THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 7592 OF 2024

(Originating from the District Court of Chunya at Chunya, in Economic Case No. 8 of 2023)

MAHONA MASANJA KITUNDU……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

Date: 17 April 2024 & 4 June 2024

SINDA, J.:

The appellant was charged and convicted of the offence of first count unlawful possession of firearms contrary to section 20 (1) (a) and (b) of the Fire Arms and Ammunitions Control Act No. 2 of 2015, read together with paragraph 31 of the First Schedule and section 60 (2) of the Economic and Organised Crime Control Act (Cap 200 R.E 2022), second count Unlawful Possession of Ammunition contrary to section 21 (a) (b) and 60 (1) of the

Fire Arms and Ammunitions Control Act No. 2 of 2015, read together with paragraph 31 of the First Schedule and section 60 (2) of the Economic and Organised Crime Control Act (Cap 200 R.E 2022) and third count unlawful entry into a game reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act Cap 283 RE 2022. The District Court of Chunya at Chunya (the **District Court**) convicted the appellant and sentenced him to serve twenty (20) years imprisonment for the first and second counts and one (1) year imprisonment for the third count. All sentences are to run concurrently.

The particulars of the offence are that on 28 June 2023 at Piti Game Reserve Area within Chunya District in Mbeya Region, the appellant was unlawfully found in possession of a firearm to wit; one locally made gun commonly known as "gobore", ammunition to wit; 29 local made bullets and also unlawfully entered into a game reserve area without having a license or permit from the relevant authority.

The appellant challenges his conviction and the corresponding sentence on three grounds as follows:

1. *That the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW1, PW2 and PW3 with its*

exhibits PE1, PE2, PE3 and PE4 which was not proved the guilty of the appellant as per law.

2. *That the trial court erred in law when convicted and sentenced the appellant without taking into account that the said exhibits PE2, PE3 and PE4 was tendered there without any form of chain of custody and the report from the expert of gun and ammunition to proof the same.*
3. *That the trial court erred in law when disregarded the defense of the appellant and failed to evaluate the whole prosecution case and convicted the appellant illegally.*

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Deusdedit Rwegira, learned State Attorney. The appellant opted to hear first from the respondent and reserved his right to make a rejoinder, if any.

On the first ground of appeal, Mr. Rwegira submitted that the court was correct to consider the evidence of the prosecution witnesses because the evidence adduced by the three witnesses i.e. PW1, PW2 and PW3, was direct evidence. Whereas PW1 and PW2 arrested the appellant while at the game reserve and PW3 was the custodian of the exhibits and interrogated the accused. Mr. Rwegara stated that there are no material contradictions in the

testimony of PW1 and PW2 as they both testified on how they arrested the appellant at the crime scene, and after searching him, he had a locally made gun "gobore" and 29 local bullets.

He submitted further that the testimonies of the prosecution witnesses were collaborated by four exhibits which are a certificate of seizure signed by the appellant, a muzzleloader gun, local bullets, bullet powder and a bicycle marked as Exhibits PE1, PE2, PE3 and PE4, respectively. He also emphasized that the appellant had no objection to the exhibits. He further added that in the appellant's defence, from pages 19 to 20 of the proceedings, he admitted some facts, although not directly. For instance, he was arrested by the game reserve officers who took his bicycle. Also, he was forced to carry a firearm.

The counsel argued that the game officers' testimonies were known to the appellant. He added that in the appellant cross-examination and defence, he didn't say why the case was fabricated to him. To cement his argument, he cited the case of **Goodluck Kyando vs. Republic**, Criminal Appeal No. 118 of 2003.

In relation to the second ground, Mr Rwegira submitted that the exhibits tendered in court (PE1, PE2, PE3 and PE4) were tendered by PW1 as shown

on pages 8 to 10 of the proceedings of the District Court (the **Proceedings**) and that there was no form of custody tendered. He argued the absence of the chain of custody form does not conclusively show that there was tempering in the handling of the said exhibits and that it is a settled principle that chain of custody can be proved by oral testimony of prosecution witnesses.

He submitted that in the matter at hand, PW1 stated how he seized the exhibits from the appellant and later stored them at Chunya Police Station. At Chunya Police Station, the exhibits were handed to PW4. This suffices as an oral explanation to sustain the chain of custody. In support of his argument, he cited the case of **Joseph Thobias & Another versus Republic**, Criminal Appeal No. 296 of 2019 (CAT at Shinyanga).

Mr. Rwegira continued that the appellant said there was no ammunition expert when he was being arrested. He argued that the persons who arrested the appellant were game officers who were conversant with handling game reserves. Even if there is no written report, the explanations by PW1, PW2, and PW3 suffice, unless it is proved that they are not credible witnesses. In that case, he argued that their testimonies can stand on behalf of the expert report.

Submitting on the third and last ground, that the court did not consider the appellant evidence. Mr. Rwegira submitted that this is not true because the lower court considered the appellant's evidence. He urged this court to visit pages 3 to 4 of the judgement where clearly the Magistrate considered the appellant's defence.

In rejoinder, the appellant prayed for this court to set him free.

I have considered the instant appeal, the grounds in support thereof, the submissions of both sides, the record of this appeal and the law.

I will start my deliberations by responding to the first and third grounds together. Mr. Rwegira opined that the District Court was right to convict and sentence the appellant on the available evidence. He also emphasized that the evidence adduced by the three witnesses was direct evidence.

After going through the records, it shows that the prosecution had three witnesses: PW1, a Wildlife Officer; PW2, a Conservation Ranger; and PW3, a Police Officer. PW1 tendered four exhibits: PE1, the certificate of seizure; PE2, the muzzleloader gun; PE3, the locally made bullets; and PE4, the bicycle and bullet powder.

The case of ***Goodluck Kyando versus Republic*** (2006) TLR 367 stated that:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"*

From the foregoing, I cannot find any reason whatsoever for not believing the evidence adduced by the prosecution and thus consider their testimonies to be the truth. In a nutshell, PW1 and PW2 arrested the appellant in the Piti Game Reserve (restricted area), where, after investigation, they found him with the exhibits named herein above.

They then surrendered the appellant to PW3 for further inquiry, awaiting his alignment before the court of law. I believe the witnesses were well informed on the matter, and their testimonies were undoubtedly well corroborated by the found exhibits.

Besides, there are no known reasons, and the appellant did not avail himself of any, why this case would be fabricated against him and not someone else. As such, the court believes the evidence adduced against the appellant was in the affirmative.

It also came to my attention that during the hearing at the District Court, the appellant failed to cross-examine the prosecution witnesses on important points – and some he did not cross-examine at all, for instance, PW3. In most circumstances, he had no objection to the exhibits against him. The same was discussed in the case of ***Bakari Abdallah Masudi versus The Republic***, Criminal Appeal No. 126 of 2017 at page 11 CAT where it was held that:

> *"Failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence on that aspect."*

Thus, failure of the appellant to exercise that right brings an impression the allegations against him are true.

On the other hand, the appellant erred the trial court in disregarding his defense. On pages 3 and 4 of the judgment, the trial Magistrate clearly reiterated what the appellant said as his defence. But it should be remembered in criminal cases, the defence evidence is usually persuasive, and the duty of proving the case is vested in the prosecution. Evidently, in the present case, although the appellant's defence was considered, the prosecution exercised their duty of proving the case beyond reasonable

doubt and hence the conviction. Consequently, I find the first and third grounds of appeal with no merit.

Addressing the second ground, to begin with I go against the contention by the appellant that the exhibits were to be tendered with a form of chain of custody and there should be a report from the expert of gun and ammunition. Firstly, there is no necessity or provision of law that requires an expert on guns and ammunition to fill a report when a person is unlawfully found in a restricted area. In my opinion, PW1 and PW2, being wildlife and conservation workers, were more than enough to handle the situation.

On matters surrounding chain of custody, in the case of ***Joseph Thobias & 2 Others versus Republic*** (**Supra**), the court had this to say:

> *"Documentation is not always the exclusive requirement in dealing with exhibits. Accordingly, the authenticity of an exhibit and its handling will not fail the test of validity merely because there was no documentation. It is now trite law that, depending on the circumstances of each case, especially where the tampering with the exhibit is not easy, oral evidence may be accepted as being credible in establishing the chain of custody"*

The same was discussed in the case of **Jason Pascal and Another versus Republic Criminal** Appeal No. 615 of 2020 CAT Bukoba [TANZLII].

In the above case, it is obvious that an oral account of the chain of custody is also acceptable. In the proceedings, PW1 explained how he and PW2 seized the appellant and took hold of the exhibits by filling out the certificate of seizure. They then took the appellant and the exhibits to Chunya Police Station, where PW4 interrogated him.

However, there was a small breakage in the chain. PW3 explained he received the accused on 28 June 2023, but he wasn't assigned the case until 29 June 2023, when PW1 gave him the exhibits. In that case, PW1 failed to explain who was in custody of the exhibits before they were handed over to PW3 the next day.

Be that as it may, the rationale behind the principle is to establish a nexus between the exhibit and the crime and thereby prevent the possibility of the exhibit being fabricated to incriminate the accused.

Upon perusal of the Proceedings on page 19, the appellant spoke of the presence of the muzzleloader gun before being taken to the Police station. Although he claims he was forced to carry it, that becomes a matter of evidence. But so far as the chain of custody is concerned, the exhibit cannot be fabricated at this point because he already acknowledged its existence.

The same goes for the rest of the exhibits. Also, PW1 managed to identify the exhibits in the certificate of seizure before the chain was broken at the police station. At this juncture, I find this ground, too, has no merit.

In conclusion, I find no fault in the findings of the District Court as the prosecution evidence is watertight and proved at the required standard. The appeal is hereby dismissed accordingly and the conviction upheld.

The right of appeal was explained.

Dated at Mbeya on this 4 day of June 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MBEYA DISTRICT REGISTRY

A. A. SINDA

JUDGE

The Judgment is delivered on this 4 day of June 2024 in the presence of the appellant who appeared in person and Ms. Imelda Aluko, learned State Attorney for the respondent.