IN THE HIGH COURT FOR ZANZIBAR
HELD AT VUGA
CRIMINAL APPEAL NO. 6 OF 2011
FROM ORIGINAL CRIMINAL CASE NO 115 OF 2011 OF
REGIONAL COURT OF VUGA

1.SALUM YUSSUF SAID
2.KHAMIS MOH'D MSABI **APPELLANT**

VERSUS

D.P.P **RESPONDENT**

JUGDMENT.

Mwampashi, J.

The appellants Salum Yussuf Said and Khamis Mohamed Msabi were taken before the Regional Court to wit being found in unlawful possession of firearms and being found in unlawful possession of ammunition both c/ss 4(1) and 34(1)(2) of the Arms and Ammunition Act, 1991 (Act No. 2/1991 of the Laws of Tanzania (R.E 2002) and the third court was being found armed c/s 301(1)(d) of the Penal count was being found armed c/s 301(1)(d) of the Penal Act, 2004 of the Laws of Zanzibar. The appellants pleaded guilty to the first two counts but denied the third. The trial court entered a plea of guilty in regard to the admitted and convicted the appellants accordingly ordering each of the appellant to serve a term of three years in prison. Being dissatisfied with the sentence the appellants have filed this appeal.

In its ruling after receiving brief facts from the Prosecution in regard to the two counts admitted by the appellants the trial court, among other things, found the two admitted counts had not been properly charged. The trial court had a view that found in possession of a firearm and ammunitions cannot result into two separate counts but one because the two offences both fall under the same provision of law i.e S. 4(1). The trial court therefore combined the two count into one count and went convicting the appellants on that one count on their own plea of guilty sentenced each appellant to serve a period of three years imprisonment.

Looking at the memorandum of appeal filed by the appellant it could be observed that the appellants were not only complaining about the sentence but also about the conviction. However, it was not until when the appeal came for hearing that the appellants realized that since they were convicted on their own unequivocal plea of guilty and since they were still not disputing that they were found in possession of the alleged gun and ammunitions then they could not appeal against the conviction. The appellants therefore asked the court to consider their fourth ground which states that since according to the relevant law the punishment for being found in unlawful possession of firearms is either fine or imprisonment then the trial court did err in ordering them to three years imprisonment term without giving them an option fine fine. They therefore asked

the court to set aside the imprisonment sentence passed by the trial court and replace it with a fine sentence.

On the other hand Mr. Juma Msafiri learned state attorney who appeared for the DPP (respondent) opposed the appeal arguing that the trial court did not err in ordering the appellants to serve a custodial sentence denying them an option of fine because S. 34(1) and (2) of Act No. 2/1991 allows the court to either impose a fine sentence or imprisonment sentence or both. Mr. Msafiri insisted that the trial magistrate acted within the law and also that the circumstances and the gravity of the offence calls for a stiffer sentence. He has further argued that since the maximum sentence under the relevant law is 15 years imprisonment then the three years imprisonment sentence imposed on the appellant is too lenient and therefore he did pray for this court to invoke its inherent power and enhance the sentence.

I would start by reproducing what is provided by the provisions of the law creating the two offences in question as well as the provision that provide for the relevant penalty. SS. 4(1) and 34(1) of the Arms and Ammunition Act, 1991 of the Laws of the United Republic of Tanzania (R.E. 2002) create it as an offence to use or carry or to be in possession of arms or ammunition without licence in the following terms;-

S. 4(1) 'No person shall use, carry or have in his Possession or under his control any firearms Or ammunition, except in a public or private Warehouse, unless he is in his possession of An arms licence issued under this Act'

S. 34(1) Any person who contravenes any provision Of this Act, or any regulation, notice or Order made under it, or conditions of any Licence or permit, commits an offence Under this Act'

The penalty is provided under S. 34(2) thus:-

'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 <u>fifteen years or to fine not Exceeding shilling three million or to both such Fine and imprisonment' (my own emphasis).</u>

It can therefore be observed that under S. 34(2) of the Arms and Ammunitions Act the court can impose ether an imprisonment term not exceeding 15 years, a fine not exceeding Tshs 3,000,000/= or it can order such a convict to serve both two sentences i.e imprisonment term and fine. It is not wrong for the court to prefer the imprisonment sentence to fine sentence. It depends on the circumstance of each case. The practice the court should first give a convict an option of fine before imposing a custodial sentence where the law provides for such an option is just a rule of practice and not of law. It is for a trial magistrate or judge putting into consideration all relevant factors including the gravity of the offence to decide what kind of sentence fits the case before him/her.

I have passed through the reasoning of the trial magistrate when he was considering the question of sentence and it is open that he decided not to give the appellants an option of fine mainly due to the gravity of the offence in question. I do not see any good reason of differing with him. It goes without saying that the offence of being found in unlawful possession of firearms or ammunitions is not a simple offence. We all know how, in most cases, the unlawful firearms end up being unlawfully used. Many innocent people end up losing their properties and even their lives from unlawful use of such firearms. Considering the gravity of the offence and the fact that the imprisonment term of three years the appellants were ordered to serve is not very stiff compared to

the maximum imprisonment sentence of 15 years the offence in question carries, I do not find any good reason of allowing this appeal.

It has also been observed by this court that in its ruling following the brief fact given by the prosecution on the two admitted counts, the trial court found that the charge sheet as preferred by the prosecution was defective as there had been laid two separate counts of being found in unlawful possession of the gun (firearm) and of six ammunitions while both two offences were committed in the same transaction and they both fall under the same provision i.e S. 4(1) of Act No. 2/1991. This was a misdirection on the part of the trial magistrate. The charge sheet as preferred by the Prosecution charging the two first counts separately had no problem at all. Two different offences are committed when one is found in unlawfully possession of gun and ammunition and the two offences need to be charged as two separate counts even though they are both committed under the same provisions of the law, i.e under ss. 4(1) and 34(1). The trial court did therefore err in holding that the two offences connate be separately charged and in combining them into one count.

Because the trial court record clearly show that the appellants did plead guilty to the first two counts and also since the facts given by the Prosecution and admitted by the appellants comprise all the necessary ingredients for the two offences this court invoking its supervisory and revisionary power under S. 8 of

the High Court Act, 1985 (Act No 2/1985) do hereby quash the trial court decision of combining the two counts into one count. This court, furthermore, do hereby step into the trial courts feet and find each of the appellants guilty of the two admitted offences, i.e being found in unlawful possession of firearms (one short gun) and also being found in unlawful possession of ammunitions both c/ss. 4(1) and 34(1) of the Arms and Ammunition Act, 1991 of the Laws of Tanzania (R.E. 2002) and convict them accordingly. Each of the appellants is, therefore, ordered to serve a period of three years imprisonment on each count and the sentences are ordered to run concurrently.

For the above given reasons the appeal fails in its totality and the trial court's conviction and sentence is confirmed but subject to correction as above demonstrated and ordered. Appeal dismissed.

Sdg: Abraham Mwampashi, J

27/03/2012.

Delivered in court this 27/03/2012 in the presence of the appellants and Mr. Juma Msafiri learned state attorney for the respondent the DPP. **Right of appeal explained.**

Sdg: Abraham Mwampashi, J

27/03/2012.

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(REGISTRAR)

HIGH COURT

ZANZIBAR.

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