IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 9021 OF 2024

(Arising from District Court of Dodoma in Criminal Case No. 21 of 2020)

DANIEL DEOGRATIUS MASSAWE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 29/05/2024

Date of Judgment: 13/06/2024

LONGOPA, J.:

This appeal challenges the decision of the District Court of Dodoma which convicted and sentenced the appellant to serve twenty years imprisonment for first count which was unlawful possession of firearm contrary to Section 20 (1) (a) and (2) of the Firearm and Ammunitions Control Act, No. 2 of 2015 read together with Section 57 (1) and paragraph 19 of the First Schedule to the Economic and Organised Crime Control Act [Cap 200 R.E 2002] as amended by Section 16 (b) paragraph 31 (a) of the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016, convicted and sentenced the appellant to serve twenty years imprisonment for

second count which was unlawful possession of ammunition contrary to Section 21 (a) (b) and 60 (1) of the Firearm and Ammunition Control Act, No. 2 of 2015 read together with Section 57 (1) and paragraph 19 of the First Schedule to the Economic and Organised Crime Control Act [Cap 200 R.E 2022] as amended by Section 16 (b) paragraph 31 (a) of the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016, convicted and sentenced the appellant to serve three years imprisonment for third count which was house breaking contrary to section 294 (1) of the Penal Code [Cap.16 R.E 2022] and convicted and sentenced the appellant to serve three years imprisonment for fourth count which was theft contrary to section 258 (1) and 265 of the Penal Code [Cap.16 R.E 2022].

It was alleged that on 9th October 2020 at Kisasa area within Dodoma District in Dodoma Region, appellant was found in possession of Firearm to wit Pistol make Browning Caliber 7.65 make A748082 C.A.R 95632 and in possession of ammunition to wit, one magazine with seven rounds of ammunitions after breaking and entry into the house of Omary Waziri Khama and steal one Pistol make Browning Caliber 7.65 make A748082 C.A.R 95632 and one magazine with seven rounds of ammunitions.

The appellant denied the charge and the prosecution called a total of six witnesses to testify and establish the case against the appellant. Upon conclusion of the hearing of the case, the appellant was convicted and sentenced thereof. Being aggrieved by conviction and sentence, the

appellant decided to challenge the decision by way of appeal on fourteen grounds, as reproduced hereunder for easy of reference: -

1. *THAT, the learned trial Magistrate grossly erred in law and fact when convicted an accused person (appellant) while the prosecution side failed to prove the case against the appellant beyond reasonable doubts.*
2. *THAT, the learned trial Magistrate erred in law and fact by convicting the appellant whilst the trial was un-procedurally conducted whereby its not clear from the court record whether memorandum of undisputed facts of the preliminary hearing was read over to the appellant before the trial court C/S 192 (3) of the C.P.A (Cap. 20 R.E 2022).*
3. *THAT, the learned trial Magistrate erred in law and fact by failing to notice that there was veracity between the P.H and the evidence given by the prosecution witnesses, whereas P.H states that accused charged on 9th December, 2020 at Kisasa area within the city of Dodoma he did break the house of his hired Omary Waziri Khama and he did steal therein one pistol browning and on the same date he used the same pistol to assault one young woman named Janeth Jackson contrary PW1 who alleged to receive the said pistol from the late Joseph on 13/10/2020 (see page 26 & 29 of theC/P).*

4. THAT, the learned trial Magistrate erred in law and fact by failing to comply with the provision of section 10(3) & 9(3) both of the C.P.A (Cap. 20 R.E 2019) in this enable the prosecution to pirate the Court and vaguely inject its witnesses then build up its case from the case already heard in court.

5. THAT, the learned trial Magistrate erred in law and fact by failing to notice that the prosecution side failed to tender Chemist report to prove whether the bullets which attacked the victim (PW5) comes from Exh. P1.

6. THAT, the learned trial Magistrate erred in law and fact by failing to notice there was no any business contract which was tendered during the trial to prove that the appellant was being employed by one Omary Waziri Khama as it has to stand by the law.

7. THAT, the learned trial Magistrate erred in law and fact by failing to notice that identification at the locus in quo was too shaky due to the fact that the victim was failed to give out the detailed description of the suspect leave alone the source of the said light and its intensity was not disclosed.

8. THAT, the learned trial Magistrate erred in law and fact by wrongly convicting the appellant without considering

the principles which have to be considered in respect to chain of custody and preservation of exhibits.

9. THAT, the learned trial Magistrate erred in law and fact by failing to notice that it was evident by PW1 that he received the said pistol (Exh.P1) from late Joseph (this means before the alleged incident to be happened) but he was failing to tender handling certificate to prove the same as required by the law (see page 29 of the C/P).

10. THAT, the learned trial Magistrate erred in law and fact by failing to evaluate the evidence given by PW4 and an Exh. P4, whereby PW4 clarified that the pistol was with seven (7 bullets) contrary to Exh. P4 (certificate of seizure) which indicates six (6) bullets (see page 29 & 39 of the C/P) this means these exhibits was being tempered against the appellant.

11. THAT, the learned trial Magistrate erred in law and fact by failing to notice that the alleged Exh. P6 contravenes section 53/54/51/50 &51 (2) (a) & (b) both of the C.P.A - whereby the prosecution side was failing to tender any certificate which was signed by the appellant during the trial to prove that he was willing to record his statement in absence of his advocate / friend or relative as the requirement of the law.

12. THAT, the learned trial Magistrate erred in law and fact by failing to notice that the appellant was arrested on 8/9/2020 but without any justified reasonable cause he was arraigned before the Court on 23/11/2020 contrary to the procedure of the law.

13. THAT, its trite law that "Forgetting or ignoring is so peril unforgivable and not worth taking" the learned trial Magistrate erred in law and fact in ignoring to comply with section 312 (2) of the C.P.A when convicted and sentenced the appellant (see page 13 &14 of the typed copy of Judgement).

14. THAT, the learned trial Magistrate erred in law and fact by failing to give due consideration the defense raised by the appellant.

On 29/05/2024 when this appeal called for hearing, the appellant appeared in person whereas he had nothing meaningful to submit but he prayed that this Court be pleased to consider thoroughly all the grounds of appeal set out in the Petition of Appeal while the respondent was represented by Miss. Sara Anesius, learned State Attorney.

It was the respondent's submission that the appellant was charged with four counts, namely:(a) possession of firearms(b) unlawful possession of ammunition (c) house breaking and (d) stealing.

In respect of the first ground, it is our submission that prosecution rallied a total of six witnesses and six exhibits. All the witnesses testified to the effect that the appellant participated in the commission of the offences.

It was on 09/10/2020 when PW 3 and PW 4 went to the appellant's home and on arrival found the appellant who admitted having possession of the firearms. It was the appellant who showed PW 3 and PW 4 the place where the gun and ammunitions were hidden whereas the appellant dug the soil to retrieve the gun and seven bullets. The gun and the ammunitions were seized, and seizure certificate was prepared, signed and tendered as Exhibit P4. The appellant stated to have stolen the gun from PW 2's house.

The evidence of PW 2 revealed that appellant was employed as a gardener at the PW 2's house and PW 2 was the owner of the guns and the bullets. PW 2 produced Exchequer Receipt evidencing purchase of the gun from Mzinga Corporation and the same was tendered and admitted as Exhibit P.3 collectively. PW 2 stated that he is the owner of a gun with number A74882 with Licence No. 9J632.

The appellant had no licence whatsoever to own the gun as per section 20 and 21 of the Firearms and Ammunitions Act, No. 2 of 2015. The appellant failed to prove how did he came into possession and owning a gun and bullets that were found in his possession.

The housebreaking and stealing offences were proved as PW 2 testified that the gun and bullets were stored/kept in his house thus the appellant did steal having broken the house of the PW 2 where the appellant was working as a gardener.

On chain of custody, it is submitted that there was no breakup of the chain of custody as the same was intact. After seizure of the gun and bullets by PW 3, both were sent to PW 1 who is the Exhibit Keeper at the Police Station. It is PW 1 who tendered Exhibit P1 which was the gun and Exhibit P.2 which were bullets collectively. These exhibits P1 and P2 cannot change hands easily as they are strictly controlled and presence of licence and registration number in the gun thus easily identifiable by its registration number. Both the gun and bullets cannot be tempered with easily by any means.

It was submitted that absence of the Government Chemist report is not fatal as the witnesses brought to court by the prosecution were knowledgeable on the gun and bullets as they are police officers. It was not necessary to bring the Government Chemist report.

Regarding absence of business arrangement/ employment contract between the appellant and PW 2, it is submitted that PW 2's evidence was clear that he employed the appellant as a gardener. This evidence was not cross examined by the appellant to deny being a gardener in the PW 2's premises. This ground lacks merits as failure to cross examine a witness

amount to admission of the truthfulness of the evidence of the PW 2 that the appellant was a gardener at the PW 2's premises.

According to respondent, there were no good reasons to disbelieve the evidence/ testimony of PW 2. In **Goodluck Kyando versus R** [2006] TLR 367, the Court stated that every witness is entitled to be believed unless there are sufficient grounds to disbelieve the witness. The evidence of PW 2 was not controverted that the gun and bullets that were lost in his house were found in the possession of the appellant.

Further, on identification it is submitted that PW 5 stated to have properly identified the appellant as there was sufficient light at the scene of the crime and PW 5 knew the appellant before the incident as they were lovers. The evidence of PW 5 is that there was enough light on the road where the incident of shooting happened.

On section 10(3) and 9(3) of the CPA, it is submitted that in the proceedings there is nowhere the appellant requested for the complainant's statement. Thus, it is incorrect to state that there was noncompliance to the provisions while the appellant never asked for the statement at any material time. It was PW 3's evidence that he was informed of the incident by PC Mloto. This was the complainant and there was no prejudice at all to the rights of the appellant as the complainant's statement was never requested and denied.

On Preliminary Hearing (PH), it is indicated that a proper procedure was followed, and the undisputed facts were signed by the appellant after the same was read and understood well. In the case of **Joseph Munene and Another versus Republic**, Criminal Appeal No. 1009/2022 at pages 9 and 10, the Court held that failure to conduct PH does not vitiate the whole of the proceedings as the purpose of the PH is to fast track the hearing by focusing on disputed facts alone.

The other ground is on section 312 of the CPA on non-conviction, it is submitted that the Court stated to have convicted the appellant in all four counts as charged. It is a further submission that if there is any minor mistake then the same is curable under section 388 of the CPA. In the case of **Masanja Maliasanga Masunga and 2 Others versus R**, Criminal Appeal No. 328 of 2021, the Court of Appeal at pages 20-21 stated that minor discrepancies are curable under section 388 of the CPA.

Regarding arrest and arraignment to court, it is the respondent's submission that arrest was made on 09/10/2020 and that there is no evidence that the appellant was arrested on 08/09/2020 as allegedly stated in the grounds.

Exhibit P.6 is a cautioned Statement of the appellant, it is submitted that there was no need to have a separate certificate to waive the presence of relatives or lawyer of the appellant's choice as he was availed all the necessary rights prior and after recording of the statement. The

appellant did not object the tendering of the Exhibit P.6, and the testimony of PW 6 is to the effect that he availed all rights to the accused person whereas the appellant waived the right to call any relative or advocate of his choice. Exhibit P6 contents were loudly read in court.

The last ground is on consideration of defence case. It is submitted that the judgment indicates that there was analysis of the evidence. Also, this Court being the first appellate court is empowered to evaluate the evidence and determine whether the defence evidence had impaired or shaken the prosecution evidence. The respondent invited this Court to review the evidence, evaluate the same and come up with an independent opinion on the same. The case of M**athayo Laurence William Mollel versus Republic,** Criminal Appeal No 53/ 2020 at page 7 was cited to reiterate the position of the Court of Appeal that first appellate court's powers to analyse, evaluate defence evidence and weigh out the same as against the prosecution's evidence is as wide as the trial court.

In totality, the four counts were proved without leaving any reasonable doubts. I pray this appeal be dismissed and the judgment-conviction and sentence of the District Court be upheld.

I have carefully considered the submission of the parties to the appeal. Upon perusal of record from the District Court of Dodoma on this matter as well as the submissions by the parties, it is my solemn duty to ascertain whether the appeal before me is meritorious. This duty can only

be discharged by analysing the available evidence on record to ably determine the issues raised in the grounds of appeal.

Generally, all the grounds can be grouped into two main board categories of grounds. The first one is irregularities, and the second one is the proof of the case to the required standard of beyond reasonable doubt. The reason being that ground alone if established is sufficient to dispose of the appeal. However, I am inclined to analyse other grounds of appeal prior to so determine on the burden and standard of proof being met.

The issues relating to irregularities feature in the grounds of appeal. The first aspect is on preliminary hearing. My perusal on the record reveals that PH was conducted in accordance with the law. The appellant herein admitted only personal particulars. Accordingly, the preliminary hearing in accordance with tenets of Section 192 (3) of Criminal Procedure Act, [Cap 20 R.E 2022]. First, there was preparation of the memorandum of agreed facts. Second, the memorandum of agreed facts was read over and explained to the appellant. Third, the appellant was availed opportunity to sign the agreed facts to signify acceptance of the same. It is on record that appellant apart from his personal particulars admitted that he knows Omary Waziri Khama as his friend. Both the appellant and state attorney signed thereafter.

In the case of **Daktari Jumanne vs Republic** (Criminal Appeal No. 602 of 2021) [2023] TZCA 18020 (28 December 2023) (TANZLII), at pages 14-15, the Court of Appeal stated that:

> *From settled case law in this jurisdiction, a trial of a case will not be vitiated for failure to conduct a preliminary hearing or for conducting it improperly. In the case of* ***Benard Masumbuko Shio v. Republic****, Criminal Appeal No. 123 of 2007 (unreported), the Court held that a trial will not be vitiated by a defective preliminary hearing. Same position was held in decisions in* ***Mkombozi Rashid Nassor v. Republic****, Criminal Appeal No. 59/2003;* ***Joseph Munene and Another v. Republic****, Criminal Appeal No. 109/2002 and* ***Christopher Ryoba v. Republic****, Criminal Appeal No. 26 of 2002 (all unreported).*

That being the legal position that failure to conduct PH does not vitiate the proceedings makes the validity of the 2nd and 3rd grounds of appeal devoid of any merits. I proceed to dismiss them.

The chain of custody is another aspect. It was the evidence of PW 1 that on 13/01/2020 he was entrusted with pistol and six rounds of ammunition and one cartridge and kept them to the time of tendering the same to Court as Exhibit P. 1 and Exhibit P.2 respectively. This evidence

was corroborated by PW 3 that upon seizure of the gun and ammunitions (bullets) the same were entrusted to the Exhibit Keeper who is PW 1.

In **Mintanga Chambuso vs The Director of Public Prosecutions** (Criminal Appeal No. 523 of 2019) [2024] TZCA 187 (18 March 2024), at page 15, the Court of Appeal reiterated that:

> *In the case of **Paulo Maduka (supra),** this Court insisted that chain of custody of an exhibit must be proven by producing the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of that exhibit. In the case of **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported), this Court relaxed the application of the principle restated in the case of **Paulo Maduka** to cater for situations involving substances that cannot change hands easily and therefore not easy to temper with.*

After seizure of the gun and bullets by PW3, both of them were sent to PW1 who is the Exhibit Keeper at the Police Station. It was PW1 who tendered Exhibit P1 which was the gun and Exhibit P.2 which were bullets collectively. These exhibits P1 and P2 cannot change hands easily as they are strictly controlled and presence of licence and registration number in

the gun thus easily identifiable by its registration number. Both the gun and bullets cannot be tempered with easily by any means.

In the instant appeal, evidence of PW 1 and PW 3 is lucid that upon seizure of the pistol and bullets by PW 3 the same were entrusted to the to PW 1 who was Exhibit Keeper. The same pistol bearing the same numbers that PW 3 and PW 4 retrieved from the appellant is the one tendered as Exhibit P.1 and P.2 respectively. There was no breakup of chain of custody as the gun being registered one could not easily changed. Therefore, the 8th and 9th grounds of appeal are destitute of merits, and they are hereby dismissed.

Another aspect relates to failure to evaluate the evidence. It is on record that the evidence of the defence was considered. Given the nature of the defence evidence being evasive, it did not raise any reasonable doubts on the prosecution's evidence.

In **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) (TANZLII), at pages 14-15, the Court of Appeal noted that:

> *Neither the bare denial of the appellant in his defence nor his grounds of appeal before us, have raised any material issue of fact or law which could be used as a peg to discredit the two prosecution witnesses. The appellant had*

every right and was given every opportunity to call any witness to discredit the three prosecution witnesses if he sincerely believed that they had not told the truth. He did not do so. His evidence alone did not raise any reasonable doubt on the credibility of PW1 Penina, PW2 Victoria and PW3 Insp. Abubakar.

The appellant's evidence did not raise any reasonable doubt to poke holes in the respondent's evidence. It was what is referred to as evasive denials. The Court of Appeal in the case of **Mathayo Laurance William Mollel vs Republic** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) (TANZLII), at page 18 guided as follows:

> *The record of appeal bears out at p. 116 that the appellant just made evasive denials that he did not commit the offence. That the cautioned statement was not his and that he was just made to sign it. He repudiated it.* ***Given the appellant's defence at the trial which consists of evasive denials, we are afraid, even if the two courts below considered it, they would have arrived at the same conclusion.*** *Consequently, we find no substance in this ground of appeal and dismiss it* (Emphasis added).

The totality of the prosecution's witness was watertight to warrant conviction of the appellant for the offences charged. It is my settled view that given the evidence on record there is nothing to indicate that evidence of the prosecution was tainted by irregularities thus touching to the root of the case. There is nothing to that effect. Thus, the 10th and 14th ground of appeal are also dismissed for want of merits.

The second broad category of grounds is on proof of the case to the required standard. It should be stated at the outset that the standard of proof for the offences in this appeal is that of proof beyond all reasonable doubt. It is always the duty of the prosecution to establish a case against the accused person thus it is the strengths of the prosecution case that would lead to conviction and not the weakness of the defence evidence.

In the case of **Anthony Kinanila & Another vs Republic** (Criminal Appeal 83 of 2021) [2022] TZCA 356 (16 June 2022) (TANZLII), at pages 20-21, the Court noted that:

> *It is common ground among the legal fraternity and we think we need not cite any authority to support the legal position that, in any criminal trial, the accused person must not be convicted because he has put forward a weak defence but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person*

committed the offence with which he stands charged. That in brief is what is called proof beyond reasonable doubt which is the responsibility cast on the prosecution side. However, according to Lord Denning in ***Miller v. Minister of Pensions*** *(1972) 2 All ER 372 and this must again be common knowledge that: "proof beyond reasonable doubt does not mean proof beyond the shadow of doubt and the law would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence "of course it is possible but not in the least possible " then the case is proved beyond reasonable doubt."*

To the extreme, other people have gone further to say that reasonable doubt is the doubt of men of good sense not of imbeciles or fools.

That being the standard applicable, it is pertinent to address all issues that touch on the proof the case to the required standard and finally conclude on whether there was proof to the standard or otherwise.

The first aspect on this category is failure to identify the appellant properly. It is noted that PW 3 testified that he went to the appellant's

home whereas the appellant admitted having possession of the gun and lead the police to the hid out of the gun and bullets. This is corroborated by testimony of PW 4 who stated to have witnessed the retrieval of the gun(pistol) and bullets from appellant and seizure of the same at the scene of crime in presence of the appellant. PW 4 identified the seizure certificate which he witnessed being signed to evidence seizure of the pistol and bullets from the appellant.

Exhibit P 4 is a Seizure Certificate dated 09/10/2020 indicates that the name of the person searched is Daniel Deogratias Massawe and the items seized include Pistol Browning Calb 7.65 Make No. A748082 and Cartridge No. 95632 with one magazine and seven bullets.

Also, in Exhibit P 6 which is the cautioned statement the appellant admits that *"...nilijilaza kwa muda mfupi nikasikia mlango umegongwa akiwa Mwenyekiti wa Mtaa na askari polisi na nilipofungulia walinikamata na kuniulizia silaha bastola iko wapi na kuwaelekeza mpaka kule nilipoifukia na baadaye ndipo walinihoji nimeitoa wapi nikawapeleka kwa mzee Omary...."* Essentially, the appellant admits in Exhibit P.6 that he lead the Mtaa Chairman and police officer to the hide out where the pistol and the bullets were hidden. Further, he took them to one Omary where he took the gun.

The question of contradiction especially of identification was analysed in the case of **Matata Nassoro & Another vs Republic** (Criminal Appeal 329 of 2019) [2022] TZCA 690 (2 November 2022), at page 20 where the Court of Appeal stated that:

> *We agree with the parties on the existence of those contradictions but, to us, they were not fundamental and did not go to the root of the case.* ***This is because, there was abundant evidence that the appellants were arrested red-handed, searched and thereafter they signed a certificate of seizure prepared by PW1. The very night they were taken to the Police station. Therefore, the evidence against the appellants outweighed the contradictions highlighted****. In the case of Luziro Sichone vs. Republic, Criminal Appeal No. 231 of 2010 (unreported) this Court had this to say on the issue of inconsistencies: "We shall remain alive to the fact that not every discrepant or inconsistency in witness' evidence is fatal to the case. Minor discrepancies in details or due lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which counts. "(Emphasis added).*

Furthermore, in the case of **Paulo Aloyce @ Mtana & Another vs Republic** (Criminal Appeal No. 422 of 2017) [2021] TZCA 286 (8 July 2021) (TANZLII), pages 11 and 12, the Court of Appeal reiterated that:

> *Our decision in Mabula Makoye (supra), cited to us by Ms. Meli, is on all fours with the instant matter as the appellant in that case was arrested red-handed while running away from the scene of the crime.* ***We held, in that case, that it was sufficiently incriminating that the appellant was arrested in a paddy field close to the scene of the crime after a hot pursuit****. We took the same stance in* ***Mbaruku s/o Hamisi and Four Others v. Republic,*** *Consolidated Criminal Appeals No. 141,143 & 145 of 2016 & 391of 2018 (unreported), where we cited our decision in* ***Joseph Munene and Another v. Republic****, Criminal Appeal No. 109 of 2002 (unreported),* ***to reaffirm that the issue as to whether the appellant was identified cannot arise where, after committing an offence, the appellant is arrested after a continuous hot pursuit*** *(Emphasis added).*

It is illustrative from these decisions that an offender who is arrested red-handed at the scene of crime or arrested after hot pursuit from the crime scene cannot advance a question of improper identification to exonerate oneself from the criminal culpability.

Given the circumstances that appellant was arrested and led the Mtaa Chairperson and police office to the hide out where the gun and ammunition were hidden, he cannot successful turn around to challenge that he was not properly identified. The 7th ground therefore collapses at this point.

The second aspect on this part relates to failure by the prosecution to establish relationship between the appellant and one Omary Waziri Khama who is allegedly employed the appellant as a gardener. It is appellant's ground of appeal that such relationship was not established. Having regard to the offences the appellant stood charged namely: possession of firearms, unlawful possession of ammunition, house breaking and stealing, it is my humble view that there was no need to establish whether or not the appellant had been engaged by the Omary Waziri Khama as a gardener.

For the first two offences, the necessary aspects are that the appellant was found in possession of the gun (pistol) and ammunitions(bullets) without any documentation regarding lawful authorization to so possess. Second, all the gun and bullets belonged to Omary Waziri Khama who had all the authorizations and receipts indicating lawfully acquisition and ownership of the same. Third, Exhibit P.4 which is the seizure certificate reveals that the gun and bullets were at time of arrest in hands of the appellant. Exhibit P6 which is the cautioned

statement reflects that appellant took the Mtaa Chairman and police officer to Mr. Omary where the gun and ammunitions originated. Fourth, the appellant in his defence stated to know Mr. Omary Waziri Khama as the appellant had been once engaged in construction of the latter's house where the gun and bullets were kept before being taken by the appellant. Thus, the elements of housebreaking and stealing come in as there was asportation i.e. taking away the gun and bullets from the owner with intent to permanently deprive the owner. As a result, none of the elements in four counts the appellant faced before trial court would require establishing the contractual relationship between the two. I shall dismiss the 6th ground of appeal for being destitute of merits.

Further, there are laments on cautioned statement being violative of the legal provisions especially section 51, 52, 53 and 54 of the Criminal Procedure Act, Cap 20 R.E. 2019. These relate to failure to allow the appellant to have a friend, relative or lawyer of his choice during recording of the statement and failure to tender a certificate signed by the appellant signifying the appellant's willingness to record the statement.

It is on record that PW 6 testified to the effect that on 09/10/2020 he interrogated the appellant who agreed to record his statement after being informed all his rights before recording of the same. Such cautioned statement was tendered, admitted and marked as Exhibit P. 6. It is upon admission that contents of Exhibit P.6 were read out loudly in Court.

Exhibit P.6 reveals that: First, the appellant was informed all his rights including the right to call any person of choice by the appellant before recording the statement. Second, upon conclusion of the recording of the statement, the same was read and upon understanding of the contents the appellant signed both thumb print and written signature to signify acceptance of the contents therein. Third, there is explicit confirmation by the appellant that the statement was made on his own free will, without being induced or coerced and that the same is correct. Fourth, police officer who recorded the statement explicitly provided a confirmation at the end of the cautioned statement that he faithfully recorded the statement in full compliance of the law in particular section 58 of the CPA, Cap 20 R.E. 2019.

Indeed, I have no doubts in my mind that the cautioned statement was properly and correctly recorded. It is a sufficient reflection of what the appellant stated at the police station when interrogated. PW 6 testified to have interrogated the appellant who willingly confessed to have been found in possession of the gun and ammunitions.

In **Chamuriho Kirenge @ Chamuriho Julius vs Republic** (Criminal Appeal 597 of 2017) [2022] TZCA 98 (7 March 2022) (TANZLII), at pages 21-22, the Court of Appeal observed that:

> *It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilian or not, maybe sufficient by itself to ground*

conviction against the suspect. The Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It means therefore that even where the court is satisfied that an accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntary or not.

It is pertinent to observe that in absence of cautioned statement in writing, an oral confess may suffice to warrant conviction. In the instant case, however, there is an explicit caution statement in writing. The evidence of PW 6 was not seriously challenged by the appellant to raise any doubts that appellant never made any confession. The only reason to challenge lies on failure to call a lawyer or relative and absence of certificate to indicate that there was willingness to record cautioned statement. Both elements have been stated to have existed in this case thus this limb of grounds of appeal seems to be incompetent thus the 11th ground of appeal stands dismissed.

Also, the issue of non-compliance to provisions of section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2019. This section relates to judgment in particular two important stages of the judgment namely conviction and sentence. It states that:

312(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.

With regard to the third issue in the trial court that if the first and second issues are answered in affirmative what are the consequences then, it is revealed at page 13 of the judgment the trial Magistrate stated as follows:

*From the above analysis, I find the Prosecution met criminal chemistry required in proving a case beyond reasonable doubt. Accused person is hereby found guilty and **convicted** in all four counts.*

Sign:

D.J. MPELEMBWA, PRM

3rd February 2023

The Court of Appeal of Tanzania has reiterated in several authorities that there must be conviction entered against the accused person before a sentence can be imposed. In the case of **Abdallah Ally vs Republic** (Criminal Appeal 253 of 2013) [2015] TZCA 55 (16 July 2015), the Court of Appeal stated that:

In terms of the clear, mandatory language used in sections 235(1) and 312(2), there is no valid judgment without a

conviction having been entered, as it is one of the prerequisites of a valid judgment.

Furthermore, the case of **John s/o Charles vs Republic** (Criminal Appeal 190 of 2011) [2014] TZCA 251 (16 June 2014) (TANZLII), the Court of Appeal stated that:

It is clear that both provisions of the CPA require that in the case of a conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged; because the term "guilty as charged" is not in the statute; and the legislature may have a reason for not using that term; but instead, decided to use the word "convict".

Accordingly, every judgment must contain conviction prior to sentence being imposed when an accused person is found guilty of the offence. It is the law that words to be used should be "convict".

In the instance appeal there was conviction of the accused person in all the four counts. Simply, it means that accused person is convicted in each of the offences he stood charged. That being the case, it is settled view of this court that in case of any shortfalls in respect of the conviction the same is curable under the provision of Section 388 of the Criminal Procedure Act, Cap 20 R.E. 2019.

There is allegation on failure to evaluate evidence namely that exhibit P4 differs in substance with the evidence of witnesses on whether there were seven bullets or six bullets. I have carefully considered the record to find out whether there are disparities of evidence on that regard. I have found there is none. The evidence tallies squarely. PW 1 tendered a pistol, six bullets and one cartridge. It reflects the Exhibit P4 which is to the effect that pistol made Browning and seven bullets.

In the case **Abel Orua @ Matiku & Others vs Republic** (Criminal Appeal No. 441 of 2020) [2024] TZCA 78 (21 February 2024) (TANZLII), at pages 29-30, the Court of Appeal held that:

> *It is trite law that, it is only contradictions or inconsistencies which affect the central story which are to be considered to be material and adverse to the party in whose favour the evidence is given. Such contradictions or inconsistencies should not be those that are of an insignificant nature.*

It is my settled view that the central story in this particular case is unlawful possession of firearms and ammunitions. It is the evidence of prosecution that both the gun (pistol) and ammunitions(bullets) were found in possession of the appellant. There is nothing significant to affect the evidence on record.

Further, the evidence is corroborated by Exhibit P. 6 that is cautioned statement where the appellant admits having been found in possession of the pistol and bullets. It is position of the law in this jurisdiction that a confession of the accused person is one the best evidence to prove commission of the offence. For instance, **Gerson Geteni vs Republic** (Criminal Appeal No. 73 of 2021) [2024] TZCA 52 (19 February 2024) (TANZLII), at pages 11-12, the Court of Appeal held that:

> *Section 3 (1) (a), (b) and (c) of the Evidence Act provides to the effect that oral confessions are recognized, and in reality an accused may be convicted based solely on such evidence see, the case of* ***DPP v. Nuru Mohamed Gulamrasul*** *[1988] T.L.R. 82. On the same aspect, this Court in* ***Posolo Wilson Mwalyego v. R****, Criminal Appeal No. 613 of 2015 (unreported), stated that: "It is settled law that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not; may be sufficient by itself to found conviction against the suspect."*

Also, in **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal No.258 of 2020) [2022] TZCA 122 (18 March 2022) (TANZLII), at page s 13-14, the Court held that:

It is settled that an accused person who confesses to a crime is the best witness*. The said principle was pronounced in the cases of* ***Jacob Asegellle Kakune v, The Director of Public Prosecutions****, Criminal Appeal No, 178 of 2017 and* ***Emmanuel Stephano v. Republic****, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in Emmanuel Stephano (supra) the Court while reiterating the above principle stated that: 'We may as well say it right here, that we have no problem with that principle because in a deserving situation, n****o witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.*** *" [Emphasis added].*

As the appellant confessed before PW 6 that he was found in possession of the firearm namely a pistol with registration No A748082 and ammunitions namely bullets, and the confession was admitted as Exhibit P.6. The appellant did not object tendering and admission of Exhibit P6. Appellant was also availed opportunity to cross examine PW 6. The only issues on testimony of PW 6 were the purpose of appellant stealing the gun and where he stated to have obtained it. Such confession of the appellant cements the central story of commission of the offence of unlawful possession of firearms and unlawful possession of ammunitions. Thus, ground 10 of the grounds of appeal is dismissed for lack of merits.

Before concluding the analysis, there is another aspect that appellant tries to advance. That is absence of Government Chemist report on the Exhibits P1 and P2. He contends that prosecution failed to tender Government Chemist report to prove that PW 5 was attached using the bullet from Exhibit P.1. Having regard to the offences that appellant stood charged at the District Court of Dodoma this ground is completely out of place.

The appellant was not charged with any offence of causing harm or grievous bodily harm that could have necessitated the evidence on whether the harm or bodily injuries resulted from the gun wound and if it is the same gun found in possession of the appellant. All the four offences of unlawful possession of firearms, unlawful possession of ammunition, housebreaking and stealing did not touch had nothing in relation to PW 5. Indeed, evidence of PW 5 was only a lead towards knowing the person who would be in possession of the gun and whether such person was lawfully holding the same.

It is settled view of this Court that evidence pertaining to Government Chemist was not necessary nor had nothing to establish in relation to the offences the appellant stood charged with. This ground collapses naturally for being preferred prematurely and without merits.

The most important ground of appeal is whether there was proof of the case to the required standard. This is the first ground of appeal. It is

our view that such ground holds the whole appeal as it is fulcrum of the appeal before this court.

In proving the offences for which the appellant stood charged, direct evidence was in respect of the offence of possession of gun and unlawfully possession of ammunitions. Evidence of PW 2 is that he is the rightful owner of the Pistol made Browning and the bullets. He ably identified the gun by its registration number. PW 2 produced all evidence and authorization regarding the gun and bullets including Exchequer receipt, the payment evidence, letters of authorization and licence. Evidence of PW 1, PW 3 and PW 4 reiterate that the same were found in possession of the appellant. Exhibit P.4 is illustrative that both gun and bullets were found in possession of the appellant. Also, the appellant had no explanation regarding authorization to be in possession of any of these items. Furthermore, Exhibit P.6 is an admission that appellant having been found in possession took the police officers to the actual owner of the gun and bullets.

There is no doubt that in totality of the events, the two offences relating to possession of the firearms and ammunitions were proved beyond any circumspection. PW 3 and PW 4 are eyewitnesses to the retrieval of such items and seizure of the same from the appellant.

However, the two offences relating to house breaking and stealing are based on circumstantial evidence. There is no direct evidence. The only evidence available is the appellant being found in possession of the items which were kept in the house of PW 2 who is the lawfully owner. Thus, circumstantial evidence is the one applicable to the proof of such cases.

The manner of proof for the offences of house breaking/ burglary and stealing in the circumstances of the appeal is through application of the doctrine of recent possession. In the case of **Marwa Chacha @ Robare vs Republic** (Criminal Appeal 133 of 2020) [2022] TZCA 325 (9 June 2022) (TANZLII), at page 13 the Court of Appeal reiterated that:

> *Indeed, there was no eyewitness to the break-in or stealing of various items from PW1's house. Therefore, proof of burglary is dependent on proof that the items seized are the same as the ones alleged to have been stolen bearing in mind the nature of the items. There is ample evidence that there were some items seized from the appellant's house, and the appellant does not dispute this, however, he denies claims that a flat-screen TV was also one of the items seized therefrom. Accordingly, it was proper for the first appellate court to consider the application of the doctrine of recent possession in the determination of the appeal before it. The issue to consider is whether the doctrine was correctly applied. In the case*

of ***Mustapha Darajani Vs Republic****, Criminal Appeal no 242 of 2008, (Unreported) the Court held;* ***"For the doctrine of recent possession to apply, it must be established; Firstly th a t the property was found with the suspect or there should be a nexus between the property stolen and the person found in possession of the property; secondly the property is positively the property of the complainant; thirdly that the property was recently stolen from the complainant; and lastly the stolen property in possession of the accused must have a reference to the charge laid against him."***

Admittedly, there is ample evidence from PW 1, PW 2, PW 3, PW 4 and PW 6 that evidence on record both oral and documentary evidence points out to only one and the same direction that appellant was found in possession of the gun and bullets that were stolen from PW 2 having broken the house by the appellant.

PW 1 evidence is that he received Exhibit P.1 and P 2 on 09/10/2020 for safe custody after the same were seized from the appellant. PW 2 testified to the effect that all those properties belonged to him and produced all the evidence regarding lawful possession and ownership. PW 3 and PW 4 are the ones who witnessed the appellant retrieving the gun

and bullets from the hide out upon being arrested. PW 6 testified to have interrogated the appellant who admitted having found in possession of the items. Further, Exhibits P1, P 2, P3, P 4, P.5 and P.6 cement the version that properties belonged to PW 2 but on material time the same was recovered from the appellant without any colour of right.

All the elements of recent possession doctrine are present in the instant appeal as demonstrated by oral and documentary evidence of the prosecution. It is lucid that there is nothing to suggest otherwise than the fact that when PW 3 and PW 4 went to the appellant house it is the appellant who led them to the hideout of the stolen items namely the gun and bullets. Also, the appellant informed them that the items originated from Mr. Omary Waziri Khama, PW 2.

At this juncture, it is evident that all the four offences that appellant stood charged were proved. The offences related to the unlawful possession of the gun and ammunitions was proved by oral and documentary evidence that was direct evidence. However, the two offences of housebreaking and stealing with proved through circumstantial evidence by application of the doctrine of recent possession.

It is reiterated that the duty to prove a criminal offence lies on the prosecution and the standard of proof is that of beyond reasonable doubt. This has been reiterated in a plethora of authorities. For instance, in **William Ntumbi vs Director of Public Prosecutions** (Criminal Appeal

No. 320 of 2019) [2022] TZCA 72 (25 February 2022) (TANZLII), at page 16, the Court of Appeal asserted that:

> *The duty of the prosecution to prove the case beyond reasonable doubt is universal. In* ***Woodmington v. DPP*** *(1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. We are fortified in this view to refer to the case of* ***Magendo Paul & Another v. Republic*** *(1993) TLR 219 where the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

In **Director of Public Prosecutions vs Shishir Shya Msingh** (Criminal Appeal 141 of 2021) [2022] TZCA 357 (16 June 2022) (TANZLII), at page 17 the Court of Appeal stated that:

> *We must emphasize that in criminal trial the prosecution is bound to prove the case beyond reasonable doubt instead of shifting the burden of proof to the accused, as it seems apparent in the case at hand. In* ***Fakihi Ismail v. The Republic,*** *Criminal Appeal No. 146 "B" of 2019*

(unreported), the Court stated that: "It is elementary that the burden of proof in criminal cases rests squarely on the prosecution with no requirement that the accused proves his innocence, that the proof must be beyond reasonable doubt - see the cases of ***Joseph John Makune vs The Republic*** *[1986] T.L.R. 44 and* ***Mohamed Said Matula vs The Republic*** *[1995] TLR 3. In the circumstances, it is the duty of prosecution to, prove the case beyond reasonable doubt, it is equally the duty of the trial court to ensure that it is satisfied that the prosecution witnesses in support of the case have given relevant evidence which establishes elements of the offence for which the accused stands charged.*

It is my humble settled opinion that from the aforegoing analysis, the prosecution managed to prove the case against the appellant to the required standard. Oral testimonies of PW 1, PW 2, PW 3, PW 4, and PW 6 as well as Exhibits P.1, P2, P3, P4, P5 and P6 left no stone unturned. The evidence sufficiently demonstrated that all elements relating to the four offences were established. The evidence pointed to one and only the same direction that the appellant was found in unlawful possession of firearm namely pistol made Browning and the unlawful possession of ammunitions namely the bullets.

The appellant had no authorization whatsoever in respect of any of these two items. The same belonged to one Omary Waziri Khama (PW 2) who produced all documentary evidence and oral testimony to show that he is the lawful owner of both the firearm and the ammunitions. As PW 2 had kept the firearm and ammunition in his house and the same were found in possession of the appellant, by virtue of doctrine of recent possession the offences of housebreaking and stealing were established.

It is certain that prosecution's evidence was watertight to warrant conviction and sentence. In the case of **Bathromeo Vicent vs Director of Public Prosecutions** (Criminal Appeal No. 521 of 2019) [2024] TZCA 186 (18 March 2024) (TANZLII), at pages 7-8, the Court stated that:

> *"It is a cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of* ***John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika v. Republic*** *[2002] T.L.R. 296 it was held that: "A person is not guilty o f a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"*

In totality of the events, this appeal has no merits as the prosecution did prove the case beyond reasonable doubt. Therefore, appeal is

dismissed in its entirety for lacking any iota of merits to warrant the same to be upheld. The decision of the District Court of Dodoma is hereby upheld.

It is so ordered.

DATED at **DODOMA** this 13th day of June 2024.

E.E. LONGOPA

JUDGE

13/06/2024.