

IN THE HIGH COURT OF TANZANIA

AT MBEYA

H/K Mwariga

APPELLATE JURISDICTION

(MBEYA REGISTRY)

CRIMINAL APPEAL NO. 62 OF 2002

(From Iringa District Court at Iringa
Criminal Case No. 227 of 2002)

GERVAS MDALINGWA ::::::::::: APPELLANT

VERSUS

THE REPUBLIC ::::::::::: RESPONDENT

JUDGMENT

MACKANJA, J.

The appellant was convicted on his own plea of guilty on charge of being in unlawful possession of a firearm s/s 4(1) and 34(2) of the Arms and Ammunition Act, No.2 of 1991. He was sentenced to five years imprisonment following his conviction. The penal provision, that is to say section 34(2) of the Act, states that -

"(2) Any person guilty of an offence against this Act shall on 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 or to both the fine and imprisonment."

The appellant has been aggrieved by his being denied the option of the fine, hence this appeal in which only one ground has been preferred, namely:-

- "1. That the custodial sentence of five years for the offence being in unlawful possession of a locally made muzzle loader was illegal and/or severe and excessive to an elderly first offender."

In this appeal Mr. Mushokorwa, learned counsel, acted for the appellant and Mr. Malata, learned State Attorney, appeared for the Republic. Mr. Mushokorwa submitted that the sentence was manifestly excessive for a first elderly offender. So he invited me to interfere with the sentence that was imposed on the appellant. Learned counsel submitted that this Court may interfere with the trial courts decision where the trial court has failed to apply the correct penal principles. He named them as follows: that the accused is a first offender; that the accused pleaded guilty; that the accused was not given an option to pay a fine even though the law provides for it. Further more, he said, there was no evidence that the firearm was being used for illegally hunting game. The authorities on which learned counsel relied are:-

1. Francis Chilema v. R. (1968) H.C.D. no 510;
2. Salum Shabani v. R. [1985] T.L.R. 71 at page 74; and
3. Bernadota Paulo v. R., [1992] T.L.R. 97 at page 99.

Mr. Malata, learned State Attorney, made no secret about the Republic's view of the matter. He submitted that the sentence was very reasonable, considering that the maximum penalty is fifteen years of imprisonment. That trial court observed all the principles which Mr. Mushokorwa enumerated. It was his further submission that the Court may interfere with the trial Courts decision if the inferior court erred in some material particular. He finds no such error. So he invited me to dismiss the appeal.

So the crux of this appeal is whether the correct principles were applied when sentencing the appellant. Before I consider the authorities that have been cited by Mr. Mushokorwa, learned counsel, we will first travel abroad for comparison with our own jurisprudence on this very important issue. I will make particular

reference from the work ARCHIBOLD (Pleading, Evidence and Practice In Criminal Cases), 42nd Edition at page 856.

The learned authors observe that with the growth in the number of sentencing cases being reported it is increasingly difficult to determine with any degree of precision the principles upon which the English Court of Appeal acts. However, in broad terms, that Court has developed the following sentencing principles:-

- (i) The sentence is not justified by law, as when the convicting court overreaches itself and acts ultra vires its powers; or where the sentence is illegal in the sense that it has not been created by Parliament or any other body empowered to make subsidiary legislation.
- (ii) Where the sentence has been passed on the wrong factual basis. This happens where the evidence would justify only one view of the facts but the sentence is passed on mere supposition. Let us take as an example Mr. Mushokorwa's contention that there was no factual basis that the appellant's gun was used for poaching. If, in such a circumstances poaching will be used as a basis for sending the appellant to prison then the sentence will be illegal.
- (iii) Where some matter has been improperly taken into account.
- (iv) Where the sentence was wrong in principle or manifestly excessive.

To the above principles I may now add one more, namely, that unless there are circumstances militating against an option of a fine, it will be improper to award a custodial sentence.

Having considered the authorities that Mr. Mushokorwa cited to me and having considered learned counsel's submissions I am sure there do exist grounds that will justify the intervention of this Court. Firstly, the sentence that was passed is not justified the sentencing court took into account unproved assertions made from the bar to the effect that the gun was used in poaching game. The sentence is, therefore, unjustified by law. Secondly, for a first offender and in the absence of aggravating factors the denial of an option to a fine was, a sentence of five years imprisonment was, indeed manifestly excessive. I would, as a result, allow the appeal. In that connection, and considering that the appellant has been in prison for upwards of five months, the sentence is reduced so as to amount to his immediate discharged from prison.

Delivered.

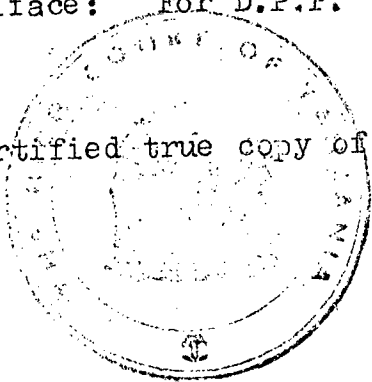
sgd: J.M. MACKANJA
JUDGE

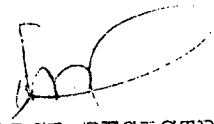
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Mr. Mwakolo/Mr. Mushokorwa, Advocate: For Appellant

Mr. Boniface: For D.P.P.

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MBEYA