IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: KOROSSO, J.A., MWAMPASHI, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 175 OF 2020

SALUM S/O SADY.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mashauri, J.)

dated the 25th day of March, 2020

in

Criminal Appeal No. 07 of 2019

.....

JUDGMENT OF THE COURT

13th & 18th March, 2024

MWAMPASHI, J.A.:

Salum s/o Sady, the appellant herein, was arraigned in the Resident Magistrate's Court of Katavi at Mpanda, with the offence of being in unlawful possession of ammunitions contrary to section 21 (b) of the Firearms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule to sections 57 (1) and 60 (2) both of Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] as amended by section 16 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 03 0f 2016.

It was alleged that on 20.11.2016 at Namanyere area Majimoto Village within the District of Mlele in the Region of Katavi, the appellant was found in unlawful possession of five (5) rounds of ammunition of SMG/SAR without a

licence or permit sought and obtained from the Authorized Officer. He was convicted and sentenced to twenty (20) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court hence the instant second appeal.

A brief factual background from which this appeal arises is as follows; On 19.11.2016 at about 23:00 hours, PW1 G5443 D/C Marwa of Majimoto Police Station was ordered by the Officer in Charge of the Station (OCS) to go and conduct a search in the appellant's house. This was in response to suspicions by TANAPA Game Wardens that the appellant had, in his house, Government trophies. Accompanied by TANAPA Game Wardens, PW1 got at the appellant's house. Before getting in the appellant's house, the appellant's neighbour, one Liberatus Gasper (PW4), was asked to witness the search. PW4 knocked on the door to the appellant's house and the door was opened by the appellant's wife. When the appellant came out and after being informed that his house was about to be searched, he demanded the search to be conducted in the presence of the village Chairperson, one Thensiana Hamis (PW5).

Upon the arrival of PW5, PW1 entered in the appellant's house and conducted the search in the presence of the appellant, PW4, PW5 and the Game Wardens. In the course of the search at the sitting room, five (5) rounds of ammunition wrapped in a red piece of cloth were found hidden under the sofa cushion. To that effect, a certificate of seizure (Exhibit P2) was filled by PW1 and signed by the appellant and other witnesses including PW4 and PW5. The

appellant was then taken to the police station and the five (5) rounds of ammunition were handed over to the case investigation officer D. 8359 D/Stg. Paul (PW2) who later passed them together with the chain of custody form to E.5701 Cpl. Robert (PW3), the exhibit keeper at Mpanda Police Station. The five (5) rounds of ammunition and the chain of custody form were tendered in evidence during the trial by PW1 as Exhibit P1 and P3 respectively.

In his affirmed defence, the appellant admitted that the search was conducted in his house but denied that the five (5) rounds of ammunition were found and seized from his house. He maintained that nothing illegal was found in his house but that the police officers only seized his smart phone. The appellant denied that PW4 was his neighbour and he also complained why his wife was not charged.

After a full trial, based on the prosecution evidence, the trial court found it proven beyond reasonable doubt that, the five (5) rounds of ammunition were found and seized from the appellant's house and also that the appellant was in constructive possession of the same. The appellant's denial of having been found in possession of the said five (5) rounds of ammunition and his complaint about his wife not being charged, were rejected by the trial court which insisted that as the appellant was the owner of the house and the head of the homestead, he was the one responsible for the five (5) rounds of ammunition found and seized from his house. The trial court found the case against the appellant proven

beyond reasonable doubt and the appellant was thus accordingly convicted of the offence and sentenced to serve a period of twenty (20) years in prison.

As alluded to earlier, the first appellant's appeal to the High Court against the conviction and sentence was dismissed. Still aggrieved, the appellant has now preferred the instant second appeal raising five (5) grounds of appeal which can conveniently be paraphrased and condensed to four (4) grounds of complaint as follows:

1. *That, in dismissing his appeal, the High Court relied on the learned State Attorney opinion without re-evaluating the whole evidence on record to the detriment of the appellant.*
2. *That, the defence evidence was unjustifiably discounted and rejected.*
3. *That, the prosecution exhibits were unprocedurally and illegally tendered and admitted in evidence.*
4. *That, the prosecution evidence was contradictory, problematic, and susceptible.*

Before us, at the hearing of the appeal, whereas the appellant appeared in person unrepresented, Messrs. Deusdedit Rwegira, learned Senior State Attorney and Kizito John Kitandala, learned State Attorney, represented the respondent/Republic.

When invited to argue and amplify his grounds of appeal, the appellant let the learned State Attorneys begin. He however reserved his right to rejoin if need to do so would arise.

Upon taking the floor, Mr. Rwegira, outrightly expressed his stance that he was supporting the appeal. However, in supporting the appeal, Mr. Rwegira was initially of the view that the matter should be remitted to the High Court for determination of the appellant's grounds of appeal which were not determined by the High Court. He pointed out that the High Court did not determine all the grounds of appeal raised before it by the appellant but that it only considered and addressed the 3rd ground of appeal on the complaint that the exhibits were unprocedurally and illegally admitted in evidence, leaving the other four (4) grounds undetermined. However, in the course of his submission and upon being probed by the Court, Mr. Rwegira changed his standpoint on what should be the way forward. He came to a view that based on the evidence on the record, remitting the matter to the High Court would not be in the interest of justice. He contended that the charge against the appellant was not proved to the required standard because the crucial ingredient of the offence that the five (5) rounds of ammunition were found in the appellant's possession was not proved beyond reasonable doubt. He further argued that as the appellant was not living alone in the house but with his family including his wife it was doubtful if the appellant was really in possession of the five (5) rounds of ammunition or that he was aware of the presence of the same in his house. He thus, urged us to allow the appeal by quashing the conviction and setting aside the sentence imposed on the appellant.

In his very brief rejoinder, the appellant, who happily welcomed the concession of his appeal by Mr. Rwegira, urged us to consider his grounds of appeal and allow the appeal.

Having examined the record of appeal and after considering the concession of the appeal by Mr. Rwegira, we are of a considered view that, in light of the four grounds of appeal raised by the appellant, the issue for our determination in disposing of the appeal is simply as to whether the case against the appellant was proved beyond reasonable doubt. We further find that as the evidence, particularly that of PW1, PW4 and PW5, left no grain of doubt that the five (5) rounds of ammunition in question was found hidden under the sofa cushion at the sitting room in the appellant's house, then the issue for our determination can be narrowed down to whether, under the circumstances of this case, constructive possession was established as against the appellant.

In determining the above narrowed down issue, regard should also be had to the fact that it is not disputed that the appellant was not living alone in the house but with his family including his wife who at the time of the search was also in the house and, in fact, she was the one who opened the door for PW1 and his team.

Before proceeding any further, we should restate the general principle that where there is concurrent finding of facts by two lower courts, a second appellate court can rarely interfere with such findings unless there is a serious misdirection,

non-direction, a violation of any principle of law or misapprehension of the evidence leading to miscarriage of justice. See- **Musa Mwaikunda v. Republic** [2006] T.L.R. 387, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.L.R. 297, **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 and **Rashid Ramadhani Hamis Mwenda v. Republic,** Criminal Appeal No. 116 of 2008 (both unreported).

Regarding the nature, quality and features of constructive possession, the Court, in the case of **Yanga Omari Yanga v. Republic**, Criminal Appeal No. 132 of 2021 (unreported), quoted an excerpt from an Article titled: **THAT AINT MINE: TAKING POSSESSION OF YOUR CONSTRUCTIVE POSSESSION CASE**, authored by H. Lee Harrel, Deputy Commonwealth's Attorney Wythe Count Virginia in Volume 6, Number 1/July 2011, which, for purposes of the determination of the appeal, we find apt to re-quote as follows:

> *"If the Commonwealth's case is one of constructive – rather than actual – possession the following must be proved beyond reasonable doubt:*
>
> 1. *That defendant was aware of the presence and character of the contraband.*
> 2. *That the contraband was subject to defendant's dominion and control.*
>
> *By its very nature constructive possession case is likely to be circumstantial, and although circumstantial evidence*

can be just competent as direct evidence, it rarely parks the same punch...

The first prong of constructive possession is usually the most difficulty to prove. Having to prove the requisite level that the defendant knew about an item not in his actual possession is challenging. Constructive possession may be established by evidence of acts, statement or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control".

The manner of establishing actual or constructive possession has been discussed by the Court in a number of its decisions including the decision in the case of **Moses Charles Deo v. Republic** [1987] T.L.R. 134, where it was categorically stated by the Court that:

"...for a person to be found to have possession, actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came, albeit in his absence, at his invitation and arrangement. But it is also true that mere possession denotes knowledge and control".

What is also clear, from the above stated position of the law, is that, regardless of the difficulties in proving constructive possession, the same may be established by evidence of acts, statement or conduct of the accused or other facts or circumstances which tend to show that the accused was aware of the

presence and character of the contraband in question and that the contraband was subject to his control. Mindful of how constructive possession may be established, our impending task is to revisit the evidence on record and find if, in the instant case, there was evidence of acts, facts, circumstances, statement or conduct of the appellant which tend to show or establish that the appellant was aware of the presence of the five (5) rounds of ammunition hidden under the sofa cushion at the sitting room of his house or that he had control of the same.

It should also be noted, at this stage, that the issue whether there was enough evidence establishing that the appellant had knowledge and control of the relevant five (5) rounds of ammunition and further whether the same could not have been in possession and control of any other person residing in the house including his wife, was an issue which was consistently raised by the appellant throughout the trial. At page 22 of the record of appeal, the appellant is on record asking PW1, in cross-examination, as to why his wife was not charged. Again, at page 32 of the record of appeal, PW5 is on record answering questions put on him by the appellant, in cross-examination, that during the search the appellant was with his wife. In his defence, at page 34 of the record of appeal, the appellant is also on record faulting the prosecution evidence against him because he had not been told why he was being prosecuted alone and also why his wife was not charged.

In resolving the above questions posed by the appellant which to us, raised some reasonable doubt on whether it was the appellant and not any other person, who might have been in possession and control of the five (5) rounds of ammunition in question, the trial court, in its judgment at page 43 of the record of appeal, observed that; ***"The accused on his side sees the omission to charge the woman (his wife) can relieve him. Indeed, this court sees that either or both of the adults occupying the premises can be held to have possessing (sic) the bullets. And omission of charging the wife cannot relieve the accused".*** The trial court went on stating that; ***"The court took note [of] the caution of the accused that in the house there are other family members including the wife but for the kind of the object SMG bullets, the one who could be implicated must be the adult. And even though the wife [was] not prosecuted this alone cannot absolve the accused person as the head of the homestead".***

With due respect, based on the evidence on record and the circumstances of the case, we are not in agreement with the above reasoning by the trial court which was upheld by the High Court in dismissing the appellant's first appeal. We have revisited and carefully examined the evidence on record. There is no any piece of evidence, fact or any statement or conduct of the appellant which suggest or tend to show that the appellant was aware of the presence of the five

(5) rounds of ammunition under the sofa cushion at the sitting room of his house or that he had control of the same.

It is our further finding that, under the circumstance of this case, because the appellant was not the only occupant in the house and as there were other persons including his wife who had access to the house and particularly to the sitting room, the possibility of the five (5) rounds of ammunition in question having been brought in there by any other person and not the appellant, cannot be ruled out. As we have alluded to earlier, it should also be borne in mind that in his defence and, in fact, throughout the trial, the appellant kept on lamenting that he was not the only one residing in the house. This kind of defence, to our view, cast a reasonable doubt to the prosecution case which ought to have been resolved in the appellant's favour. It is also our considered view that under the circumstances of this case, the fact that the appellant was the owner of the house or that he was the head of the homestead, does not necessarily make him responsible for the said five (5) rounds of ammunition which were found in his house.

Finally, we are of the view that had the trial court and the High Court properly applied the law in regard to constructive possession and had they not misapprehended the evidence on record as a whole, they would not have failed to reach at a conclusion that the case against the appellant was not proved to the hilt. Our interference to the concurrent finding by the two lower courts that

the appellant was found in constructive possession of the five (5) rounds of ammunition in question, is thus justifiable.

In the final analysis and for the above reasons, our resolve is that the case against the appellant was not proved beyond reasonable doubt as the law requires. The appeal is therefore allowed, the conviction is quashed and the sentence imposed on the appellant is set aside. We further order that the appellant be set at liberty forthwith unless he is being so held for any other lawful cause.

DATED at **SUMBAWANGA** this 18th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B.S. MASOUD
JUSTICE OF APPEAL

The judgment delivered this 18th day of March, 2024 in the presence of the appellant in person unrepresented and Mr. David Mwakibolwa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL