IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 58 OF 2019

NDUGULILE MANDAGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Sumbawanga)
(Mambi, J.)

dated the 22nd day of November, 2018
in
Criminal Appeal No. 109 of 2017

.....

JUDGMENT OF THE COURT

24th November & 1st December, 2021

MWAMBEGELE, J.A.:

Before the Court of the Resident Magistrate of Katavi sitting at Mpanda, the appellant Ndugulile Mandago was charged with and convicted of the offence of unlawful possession of ammunitions contrary to section 21 (b) of the Firearms and Ammunitions Act, 2015 read together with paragraph 14 of the first schedule to, and section 57 (1) of, the Economic and Organized Crime Control Act, Cap. 200 of the Revised Edition, 2002. He was sentenced to serve a jail term of twenty years. His first appeal to the High Court was barren of fruit, hence this second appeal.

Before we go into the determination of the appeal in earnest, we wish to narrate the background facts of this appeal before us. It is this: on 26.01.2017, the appellant who, on the previous day, was accused together with others of possessing a firearm unlawfully, was searched in his residence and found in possession of five rounds of ammunition. The search was conducted by ASP Pallangyo (PW2) who was the officer commanding the Criminal Investigation Department (OC-CID), Mpanda District in Katavi Region. Also present during the search were Didas Mipupo (PW1) who was landlord of the appellant and Gervas Kasamata (PW3), a *mtaa* chairperson. Having retrieved the five rounds of ammunition, the appellant was arraigned.

The prosecution fielded four witnesses to prove its case. These were PW1, PW2 and PW3 referred to in the foregoing paragraph as well as E. 5701 Corporal Robert (PW4) who investigated the case. The appellant was the only witness in defence. Upon a full trial, the trial court was satisfied that the appellant's guilty was established beyond reasonable doubt. The appellant was thus found guilty, convicted and sentenced in the manner stated above. His appeal before us is comprised in a four-ground memorandum of appeal, namely:

1. *That the first appellate court erred at law by admitting a certificate of seizure which was extracted by police officer who were not searched by the appellant before they got access into the appellant's room;*
2. *That the first appellate court erred at law for not disposing the fourth ground of appeal which was the fact the appellant was not found guilty of the offence of possession of Drugs in Economic Case No. 26 of 2017 which was said to have been hidden under the mattress together with the said Ammunitions;*
3. *That, the first appellate court misdirected itself by raising the doctrine of recent possession to a case which no one is claiming loss by theft of the said ammunition; and*
4. *That the first appellate court erred at law by deciding that the case was proved beyond reasonable doubt despite many unexplained and unsettled doubts raised.*

When the appeal was called on for hearing on 24.11.2021, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Scholastica Ansigar Lugongo, learned Senior State Attorney. When we called the appellant to argue his appeal, he did no

more than adopt the four grounds of appeal and prayed to hear the learned Senior State Attorney in response.

Responding, Ms. Lugongo, at the outset, addressed us on a legal point that she thought touched the jurisdiction of the trial court. She submitted that the appellant was charged with unlawful possession of ammunitions contrary to section 21 (b) of the Firearms and Ammunitions Act, 2015 (the Firearms and Ammunitions Act) which is an economic offence under paragraph 31 of the first schedule to, and section 57 (1) of, the Economic and Organized Crime Control, Cap. 200 of the Revised Edition, 2002 (the Economic and Organised Crime Control Act). For the economic offence to be tried by a subordinate court, she submitted, a consent and a certificate conferring jurisdiction to a subordinate court to try an economic crime case were given by the Senior State Attorney in-Charge of Katavi Region. However, those two documents indicated that the appellant was charged under, *inter alia*, paragraph 14 of the Economic and Organised Crime Control Act and not paragraph 31 thereof. That paragraph, she argued, did not make the offence with which the appellant was charged, economic. It was paragraph 31 of the same Act which made it economic. The two documents were therefore defective and made the subordinate court try the case without jurisdiction, she argued. She thus

urged us to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (the Appellate Jurisdiction Act) to nullify the proceedings and judgment of the trial court for being a nullity as well as those of the first appellate court as they emanated from nullity proceedings.

With regard to the way forward, the learned Senior State Attorney beseeched us to release the appellant from prison. Ms. Lugongo pegged her course of action on shaky evidence adduced at the trial by the prosecution arguing that the evidence by the prosecution at the trial did not prove the case to the required standard; beyond reasonable doubt. Substantiating, she submitted that, **first**, the appellant's residence was searched without permit contrary to section 38 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). As the search was not out of emergency, she submitted, the police ought to have procured a search warrant before embarking on the search during which the five rounds of ammunition were allegedly retrieved. The search was therefore illegal, she concluded.

Secondly, the certificate of seizure and the Chain of Custody Record were admitted in evidence but were not read out loud in court after

admission as held by the Court in a plethora of its decisions. For failure to read the certificate of seizure and the Chain of Custody Record after admission, the appellant was denied of the right of knowing their contents, she contended. Ms. Lugongo cited our decision in **Ramadhani Mboya Mahimbo v. Republic**, Criminal Appeal No. 326 of 2017 (unreported) to buttress the point that such shortcoming renders the documents expungable.

Given the above weaknesses in the prosecution's case, the learned Senior State Attorney found herself reluctant to pray for a retrial. For this standpoint, she relied on the decision of the erstwhile Court of Appeal of East Africa in **Fatehali Manji v. Republic** [1966] 1 EA 343 to urge us to refrain from ordering a retrial. She besought us to release the appellant instead.

Having heard the response of the learned Senior State Attorney, the appellant, for the obvious reason that the submissions was in his favour, had nothing useful to submit in rejoinder. He simply joined hands with her and prayed to be released from custody.

We have considered the submissions of the learned Senior State Attorney to the effect that the trial court tried the case the subject of this

appeal without jurisdiction. Having so done, with profound respect, we find ourselves diffident to agree with her. As already stated at the beginning of this judgment, the appellant was charged with unlawful possession of ammunitions contrary to section 21 (b) of the Firearms and Ammunitions Act, 2015 read together with paragraph 14 of the first schedule to, and section 57 (1) of, the Economic and Organized Crime Control Act. The consent and certificate conferring jurisdiction on the subordinate court to try the economic case was made under section 26 (2) of the Economic and Organized Crime Control Act and referred to section 21 (b) of the Firearms and Ammunitions Act, 2015 read together with paragraph 14 of the first schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, the provisions under which the appellant was charged. With due respect we do not see any fault in the consent and certificate issued by the Senior State Attorney in-Charge of Katavi Region. Admittedly, the offence with which the appellant was charged does not fall under the purview of paragraph 14 of the Economic and Organized Crime Control Act. That paragraph deals with offences under "the Wildlife Conservation Act or section 16 of the National Parks Act." We take the liberty to reproduce it hereunder for easy reference:

"A person commits an offence under this paragraph who commits an offence under section 17, 19, 24, 26, 28, 47, 53, 103, 105, Part X or Part XI of the Wildlife Conservation Act or section 16 of the National Parks Act."

In the case the subject of this appeal, it is apparent in the charge sheet appearing at p. 21 of the record of appeal as well as the evidence led by the prosecution at the trial, that the appellant did neither commit an offence under the Wildlife Conservation Act nor the National Parks Act. It was therefore inappropriate to charge him under that paragraph. The proper paragraph under the first schedule to the Economic and Organized Crime Control Act under which the appellant should have been charged, is paragraph 31 thereof which provides for offences related to firearms and ammunition, Cap. 223. 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."

As the appellant was charged with contravening, *inter alia*, section 21 (b) of the Firearms and Ammunitions Control Act, paragraph 31 should have been an appropriate provision of the first schedule of the Economic and Organised Crime Control Act, to charge the appellant with.

Be that as it may, we are of the view that the consent and certificate conferring jurisdiction on the Court of the Resident Magistrate of Katavi were not defective, for they were made under an appropriate provision; section 26 (2) of the Economic and Organized Crime Control Act and referred to the provisions under which the appellant was charged with. They could not refer to paragraph 31 of the Economic and Organized Crime Control Act which did not appear in the charge sheet. They cannot therefore be said to be defective.

The learned Senior State Attorney referred to our decision in **Mabula Mboje** (supra) to reinforce her arguments on the point. We have read that decision. With respect, we find it distinguishable from the appeal before us. In **Mabula Mboje** the certificate given by the Director of Public Prosecutions to confer jurisdiction upon the District Court to hear the economic crimes case was given under section 12 (3) of the Economic and Organized Crime Control Act. We held that, as the charge constituted a combination of both economic and non-economic offences, the appropriate provision should have been section 12 (4) of the Economic and Organized Crimes Control Act. In the case at hand, as already stated above, the consent and certificate were given under an appropriate section 26 (2) of

the Economic and Organized Crimes Control Act. Our decision on the point in **Mabula Mboje** is therefore inapplicable in the appeal before us.

In view of our discussion above, we disagree with the stance taken by the learned Senior State Attorney and decline her invitation to engage section 4 (2) of the Appellate Jurisdiction Act to nullify the proceedings in both courts below.

On the merits of the appeal, Ms. Lugongo argued the grounds of appeal in her bid to justify her discomfort to pray for a retrial. She was generally of the standpoint that the prosecution case at the trial was shaky to prove the case against the appellant to the hilt. We agree. We will demonstrate hereunder why we are in such agreement with the learned Senior State Attorney. In that process, we will be considering the merits or otherwise of the appeal.

First, the complaint of the appellant in the first ground of appeal hinges on the improper admission of the certificate of seizure as well as the propriety of the search that was conducted in his residence. With regard to the admission of certificate of seizure Ms. Lugongo contended, and to our mind rightly so, that it was improperly adduced in evidence. As evident at p. 36 of the record of appeal, the certificate of seizure was

tendered and admitted as Exh. P2. However, after it was admitted, it was not read out loud in court and explained to the appellant. This was a fatal irregularity which makes the exhibit expungable. This standpoint is explained by the Court in a string of its decision – see, for instance, **Sylvester Fulgence v. Republic**, Criminal Appeal No. 507 of 2016, **Erneo Kidilo & Another v. Republic**, Criminal Appeal No. 206 of 2017 and **Robert P. Mayunga and Another v. Republic**, Criminal Appeal No. 514 of 2016 (all unreported), to mention only a few.

As regards the search, we also agree with Ms. Lugongo that it was not on emergency basis. The appellant was under custody of the police in connection with another offence a day before. PW2 who led the search did not testify anything to show that the same was on emergency. The search without warrant was therefore illegal in terms of section 38 of the CPA which is applicable to cases under the Firearms and Ammunitions Act in terms of section 53 of the latter Act. The search conducted without warrant was thus illegal and, to say the least, a blatant disregard of the law. We held in a number of our decisions that items recovered during an illegal search are expungable - see: **The Director of Public Prosecutions v. Doreen John Mlemba,** Criminal Appeal No. 359 of

2019 and **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of (both unreported).

In **Doreen John Mlemba** (supra), we grappled with an identical situation wherein a search was conducted without a warrant. We relied on our previous decisions in **Badiru Musa Hanogi v. Republic**, Criminal Appeal No. 118 of 2020 and **Mbaruku Hamisi and Four Others v. Republic**, Consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018 (both unreported) to expunge the exhibits which were retrieved in a search conducted without a warrant. We stated:

> *"In other words, in **Badiru Musa Hanogi** case (supra) and **Mbaruku Hamisi and Four Others** (supra) referred to in the former case, exhibits impounded without a search warrant were treated as evidence illegally obtained and this Court expunged the said exhibits from the record. We are afraid, in the circumstances obtaining in this appeal, it is beyond certainty that we will be constrained to follow suit."*

On the authority of the cases cited above, we expunge from the record the five rounds of ammunition retrieved in the search we have found and held to be illegal. We find merit in the first ground of appeal.

In ground 2, the appellant seeks to challenge the first appellate court for ignoring to consider ground 4 at the trial which was and still is in this appeal, that the fact that he was acquitted in Economic Case No. 26 of 2017 in which he was alleged to have been found in possession of narcotic drugs (hashish) which was said to have been found hidden under the mattress together with the five rounds of ammunition. We found this ground without merit. We do so because Economic Case No. 26 of 2017 is a different case from the one the subject of this appeal. We are not sitting on that appeal. The first appellate court was right to disregard the complaint. We also disregard it as having no bearing on the case the subject of this appeal. In the result, we dismiss this ground of complaint.

We now turn to consider ground 3, a complaint that the doctrine of recent possession was applied out of context. We find justification in the appellant's complaint. The first appellate court spent about five pages from p. 13 through to p. 17 to discuss, with supporting case law, the doctrine of recent possession and used it to found the conviction against the appellant. As rightly put by the appellant, and to our mind rightly so, no one alleged that the rounds of ammunition were stolen from elsewhere. The statement by the trial court that the rounds of ammunition belonged to the police was not backed by evidence. So was the reference to the

appellant being found in possession of elephant tusks at p. 15 of the record of appeal. As none complained that the rounds were recently stolen, to call the same as recently stolen was a misnomer.

As we stated in our unreported decision in **Salum Rajabu Abdul @ Usowambuzi v. Republic**, Criminal Appeal No. 219 of 2017:

> *"... the doctrine of recent possession is applicable where it may be established that the accused person was found in possession of a recently stolen property and did not give plausible explanation on how he came to possess it, of course conditional upon the fact that the said property was the subject of the charge against him. It is similarly necessary to point out that the said property must have been positively identified by the victim of the robbery."*

It will be appreciated that this was not the case in the appeal before us. We agree with the appellant that the doctrine of recent possession was applied out of context. We find merit in the third ground of complaint.

The last ground of appeal will not detain us. Based on the consideration of the three grounds above, the resultant conclusion should be a finding that the prosecution failed to prove the case beyond reasonable doubt. We so find and hold.

In the final analysis, we find merit in this appeal and allow it. We order that the appellant Ndugulile Mandago be released from prison forthwith unless he is held there for some other lawful cause.

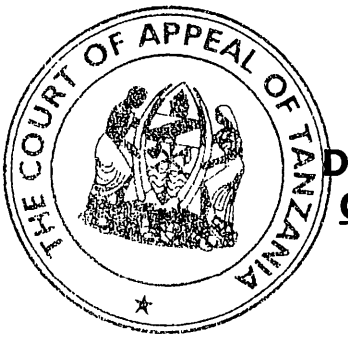
DATED at **MBEYA** this 30th day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of the appellant in person and Ms. Scholastica Ansigar Lugongo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL