

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA {CORAM: MWARIJA, J.A., LILA, J.A. .. And
KWARIKO, J.A.) CRIMINAL APPEAL NO. 529 OF 2016 HAMIS SAID ADAM

..... APPELLANT VERSUS THE

REPUBLIC..... RESPONDENT (Appeal from the
Judgment of the High Court of Tanzania at Arusha) {Opiyo, I.} Dated 3rd day of August, 2016 in
{Criminal Appeal No. 45 of 2015} JUDGMENT OF THE COURT J₁ & 11th December, 2018 LILA,
J.A.: The Appellant was charged before the District Court of Babati with two counts of being in
unlawful possession of firearms c/s 4 (1) and 34 of the Arms and Ammunition Act Cap. 223 R.E
2002 as amended by section 46 of the Written Laws (Miscellaneous Amendment Act) Act No.3 of
2010. He was convicted as charged and was sentenced to serve fifteen (15) years imprisonment
for each count and to pay a fine of five million shillings for both counts. It ordered that the jail
terms should run concurrently. Having been aggrieved, he unsuccessfully preferred an appeal to
the High Court. Still protesting his innocence, he lodged the present appeal. 1 r ~.

- '.,i', ~ 1 The charge alleged, in the first count, that the appellant was found r in unlawful
possession of a gun make 458 with erased registration number whereas in the second .count
it alleged that he was found in possession of five rounds of ammunition. The offences were
alleged to t have been committed at Galapo village within Babati District in Manyara Region
on 10th December, 2012 at 20:30 hrs. Briefly, the facts as gleaned from the record are to the
effect that; on 10/12/2012, Halidi Jumanne (PW1} and Makuru Tuma (PW2), both . Park
Rangers at Tarangire National Park, while on patrol at Gedamara Galapo near the - park,
they were tipped that the~ appellant and one Dickson Kabede had a gun and were arranging
to go for hunting elephants. A trap was set and the two were arrested. In their testimony,
PW1 and PW2 said the appellant had a gun and Dickson Kabede had five rounds of
ammunition in a plastic bag together with tecno and voters registration card. PW1 said the
firearm was make 458. They also said Dickson Kabede ran away as they were taking them to
the car. D 9633 D/CPL William (PW3), an Investigative Officer, told the trial court that he was
assigned to investigate the case while the appellant was iri lockup. He tendered the firearm
and five rounds of ammunition as exhibits PE1 and PE2, respectively. Since we shall, in the
course of our 2 judgment, be referring to the testimonies of PW1 and PW2 we wish to
reproduce their respective evidence as they were recorded to have told the trial court: PW1 is
recorded to have said: "I am staying at Tarangire. I am Park Ranger. And I am in the security

Department I am guarding parks properties. On 10/12/2012 on 20.00hrs I was with Cpl. Makuru Tuma, Kigedele and Cherehano, we were at Gedamara Gallapo. We got information of people unlawful possessing firearm and wanted to go hunt Elephants. 1 with other prepared a trap, and arrested • two accused's, they had an arm make 458, one of it. They had five •(5) rounds of ammunition 1 Tecno phone of two lines. They are the accused and Dickson Kabede @ Kinada. They had no permit allowing them to own the arm. The accused had an arm, rounds of ammunition with Kabede. When going to the car, Kabede run away into the forest. We took the accused to Police. I know him since the day when I arrested him. I have no spite with him. That is all. "(Emphasis added). PW2 said: "I am staying at Tarangire National Park. I am park Ranger. I do patrols and also guard parks properties. 3 On 10/12/2012 I recall on 20.30hrs I was at Gallapo village at Gadamera. I was in patrol when the informer told us of people preparing to go to hurt elephants. We prepared a _trap, and managed to arrest two pouches with an arm. They are Hamisi Said Adamu and another Dickson Kabede. The accused had an arm, Dickson with rounds of ammunitions, in the black plastic bag, tecno and voters registration card. They had no permit allowing them to own the arm. Dickson managed to run away. We took them to police here in town for further steps. The accused is here in court I have no spite with him. '~(Emphasis _added). Another witness for the prosecution was E 3663 CPL Haji (PW4), a Store Keeper, who testified that he was, on 13/12/2012, given by an undisclosed person a gun make rifle which had no number (Exhibit PE1) and five rounds of ammunition for safe keeping and he produced the police registration number 19/2012 (exhibit P4) showing that the gun make rifle was kept in police store. The appellant, in his affirmed defence~ admitted being arrested at • Galapo while with Dickson Kabede when they were looking for one Ramadhani who had disappeared with his money. He denied being found in possession. of the gun. He complained that he was a victim of a • framed up case against him but did not give reasons. 4 The Trial court, in convicting the appellant, was satisfied that the appellant was found in possession of the gun and 5 ammunition_s without permit at Gedamara Galapo near Tarangire national park' by PW1 and PW2 and he did not object the tendering of the gun as exhibit. According to it, the appellant's use of a gun with erased number and his failure to offer explanation why he was arrested near the National Park signified intention to commit an offence. On appeal, the High Court fully agreed with the trial court that the appellant was. -found in possession of the gun and 5 rounds of • . ammunition. The .High Court was also satisfied that the. gun tendered in court was the one found in the appellant's possession: The appellant's convictions and sentences were accordingly upheld and the appeal was dismissed. The appellant filed a five point r:nemorandum of appeal followed by a supp\ementary_ one consisting of three grounds. Substantia\\y, the appellant's complaints centre on:

1. That, no seizure certificate was prepared and tendered.
2. That, the. Judge turned the court into a witness by involving itself in speculations.
3. That, the evidence by PW3 and PW4 was hearsay. 5

4. That, the Judge wrongly held that the weapon tendered was the one found with the appellant.
5. The trial court did not comply with section 231 of the Criminal Procedure Act, Cap. 20 R. E. 2002.
6. That, chain of custody was not observed.
7. That, the weapon was tendered by Public Prosecutor.
8. That, the appellant was tried and convicted on a defective charge. The appellant, as was the case before both courts below, appeared before us in person at the hearing of the appeal. The respondent Republic had the services of Mr. Khalili Nuda, learned Senior State Attorney. The appellant, after adopting his grounds of appeal, urged the Court to be allowed to re-join after the learned State Attorney has responded to the grounds of appeal. Mr. Nuda supported the appeal. He argued generally on the grounds of appeal. He contended that it was PW1 and PW2 who arrested the appellant hence they are the only ones who knew the kind of weapon (exhibit PE1) the appellant had in possession. He asserted that the two did not mention the type of weapon but they described it in terms of number 458. They were, however, not shown for identification. He, instead, said Exhibits PE1 and PE2 were tendered by PW3, an investigator, who did not participate in arresting the appellant and who was not in a position to identify it. PW4, a store keeper who received it for safe custody said it was a rifle gun with erased number. PW1, PW2 and PW4 were not shown the weapon so that they could identify it in court. He further contended that the descriptions of the weapon offered by the prosecution witnesses differed hence raised doubts on whether or not exhibits PE1 and PE2 were the ones found in the appellant's possession. He concluded that there was, in the circumstances, nothing linking the appellant with the commission of the offences charged. In his brief rejoinder, the appellant fully agreed with the learned State Attorney's arguments. In addition, he said the firearm was not tendered as exhibit and that he was convicted by the trial magistrate on a wrong provision of the law because he cited section 312 (2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). We think we should begin by considering the two grounds of appeal raised by the appellant during the hearing of the appeal. Thereafter, in the circumstances of this case, we are of the view that, like the learned State Attorney; we should also consider the appeal generally and determine its merits. We have examined the record and we are satisfied that when PW3 testified, a number of items were mentioned to have been in the possession of the appellant and Dickson Kabede at the time of arrest. These included a firearm make 458, five rounds of ammunition, a wallet, a voter's registration card, a tecno phone of two lines one of voda and the other of airtel. The trial magistrate then wrote: "Court: Admitted and marked as exhibit "PE1 ~" Certainly, it was not clear whether all the mentioned items were collectively admitted as exhibit PE1 or which particular item was particularly admitted as exhibit PE1. This Court has, however, taken position that irregularities in admitting exhibits collectively do not occasion any miscarriage of justice on the appellant (see Zablon Masunga and Another Vs. R, Criminal Appeal No. 232 of 2011 (unreported)). In that case, the trial court

admitted the motor vehicle and pistol and marked them as collective exhibits. The Court observed that the pistol had to be marked separately. It went further to state that such irregularity did not occasion any injustice to the appellant as it is curable under section 388 of the CPA. In the instant case, it would appear to us that all the listed items were collectively admitted as exhibit PEL. On the above authority we are of the view that it was not fatal. This is because, on the face of the record, it can, at least, be seen and taken that the firearm was ~ among the exhibits tendered and admitted as exhibit PEL. We are, however, of the view that, to avoid confusion and mix up of exhibits under reference during trial, it was necessary for the trial magistrate to be specific when admitting and marking exhibits. This ground lacks merit and it is dismissed. On the complaint that the trial magistrate wrongly cited section 312 (2) of the CPA at the time of convicting the appellant, we equally think that it was not a serious irregularity. That section requires the judgment to specify the offence and the section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. Those were matters he had to comply with after having convicted the appellant. As he had earlier on indicated the provisions of the law under which the appellant was convicted, we agree) that such statement was misplaced and wholly unnecessary. Going by the evidence on record, at the trial, it was undisputed that the appellant and one Dickson Kabede were arrested by PW1 and PW2 at Gedamara Galapo and that the latter escaped. The crucial issue here is whether the appellant committed the charged offences. 91- . ., As already indicated above, the appellant's arrest was made immediately upon a tip made to PW1 and PW2 by an undisclosed person. The two witnesses were very dear in their testimony that at the time of arrest the appellant had a gun while Dickson Kabede had five rounds of ammunition. We, therefore, take it as an established fact that the appellant was not found in possession of the five rounds of ammunition. The lower courts definitely misapprehended the evidence before them. Had they addressed themselves on the relevant parts of the evidence by the two witnesses, they would not have arrived at the finding that the appellant was guilty -of the offence charged in the second count. Admittedly, with regard to the first count, the evidence incriminating the appellant, as rightly argued by Mr. Nuda, was that he was found in possession of the firearm. The relevant evidence came from PW1 and PW2 whose evidence we have reproduced above. As can be gleaned therefrom, the two witnesses did not tell the type of the firearm. PW1 described it as number 458. PW2 simply said a firearm. There was no mention, at all, that its number was erased. The evidence by the two witnesses did not find support from PW4 who was given the firearm for safe custody. In his evidence, he said that it was a rifle gun 10 • .. with erased serial number. As the charge levelled against the appellant raised the allegation that he was found in possession of the firearm, then its identification and description was crucial. It is apparent that the witnesses were not consistent on the description of the firearm. The contradictions therefore go to the root of the case. The contradictions were material to the prosecution case. It is now settled that discrepancies and contradictions in the evidence of the witnesses are basis for a finding of lack of credibility [see Maramo Slaa Hofu and Three Others Vs. R, Criminal Appeal No. 246 of 2011 (unreported)]. The trial and first appellate court ought, therefore, to have realized that PW1, PW2 and PW4 were not

witnesses of truth on whose evidence conviction could not be relied on. PW1 and PW2 who arrested the appellant allegedly in possession of the firearm and PW4 who stored it, were better placed to know the kind of the firearm and whether or not it had any number. They were the right persons to, not only identify the firearm, but also tender it in court as exhibit [see Zabron Masunga and Another Vs. Republic (supra), and The DPP vs. Mirzai Pirkakhsh @ Hadji and Three Others, Criminal Appeal No. 493 of 2016 (both unreported)]. In the latter case, this Court listed the categories of people who can tender exhibits in court. It stated thus: "A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike -are legally capable of tendering the intended exhibit5. in question provided he has the knowledge of the thing in question." Unfortunately, in the instant case, PW1 and PW2 who arrested and seized the firearm and PW4 who stored it, were not shown the firearm in court for identification. Instead, the firearm was tendered as exhibit by PW3 who did not state if he had seen or possessed the same at any point in time. This was quite irregular. Worse still, different descriptions were given by the above witnesses of the firearm allegedly found in the appellant's possession. As the evidence by the prosecution now stands, the firearm was not identified in court as being the one found in the appellant's possession. It cannot therefore, with certainty, be said that exhibit PE1 was the one allegedly found in the appellant's possession. The appellant is entitled to the benefit of the doubt. The above findings sufficiently dispose of the appeal. We do not therefore see any good reason to consider the grounds of appeal seriatim as that will be a mere academic exercise which will not serve any useful purpose. We consequently allow the appeal, quash the conviction and set aside both the sentences and the order for payment of fine meted by the trial court and upheld by the first appellate court. The appellant be set at liberty unless held on some other lawful cause. DATED at ARUSHA this 10th day of December, 2018. A. G. MWARIJA JUSTICE OF APPEAL S. A. LILA JUSTICE OF APPEAL M. A. KWARIKO JUSTICE OF APPEAL I certify that this is a true copy of the original. S. J. KAINOA c.s.,_- DEPUTY REGISTRAR COURT OF APPEAL 13

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