

TANZANIA / JUDGMENT

MAZIKU JUDG for Tanzlii

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29 January 2024

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IN THE HIGH COURT OF TANZANIA GEITA SUB-REGISTRY AT GEITA CRIMINAL APPEAL NO.
30484 OF 2024 (Original Economic Case No. 16776 of 2024 from Mbogwe District Court at Mbogwe
before A.B Fungo-SRM) JUMANNE MAZIKU-----APPELANT
VERSUS THE REPUBLIC -----RESPONDENT

JUDGMENT

Date of last Order: 07/11/2024 Date of Judgment: 22/11/2024 K. D. MHINA, J. On 29 January 2024, after the District Court of Mbogwe (“the trial court”) received the certificate conferring jurisdiction to try an economic case and consent to prosecute the appellant, JUMANNE s/o MAZIKU, it charged, tried and convicted him on the following two counts. The first count was unlawful possession of a firearm contrary to section 20 (1) (a) and (b) of the Firearms and Ammunition Control Act, No. 2 of 2015, read together with paragraph 31 of the first Schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act 1|Page (CAP 200 R.E 2022). It was alleged that on 14 June 2023 at Bukandwe Village within Mbogwe District and the Region of Geita, the appellant was found in possession of a muzzle-loading gun commonly known as “gobole” without having a valid licence. On the second count, he was charged with unlawful possession of ammunition contrary to Section 21 (a) and (b) of the Firearms and Ammunition Control Act. No. 2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57 (I) and 60 (2) of the Economic and Organized Crimes Control Act (Cap. 200 R.E 2022). It was alleged that on 14 June 2023 at Bukandwe Village within Mbogwe District and the Region of Geita, the appellant was found in possession of three hundred and fifty (350) local ammunition without having a valid licence. After a conviction, the appellant was sentenced to twenty (20) years in jail for each offence. Further, the trial court ordered the sentences to run concurrently. Aggrieved with the conviction and sentence imposed by the trial court, the appellant filed his memorandum of appeal containing five grounds of complaints as follows; 2|Page

- i. The trial Magistrate Court erred in law and facts to convict the Appellant without following in detail why the Appellant denied both counts of unlawful possession of Firearms and Ammunition. ii. The trial Magistrate Court erred in law and facts to convict the Appellant without any proof that the Appellant was in unlawful possession of a Firearm and Ammunition. In fact, the evidence used by the Prosecution side was different and was poor

to convict the Appellant without any doubt. iii. The Trial Magistrate Court erred in law and facts to convict the Appellant without following in detail that the Appellant legally possessed the Firearm and the Ammunition. iv. The Trial Magistrate Court erred in law and facts to convict the Appellants excessive conviction of 20 years each without considering the defence given by the Appellant.

- v. The Trial Magistrate Court erred in Law and Facts to convict the Appellant using evidence given by PW1, PW2, PW3, PW4, PW5, PW6 and PW7. In fact, the evidence given by those Witnesses had many contradictions. They failed to explain if the Appellant unlawfully possessed the Firearm and Ammunition and for what time, date and place. As for the background of this case, I wish to lay down the facts that led to the Appellant's arrest, as well as the evidence presented during the trial. The facts and evidence presented at the trial` briefly are as follows; 3|Page On 14 June 2023, at 00:00 hours, at Bukandwe Village in Mbogwe District, the appellant was arrested by a local vigilante group (Sungusungu) in possession of a firearm locally known as “gobole” and 350 rounds of local ammunition and a bottle of gun powder. According to PW2 (Shughuli Mkilijiwa), a member of a vigilante group and his commander, Mathias Manyamigeka (PW4), while they were patrolling their village, they arrested the appellant in possession of the firearm and ammunition. According to PW2, the appellant told them that he was a hunter. Then, they sent the appellant to the village office after being told to do so by the village chairman, Makenzi Masali (PW3). In his evidence, PW3 stated that in the morning, when he arrived at the office, he interrogated the appellant, who responded that he was a hunter. Then, he informed the police officers. PW1 (F4136 SGT Elly) stationed at Masumbwe Police Station was a police officer who was, on the morning of 14 June 2024, instructed by the OC-CID of Mbogwe to travel to Bukandwe Village and bring the appellant to Masumbwe Police Station. Upon arrival at Bukandwe Village, he found the appellant held at the Ward Executive Officer's office. The appellant, when 4|Page arrested, was found with the locally made firearm known as “gobole”, 350 rounds of local ammunition and a small bottle containing gunpowder. He seized the items, and the appellant signed the search warrant by putting his thumbprint. Then he transported the appellant to Masumbwe Police Station, where he was recorded his cautioned statement by PW5 (WP 9897 CPL Imelda). According to PW5, the appellant confessed to being caught in possession of a firearm. Further, PW1 handed the seized items/exhibits to PW6 (F. 9740 CPL Kei), the exhibit keeper, who, after receiving the exhibit, registered the same, filed the chain of custody form and kept the exhibits in the exhibit room. Later, on 14 October 2023, the firearm and ammunition were sent to the Forensic Bureau Laboratory in Dar es Salaam for analysis. At the Bureau, PW7 (SSP John Mayunga) analysed the gun and found it was working properly, and it uses locally made ammunition. Regarding locally made ammunition sent to him for analysis, he said they could cause death or injuries to human beings as well as animals when used by the firearm (gobole). 5|Page In his defence, the appellant admitted being arrested at Bukandwe Village in possession of the firearm make “gobole”. However, he denied being found with the ammunition. He stated that he lawfully possessed that firearm and paid for it at Busangi Police Station in 2022. He had a receipt, but he was told at the

police station that the receipt was not genuine. He also maintained his innocence by stating that the Ward Executive Officer and the Village Executive Officer knew that the firearm belonged to him. At the hearing of the appeal, the appellant appeared in person and was unrepresented via video link from Kahama Prison. The Respondent/ Republic was represented by Ms. Deodatha Dotto, learned state attorney. In supporting the appeal, the appellant adopted the grounds contained in the memorandum of appeal and added what he stated in his defence at the trial court. He lawfully owned the gun and had a hunting permit; however, this time, he admitted that he also owned the ammunition lawfully, a fact which he denied in his defence. In response, Ms. Dotto resisted the appeal. She started by arguing the 4th ground of appeal by stating that the sentence of 20 years given by the 6|Page trial court was not excessive. She explained that the sentence was proper according to section 60 (2) of Cap 200 RE 2022. She further submitted that, as indicated on page 23 of the proceedings and page 3 of the judgment, the trial court considered the appellant's defence, but that defence failed to raise doubt on the prosecution case. That defence lacked merit because the appellant admitted being found with the firearm and ammunition but failed to tender the licence to prove his ownership. Submitting on the 3rd ground of appeal, Ms. Dotto stated that, as indicated on page 23 of the trial court's proceedings, the appellant was given an opportunity to defend himself. However, in his defence, he did not deny being found with the firearm and ammunition but failed to tender the licence to prove his ownership. Lastly, Ms. Dotto argued the 1st, 2nd and 5th grounds together and submitted that the evidence by the prosecution witnesses had no contradictions. She explained that all witnesses testified on how and when the appellant was arrested until he was taken to the Police Station. 7|Page PW1, the arresting officer, was the one who searched the appellant and recovered a gun (gobole) and 350 locally made ammunition. He filed the certificate of seizure, and the appellant signed. Further, the appellant did not object to the admission of the weapon. On his side, PW2 testified that he was the one who had reported the matter, which led to the arrest of the appellant. PW3 witnessed the search of the appellant while PW4 participated in the arrest of the appellant, whom they found with a gun and locally made ammunition. For PW5, he was the one who recorded the appellant's cautioned statement and stated that the appellant admitted to being found with a gun and ammunition. He tendered the cautioned statement, but the appellant did not object. On this, Ms. Dotto cited the case of *Nyerere Nyague vs Republic* (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012) (Tanzlii), on page 5, where the Court of Appeal held that failure to cross-examine the witness means the evidence goes into record unchallenged. From above, she argued that the appellant did not object at the trial and cross-examined the witness, which means he agreed with the witness. 8|Page Further, she stated there was evidence of PW6 (exhibit keeper); he received the exhibit from PW1 and stored them. Later, he prepared a chain of custody form. On his side, PW7 (Ballistic expert) proved that the weapon and ammunition were working properly. He tendered the ballistic report, but the appellant did not object. Therefore, there were no contradictions, and the charge was proved to the hilt per section 3 (2) A of the TEA and as per the case of *Galus Kitaya vs Republic* (Criminal Appeal No. 196 of 2015) [2016] TZCA 301 (15 April 2016) (Tanzlii) on page 7. I have considered the appellant's grounds of

appeal, submissions by the state attorney for the republic/ respondent, and the trial court records. I will start with the fourth ground of appeal, in which the appellant complained that the sentence of twenty (20) years was excessive. On this, as the general rule, this court will normally not interfere with a sentence imposed by the trial court unless satisfied that the sentence was manifestly excessive, or the trial court failed to consider a material circumstance and that it erred in principle. See *Misango Shantiel vs 9* [Page Republic (Criminal Appeal 250 of 2007) [2012] TZCA 66 (30 May

2012) (Tanzlii). In the instant appeal, the provision of the law dealing with the sentence/ penal sanction under which the appellant was charged in both counts is section 60 (2) of the Economic and Organized Crimes Control Act (CAP 200 R.E 2022). That section reads; “Notwithstanding the provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act: Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence”. [Emphasis provided] The construction and interpretation of the cited provision of law are clear and unambiguous, leaving no room for misinterpretation on what should be imposed as a sentence under the section. One, under the cited section, the term used is “shall be liable to imprisonment for a term of not less than twenty years but not exceeding 10 | P a g e thirty years”. That means the law set out a minimum sentence of twenty (20) and a maximum sentence of thirty (30) years. Therefore, section 60 (2) of Cap 200 is couched in discretionary terms but in limitation. The section gives the courts an obligatory mandate to impose a penal sanction of 20 years as minimum and 30 years as maximum. Thus, depending on the aggravated factors, it is the discretion of the sentencing court to impose a punishment from 20 years to 30 years in jail. Upon careful examination, it becomes evident that the wording of section 60 (2) of Cap. 200 implies a discretionary approach to sentencing, albeit within certain limits, as discussed above. Two, on further interpretation of the provision of law, there is a proviso which provides that; “Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence”. That means if the person is found guilty of an economic offence (s) mentioned under the 1st schedule of Cap 200, and the law creating that offence provides a greater penal sanction than what is provided under section 60 (2), the court must impose that greater sentence. 11 | P a g e For instance, a person convicted of trafficking narcotic drugs contrary to section 15 (1) (a) and (2) (a) of the Drug Control Enforcement Act, Cap. 95, R: E 2019, read together with paragraph 23 of the 1st schedule to, and section 57 (1) and 60 (2) of Cap. 200. While, as already alluded, section 60

- (2) of Cap 200 provides for a sentence between 20 to 30 years in prison, section 15 (2) (a) of Cap. 95 provides for mandatory life imprisonment. Therefore, the sentence to be imposed between the two shall be the greater sentence, which is life imprisonment. In the instant appeal, the appellant was convicted for contravening sections 20 and 21 of the Firearms and Ammunition Control Act, No. 2 of
2015. Under the same Act, the provisions for the sentences for the convicted offences are sections 20 (2) and 60 (1). Section 20 (2) provided for a maximum sentence of five (5) in jail for the offence of unlawful possession of a firearm. Section 21 does not provide for a sentence of unlawful possession of ammunition. However, section 60
- (1) provides a fine penalty not exceeding TZS. 15,000,000/= or imprisonment for a term not exceeding ten (10) years or both. 12 | P a g e The two offences are listed under the first schedule to the Economic and Organized Crime Control Act under paragraph 31 thereof which provides for offences related to firearms and ammunition. The paragraph reads: "A person commits an offence under this paragraph who commits an offence under section 20, 21 or 45 of the Firearms and Ammunition Control Act." Therefore, as the appellant was charged with contravening, inter alia, sections 20 (1) (a) and 21 (b) of the Firearms and Ammunitions Control Act, section 60 (2) of the Cap 200 was applicable in sentencing him. Further, it is clear that the penal measures provided under the Firearms and Ammunition Control Act, no 2 of 2015, were not greater than what is provided under section 60 (2) of the Economic and Organized Crimes Control Act (Cap 200). Therefore, the trial court was correct in imposing the sentence under section 60 (2) of Cap 200, which provides a minimum sentence of 20 years and a maximum of 30 years in prison. From the above discussion, the sentence of 20 years for each offence imposed to the appellant was not excessive. It was the minimum under the provision of law creating it. Thus, the 4th ground of appeal is devoid of merits. 13 | P a g e I now turn to consider ground five (5), a complaint that the trial court erred in law and fact to convict the appellant using evidence given by PW1, PW2, PW3, PW4, PW5, PW6 and PW7 while their evidence had many contradictions and failed to explain if the appellant unlawfully possessed the Firearm and Ammunition and for what time, date and place. In discussing this complaint, the principle underlying the issue of contradictions in witness evidence has already been settled by the Court of Appeal and this Court in a number of cases. *Gaudence Mpepo vs Republic* (Criminal Appeal 67 of 2018) [2021] TZCA 129 (23 April 2021) (Tanzlii), it was held that; "It is a settled principle of law that where the evidence contains contradictions and inconsistencies, the court is duty-bound to address them and decide whether they are minor or go to the root of the case". Therefore, to determine the issue of contradictions and inconsistencies, one, they must be identified, pointed out and raised by a party alleged; two, the court must scrutinise and address the contradictions and inconsistencies; and three, the court must decide whether are 14 | P a g e discrepancies and contradictions and if there are present, whether they are minor or they go to the root of the case. In the instant appeal, having gone through the trial court's records and the grounds of appeal, I have the following; One, the appellant, neither in his ground of appeal nor in his submission, ever pointed out the contradictions and inconsistencies he

identified in the prosecution witnesses' evidence Two, I see no contradictions and inconsistencies in the prosecution case, and I hasten to find that the prosecution case was coherent; thus, this ground of appeal is also without merit. The prosecution witnesses testified on how the appellant was found with the firearm and ammunition. That evidence was never denied by the appellant. In fact, in his defence, he admitted that he was found with the firearm. The only defence he raised was that he owned it lawfully. It was testified that the appellant was arrested on 14 June 2023, at 00:00 hours, at Bukandwe Village in Mbogwe District, by a local vigilante group (Sungusungu) in possession of a firearm locally known as "gobole" and 350 rounds of local ammunition and a bottle of gun powder. 15 | Page Therefore, this court detected no contradictions or inconsistencies in the prosecution case. Thus, this ground is devoid of merits. Lastly, I will jointly determine the 1st, 2nd and 3rd grounds, as both technically revolve around the question of whether the prosecution side proved the case against the appellant to the hilt. At the trial, the prosecution presented oral, documentary and physical evidence to prove the offences. The evidence of PW2 and PW4 revealed how the appellant was arrested in possession of the firearm, 350 rounds of ammunition and a bottle of gunpowder. Those items were seized by PW1 in the presence of PW3. The certificate was signed by PW1, PW3 and the appellant. During the trial, PW1 tendered the firearm (Exhibit P1), 350 rounds of ammunition (Exhibit P2) and seven bottles of gunpowder (Exhibit P3). The appellant did neither object to their admission nor cross-examine in relation to the exhibits. Further, PW1 tendered the certificate of seizure (Exhibit P5), which was also not objected to in its admission by the appellant, who also never cross-examined it. 16 | Page The exhibits were handed and under the custody of PW6, who registered them and maintained their custody by a paper trail. At the court, he tendered the chain of custody form (Exhibit P5), which the appellant did not object to. When the appellant was at the police station, he was interrogated. According to PW5, the appellant confessed to committing the offence, and she recorded his cautioned statement (exhibit P6). The cautioned statement was never objected to in its admission and was not cross-examined. The firearm and ammunition were analysed by PW7, the ballistic expert who found the gun was properly working, and the locally made ammunition can be used in the gun and can cause death or injuries to human beings as well as animals. The ballistic report (Exhibit P7) was admitted without objection. In his defence, the appellant stated that he lawfully possessed that firearm and paid for it at Busangi Police Station in 2022. He had a receipt (exhibit D1), but he was told at the police station that the receipt was not genuine. My analysis of the above evidence is that; 17 | Page One, the appellant did not object to or challenge the prosecution's evidence orally, in documentary and physically. He even never objected to the exhibits tendered and failed to cross-examine in relation to those exhibits. In *Anna Moises Chissano vs. The Republic*, Criminal Appeal No. 273 of 2019(Tanzlii), the Court held that; "An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused". From above, by failing to object and cross-examine the prosecution exhibits, the appellant admitted that, as per the certificate of seizure, he was

arrested in possession of the firearm and 350 rounds of ammunition. By the cautioned statement, he confessed and admitted that he was arrested in possession of the firearm and 350 rounds of ammunition. In the cautioned statement, the appellant said he was found with “350 goroli”. Further, the appellant admitted that the chain of custody was maintained and the firearm was working properly. 18 | P a g e Two, the appellant, in his defence, raised an issue that he owned the firearm lawfully, and he tendered the receipt for that firearm and claimed that he had a hunting permit. Therefore, the question is whether the appellant lawfully owned the firearm and 350 rounds of ammunition. Section 10 (1) of the Firearms and Ammunition Control Act. No. 2 of 2015 requires mandatorily the person who owns the firearm to possess the licence. The section reads that; “A person shall not possess a firearm unless he has obtained a licence or permit under this Act”. In the instant appeal, as alluded to earlier, the prosecution evidence was that the appellant was found possessing the firearm and ammunition, and his possession was unlawful. On the other hand, the appellant stated that he owned the licence lawful as he was a hunter and had a permit. He tendered exhibit D1. Regarding that exhibit D1, the trial court held that the receipt did not prove that the appellant owned the firearm. Having to scrutinize D1, I found that it was titled; 19 | P a g e “HALMASHAURI YA WILAYA YA MSALALA (MSALALA DISTRICT COUNCIL) STAKABADHI YA ADA/USHURU/KODI (GENERAL RECEIPT)” Then, in the content, it was written; “Nimepokea kutoka kwa: JUMANNE MAZIKU MABUBU Anuani: 16 KAHAMA Hesabu ya shilingi: TWO THOUSAND ONLY Kwa ajili ya ada/ushuru wa kodi: OTHERS PRODUCES (2022/2023)”. Simply, it means the Msalala District Council received from Jumanne Maziku Mabubu, TZS. 2,000/= as payment (tax) for “other produces” for 2022/2023. In my view, that is not a licence to own a firearm. This is because according to section 10 (3) of the Firearms and Ammunition Control Act. No. 2 of 2015, the authority with a mandate to issue the licence is the Registrar of Firearms. It is trite that in criminal law, the general duty of the accused person in criminal matters is only to raise doubt against the prosecution case and not otherwise. See DPP. vs Ngusa Keleja @ Mtangi & Another 20 | P a g e (Criminal Appeal No.276 of 2017) [2020] TZCA 288 (11 June 2020) (Tanzlii). At the trial, the appellant failed to disprove the prosecution evidence that he was found in possession of the firearm and ammunition unlawful and he failed to raise doubt against the prosecution case. The receipt he tendered was not a licence issued by the Registrar for the ownership of the firearm. The receipt (exhibit D1) does not even show what was paid for at Msalala District Council. Therefore, the 1st, 2nd and 3rd grounds of appeal lack merits. In the final analysis, the grounds of appeal by the appellant failed to persuade this court to interfere with the trial court’s findings. Ultimately, I uphold the appellant's conviction and sentence given by the trial court and dismiss this appeal to its entity. It is so ordered. K. D. MHINA JUDGE 22/11/2024 21 | P a g e Court: Right to appeal explained. K. D. MHINA JUDGE 22/11/2024 22 | P a g e

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Prepared on 14 October 2026 · Esheria