the law enacted in section 3(2) (a) of the Evidence Act. The complained faults in the case, in my opinion, are minor to the merit of the case under section 388 of the Act as considered in the indicated precedents. I think the issue in the present dispute is whether the appellant was found with the indicated gun and ammunitions. The reply is obvious that the appellant was found in possession of the gun and ammunitions.

The established law in precedents of the Court requires courts of law to deliver justice to both sides who appear before them. This is a court of law which makes sure that those appear before it to have their justice. I am mindful of the thinking of the Court in the precedent of **Marko Patrick Nzumila & Another vs. The Republic**, Criminal Appeal No. 141 of 2010, and its long-quoted text displayed at page 14 of the judgment, that:

The term failure of justice has eluded a precise definition, but in criminal law and practice, case law has mostly looked at it from an accused/appellant's point of view. But in our view the term is not

designed to protect only the sides in the trial. Failure of justice or (sometimes referred as miscarriage of justice) has, in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal...but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because while it is always safe to err in acquitting than in punishment it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether failure of justice has been occasioned, the interests of both sides of the scale have to be considered.

This thinking was invited and applied by the Court in the precedent of **Tabu Paulo v. Republic**, Criminal Appeal No. 53 of 2014 and this court in the authority of **Stephano Ibrahim v. Republic**, Criminal Appeal No. 27 of 2022. Thus, all things being equal, I am fully satisfied that the defects cited by the appellant in the appeal are minor and did not occasion any failure of justice.

Having said so, and considering the totality of the facts and evidence produced in the case at the district court, I find this appeal to have no any merit and hereby dismiss in entirety.

Right of appeal explained.

It is so ordered.




F.H. Mtulya

Judge

18.05.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of the appellant, **Mr. Muhumbwa Muhumbwa @ Matokore @ Samwel Muhumbwa** and in the presence of the respondent's learned State Attorney, **Mr. Felix Mshama**, through teleconference attached in this court.


F. H. Mtulya

Judge

18.05.2023