IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT MPANDA

DC CRIMINAL APPEAL NO. 70 OF 2013

(Appeal from the decision of the District Court of Mpanda in Original Criminal Case No. 341 of 2012)

SEBA LUNGWA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

28th May & 6th June, 2014

JUDGMENT

MWAMBEGELE, J.:

The District Court of Mpanda arraigned and convicted the appellant Seba Lungwa with two counts of unlawful possession a firearm in the first count and unlawful possession of ammunitions in the second count contrary to sections 4 (1) (2) and 34 (1) (2) of the Arms and Ammunitions Act, Cap. 223 of the Revised Edition, 2002 (henceforth "the Arms and Ammunition Act"). He was convicted on both counts and sentenced to pay fine of shillings four million or serve eight years in jail in default in respect of the first count and fine of shillings two million or serve four years in jail in default thereof in respect of the second count. The convictions and

sentences aggrieved the appellant. He therefore has appealed to this court on seven grounds of grievance. The seven grounds are, in my view, summarised by the first two grounds which state that the case was not proved beyond reasonable doubt and that the cautioned statement was wrongly admitted in evidence.

The appeal was argued before me on 28.05.2014. The appellant appeared in person and unrepresented. He fended for himself. The respondent Republic was represented by Mr. Mwashubila, learned State Attorney. At the hearing of this appeal the appellant prayed to adopt and rely on the grounds of appeal he earlier filed.

Mr. Mwashubila, learned State Attorney supported the appellant's appeal. He submitted that the trial court convicted the trial court on the strength of evidence of five witnesses who were park rangers and policemen and therefore had interest to serve. He stated that their evidence ought to have been corroborated with some other independent evidence. He submitted further that Liberatus Nyabira PW6 who was an independent witness and his evidence should have corroborated the testimonies of the five witnesses, but his evidence is at variance with the rest of the witnesses. The learned State Attorney made reference to ***Abraham Wilson Saiguran & 2 Others Vs R*** [1981] TLR 265 to buttress this point.

The learned State Attorney referred to the cautioned statement as another piece of evidence which was used to convict the appellant. The cautioned

statement was objected to being tendered on the ground that the appellant claimed that it was not voluntarily made. The learned State Attorney submitted, quite correctly, that under such circumstances, the trial court ought to have conducted an inquiry to decide on its admissibility.

There are two issues before me to determine. These are: one, whether or not the case was proved beyond reasonable doubt and two, whether or not the cautioned statement was wrongly admitted in evidence.

I start with the second issue. The learned State Attorney is of the view that this document was improperly admitted in evidence in that the appellant objected to its being tendered in evidence because he alleged it was involuntarily made. I entirely agree with the learned State Attorney. I have perused the proceedings of this case. It is true that the appellant objected to the statement being tendered in evidence because, he stated, the statement was made after he was beaten up by the police. He seemed to suggest that the same was not voluntarily made. In objecting the tendering of the cautioned statement, the appellant is recorded as saying:

> "I was beaten at the police that is why I said so".

After the appellant's objection to the tendering of the document, the court made the following ruling:

"**RULING**

The accused is alleged to have been beaten that is why he said all those to the police. If he would have denied the statement to be his or said to be false the court would have said otherwise.

This court, therefore, admits the accused caution statement as exhibit Tan. 3".

After the ruling and the court having been admitted the cautioned statement in evidence, the court proceeded with the trial. I hasten to state that this was not proper. After the appellant objected to the cautioned statement being tendered in evidence on account that he made that statement and stated the contents thereof after he was beaten, the trial court ought to have stopped everything and should have embarked upon determining whether the contents of the cautioned statement were a result of the beating. That could be ascertained by conducting an inquiry. I am fortified by this stance by an unreported decision of the Court of Appeal of ***Selemani Abdallah & 2 others Vs R*** Criminal Appeal No. 384 of 2008. In that case, the appellants objected to the tendering of the cautioned statements on the grounds that they involuntarily made them. Yet the court, like in the present instance, admitted them. The court of appeal, restating the law as stated in its earlier decision of ***Twaha Ali & 5 Others Vs R***, Criminal Appeal No. 78 of 2004 (unreported) on what should be done when an accused person objects to the cautioned statement being tendered in evidence, had this to say:

"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, **the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence**"
[Emphasis supplied]"

And to clinch it all, in a fairly recent decision of ***Makumbi Ramadhani Makumbi & 4 Others Vs R*** Criminal Appeal No. 199 of 2010 (unreported), the Court of Appeal in its judgment delivered on 27.11.2013 at Mwanza, on the effect of failure to conduct an inquiry in a situation where it was supposed to, held:

"**Failure to conduct a trial within a trial is, in our settled view, a fundamental and incurable irregularity and inevitably leads to the admitted confessional statement being expunged from the record** and/or vitiating the trial either wholly or partially depending on the facts of each case. "

[Emphasis supplied].

The above discussion rests this issue. In the ***Makumbi*** case (supra), the court of appeal, eloquently speaking through Rutakangwa J.A, discussed in detail all the earlier Court of Appeal decisions on this point. Suffice it to say that the cautioned statement in the present case was wrongly admitted in evidence and therefore must be expunged from the record.

Just for the sake of clarity and direction to the trial court, the ***Selemani Abdallah*** case (supra) provided guidance on how an Inquiry should be conducted. Having said the procedure in an inquiry before a subordinate court (not the primary court) is akin to a trial within a trial in the High Court, the Court of Appeal proceeded to provide guidance on how the Inquiry should be conducted in the following terms:

> "The procedure entails the following:-
>
> i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.
>
> ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap 20.

iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.

iv) Then the prosecution to re-examine the witness.

v) When all witnesses had testified, the prosecution shall close its case.

vi) Then the court is to call upon the accused to give his evidence and call witness, if any. They should be sworn or affirmed as the prosecution side.

vii) Whenever a witness finishes, the prosecution to be given opportunity to ask questions.

viii) The accused or his advocate to be given opportunity to re-examine his witnesses.

ix) After all witnesses have testified, the accused or his advocate should close his case.

x) Then a Ruling to follow.

xi) In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it as an exhibit. The contents should then be read in court.

xii) In case the court finds out that the statement was not made voluntarily, it should reject it".

The correct procedure is therefore as elucidated in the ***Selemani Abdallah*** case above. I wish to add that compliance with this procedure must appear on record. The procedure entails, *inter alia,* the calling of witness or witnesses for the prosecution and defence, to verify the admissibility or otherwise of the cautioned statement. It is a mini trial staying the main trial until after it is finished and a ruling thereof given. In the ***Selemani Abdallha*** case (supra), the court of appeal referred to the case of ***Rashid & Another Vs R*** [1969] EA 138 in which its predecessor; the Court of Appeal for Eastern Africa held:

> "The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses if any".

The court, having expunged the cautioned statement from the record, it remains with the testimonies of the six witnesses who testified for the prosecution. The learned State Attorney is of the view that the first five witnesses had interest of their own to serve and that their evidence therefore ought to have been corroborated. He added that PW6's evidence cannot be used to corroborate the five witnesses' testimonies because his evidence is at variance with the rest of the witnesses. I have glanced through the evidence of the six witnesses soberly and with great care. The first two witnesses – Frank Masasu PW1 and Shamimu Uromi

PW2 – are park rangers. The other three – ASP Milinga PW3, No. F 261 Detective Constable Halifa PW4 and No. D 9571 Detective Corporal Sadick PW5 – are policemen. PW3 and PW4 searched the appellant's house together with PW1 and PW2 which search was witness by Liberatus Nyabira PW6. PW5 wrote the appellant's cautioned statement. The learned State Attorney is of the view that the park rangers and policemen had interest of their own to serve. I am afraid, I find myself unable to swim the current of the learned State Attorney. It does not seem to me that the learned State Attorney is fully armed with what constitutes "interest to serve" or "interested witness" in criminal jurisprudence. As bad luck would have it, the learned State Attorney did not explain what kind of interest of their own the five witnesses are interested to serve. **Black's Law Dictionary**, Ninth Edition (Brian A Garner; Editor in Chief) defines who an interested witness is as:

> "A witness who has a direct and private interest in the matter at issue."

The interest which is envisaged by the law is one which is **direct and private** in the matter at issue. With respect, having scanned through the record of this case thoroughly, I do not see that kind of interest in the five witnesses in the matter at hand. The mere fact that the five witnesses are park rangers and policemen does not *ipso facto* connote they have interest of their own to serve. In the premises, a court can still depend on such witnesses to found a conviction basing on their evidence provided that

such evidence is enough to prove the prosecution case beyond reasonable doubt.

As already observed above, in the present case, I have not been able to sieve any private interests of their own to serve in the park rangers and the policemen. The learned state attorney cited the ***Saiguran*** case on the point. I have had an advantage of reading between the lines the case referred to by the learned State Attorney. In that case, His Lordship Kisanga, J. (as he then was) showed how Fatuma Sunderji, as a witness, had an interest of her own to serve. That was a case in which the appellant was charged with stealing by servant contrary to section 271 and 265 of the Penal Code. The foreign currency the appellant allegedly stole, he said he used to give the same to Sunderji who would keep them under custody. His conviction was based on the testimony of Sunderji who denied to have been given the foreign currency; the subject of the charges. Relying on ***Dengwa Masiku Vs R*** [1967] HCD n. 454 and ***Bartholomeo Daniel Vs R*** [1969] HCD n. 300, the court held that Sunderji had interest of her own to serve as she was exonerating herself from the crime and therefore her evidence should be approached with great care and needed corroboration to act upon it. That case is therefore distinguishable from the present case.

What then were the contents of the testimonies of PW1, PW2, PW3, PW4 and PW5? I have already stated that PW1, PW2, PW3 and PW4 are the ones who searched the appellant's house. They, in unison, testified that they went to the appellant's house where they found him, showed him the

search warrant and searched the house. The search found a firearm and a magazine with ten rounds of ammunition which were retrieved underneath the mattress of the appellant's bed. The four witnesses did not at all mince words.

PW5 is a police officer who recorded the appellant's cautioned statement. Now that the cautioned statement has been expunged from the record, PW5's testimony is rendered redundant. But, I think, the testimonies of PW1, PW2, PW3 and PW4 was strong enough and as I have already found that they had no interest of their own to serve, their evidence needed no corroboration.

PW6 witnessed the search, the learned State Attorney thought that his evidence was at variance with that of PW1, PW2, PW3 and PW4 and therefore it could not be used to corroborate their testimonies. With utmost due respect, I beg to differ. It is in PW6's testimony that he is a hamlet chairman and was asked by PW1 and PW2 to witness the search in the appellant's house and that they searched and a gun and ten Sub-Machine Gun (SMG) rounds of ammunition were found beneath the mattress of the appellant's bed. Admittedly, there are minute details which were not unveiled by PW1, PW2, PW3 and PW4. These are the details like the house being surrounded by park rangers and policemen, that he inspected PW1, PW2, PW3 and PW4 before the search. These, however are trivial details which, in my view, neither prejudiced the appellant nor vitiated the merits of the prosecution case. unlike the learned State Attorney could perceive, it is my view that PW6's testimony was not at

variance with the testimonies of PW1, PW2, PW3 and PW4 and could be used to corroborate the their testimony if there was that need to.

It is my well considered view that the testimonies of PW1, PW2, PW3 and PW4 who searched the appellant's house, supported by that of PW6, was enough to ground a conviction against the appellant. The appeal against conviction lacks merit.

With regard to the sentence, the appellant was sentenced to pay fine of shillings four million (Tshs. 4,000,000/=) in the first count or go to jail for eight years in default. In imposing the fine of shilling four million (Tshs. 4,000,000/=), the learned trial Resident Magistrate was aware that he was imposing a sentence which was above the one provided by the law. He stated:

> "This court does not think that a maximum fine of three million is anything in a devaluated currency. In this regard I find it appropriate to sentence the accused person to pay a fine of four million or serve a sentence of eight years in case of default."

With due respect to the learned trial Resident Magistrate, the penalty section of the Arms and Ammunition Act – section 34 - under which the appellant was charged and which the learned trial Resident Magistrate seemed to be conversant with, reads:

> "Any person who commits an offence under this Act shall upon conviction except where any other penalty is provided, be liable to imprisonment for a term not exceeding fifteen years **or to a fine not exceeding three million shillings** or to both such fine and imprisonment."
> [Emphasis supplied]

It is apparent, therefore, that an accused person who is convicted of an offence under the Arms and Ammunition Act, except where any other penalty is provided by the Act, is liable to imprisonment for a term not exceeding fifteen years **or to a fine not exceeding three million shillings** or to both such fine and imprisonment.

The fine of four million shillings imposed upon the appellant was therefore illegal. The legislature intended that any conviction under the Arms and Ammunition Act, except where any other penalty is provided by the Act, the fine should not exceed three million shillings. The devaluation of the shilling notwithstanding, the learned trial Resident Magistrate had no power to go beyond the fine prescribed by the legislature. That, to say the least, was not within his powers. If there is the devaluation of the shilling, which sentiment I fully share, it is for the legislature to amend the same; not the court. What the court was and is supposed to do in future is to show its concern and urge the legislature, in its wisdom, to play its part in

making the fine up to date. In the circumstances, the fine of four million shillings imposed on the appellant in respect of the first count was in excess of one million shillings over and above three million shillings; the maximum provided by the Arms and Ammunition Act. It was undoubtedly illegal. In exercise of the revisional powers endowed upon me by the provisions of section 373 (1) (a) the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002, I hereby set aside the sentence of four million shillings imposed upon the appellant and reduce it to one of three million shillings; the maximum provided by the law.

Again, the sentences were ordered to run separately. In view of the fact that the two counts of possessions of a firearm and ten rounds of ammunition were committed in the same transaction and taking into consideration the peculiar facts of this case, I think it could be apposite, in the interest of justice, if the prison sentences were ordered to run concurrently. In the premises, I order that the custodial sentences of eight and four years inflicted on the appellant in respect of the first and second counts respectively in default of fines thereof, should run concurrently. For the avoidance of doubt, the fine in respect of the second count remains unaltered.

In the upshot, except for the variation on the custodial sentence which were ordered to run consecutively and have now been ordered to run concurrently and in respect of fine of shillings four million on the first count which was in excess of the maximum provided by the law, which I have reduced to one of shillings three millions; the maximum provided by the

law, this appeal lacks merit and is hereby dismissed in its entirety. Order accordingly.

DATED at MPANDA this 6th day of June, 2014.

J. C. M. MWAMBEGELE
JUDGE