IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 58 OF 2023

(Appeal from the decision of the District Court of Kiteto at Kibaya in Economic Case No. 4 of 2021 dated 31/5/2023)

ALLY MUNGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

31/8/2023 & 3/10/2023

BARTHY, J.

The above-named appellant was arraigned before Kiteto District Court sitting at Kibaya (hereinafter referred as the trial court), charged with one count of unlawful possession of firearm contrary to section 20(1)(b) of the Arms and Ammunition Control Act No. 2 of 2015 (hereinafter referred to as the Act), read together with paragraph 31 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [CAP 200 RE 2022], (hereinafter referred to as the EOCCA).

It was alleged by the prosecution that, on 4/12/2021 at Lesoiti Village within Kiteto District, the appellant was found in unlawful possession of one locally made firearm known as "gobore" without authorization.

The appellant pleaded not guilty to the charge. In attempt to substantiate the allegation, the prosecution marched three witnesses and tendered four exhibits. On defence side, two witnesses testified with no exhibit tendered.

After hearing the parties, the trial court was convinced that the case against the appellant was proved beyond reasonable doubt. Hence, it convicted and sentenced the appellant to twenty (20) years imprisonment. The appellant was distressed with the conviction and sentence meted out against him. Therefore, he preferred the instant appeal with 8 grounds as follows;

1. *That, the learned magistrate erred in law as he failed to analyze evidence which led him into a wrong conclusion.*
2. *That, the proceedings of the trial court are tainted with irregularities and illegalities.*
3. *That, the learned magistrate erred in law seriously and fact to convict the appellant based on his signature of caution statement and signature on the certificate of seizure while the appellant is ignorant and he was forced to sign.*
4. *That the learned magistrate erred in law and in fact by shifting the burden of proof to the appellant to prove their [sic] innocent [sic] rather than the republic to prove the case beyond reasonable doubt.*

5. *That the learned magistrate erred in law in rejecting their defense evidence and proceeded to ground the conviction for unlawful possession of fire arms based on the contradictory inconsistent and unreliable evidence.*
6. *The learned magistrate erred in law to convict his [sic] unreliable evidence in rely(sic) exhibit tendered by respondent himself before brought(sic) against her [sic] in the court.*
7. *The learned magistrate erred in law and fact to provided [sic] with incomplete document (judgment document).*
8. *That the judgment and finding(sic) of trial court are all a nullity for contravening the law.*

A brief background underlying the instant appeal as could be gathered from the record is such that, on 4/12/2021 there was an operation at Lesoiti village for expulsion of pastoral intruders. The operation was being supervised by police officers; village chairman and traditional militia commonly referred to as *sungusungu.*

When the operation was underway the appellant was seen with firearm famously known as 'gobore' and attempted to escape, but he was arrested by PW1 and PW2. A certificate of seizure was filled which was tendered and admitted as exhibit PE1. Similarly, the ballistic report was tendered and admitted as exhibit PE4.

On his defence, the appellant testified on oath as DW1 and denied the allegation. He maintained his innocence at all the time. He claimed to have never owned any gun in his entire life. His testimony was supported by DW2 who told the trial the trial court that the appellant never owned the firearm.

Upon hearing both sides, the trial court was convinced that the offence against the appellant was proved beyond reasonable doubt. The appellant was then convicted and sentenced as shown above.

At the hearing of the appeal the appellant appeared in person, while the respondent was represented by Ms. Anifa Ally learned state attorney.

When called to expound his grounds of appeal, the appellant generally submitted that, the trial court did not do justice to him, as the prosecution did not disclose he was arrested. He argued further that, the trial court did not accord weight to his evidence and he was convicted without regarding his evidence.

Ms. Anifa responding to the grounds of appeal and the appellant' submission she contended that, the trial court evaluated properly the evidence of both sides as seen on pages 2 and 3 of the typed judgment. She added that, on page 2 of the typed judgment it shows the evidence of three

prosecution witnesses analyzed based on what had transpired at the scene of the crime.

Again, she pointed out to page 3 of the typed judgment, where the trial court considered the defence testimony. She however observed that, should this court find that the defence was not considered, it may step into the shoes of the trial court to analyse the same. To further her argument, she cited the case of **Leonard Bundala Malulanga @ Rena Ngasa v. Republic,** Criminal Appeal No. 313 of 2023 Court of Appeal of Tanzania (unreported).

Ms. Anifa further submitted on second and eighth ground of appeal jointly. She contended that, the law sets a burden of proof to the prosecution as decided in the case of **Daudi Nkanga v. Republic,** Criminal Appeal No. 316 of 2013 (unreported).

She went on arguing that, in the instant matter PW1 and PW2 saw the appellant with the firearm and he was arrested with it ready-handed. To reinforcement her arguments, she referred to the case of **Joseph Mkumbwa v. Republic,** Criminal Appeal No. 4 of 2007 (unreported) quoting the case of **Jaribu Abdallah v. Republic,** Criminal Appeal No. 200

of 1994, where the court considered the evidence of eye witnesses as the best evidence to prove the offence.

It was also recounted that, there was a certificate of seizure which was signed by the appellant that stood as a proof that the firearm was found in his possession. She cemented her argument with the case of **Mabibaksh Pirbaksh Birbarde v. Republic**, Criminal Appeal No. 663 of 2020 where the court observed that, signing of certificate of seizure implies that the property belonged to him.

Submitting on the third ground, Ms. Anifa maintained that, the appellant was not forced to sign the seizure certificate. Ms. Anifa refuted the claim stating it was the new fact which was never raised before the trial court when the said document was tendered. She maintained that the appellant's claim is not only an afterthought, but also baseless.

Counter arguing on the fifth ground of appeal, Ms. Anifa was of the view that the trial court accorded weight to the evidence of the defence side as seen on page 7 of the judgment of the trial court and it was satisfied that it did not raise any doubt to the prosecution evidence.

As to the sixth ground of appeal, Ms. Anifa was firm that it was too general as the appellant did not point out which evidence was not reliable.

Winding up with the seventh ground of appeal, Ms. Anifa counter submitted that, the judgment of the trial court was complete and both sides were supplied with correct copies of judgment. She therefore urged the court to dismiss the appeal for lack of merits.

On rejoinder submission the appellant essentially reiterated his submission in chief.

Having gone through the parties' rival arguments and the records of this case, deducting from the grounds of the appeal, there are three issues for my determination;

1. *Whether the appellant was found in possession of the firearm namely exhibit PE3.*
2. *Whether there were irregularities on the proceedings before the trial court*
3. *Whether the trial court did not consider defence evidence on its judgment.*

Starting with the first issues, where I have to determine whether the appellant was found in possession of firearms: Considering the appellant was charged with an offence of unlawful possession of firearm, it was incumbent

for the prosecution to prove that indeed the appellant was found with firearm and such possession was unlawful.

Going by the evidence on record, there is evidence of two eye witnesses who saw the appellant carrying on the firearm which is traditionally known as *gobore.* The appellant attempted to escape, but he was apprehended by PW2 assisted by PW1 the village chairman.

In the present case no receipt was issued after the seizure of the firearm, still the record reveal there was ample evidence to corroborate the certificate of seizure tendered as the exhibit. Dealing with the similar situation, in the case of **Matata Nassoro & another v. Republic,** Criminal Appeal No. 329 of 2019, where the court observed that, despite the fact that no receipt was issued, the certificate of seizure was sufficient since the appellant signed it and there was also evidence from independent witness to support.

Apart from the evidence of eye witnesses namely PW1 and PW2, also exhibit PE1 (the certificate of seizure) was signed by the appellant. Rightly as argued by Ms. Anifa in view of the authority she cited in the case of **Mabibaksh Pirbaksh Birbarde v. Republic** (supra) signing of the certificate of seizure implied that the firearm was found in possession of the appellant.

The appellant on his argument he claimed he was forced to sign the Exh. PE1. As rightly submitted by the learned state attorney, the appellant never raised such claims before the trial court. Raising a complaint at this stage is nothing but an afterthought. The same was observed in the case of **Abdallah Rashid Namkoka v. Republic** (Criminal Appeal 206 of 2016) [2018] TZCA 363.

Also, the appellant never cross examined PW2 on that aspect. It is the settled law that, failure to cross examine a witness on particular material fact amounts to acceptance of such facts. This position was underscored in numerous decisions such as **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 8 of 1992 and **Damian Ruhele v Republic**, Criminal Appeal No. 501 of 2007 (all unreported) to mention but few. In the latter case, the Court of Appeal observed as follows;

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

Equally, the claim by the appellant that he was forced to sign the caution statement lacks basis and its clearly an afterthought.

The firearm seized from the appellant was taken to the ballistic expert and it was proved to be a muzzle loading gun designed to use local ammunitions made of savaged pellets or pieces of metals. The said report was tendered and admitted as exhibit PE4.

Having the weapon being proved to be the firearm which was found in possession of the appellant without any lawful permit, I am of the settled mind that, the first issue has been answered in affirmative. Determination of the first issue essentially disposes the first, fourth and sixth grounds of appeal.

I will turn to the second issue, whether there was any procedural irregularity on the proceedings of the trial court

On this issue, the appellant did not point out of any irregularity in the proceedings or judgment of the trial court. Ms. Anifa on this ground she argued it was too general and not clear.

In order to ascertain if there was any irregularities, going through the records of the trial court, I have noted that, on the first day the appellant appeared before the court he was required to take his plea. At that time the certificate conferring jurisdiction as well consent of the DPP were not yet furnished before the trial court.

I am of the settled view that, the appellant was not required to take his plea for want of jurisdiction. Nevertheless, I find such omission to have not caused any injustice, since the prosecution substituted the new charge in later staged and lodged the certificate conferring jurisdiction and the consent of the DPP. Then, the appellant was called on to take a fresh plea.

Apart from that, there was no notable irregularity which would have vitiated the trial. Again, the second issue is not answered in affirmative. Determination of the second issue essentially disposes of the second, seventh and eighth grounds of appeal.

For the third and last issue, the court is called to determine whether the trial court did not consider defence evidence on its judgment. It is the settled law that, the court must evaluate and consider defence evidence in its judgment. The emphasis of this position was stated in the case of **Leonard Mwanashoka v. Republic** (Criminal Appeal 226 of 2014) [2015] TZCA 294 where the Court of Appeal held that;

> *Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.*

With regard to the present issue, I have gone through the trial court's judgment particularly on pages 6 and 7, I have found that the trial court considered the defence evidence.

The trial magistrate in his judgment, he made an analysis of evidence of both sides and weighted it. He then came to the conclusion that, the prosecution proved its case beyond reasonable doubt. The records of the trial court speak for itself as follow;

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Normally the burden of proof in criminal cases lies on prosecution side to prove existence of certain fact(s). nonetheless, in some circumstance in my view the person who owns a property(s) is in a duty to tell details of his ownership of the property. In his defense an accused had denied to own the firearm with no detailed denial as to why the gun was found with him; here his defense is as light as pigeon feather.

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I insist, the defense levelled by an accused is too flat to have the evidence from the prosecution being surpassed. In the entire case when the exhibit was tendered, he did not deny his signature in the admitted exhibits or say may be he was in a way forced to sign the document.

As the record clearly reveal, the trial magistrate properly evaluated the evidence of both sides and reached to his findings. Thus, the third issue is answered in affirmative. Determination osf the third issue disposes of the fifth ground of appeal.

In final analysis I find the appeal has no merits and the same is dismissed in its entirety. The conviction and sentenced meted out against the appellant by the trial court are upheld.

It is so ordered.

Dated at **Babati** this 3rd of October 2023.

G. N. BARTHY

JUDGE

The judgment was delivered this **3rd day of October, 2023** at Babati in the presence of Ally Munga, the appellant and Ms. Anifa Ally, State Attorney for the respondent.