THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA

(CORAM: HON. AUGUSTINE RWIZILE)

DC. CRIMINAL APPEAL NO. 48 OF 2023

DIDIE GERVAS ..... COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF

VERSUS

REPUBLIC ..... RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

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Facts

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Ratio Decidendi

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2nd of May 2024

Hon. RWIZILE.:

The appellant in this case challenges the decision of the District Court of Kasulu in Economic Case No. 9 of 2022, where he was charged, convicted, and sentenced heavily to 20 years imprisonment. He was arraigned on unlawful possession of firearms contrary to sections 20(1)(a) and (2) of the Firearms and Ammunitions Act read with paragraph 31 of the first Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act. It is on record that the appellant was found on possession of the so-called Muzzleloading gun at his home in Titye village of Kasulu District without any lawful permit.

Mr. Moses Rwegoshora learned Advocate appeared for the appellant and advanced five grounds of appeal to wit;

1. That, the trial court erred in both law and fact in convicting and sentencing the Appellant with an offence of Unlawful Possession of fire Arms while the prosecution failed to prove the offence beyond reasonable doubts.

2. That, the trial court grossly erred in law by convicting and sentencing the appellant basing on hearsay evidence from Pw2 & Pw3 without there being an independent evidence to incriminate the Appellant.
3. That, the learned trial magistrate erred in law, point and fact by convicting and sentencing the Appellant relying on the prosecution evidence while it was observed that the search was conducted during the night without authorized search warrant.
4. That, the trial Court grossly erred in law and fact by convicting and sentencing the Appellant without considering that the alleged independent witness one FESTO NYANDULA was not called to testify and that draws negative inference against the prosecution.
5. That, the trial court erred in both law and fact by not considering the Appellant's defence and dismiss his evidence on the sole ground that Appellant failed to cross examine prosecution witnesses when they testified before the court on the matter he raised his defence.

Advancing oral arguments, the learned counsel argued the first four grounds together. It was briefly stated that the trial court relied on evidence from Pw2 and Pw3 who searched the house. According to him, the search had irregularities in that;

1. They had no search warrant contrary to section 38 of the Criminal Procedure Act (CPA). According to him, this was not an emergency search. It was therefore his opinion that Pw2 and Pw3 should have obtained the search warrant as held in the case of **Badiru Mussa v. R**, Criminal Appeal No. 118/2020. Further, he said, evidence was based on the information that did not specify the same was in motion and so could temper with exhibits and so exhibits P1 and P3 be expunged from the record because they did not abide by the law.
2. The key witness – Festo Nyandula was not called to testify. The learned counsel argued that the proceeding does not show what happened to him and there is no proof of service to prove he could not be found. The summons was not tendered. In his view, since the key witness was not called, the inference must be drawn against the prosecution as held in the case of **Azizi Abdallah vs R** [1991] TLR 72.
3. The evidence of Pw2 and Pw3 was hearsay because they said they were informed by an informer, worse he added, the independent witness did not testify. This court was asked to refer to the case of **Mawazo Saliboko and 7 others v DPP**, Consolidates Criminal appeal. Nos. 113,114, 115, 117, and 190 of 2016 on page 17.
4. The chain of custody was not proven intact. The counsel argued that there is no paper trail, to prove if the chain of custody was properly observed from when the exhibits were seized until when taken to court, to support this point he cited the evidence of Pw1 and Pw6 as to have left the gaps.

Arguing the 5th ground of appeal, it was stated that, the appellant was convicted on failure to cross-examine the witnesses. He added that the duty of proving the case lies with the prosecution. According to the learned counsel, the prosecution did not prove its case, the court relied upon the evidence of failure to cross-examine a witness not on the straight of the prosecution case. This court was therefore asked to allow this appeal.

Mr. Dickson Makongo, learned State Attorney stood for the respondent-Republic. He was explicit, that the appeal be dismissed because the case was proved beyond reasonable doubt. Similarly, he argued the first four

grounds together as follows;

1. The search was legal and done in an emergency. He argued that Pw3 told the court that he got information when in the village where the appellant was living. He got assistance from fellow police officers around and went to the crime scene at night. The Attorney added that the search complied with section 42 of the CPA. In his view, the evidence was legally obtained. He said, the certificate of seizure was signed by the appellant and did not say he was forced to sign or that, the signature did not belong to him. Pw2 and Pw3, he argued, proved how the evidence was properly obtained.
2. On independent witnesses he argued that the proceeding showed the key witness could not be found. In the proceedings, it was shown the witness could not be traced. He added that the evidence was not hearsay as alleged. The evidence of Pw2 and Pw3 proved the muzzleloading gun was found in the possession of the appellant.
3. The paper trail on the chain of custody, it was argued, does not render the evidence irrelevant, I was asked to refer to the case of **William Maganga Charles v R,** Criminal Appeal No. 104 of 2020, which held that oral evidence, if well-handled may prove the chain of custody.
4. On cross-examination and failure of which draws an adverse inference on the party of the appellant. The court had the duty to examine the evidence. It was stated in the case of **Isaya John v R,** Criminal Appeal No. 167 of 2018 which held that failure to cross-examine on key issues affects the case on the party that did not ask questions

Mr. Rwegoshora, given a chance to rejoin, said, the search was not an emergency and could not fall within section 42 of the CPA. He, said, Pw2 testified that they took weapons from the police and went to the village they did not show how it was on an emergency case. On calling material witnesses, there is no evidence to prove so, he added. They ought to have brought an affidavit of proof of service. They would have so proved and that the witness would have cleared the point on the chain of custody. The evidence of Pw1 and Pw6 is at variance and so, there is no proof that what they seized is what was taken to Pw6, he argued vehemently. Lastly, he said, the duty of the prosecution is to prove the case and should not rely on failure to ask questions in cross-examination.

I have heard the parties, it is clear to me that this appeal hinges on whether, the evidence proved the case beyond doubt. The appellant has advance four arguments challenging the finding of the trial court. Upon meditation on what has been submitted, it is clear to me that key issues are on whether the search was properly conducted. In criminal trials as this one, search is governed by section 38 of the CPA. The dispute here is if exhibit P3 a seizure certificate was properly procured and if there was lawful authority to conduct search a search.

It should be taken with certainty that in terms of section 38, which exhibit P3 is based and based on the evidence of the two arresting officers Pw2 and Pw3, search was done at night, close to midnight upon the information to Pw3 from his informers. Pw3, according to Pw2, was an acting OCCID. When testifying Pw3, said was a police officer in the investigation department. It is this person who did not only receive information leading to the arrest of the appellant, but also led the team including Pw2 to arrest him. In terms of exhibit P3, styled as the search warrant- (*Hati ya Upekuzi,*) it was made under section 38(3) of the CPA. It was signed by

the author, Inspector Fortunatus-(Pw3) and two other fellow police officers. It was testified that the appellant signed by affixing his fingerprint and one Festo Nyandula as an independent witness. Based on the nature of the information and evidence, the time the same was done, one has no reason not to believe that the search was indeed of the emergency nature. Clearly therefore, there was an emergency and the law allowed the police officers to do what they did.

As to whether, section 38 was complied with when effecting search, it is an important legal point to be decided. This is important because, search was done at night and exhibit P3 a certificate of seizure is key document to prove that the law was followed. To be able to appreciate that, it is key to reproduce the section, thus;

38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place- (a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence,

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel,

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued, and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

(4) N/A

(5) N/A

From the foregoing provisions of the law, for search to properly count, ***first*** it must either be done or authorized by the officer in charge of the police station. Pw2 did not say, Pw3 was the police in charge of the police station, Pw3 neither did he say he is one. But because, Pw3 was an inspector of police, i believe he has some powers to do what he did, and this anomaly alone cannot affect the quality of the evidence in favour of the appellant.

The above notwithstanding, still, ***second,*** the law provides that where an authority to search is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued, and the result of any search made under it to a magistrate.

In as much as I agree that there was an emergency which warranted search at night, but neither Pw2 nor Pw3 or any other prosecution witness, said, the requirement of reporting search to a magistrate was complied with. Pw2 did not as well as Pw3 who in fact conducted it. Subsection 2 is coached in terms that are mandatory and Pw3 ought, willy nilly to comply with it. Failure to do so, as he did, discredits his evidence and goes to the point whether that was indeed done as per the law.

Third and perhaps with weight as the above, it is required under subsection 3 of section 38, issuance of the receipt and in this case, it was issued. It also requires listing the article(s) recovered, and signatures of the witnesses present during the search, the owner of the premises and the suspect. In this case, there are two things in doubt, one if the appellant indeed signed. In his evidence, he said, he did not have such a document signed, but it is alleged that he signed by his affixing his fingerprint. Therefore, there is evidence of the appellant against the police officers. The only thing that rescues such situations is the presence of an independent witness. The prosecution alleged, One Festo Nyandula was present but did not testify on pretext that he could not be found.

It is my view that the prosecution risked proof of this case by failure to look for an independent witness. It was said, they found him with the appellant and yet chose to take him as an independent witness. There is an allegation that he signed. Looking at exhibit P3, there is a name of the same person standing as his signature and in a more or similar handwriting as the person who filled the form in question. Too much doubt is apparent in the manner it was done.

But a key and independent witness as this one could not afford to miss the proceedings. But given the fact that there is no evidence to prove efforts were employed to look for him but did not get him, the prosecution had at least to tender his statement under section 34 of the evidence Act.

The appellant in his defence clearly said, under cross-examination that Festo was available. The trial court did not bother to call him and clear this doubt. But since it is the duty of prosecution to call important evidence to prove its case, that duty could not shift to the appellant or any other side.

It is therefore clear to me that there are gaps in the manner the case was handled, and it was not proved to the required standard. That being the case, ground 1 to 4 have merits as argued by the appellant.

Therefore, I find merit in the appeal. I find no reason to deal with the last ground of appeal, since the first four have disposed of the appeal.

From the foregoing reasons, I quash the conviction and set aside the sentence imposed on the appellant. I order his immediate release, unless he is held for some other lawful cause.

Dated at **KIGOMA ZONE** this 2nd of May 2024.

AUGUSTINE RWIZILE

JUDGE OF THE HIGH COURT