

IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT VUGA
CRIMINAL CASE NO. 07 OF 2016

DIRECTOR OF PUBLIC PROSECUTIONS.....

PROSECUTOR

VERSUS

1. ABDALLA SULEIMAN MWINYI
2. OTHMAN ABDALLA JUMA
3. ELEX GADI MJEMAR
4. JUMANNE JUMA KHALFAN
5. ADINAN MOH'D MRUTU
6. KHALFAN SAID KOMBO
7. KHAMIS MAKAME HAJI

ACCUSED

RULING

DATE OF RULING: 30/10/2017

BEFORE: Hon. ABDUL-HAKIM A. ISSA, J

The accuseds in this case were charged before this Court with three counts of offences. Count one is unlawful possession of firearm contrary to section 20 (1)(a)(b) and section 20(2) of The Firearms and Ammunition Control Act No. 2 of 2015 of the Laws of Tanzania. Count two is unlawful possession of ammunitions contrary to section 21(a) and section 60(1) of The Firearms and Ammunition Control Act No. 2 of 2015 of the Laws of Tanzania. Count three is robbery contrary to section 285 and 286(2) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar.

In this case the DPP was represented by learned State Attorneys, Mr. Albaqhir Yakout and Mr. Hamad Kombo Zidikheri. The accuseds, on the other hand, were represented by learned advocates, Mr. Abdalla Juma and Mr. Rajab Abdalla Rajab. The Court is assisted by three assessors, Ms. Fatma Omar Jamal, Mr. Mussa Moh'd Khamis and Mr. Ali Salum Nassor.

Before the trial started by reading the charge-sheet to accuseds and taking their plea, the advocates for accuseds raised a concern which is the subject of this ruling. Mr. Abdalla raised

a concern that the accuseds have been charged with offences under the Firearms and Ammunition Control Act, 2015, the Laws of Tanzania which was signed by the President of Tanzania on 5.4.2015. Section 73 of this Act repeals the previous law which was the Arms and Ammunition Act, the Laws of Tanzania. The Arms and Ammunition Act on the other hand had repealed many laws including those laws which were used in Zanzibar, for instance, Cap. 162 of the Laws of Zanzibar. Therefore, Zanzibar had no law on arms and ammunition and applies the Arms and Ammunition Act. His concern is that in Zanzibar the laws are passed by the House of Representatives, and section 132 (1) of the Constitution requires the law passed by the Parliament to be tabled in the House of Representatives by the concerned Minister. He also cited section 17(2) of the Interpretation of Laws Act No. 7 of 1984 which requires the Act to be laid before the House of Representatives by the concerned Minister. He submitted that this law has not been tabled in the House of Representatives. From 2015 to date only the Cyber Crime Act has been laid down in the House. He added that the accuseds have been charged under the law which is not applicable in Zanzibar. Therefore, the accuseds are not supposed to be charged with the first two counts.

With respect to the third count Mr. Abdalla submitted that the High Court has no jurisdiction to hear that offence. Section 4 of the Criminal Procedure Act explains where such offences would be heard. He added that the accuseds were charged under section 286 and according to the First Schedule they are supposed to be charged before Regional Magistrate's Court. He prayed that the case should be dismissed and DPP, if he wants, should charge the accuseds using the law applicable in Zanzibar.

Mr. Hamad Zidikheri in his reply submitted that it is true that the Firearms and Ammunition Control Act repealed the law applicable in Zanzibar which was the Arms and Ammunition Act No. 2 of 1991. This new law is the law passed by Parliament of Tanzania and section 2 provides that the law shall apply to Mainland Tanzania as well as Zanzibar. He added that section 132 of the Constitution of Zanzibar refers to the Constitution of United Republic of Tanzania (URT) and section 64(1) of URT Constitution lay down conditions for application of laws in Zanzibar. Those conditions are that the law should specify that it shall apply to Zanzibar or it should repeal the law which was applicable in Zanzibar. He added that the matter is very clear if you read Article 64(1)(5). Mr. Zidikheri added that possession of firearms is one of the union matter and is not regulated by Zanzibar. Therefore, the URT Constitution is applicable and has supremacy on that matter. Hence, the law passed by Parliament is the one which should be applied.

On the issue of tabling the law, Mr. Zidikheri agreed to that , but submitted that it is not this Act; the House of Representatives has no power on this Act in terms of amendment or repeal. He added that even the repealed Act was not tabled in the House of Representatives. Mr. Zidikheri cited the case of **Maico Petro Elias V. DPP** Criminal Appeal No. 224 of 2008 where the accused was convicted under the repealed law (Arms and Ammunition Act) and the decision was upheld by the Court of Appeal. He prayed that the law should apply and the case should proceed with the hearing.

Regarding section 4 Mr. Zidikheri submitted that section 4(1) of Criminal Procedure Act specifies that any offence may be tried by the High Court even if there is a specific court mentioned. He said it is true that robbery is tried in the subordinate court according to the First Schedule, but it was joined with other charges as they were committed in one transaction.

Mr. Rajab in replying to the submission made by the learned State Attorney, submitted that section 132(2) of the Constitution of Zanzibar specifies that the law should be tabled before the House of Representatives, and until now there is no law which has struck off section 132(2).

Regarding Article 64(5) Mr. Rajab submitted that the words used are “notwithstanding the Constitution of Zanzibar”, therefore, the provisions in the Zanzibar Constitution should be used the way they are. He reiterated that the law of Firearms and Ammunition Control is not applicable in Zanzibar, therefore, there is no offence if there is no law. The Maico’s case shows that the Court of Appeal was not aware of that error. Therefore, they are now making the court aware of this fault.

With respect to the offence of robbery, Mr. Rajab submitted that the accuseds should be charged in the proper court. The law has specified the jurisdiction and where cases should be filed. He prayed that this Court should dismiss offences under Firearms Act and accuseds should be charged for robbery in the proper court.

The issue for determination in this concern is whether the Firearms and Ammunition Control Act, 2015 is applicable in Zanzibar. The control of firearms and ammunition in Zanzibar has a long history. The law which was governing firearms in Zanzibar was the Firearms Decree, Cap. 162 of the Laws of Zanzibar. This Act was repealed by the Arms and Ammunition Act No. 2 of 1991 of the Laws of Tanzania. But the Arms and Ammunition Act became operational on 1.5.2001 through GN 66 of 2001, and continued to be in force until 2015 when it was repealed by the Firearms and Ammunition Control Act, 2015. This new law has

become operational on 1.11.2015 through GN 445/2015. Now, the issue here is this law applicable in Zanzibar or is it required to be laid down before the House of Representatives in accordance with section 132 (2) of the Constitution of Zanzibar. It is worth here to look at section 132 of the Constitution which provides:

“132(1) Hakuna Sheria yoyote itakayopitishwa na Bunge la Muungano ambayo itatumika Zanzibar mpaka Sheria hiyo iwe ni kwa ajili ya mambo ya Muungano tu na ipitishwe kulingana na maelekezo yaliyo chini ya vifungu vya Katiba ya Jamhuri ya Muungano.

(2) Sheria kama hiyo lazima ipelekwe mbele ya Baraza la Wawakilishi na Waziri anayehusika.

(3) N/A

This provision is very clear that the Parliament has been given power by the Zanzibar Constitution to pass law on Zanzibar on the union matter only and should follow the directions laid down in the URT Constitution. Subsection (2) on the other hand lays down that such law must be laid down before the House of Representatives by the concerned Minister.

Similarly, the Interpretation of Laws and General Provisions Act, as rightly pointed out by the advocate for accuseds, has a similar provision. Section 17 of this Act provides:

“17.(1) No Act enacted by the Union Parliament shall extend to Zanzibar unless the Act in question is specifically on Union matters and is passed in accordance with the requirements under the provisions of the Constitution of the United Republic.

(2) Such Act shall be laid before the House of Representatives by the Minister responsible.

The Interpretation of Laws and General Provisions Act went further and say the provision of section 17 applies also to subsidiary legislation or regulation passed under the parent Act which was passed under section 17. This is seen in section 18 and is similar to Section 132(3) of the Constitution. This section reads as follows:

“18. Where a subsidiary legislation is made in exercise of powers conferred by an Act under section 17 of this Act such subsidiary legislation shall come into force only upon the completion of such formalities as are laid down for the application of the parent Acts as laid down respectively under the provisions of section 17 of this Act.

Reading the provisions of the Zanzibar Constitution and the Interpretation of Laws and General Provisions Act it is clear that for the law passed by Parliament of URT to be applicable to Zanzibar there are three conditions to be satisfied; the first is that the law should be on the union matters only, the second is that it should be passed in accordance with the requirements under the provisions of the Constitution of the URT, and the third is that it should be tabled before the House of Representatives.

If we look at the union matters which are in the First Schedule of the URT Constitution, there is no doubt that there is no specific matter called firearms and ammunition, but we find the issue of defence and security, and police. Therefore, it is not clear where exactly it falls. The issue of whether firearms and ammunition is a union matter or not should not detained me any further as it is not the concern raised and hence, it is not the subject of this ruling.

Regarding the second condition we have to look at the Constitution of URT as provided by section 132 of the Zanzibar Constitution and section 17 of the Interpretation of Laws and General Provisions Act, and as rightly argued by the learned State Attorney. Our starting point is Article 64 (1), and (4) which provides:

- “64. (1) Legislative power in relation to all Union Matters and also in relation to all other matters concerning Mainland Tanzania is hereby vested in Parliament.
- (4) Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions:
- a) Such law shall have expressly stated it shall apply to Mainland Tanzania as well as to Tanzania Zanzibar or it replaces, amends or repeals a law which is in operation in Tanzania Zanzibar;
 - b) Such law replaces, or amends or repeals a law which previously in operation in Mainland Tanzania and also in operation in Tanzania Zanzibar pursuant to the Articles of the Union of Tanganyika and Zanzibar, or pursuant to any law which expressly stated that it shall apply to Mainland Tanzania as well as Tanzania Zanzibar; or
 - c) Such law relates to Union Matters; and whenever reference is made to the term “Tanzania” in any law, it is hereby declared that such law shall apply in the United Republic in accordance with the interpretation contained in the provisions of this Article.

From the history of the legislations on firearms and ammunition as explained above, there is

no doubt that the Firearms and Ammunition Control Act, 2015 was passed under Article 64(4)(a) as it has expressly stated in section 2(1) of the Act that it shall apply to Mainland Tanzania as well as to Tanzania Zanzibar. Further, it repeals and replaces a law which was in operation in Tanzania Zanzibar, which is the Arms and Ammunition Act 1991. Therefore, the second condition has been complied.

We are now turning to the last condition that such law should be tabled before the House of Representatives. There is no doubt that this is not the requirement of the URT Constitution, but it is the requirement of Zanzibar Constitution and the Interpretation of Laws and General Provisions Act. The Constitution has used the word “shall” (lazima) in section 131(2). It provides:

“(2) Sheria kama hiyo lazima ipelekwe mbele ya Baraza la Wawakilishi na Waziri anayehusika”.

Similarly the Interpretation of Laws and General Provisions Act also has used the word “shall” in section 17 as follows:

“Such Act shall be laid before the House of Representatives by the Minister responsible”.

These provisions have been couched in a mandatory language which makes it imperative; for such law to be applicable in Zanzibar it must be laid before the House of Representatives. This is not a mere formality as the learned State Attorney suggested. It is the requirement of the Constitution and the law which cannot be ignored. The fact that the House of Representatives cannot change or amend anything on the law is immaterial. The requirement is that the law should be complied as stipulated. Similarly, the failure to table such law before the House does not repeal or invalidate the law, but it makes it unenforceable in Zanzibar until the completion of such formality.

The Court of Appeal had an opportunity to deal with similar issue in the case of *Seif Sharif Hamad v. SMZ* [1998] TLR 48. In this case the Court of Appeal formulated three issues for determination. The first is whether or not the National Security Act, after security had become a Union matter, extends to Zanzibar. The second is what is the effect of the non-tabling of the Act in the House of Representatives as provided by Section 132 (2) of the Zanzibar Constitution. Lastly, the issue of the authority of the DPP in the High Court of Zanzibar. There are only two issues, which are relevant for this case and will be discussed below.

With respect to the first issue the Court of Appeal came to the conclusion that “security”

became a union matter in 1984 when the Fifth Constitutional Amendment Act 1984 amended item 3 of the 1st Schedule to the Constitution of URT by extending its content from “Defence” to Defence and Security”, by that amendment the National Security Act 1970 was extended to Zanzibar by virtue of section 5 (1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 which provides that after the said constitutional amendment all laws shall be construed with such modifications and adaptations as may be necessary to bring them into conformity with the said amendment. The Court continued that although the National Security Act 1970 has not been tabled before the House of Representatives as provided under section 132(2) of the Zanzibar Constitution, it nevertheless extends to Zanzibar by way of construction as mandated by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984.

With respect to the second issue the Court held that due to the approach it has taken on the first issue the second issue, that of relevancy of section 132(2) is not an issue which needed to be decided as the National Security Act extended to Zanzibar because of the construction done with such necessary adaptations. Such process was not envisaged by Section 132(2) of Zanzibar Constitution. That section deals with enactment which can be tabled in the House of Representatives but not a construction or an interpretation of the kind stipulated under section 5 (1) of Act No. 16.

But at pg 64-65 the Court highlighted the unhealthy situation of the two constitutions in Tanzania. The Court said:

“We shall just highlight a few of the points raised: First Mr. Shaidi pointed out that Art. 98(2) (a) of the Zanzibar Constitution prohibits this Court to hear any appeal concerning the interpretation of the Zanzibar Constitution. We just wonder whether that is inline with Art. 17 (1) and (4) of the Union Constitution. Then, what is the import of Art. 132 (2) of the Zanzibar Constitution and how does it correspond with Art. 64(4) of the Union Constitution. Lastly, if there is any inconsistency between the two Constitutions, which body has authority to reconcile the two provisions or declare one inappropriate? We may as well point out that the Special Constitutional Court established under Art. 125 of the Union Constitution is not meant for such role but to give reconciliatory decisions in respect of disputes submitted before it relating to interpretation or implementation of the Union Constitution (See Art. 126). We suggest that the appropriate authorities on both sides of the Union should take appropriate measures to harmonise these and other provisions of actual and potential conflicts between the two Constitutions.”

From this decision it is cleared that the dilemma in section 132(2) was not resolved by the Court of Appeal and it left the matter to the wisdom of the Government and Legislature.

In 2002, four years after the decision of *Seif Shariff Hamad v. SMZ (supra)*, the Court of Appeal had another matter to deal with in *SMZ v. Machano Khamis Ali and 17 Others* [2002] TLR 338. At pg. 360 the Court of Appeal pointed out again:

“As rightly pointed out ..., there are a number of unfortunate inconsistent provisions in the two Constitutions but which we do not think it is necessary to go into. However, that state of affairs is not healthy at all”.

The Court of Appeal again reminded the Authorities of what was stated in *Seif Shariff Hamad case* quoted above and added:

“In that appeal we reserved constitutional matters for political solutions and we disposed of the appeal on a procedural ground. But it is time to look at such provisions and take remedial steps. The court will not throw in the towel but will keep on drawing the attention of the powers that be. That is our role”.

But for the case of Zanzibar it seems the position of section 132(2) is what has been intended by the Constitution. After the decision of the Court of Appeal in *Seif Shariff Hamad v. SMZ* in 1998 and *SMZ v. Machano Khamis Ali and 17 Others* in 2002 the Constitution of Zanzibar has been amended three times: the 8th and 9th Constitutional Amendments which were done in 2002 and the 10th Constitutional Amendment which was done in 2010. The 8th and 10th amendments were the major amendments of the Constitution; the 8th Constitutional amendment amended 38 provisions while the 10th Constitutional amendment amended 62 provisions of the Constitution. But section 132 remained intact, it was not touched by any of those amendments. This is a clear implication that the import of section 132 is what is intended by the Constitution of Zanzibar.

Therefore, this Court is of the firm view that the provision of section 132 of the Zanzibar Constitution has to be complied with before any Act of Parliament on Union matters can be enforceable in Zanzibar. Having found that I agree with the advocates for accuseds that the Firearms and Ammunition Control Act is not applicable in Zanzibar as it has not complied with Constitutional provision, namely, section 132(2) which requires such Act to be table before the House of Representatives before it becomes operational in Zanzibar. Therefore, the accuseds are hereby acquitted of the first two counts of offences.

With respect to the third count there is no dispute that the offence of robbery is triable by the

Regional Magistrate Court. Part XXVIII of the First Schedule to the Criminal Procedure Act provides for that. Hence, the charge-sheet is rejected and the DPP is ordered to charge the accuseds in the proper court.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA, J

30/10/2017