IN THE COURT OF APPEAL OF TANZANIA AT ZANZINBAR

(CORAM: MSOFFE, J.A., OTHMAN, J.A. AND MJASIRI, J.A.)

CRIMINAL APPEAL NO 224 OF 2008

(Appeal from the Judgment of the High Court of Zanzibar At Vuga)

(Mwampashi, J.).

Dated the 23rd day of April, 2008
In
HC Criminal appeal no. 32 of 2006

JUDGMENT OF THE COURT

18 & 28 November, 2008

MJASIRI, J.A.:

This is a second appeal. The appeal arises from the decision of the High court of Zanzibar at Vuga. The Appellant Michael Petro Elias was charged and convicted of the offence of unlawful possession of firearms and ammunitions contrary to section 4 (1) and 34 (2) of the Arms and Ammunition act, (Act No. 2 of 1991) of the Laws of Tanzania. He was sentenced to seven (7) years imprisonment (Correctional institution). Being aggrieved with the decision of the Regional Court, the appellant appealed to the High Court of Zanzibar against conviction. His appeal to the High Court was also unsuccessful, hence the appeal to this court.

The appellant filed three grounds of appeal and four supplementary grounds of appeal. However, the main grounds of appeal crystallize on the following:

1. The High Court Judge erred in giving weight to the evidence of PW1, PW3 and PW4.

2. The High Court Judge was wrong in accepting the evidence of PW 5, AS PW5 never saw the pistol.

3. .The High Court Judge erred in law in giving a decision without

having any basis in law. The pistol tendered in court as exhibit P2 was different from the one examined by PW2, the ballistic expert.

The Appellant was unrepresented. Ms. Aziza Suwedi, learned State Attorney represented the respondent Director of Public prosecutions of the revolutionary government of Zanzibar.

The background to the case is that the appellant upon arrival at the port, at Mkokotoni Zanzibar, on April 28, 2006 tried to avoid routine search/inspection by the police,. Which iis carried out to all the arriving passengers. While the other passengers' luggage was being searched, the Appellant tried to sneak out. He was seen by the policemen on duty at the port. He was chased by one of the police men stationed at the port. He ran towards the *Kikosi cha Kuzuia Magendo* (KMKM) military camp, where he was apprehended by a KMKM Militia. When he was searched by PW3, F3016 PC Talib, while being held by Daudi Ameir, a KMKM militia, who assisted PW3 in carrying out the search, he was found in possession of a pistol which was stacked on his backside and held by a belt. The Appellant denied being in possession of the pistol.

When the appeal was called on for hearing, the Appellant requested the Court to adopt the Memorandum of appeal as his submissions in court.

Ms. Aziza Suwedi strongly opposed the appeal. In relation to ground No. 1 she stated that although the Appellant denied possession on the pistol, the evidence of possession was overwhelming. Ms. Suwedi made reference to the evidence of PW3 and PW4. According to Ms. Suwedi, the evidence of PW3, was to the effect that when the appellant was arrested and searched a pistol was found on his body. Eight rounds of ammunition (live bullets) were also found in the pistol. PW3 gave a description of the pistol. It w as black in colour, made of steal, rusty (colour of iron), having a star mark with no serial number. The serial number was scratched out and the handle was slightly broken.

PW4 a KMKM militia stationed at the Mkokotoni camp was the one who apprehended the Appellant, and was also involved in searching the Appellant. PW4 gave a similar description of the pistol as the one given by PW3.

PW1, AS 3174 Salim Maulid Khamis, a militia stationed at the KMKIM camp at Mkokotoni also participated in the arrest and the search of the Appellant. In the course of the search a pistol was found with the Appellant. The search was conducted in his presence. He gave the same description of the pistol as the one given by PW3 and PW4.

Ms Suwedi further submitted that both the Regional Court and the High Court carefully reviewed the evidence in respect of possession and both courts were satisfied that the evidence was watertight. Ms. Suwedi made references to the findings of the regional magistrate, that there was an unbroken chain of events. PW1, PW3 AND PW4 were found to be reliable witnesses.

In relation to ground No. 2 Ms. Suwedi submitted that PW5 F 6077 Pc Abdalla was a credible witness. PW5 was stationed at the port. He was therefore present at the scene and witnessed the Appellant's act of avoiding inspection and sneaking away. He saw the appellant running towards the AKMKM camp. The Appellant was chased by PW3. PW5 testified as to what transpired at the check point. His evidence lent a hand to the evidence of PW1, PW3 and PW4. This was clearly elaborated by both the trial court and the High court.

In relation to ground No. 3 Ms. Suwedi submitted that all the witnesses made a similar description of the pistol. This is supported by the evidence of PW1, PW3, and PW4. Ms. Suwedi also stated that PW2, CD# 6190 #, Detective Sergeant Rafael Maira made a similar description of the pistol. Ms. Suwedi further stated that PW2 being a ballistic expert gave a more professional account on the model the pistol and country of origin. He testified that the pistol was a Yugoslavian model, Tokarev, M1933, 7.62 calibre, whereas the rest of the witnesses indicated that it was a Chinese model with a board number5154. However, apart from that factor, PW2 gave the same account as the other witnesses including the absence of a serial number. PW2 also testified that eight (8) live bullets were found in the pistol.

Ms. Suwedi submitted that ground No. 3 has no basis. Both the High Court and the trial court came to the conclusion that the pistol examined by PW2 was the same one found in possession of the Appellant, in view of the prevailing evidence.

After reviewing the evidence on record and the submissions made by the appellant and the learned State Attorney, we are of the view that the whole appeal centres on the issue of unlawful possession. What needs to be considered is whether or not the evidence or record supports the allegation of unlawful possession of a firearm and ammunitions by the Appellant contrary to sections 4(1) and34 (2) of the Arms and Ammunition Act.

The evidence of PW1, PW3, and PW4 is very crucial to the case. Both the trial magistrate and the judge on first appeal went to a great length to analyze the evidence and to show the basis of their respective decisions. PW1, PW3 and PW4 were involved in arresting the appellant, and in conducting the search. All the three witnesses saw the pistol and gave the same description. PW2 the

ballistic expert, though he presented a more elaborate description, given his professional background, his testimony did not differ in material terms with that of PW1, PW3 and PW4. The evidence of PW5 is also of vital importance. It sets in motion the sequence of events.

The lower courts found all these witnesses credible and relied on their testimony. The conclusion reached was that the case against the appellant was proved beyond reasonable doubt.

As this is a second appeal, the principles to be followed in dealing with the finding of facts and conclusions reached by the lower courts in clearly set out in various decisions of the Court of Appeal for east Africa. The legal position is well established as clearly demonstrated in the following decisions.

> In ***R v Hassan bin Said*** (1942) 9 E.A.C.A. 62 it was held at under;
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> *"On second appeal, the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, through it may think possible, or even probable, that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law."*

In ***R.v Gokaldas Kanji Karia and another,*** (1949) 16 E..A.C.A. 116 it was stated as under:

> "*Where a case is essentially one of fact, in the absence of any indication that the trial judge had failed to take some material point or circumstances into account, it is impossible and improper for a Court of appeal to say that he has come to an erroneous conclusion as to the respective credibility he attached to the evidence of the crown witnesses and that given by the Accused".*

In Reuben Karari s/o Karanja v R, (1950) 17 E.A.C.A. 146 it was stated as follows:

> "As a second appeal lies to the court of appeal only on law, the test to be applied is whether there was any evidence on which the trial Court could find as it did."

In ***Peters v Sunday Post,*** (1958) EA 424, the court of appeal for East Africa reiterated the principles in which an appellate court can act in appreciating and

evaluating evidence. Amongst other things it was held that; whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial court should stand, this jurisdiction is to be exercised with caution where there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide.

In ***Salum Mhando v Republic*** (1993) TLR 170 the Court of Appeal of Tanzania observed as follows:

> "where there are misdirection's and non directions on the evidence, a Court of second appeal is entitled to look at the relevant evidence and make its own finding of fact."

In the light of the evidence on record, and the authorities cited above, we see no reason for interfering with the findings of fact by the courts below. We are satisfied that the case against the appellant was proved beyond reasonable doubt.

In the event, for the reasons stated, we hereby dismiss the appeal in its entirety. It is so ordered .

DATED at ZANZIBAR this 27th day of November, 2008.

J. H. MSOFFE
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

S. MJASIRI
JUSTIFE OF APPEAL

	I certify that this is a true copy of the original. /////// (P.B. KHADAY) **DEPUTY REGISTRAR**	