IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 29 OF 2014

1. **MAKOYE MASANYA**
2. **NGUSA BUKALASA**
3. **EMMANUEL JAMES @ BUDOLO**
4. **MICHAEL MAGEMBE NGEKELE @ NYANZA**

.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mruma, J.)

dated the 20th day of November, 2013
in
(DC) Criminal Appeal No. 99 of 2013

JUDGMENT OF THE COURT

3rd & 7th December, 2015

MASSATI, J.A.:

The appellants and another person, who was acquitted, appeared before the District Court of Bariadi to plead to the charge of unlawful possession of government trophy contrary to section 86(1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009, read together with paragraph 14(d)

of the Economic and Organized Crimes Control Act (Cap. 200 – R.E. 2002 (the Act). They pleaded not guilty.

After presenting in Court a total of 8 witnesses and 5 documentary exhibits the prosecution managed to cull out a prima facie case, and so the appellants had to give their defence. They all gave their evidence on oath and denied involvement in the crime.

The short story of the prosecution case is that, following a tip, on the 22nd July, 2012 at around 22.45 hours, the appellants were jointly found at Mbele Guest House in Meatu Township. They were trying to sell 13 elephant tusks (17 kgs) valued at Tshs. 14,960,000/=. They were rounded up and taken to Bariadi police station. After some interrogations they were taken to the District Court on 25/7/2012.

Upon hearing the prosecution and the defence cases, the trial court convicted the present appellants, as charged and sentenced them to 30 years imprisonment. They appealed to the High Court, where Mruma, J. dismissed their appeals against conviction, but varied the sentences. They were sentenced to 20 years imprisonment each, or pay a fine of Tshs. 35,240,000/= each. Aggrieved they have now appealed to this Court.

Each appellant filed a separate memorandum of appeal. The first had four grounds of appeal. The second appellant had four. The third one had five, and the last appellant had four grounds. Some grounds of appeal are common to some appellants, but almost most grounds are common in all the appellants' grounds. The first, third and fourth appellants' memoranda raise one common ground that the charge sheet was defective. The second, third and fourth appellant's raise an additional ground to challenge the territorial jurisdiction of Bariadi District Court to try them for an offence which was committed in Meatu District. All grounds of appeal, commonly challenge the findings of the lower courts as to the sufficiency of the prosecution evidence against them, and pray that their appeals be allowed.

The respondent/Republic was represented by Mr. Rwegira Deusdedit, learned State Attorney. At first, he was all out to support the conviction, but after some exchange with the bench, he shifted positions, and decided to support the appeals.

Before he took to responding to the substance of the appellants' complaints, we asked Mr. Deusdedit to address us on the propriety of the charge sheet.

Our exchange led him to admit that the charge sheet was defective, not only for not citing the Government Notice, in which the responsible Minister, cited elephant tusks as government trophies, in terms of section 86 of the Wildlife Conservation Act but also, for failure to show in the particulars of the offence, that the said possession was **unlawful**. After so conceding, the learned counsel prayed that the appeal be allowed, the proceedings of the lower courts be quashed, and a retrial be ordered.

When they were asked to respond, all the respondents submitted that they were not privy to the trial irregularities and that they were innocent of the offence and that justice would be met if they were set free.

The appellants' grounds of appeal raise two important issues. The first is whether the trial court had territorial jurisdiction to try the case. The second is whether the charge laid at the appellants' doors was lawful to warrant a lawful trial?

As the question of jurisdiction is fundamental, we shall begin with that issue. In the present case, it is not disputed that the appellants are alleged to have committed the offence on 22nd day of July, 2012, at Mwanuhuzi,

Meatu District in Shinyanga Region. It is also true that they were tried in the District Court of Bariadi District.

District Courts are established under section 4 of the Magistrates Courts Act (the MCA). Once established under section 4(1) of the MCA, a district court shall exercise jurisdiction within the district in which it is established, but under section 4(5), the Chief Justice, may, by order published in the Gazette, confer upon a district court established for any district jurisdiction over any other contiguous district or districts and where such order is made, such district court shall have concurrent jurisdiction in relation to the district court for which it is established and also in relation to such other districts as may be specified in such order.

But the place of trial of an offence is also governed by the Criminal Procedure Act (Cap. 20 R.E. 2002). Sections 180, 181, 182, 183 and 184 of the CPA: Section 180 specifically provides:

> *"Subject to the provisions of section 178 and to the powers of transfer conferred by section 189, 190 and 191 every offence shall be inquired into and tried as the case may be, by a court within the local limits of whose jurisdiction it was committed or within the*

local limits of whose jurisdiction the accused person was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging him with the offence.

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The appellants contend that although the offence is alleged to have been committed in Meatu District, and they were arrested in Meatu, and whereas there is a District Court in Meatu, they do not know why they were tried in the District Court of Bariadi.

Due to the paucity of material at this end of the country, which has inhibited our legal research, we were only able to sight GN 138 of 1988, in which the District Court of Maswa was conferred with contiguous jurisdiction to try matters arising from Meatu District. We also note that the trial in the present case took place in Bariadi District Court. The appellants have

referred to us our decision in **JAMES SENDAMA v R**, Criminal Appeal No. 279 "B" of 2013 (unreported) where the issue of jurisdiction of the trial court also arose. In that case the offence was committed in Bariadi District, but the charges were filed in Shinyanga Resident Magistrate's Court. The Court quashed the conviction, not because it was tried in another district, but because it was presided over by a district magistrate who had no business sitting in the Court of the Resident Magistrate. So the facts in that case are plainly distinguishable from those in this case where a district resident magistrate presided over a case originating in a different district. So, the issue is, does that affect the validity of the trial?

The answer to that issue is provided by section 387 of the CPA which provides as follows:

> *"No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed, took place in a wrong region, district, or other local area, unless it appears that such error has in fact occasioned or failure of justice."*

So, even if there was a district court in Meatu, the offence was committed in Meatu, and the appellants were arrested there, their trial in the District Court of Bariadi is not necessarily an incurable irregularity unless they can show that by so doing some injustice has been occasioned to them. The appellants have not suggested so in their grounds of appeal or in their oral submissions in Court. We therefore reject that ground of appeal.

We now move to the next issue; concerning the validity of the charge sheet.

It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and that this can only be achieved if a charge discloses the essential elements of an offence. (See **MUSSA MWAIKUNDA v R** (2006) TLR 387). And for that reason, it has been sounded that no charge should be put to an accused unless the Court is satisfied that it discloses an offence known to law. (See **OSWALD MANGULA v R**, Criminal Appeal No. 153 of 1994 (unreported). A clear charge drawn in terms of section 135 of the CPA would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.

In the present case, the appellants were tried on one count of being in unlawful possession of government trophy, contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act. The full charge is reproduced below for ease of reference.

IN THE DISTRICT COURT OF BARIADI DISTRICT

AT BARIADI

ECONOMIC CRIME CASE NO. 13 OF 2012

REPUBLIC

VERSUS

1. *MAKOYE MASANJA*
2. *NGUSA BUKALASA*
3. *SAMWEL SHIMBA @ MIDUNDO*
4. *EMMANUEL JAMES BUDOLO @ NANDI*
5. *MICHAEL MAGEMBE NGEKELE @ NYANZA*

CHARGE

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHY: C/S 86(1) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph

14(d) of the Economic and Organized Crime Control Act Cap 200 [RE 2002]

PARTICULARS OF OFFENCE

That MAKOYE MASANJA, NGUSA BUKALASA, SAMWEL SHIMBA @ MIDUNDO EMANUEL JAMES @ BUDOLO and MICHAEL MAGEMBE NGEKELE @ NYANZA are jointly and together charged on 22nd day of July 2012 at 22:45 hrs at Mwanuhuzi town within Meatu District in Shinyanga Region were found in possession of thirteen pieces of Elephant Tusks weighing 17 Kilograms valued at Tshs. 14,960,000.00. the property of the United Republic of Tanzania

Dated at Bariadi this 25th day July, 2012.

ELISA BENJAMIN
PUBLIC PROSECUTOR."

In their memoranda of appeal on this ground, the 1st, 3rd and 4th appellants complain that the charge was defective because they were charged under a wrong section of the law. They even suggested that the

proper provision would have been section 86(1) and 2(c), and not section 86(1) (2) (b). In the first appellant's memorandum of appeal, a list of authorities is attached, suggesting that Act No. 5 of 2009 was amended by Act No. 2 of 2010. It is true that Act No. 2 of 2010 effected some amendments to the Economic and Organized Crimes Act (Cap. 200) by deleting paragraph 19 of the First Schedule to the Act which relates to unauthorized possession of and arms ammunition. Even if there was a re arrangement of the paragraphs, we think that paragraph 14(d) of that schedule, with which the appellants were charged, was still intact. So, that amendment is of little if any consequence to the situation at hand.

The appellants have also criticized the charge sheet for citing section 86(1) and 2(b) instead of section 86(1) and 2(c). In our view the two paragraphs of subsection 2 have a connection with the value of the trophies with which an accused person is found in possession and is a yardstick for assessment of penalties.

Paragraph (c) only applies to trophies the subject matter of the charge which does not exceed one hundred thousand. But in the present case, the prosecution alleges that the value of the trophies was shs. 14,960,000/= far

in excess of one hundred thousand. This falls within paragraph (b) of section 86(4). So the question of wrong citation does not arise.

But on the wording of the statement of the offence, we asked Mr. Deusdedit, whether in his opinion, it was clear that by citing those provisions only, an accused person would know whether an elephant tusk fell under any of the categories of a government trophy as classified under section 85(1) of the Wildlife Conservation act. His answer was that an elephant tusk fell under section 85(1) (f) which empowers the Minister to declare any trophy as a government trophy. Then we asked him whether it was not necessary to cite the specific Government Notice in the statement. He agreed that it was necessary.

We think that 86(1) (2) (b) of the Wildlife Conservation Act was properly cited, but to complete the picture, the First Schedule to the Act, which lists down animals whose parts constitute trophies, as defined in section 3 of the Act, should also have been cited in the statement of the offence. However, we do not think that this omission occasioned any failure of justice to the appellants. So we dismiss this ground of appeal.

The second defect is in the particulars of the offence. It omits the word "unlawful". It is the presence of this word in the particulars that creates

the offence. In the absence of that word, the particulars would not match with the statement of the offence, and the marginal notes of section 86(1) of the Wildlife Conservation Act. As it is presently worded, the particulars of the offence do not create an offence. Mere possession of government trophies is not intended to be an offence. It is **unlawful** possession of trophies which is an offence. So the omission of that word is a serious damage to the charge laid at the doors of the appellants. It was an essential element of the offence. Without such essential element, the charge is incurably defective. (See **KASHIMA MNADI v R**, Criminal Appeal No. 78 of 2011, **OSWALD MANGULA v R** (supra).

For the above reasons we are constrained to find that by laying at their doors, a defective charge, the appellants were embarrassed and they did not get a fair trial. The trial was therefore vitiated, and so were the proceedings and judgment of the High Court on first appeal.

In the event, the appeal is allowed to the extent shown above. The proceedings of the trial court and the judgment and conviction of the first appellate court are quashed. The sentence is set aside. In view of the fact that the appellants are alleged to have committed serious offences affecting the economy of the nation, and since they have only spent an insignificant

part of their prison terms, we order a retrial, of the appellants with immediate dispatch. We also direct that in case of a re conviction, a portion of their current prison terms should be taken into consideration in assessing sentence.

It is so ordered.

DATED at **TABORA** this 4th day of December, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL