IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 237 OF 2018

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. **SALUM MOHAMED SALUM**
2. **MASHAKA JUMA WAZIRI**
3. **BENEDICTO ALOYCE SHIO**
4. **JAFARI ATHUMAN HAMADI**
5. **DANFORD ROMAN KANIKI**
6. **BISEKO MAKARANGA BISEKO**
7. **AZIZI SALUM PUME**

..... RESPONDENTS

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)
(Mlacha, J.)

dated the 4th day of July, 2018
in
Consolidated Criminal Appeals No. 31, 36, 97 and 69 of 2017 and 14, 26 and 27 of 2018

.....

JUDGMENT OF THE COURT

19th June & 29th July, 2019

NDIKA, J.A.:

This is a second appeal by which the Director of Public Prosecutions (the DPP), the appellant herein, seeks reversal of the judgment of the High Court (Mlacha, J.) sitting at Mtwara dated 4th July, 2018 in Consolidated Criminal Appeals No. 31, 36, 97 and 69 of 2017 and 14, 26 and 27 of 2018. The aforesaid decision affirmed the judgments of the Resident Magistrate's Court of Mtwara at Mtwara (the trial court) in Criminal Cases No. 104, 105,

106, 107, 108, 110 and 131 of 2014 by which the respondents were separately acquitted of charges that included unlawful possession of forest produce contrary to section 88 of the Forest Act, No. 14 of 2002 (the Act) read together with Regulations 10 and 57 of the Forest Regulations, G.N. No. 153 of 2004 (G.N. No. 153 of 2004).

In the trial court, the first to sixth respondents were individually tried on a charge containing three counts. While on the first count each of them was charged with forgery contrary to sections 333, 335 (a) and 337 of the Penal Code, Cap. 16 RE 2002 (the Code), on the second count each faced the offence of uttering false documents contrary to section 342 of the Code. The offence of unlawful possession of forest produce as particularized above was charged on the third count as against each of them. The seventh respondent, on his part, faced that charge as the sole count.

As it turned out, the trial court was unconvinced in all the seven trials that the prosecution had proven the charges beyond peradventure. In consequence, all respondents were acquitted of the offences charged.

Being dissatisfied by the respondents' acquittals, the DPP separately appealed to the High Court sitting at Mtwara. The seven appeals, arising from a similar factual setting and raising common issues, were duly consolidated and hence heard and determined as a single appeal. Before the

High Court, the appellant chose not to contest the acquittal of the first to sixth respondents in respect of the first and second counts. Hence, the thrust of the consolidated appeal was a challenge of the respondents' acquittals in respect of the offence of unlawful possession of forest produce.

The essential facts of the case as regards the common charge of unlawful possession of forest produce were as follows: the respondents were, at different times between 1st January, 2013 and 20th March, 2013, separately found in possession of timber at Mtambaswala area within Nanyumbu District in Mtwara Region. It was alleged that the said possession was not backed up by any licence or certificate issued by the Director of Forests. The quantity and value of the seized timber for each respondent were as follows: the first respondent had 820 pieces valued at TZS. 26,240,000.00; the second respondent – 3,600 pieces worth TZS. 115,200,000.00; the third respondent – 2,650 pieces valued at TZS. 84,800,000.00; the fourth respondent – 2,327 pieces worth TZS. 74,464,000.00; the fifth respondent – 2,521 pieces estimated at the value of TZS. 82,272,000.00; the sixth respondent – 1,300 pieces worth TZS. 41,600,000.00; and the seventh respondent – 1,040 pieces valued at TZS. 33,280,000.00.

Relying on the evidence adduced at the trials by Mr. Anyimike Gideon Mwakalinga, Head of the Forest Surveillance Unit of the Tanzania Forest Services Agency (TFS), it was alleged further that the documentation the respondents produced as authorization for the importation was invalid; it was issued by District or Regional Forest Officers who had no authority to issue any permits or certificates or licences. It was claimed that the requisite licences or certificates could only be issued by the Director of Forestry at the headquarters in Dar es Salaam.

In their respective defences, the respondents admitted being found in possession of the timber imported from Mozambique via Mtambaswala, Nanyumbu District. They also averred in common that they were regular businesspersons based in Dar es Salaam and that they had requisite certificates of registration for dealing in timber business. They further averred that they used to import timber on the strength of documents issued by the District and Regional Forest functionaries in Dar es Salaam and Mtwara.

Recalling about the practice and procedure on their past imports, the respondents testified in unison that they were issued with import certificates while the timber so imported was already at the port of entry, in the customs controlled area. That after the import documentation and timber were

inspected by the forest and customs officials, they would, upon clearance, pay an inspection service charge and chargeable taxes before being issued with a transit pass and an import certificate. To evidence this practice, each respondent tendered in evidence several import certificates in respect of past imports.

Furthermore, each respondent produced one Mr. Augustino Enock Mwangosi, the Acting Mtwara Regional Forestry Officer at the material time, as a witness. Apart from Mr. Mwangosi acknowledging that a certificate of registration of a timber dealer was a prerequisite for importation of timber into the country, he averred that such certificate could be issued at District and Regional Forest Offices countrywide, not just at the headquarters in Dar es Salaam. He also told the trial court that after a consignment of imported timber was received at the port of entry, it would then be inspected and hammer marked by forest officials. The importer would then pay an inspection service charge and chargeable import taxes. Finally, the importer would be issued with a transit pass and an import certificate as authorization for transportation of the consignment to its final destination subject to verification at various check points along the way.

What is more, Mr. Mwangosi tendered a Directive dated 21st January, 2008 signed by the then Director of Forestry, Dr. Felician Kilahama, on behalf

of the Permanent Secretary, the Ministry of Natural Resources and Tourism, bearing the title "*Nyaraka Zinazotakiwa Kuonyeshwa na Wafanyabiashara Wanaotoa Mbao Msumbiji*". The Directive, in essence, provided a list of all necessary documents required for authorization of timber imports into the country from Mozambique as well as the corresponding procedure for importation. Mr. Mwangosi said that the Directive also permitted local forestry officials to issue transit passes and import certificates to timber importers once all import documentation (including the certificate of origin and phytosanitary certificate) has been cleared, the timber consignment inspected and marked, and inspection service charge and import taxes fully paid.

As already hinted, the learned High Court Judge was likewise unimpressed that the charge of unlawful possession of forest produce as against each respondent was proven beyond reasonable doubt. In consequence, he dismissed the consolidated appeal in its entirety and ordered the seized timber to be restored to the respondents subject to payment of taxes as they stood at the time of arrival of the consignments in 2013.

In his reasoning, the first appellate Judge made four germane findings: first, having reviewed sections 3 (on the objectives of the Act), 64 (on

prohibition of importation into Tanzania of forest produce) and 88 along with Regulations 4 to 10 (on management of forest resources) and 10 and 57 of G.N. No. 153 of 2004, the learned High Court Judge concluded as follows:

> *"Apart from section 64 of the Act which gives the Minister [responsible for forests] power to restrict importation of forest produce,* ***there is no clear provision on importation of timber. It is obvious that there is a lacuna in law but that is the law****. Until such time when it can be amended it will remain to be the law. And I don't think that this gap can be filled by subsidiary legislation."* [Emphasis added]

Secondly, citing an earlier decision of the High Court (Twaib, J.) in **Director of Public Prosecutions v. Jamila Salum Mtali & Another**, Criminal Appeal No. 34 of 2017 (unreported) on the same offence, the learned High Court Judge took the view that G.N. No. 153 of 2004 does not govern any aspect of importation of timber. In the premises, he took the view that:

> *"... the legal provisions supporting the charge had nothing to do with importation of timber creating a variance between the charge sheet and the evidence on record. No conviction can arise out of that arrangement."*

Thirdly, in dealing with a hotly contested issue whether the documents the respondents tendered in court as proof of lawful authority to import timber were authentic, the learned High Court Judge held that:

> *"By dropping the appeals in respect of the first and second counts, it meant that they had no problem with the finding of the trial magistrates on the documents. Challenging them at this stage cannot be allowed."*

Finally, the learned first appellate Judge considered the disputation between the evidence of Mr. Anyimike Gideon Mwakalinga and that of Mr. Augustino Enock Mwangosi, the prosecution and defence witnesses respectively. He took the view that the contradictions between the two witnesses on the procedure for importation of timber, both of them being government officials from the same Ministry responsible for the administration and management of forests, "injected serious doubts to the prosecution case."

In this appeal, the DPP seeks the reversal of the High Court's judgment on four grounds of complaint as follows:

1. That the High Court Judge erred grossly both in law and fact by holding that the charge sheet preferred does not cover the facts of the case on the grounds that the Forest Act is designated only for

local forest produce and that it does not cover imported forest produce.

2. That the High Court Judge erred grossly both in law and fact by holding that the respondents herein gave better explanation as to the possession of the alleged timber by submitting in court the sample documents without taking into consideration the fact that the said sample documents are not concerned with the matter at hand.
3. That the High Court Judge erred grossly both in law and fact by holding that the Republic cannot challenge the legality of the licences and permits which were part of the First and Second counts in the Charge Sheet on the ground that the said First and Second counts were not preferred in the first appeal.
4. That the High Court Judge erred grossly both in law and fact by holding that the testimonies of the two government officials namely Mr. Anyimike Gideon Mwakalinga for the Republic and Mr. Augustino Enock Mwangosi for the defence caused contradictions to the prosecution case.

At the hearing of the appeal before us, Messrs. Ladislaus Komanya, Paul Kimweri and Theophil Mutakyawa, all learned Senior State Attorneys,

teamed up to represent the appellant DPP. On the other hand, Mr. Wilson Ogunde, learned counsel, appeared for the respondents.

It was Mr. Kimweri who argued the appeal for the DPP. Beginning with the first ground of appeal, he contended that section 88 of the Act, which, read together with Regulations 10 and 57 of G.N. No. 153 of 2004, create the offence of unlawful possession of forest produce, imposes on the accused person the onus to prove that his possession of forest produce was lawful or that he came by it innocently. Mentioning an objective of the Act as spelt out by section 3 (i) of that Act for providing a framework for taking measures to protect and enhance global diversity as well as section 64 (1) of the Act providing for regulation of foreign produce, the learned Senior State Attorney urged us to hold, on a purposeful and contextual reading of the scheme of the Act, that section 88 covered possession of any forest produce imported into the country. He particularly disputed that the Act had a gap in respect of importation of forest produce.

Mr. Kimweri then disputed the finding on the breadth of the charging provisions. He contended that the said provisions covered possession of any kind of forest produce, be it local or imported. He added that it was unnecessary for Regulation 2 (a) and (b) of G.N. No. 181 of 2007 to be cited in the statement of offence bearing in mind that the said provisions create no

offence even though they prohibit importation of forest produce without the requisite certificate of registration and import certificate. As to whether there was a variance between the evidence on record and the charge, the learned Senior State Attorney contended that there was none. On this issue, he cited the testimony of one prosecution witness – Setti Paulo, a retired police officer – that the respondents were found in possession of the timber without any proper documentation constituting lawful authorization.

Moving to the second ground, Mr. Kimweri faulted the High Court's finding that the respondents sufficiently accounted for their respective possession of the seized timber. He firmly argued that the documents that they tendered in evidence were used for clearance of their past timber imports. That the said documents were unconcerned with the legality of possession of the seized timber and that they ought to have been disregarded.

As regards the third ground, the learned Senior State Attorney questioned the High Court's finding that the DPP could not challenge the legality of the documentation the respondents had tendered as proof of their authorization to possess the seized timber. He argued that the DPP did not seek to challenge the authenticity of all the documents that the respondents had submitted as proof that the timber had been inspected, verified and

authorised by the relevant authorities in Mozambique. These documents were the subject matter of the charges on the first and second counts. In no way by not assailing the acquittals on the first and second counts should the DPP be taken to have conceded to the authenticity of the respondents' documentation purporting to establish the legality of possession of the seized timber.

Finally, Mr. Kimweri bemoaned the High Court's characterization of the defence evidence adduced by Mr. Mwangosi as having contradicted the testimony of Mr. Mwakalinga for the prosecution as regards the procedure for issuance of requisite certificates for importation of forest produce. While conceding that the two witnesses were government officials involved in administration of the Act, the learned Senior State Attorney contended that the High Court erroneously held that the two opposing witnesses contradicted each other and that such contradiction bolstered the respondent's case. It was his submission that a contradiction would only arise where the testimonies of a party's witnesses contradict each other; that testimonial accounts of witnesses from two opposing parties cannot be said to be contradictory.

The learned Senior State Attorney concluded his submissions urging us to allow the appeal thereby quashing and setting aside the respondents'

acquittals and then proceed to convict each of them of unlawful possession of forest produce.

On the part of the respondents, Mr. Ogunde wholly supported the High Court's decision. On the first ground of appeal, he urged us to appraise and interpret the Act as a whole, contending that the Act was essentially enacted to administer local forest produce and so the charge in issue does not cover imported forest produce. He supported his view by examining sections 3 (i), 58 to 63 (governing exportation of forest produce with no corresponding provisions on importation of such produce) and 84 to 100 (the offences sections), insisting that the Act does not govern imported forest produce. In the premises, it was his submission that section 88 of the Act does not cover the timber in issue which was without a doubt imported from Mozambique.

Mr. Ogunde added that since the timber in issue was imported, the charge in issue should have cited Regulation 2 (a) and (b) of G.N. No. 181 of 2007, which governs such importation even though it creates no offence. The omission to do so, he argued, resulted in the said charge being at variance with the evidence on record, which was that the importation of forest produce into the country was without a requisite import certificate.

As regards the second ground, Mr. Ogunde denied that the documents used in the past importation of timber by the respondents were introduced

into evidence as proof of the legality of their respective possession of the timber in issue. Instead, they were intended as proof of the practice or procedure that import certificate was to be issued at the end of the clearance process once the imported timber is inspected, the corresponding documentation verified and inspection service charge and import taxes paid. The documents, therefore, effectively negated Mr. Mwakalinga's claim that import certificate had to be issued in advance of the importation.

Mr. Ogunde, then, conceded to the fourth ground of appeal that the High Court wrongly held that Mr. Mwakalinga's evidence had been contradicted by that of Mr. Mwangosi. He based his concession on his affirmation of the rule that a contradiction of a witness testimony can only arise from the evidence of another witness produced by the same party. The learned counsel, too, acknowledged, in respect of the third ground, that the trial court's determination that there was no proof that the documents allegedly obtained from the Mozambican authorities that were forged did not banish the appellant's contention that the other documents tendered by the respondents were unauthentic. Nonetheless, the learned counsel was quick to contend that the third and fourth grounds of appeal had no bearing on the determination of the appeal.

Having summarized the contending learned submissions, it bears restating that this being a second appeal we shall be guided in our determination of the matter by the principle that the Court is only entitled to interfere with the concurrent findings of fact made by the courts below if there is a misdirection or non-direction made by the courts below on the evidence: see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

We begin with the first ground of appeal, which calls upon us to determine the breadth of the offence under section 88 of the Act read together with Regulations 10 and 57 of G.N. No. 153 of 2004. We find it imperative to reproduce the essential part of the charge in issue as against the first respondent, which, in all material aspects, mirrors the respective charges against the rest of the respondents:

> "**STATEMENT OF OFFENCE**
>
> **UNLAWFUL POSSESSION OF FOREST PRODUCE** contrary to section 88 of the Forest Act, No. 14 of 2002 read together with Regulations 10 and 57 of the Forest Regulations G.N. No. 153 of 2004.
>
> **PARTICULARS OF OFFENCE**
>
> **SALUM MOHAMED SALUM** on 20th March, 2013 at Mtambaswala area within Nanyumbu District in Mtwara Region was

found in possession of 820 pieces of timber valued at Tanzania Shillings Twenty-Six Million Two Hundred and Forty Thousand only (TZS. 26,240,000.00) without a licence issued by the Director of Forests."

As shown above, one of the charging provisions is section 88 of the Act. It states as follows:

> *"Any person,* ***who without lawful authority or excuse, the burden of proof which shall be upon him,*** *takes, receives or is* ***found in possession of forest produce with respect to which an offence against this Act has been committed, unless he can account for such possession or can show that he came by such produce innocently*** *shall be guilty of an offence and upon conviction shall be liable to a fine of not exceeding one million shillings or to imprisonment for a period not exceeding two years or to both such fine and imprisonment."* [Emphasis added]

Regulation 10 of G.N. No. 153 of 2004, which is charged together with the aforesaid section 88, stipulates that:

> *"It shall not be lawful to acquire or keep* ***in possession any forest produce unless such produce is obtained by a licence*** *issued under these Regulations and duly marked by the registered*

mark of the Director and the registered property mark of the licensee." [Emphasis added]

The last provision is Regulation 57 of G.N. No. 153 of 2004 stating that:

> *"**Any person or persons who contravene the provisions of these Regulations shall be guilty of an offence** and shall on conviction, be liable to such penalty as prescribed under the Act and any materials found with him/her while committing the offence shall be confiscated by the Government."* [Emphasis added]

At this point, we wish to recall the approach we took most recently in the **Director of Public Prosecutions v. Seleman Aziz Ally**, Criminal Appeal No. 235 of 2018 (unreported), which was a case involving the same offence of unlawful possession of forest produce raising similar issues. In our decision in that case, we faulted the High Court's construction of the same charging provisions to the effect that possession of imported timber did not fall within the purview of the charged offence. That construction was premised on a wrong approach, which involved construing the charging provisions in the light of the legislative scheme, the alleged object and purpose of the Act and the effect of adopting one interpretation over the other as if the said provisions were unclear or ambiguous. Citing our earlier decision in **Republic v. Mwesige Geofrey & Another**, Criminal Appeal No. 355 of 2014 (unreported) and a commentary by the learned authors, Sir

Peter Benson Maxwell *et al*, in **Maxwell on the Interpretation of Statutes**, 12th Edition, London: Sweet and Maxwell Limited, 1969, at page 29, we held in **DPP v. Seleman Aziz Ally** (supra) that the said charging provisions should have been construed literally, in their natural and ordinary meaning, because the language used was clear and unequivocal. In the end, we construed the charging provisions thus:

> *"It is our considered view that on a plain and ordinary grammatical meaning of the words used in the charging provisions,* ***the offence of unlawful possession of forest produce, so far as is relevant to this case, is consummated if one is found in possession of forest produce with respect to which an offence against the Act has been committed.*** *As such, mere possession of such produce without the proper documentation, be it a licence, a permit or a certificate, consummates the crime.* ***The onus, then, lies on the person in such possession to account for it*** *(by producing proper documentation for the forest produce concerned)* ***or to establish that he came by such possession innocently.*** *"*[Emphasis added]

Specifically regarding Regulations 10 and 57, we took the view that:

> *"Regulation 10 adds to the above is a specific* ***prohibition against possession of any forest***

> ***produce without a licence*** *issued under G.N. No. 153 of 2004. It occurs to us that the term "licence" here must be broadly applied to mean any document of authority to possess forest produce such as a certificate or permit issued under G.N. No. 153 of 2004.* ***While this regulation does not in itself create an offence, its contravention is criminalized by the general offence created under Regulation 57 as shown above."*** [Emphasis added]

It is necessary to take into account that in both section 88 and Regulation 10 quoted above, the subject matter of the offence is "forest produce", which is defined by section 2 of the Act to mean:

> ***"anything which is produced by or from trees or grows in a forest or is naturally found in a forest*** *and includes bamboos, bark, bast, branchwood, canes, charcoal, earth, fibres, firewood, fruits, galls, gums, honey, latex, laths, leaves, litter, natural varnish, peat, plants., poles, reads, resin, roots, rushes, sap, sawdust, seeds, slabs, timber, trees, thatch, wattles, wax, wild silk, withies, wood ashes, wood oil, and any other living or inanimate object declared by notice in the Gazette to be forest produce for purposes of this Act."* [Emphasis added]

Again, in **DPP v. Seleman Aziz Ally** (supra) we considered the part of the above description in bold text as providing a broad, generic definition of the term "forest produce" as anything produced by or from trees or grows in a forest or is naturally found in a forest. Construed literally, this definition, in the first part, sets out no territorial limitation or origin on the term forest produce. It was also our view that the same position holds true as regards the meaning of "forest", which, under the same section 2 of the Act, is defined as:

> *"**an area of land with at least 10 % tree crown cover, naturally grown or planted and or 50 % or more shrub and tree regeneration cover** and includes all forest reserves of whatever kind declared or gazetted under this Act and all plantations."* [Emphasis added]

As we did in **DPP v. Seleman Aziz Ally** (supra), we think that it was improper for the High Court to go behind the said words in the charging provisions and take other factors into consideration so as to read into them the territorial limitation that is literally not expressed in the law. In the premises, it is our firm view that the term "forest produce" in section 88 of the Act is applied in broad terms irrespective of whether the produce concerned was obtained from local forests or abroad. We thus agree with the

DPP, with respect, that the High Court wrongly held that the charge in issue did not, on the face of it, cover imported forest produce.

As regards the ancillary issue whether the charge at hand ought to have cited Regulation 2 (a) and (b) of G.N. No. 181 of 2007 in the statement of offence, we take view that the aforesaid regulation did not have to be cited because it creates no offence. As is evident, the said regulation forbids importation of any forest produce into the country unless the importer is a registered forest produce dealer having an import certificate. For ease of reference, we reproduce the said regulation thus:

> *"2. A person shall not import any forest produce unless- (a) he is registered forest produce dealer;*
>
> *(b) he has an Import Certificate as prescribed in the First Schedule to this Order (sic)."*

Even though Regulation 2 above constitutes a prohibition against the importation of any forest produce without a certificate of registration and an import certificate, it does not create any specific offence. In terms of section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 RE 2002, what is required to be contained in any statement of offence is the reference to the section of the enactment creating the charged offence. Thus, the reference to section

88 of the Act as read together with Regulations 10 and 57 of G.N. No. 153 of 2007, which create the charged offence, was sufficient in the matter at hand.

We now turn to the second ground of appeal faulting the High Court for holding on the basis of "sample documents" tendered by the respondents that the possession of the timber was duly accounted for while the said documents were irrelevant to the matter at hand. It is noteworthy here that the so-called "sample documents" included past import certificates issued to the respondents authorizing their previous consignments of timber imported from Mozambique.

With respect, we are inclined to agree with Mr. Ogunde that the documents used in the past importations of timber by the respondents were not introduced into evidence as proof of the legality of their respective possession of the timber in issue. They only served as proof of the procedure or practice that an import certificate was to be issued at the end of the clearance process once the consignment of imported timber is inspected, the corresponding documentation verified and inspection service charge and taxes paid. Besides complementing oral evidence adduced by the respondents, the said documents supported Mr. Mwangosi's account. The overall effect of that documentary evidence, as rightly held by the courts below, was to negate Mr. Mwakalinga's testimony that an import certificate

had to be issued in advance of the importation. On that basis, we endorse the first appellate Judge's view in his judgment at page 205 of the record that:

> *"The respondents brought sample documents and brought the Mtwara District Forest Officer to prove [their case]. They had a better explanation than the prosecution."*

We are also alert that the respondents' account of their respective possession of the timber did not solely rely on the impugned past import certificates. The second ground of appeal is, in the premises, devoid of merit and we reject it.

The third ground of appeal should not detain us. We recall that Mr. Ogunde conceded to this ground as it dawned on him that the first appellate Judge must have wrongly held that the appellant, having abandoned its appeal against the trial court's verdict on the charges of forgery and utterance of forged documents, could not legally challenge the authenticity and cogency of the documents relied upon by the respondents as proof of their possession of the seized timber. To be exact, the aforesaid verdict of the trial court related to the documents allegedly obtained from the Mozambican authorities, that the prosecution witnesses tendered in evidence against the respondents as proof of forgery and utterance of forged

documents. This bundle of documents is certainly different from the sample documentation the respondents tendered in evidence, to account for their respective possession of the timber, which included import certificates and transit passes for previous importations besides their respective certificates of registration as timber dealers and TIN certificates. In this sense, it is plain that the appellant's abandonment of their appeal against the verdict on forgery and use of forged documents did not signify an acknowledgement of the authenticity of the respondents' documentary evidence.

Notwithstanding the foregoing, we agree with Mr. Ogunde that the result on the complaint under consideration has no bearing on the outcome of the appeal. For it is our firm view that the past import certificates, transit passes and certificates of registration as timber dealers that the respondents produced at the trials were not effectively controverted. What we saw on record from the prosecution witnesses especially Mr. Mwakalinga, against the authenticity of some of the documents, was a mere word of mouth, which found no purchase from the courts below. More tellingly, we view it as weighty that the said courts found it uncontested that the aforesaid documents were all issued and stamped by government officials (in Mtwara and or Dar es Salaam) and that the respondents cannot be blamed if certain procedures, if at all, were not followed to the letter.

We now deal with the final ground of appeal, which, as stated earlier, is a complaint that the High Court wrongly held that the contradictions between testimonies of Mr. Mwakalinga and Mr. Mwangosi caused contradictions to the prosecution case. For clarity, we reproduce hereunder the relevant part of the decision of the High Court:

> *"The evidence of Mr. Anyimike Gideon Mwakalinga who came from TFS Headquarters, Dar es Salaam was attacked by the evidence of Mr. Augustino Enock Mwangosi from Mtwara District. Mr. Mwangosi gave the same evidence in all the cases coming from a government office. This was unusual. But the battle injected serious doubts to the evidence of Mr. Anyimike because TFS, formed in 2011, was rather new in the field than Mr. Mwangosi who was in the field for many years.* ***These government officials were not supposed to contradict each other.*** *Things could be different if Mr. Mwangosi came from the streets. Receiving such evidence from the forest department in Mtwara* ***demolished the evidence of Mr. Anyimike [Mwakalinga] and injected serious doubts to the prosecution case.***"
> [Emphasis added]

As stated earlier, Mr. Ogunde, once again, conceded to yet another error having been made by the learned first appellate Judge this time in

finding, as excerpted above, that the contradictions in the testimonies injected serious doubts to the prosecution case. We agree that it is settled that witness accounts can only be said to be contradictory if they were given by witnesses of the same party. We are, therefore, of the view that the High Court's characterisation of the testimonies of Mr. Mwakalinga and Mr. Mwangosi as being contradictory simply because both of them were government officials from the same Ministry was plainly inaccurate. To that extent, there is merit in the appellant's complaint in the fourth ground of appeal.

Nevertheless, we think in its proper context the impugned holding above suggests that the learned first appellate Judge found, as did the trial court, that Mr. Mwangosi's evidence was credible and that, in effect, it negated Mr. Mwakalinga's account that an import certificate had to be obtained from the headquarters in Dar es Salaam ahead of importation of timber from Mozambique. The appellant having not established that the courts below materially misapprehended the evidence on record or that there was any serious misdirection or non-direction on the evidence, we find no grounds to disturb the concurrent finding on the timing and procedure for issuance of import certificates. In view of that, we hold that even though

there is some merit in the fourth ground of appeal the complaint therein is not decisive on the appeal.

At this point, we think, for the sake of completeness, it is necessary that we express our firm mind that the thrust of the present appeal leaves the respondents' acquittals unshaken.

In the first place, it is common ground that the respondents were found in possession, be it actual or constructive, of the timber in issue which they imported into the country from Mozambique. The timber was lying in the customs controlled area at Mtambaswala in Nanyumbu District at the time it was seized.

To account for their respective possession of the timber, the first, second, fifth and seventh respondents averred that they were each holding a valid certificate of registration as a forest produce dealer issued pursuant to Regulation 2 (a) of G.N. No. 181 of 2007 read together with Regulation 54 (1) and (2) of G.N. No. 153 of 2004. The said certificates were duly tendered in evidence. On the part of the third, fourth and sixth respondents, each of them claimed to be running a duly registered timber business as a sole proprietorship or in partnership with another person. They tendered in evidence a respective certificate of registration as a forest produce dealer issued in their respective business name or their partner's name.

While all the respondents acknowledged that at the time the timber was seized from them none of them had any import certificate, they claimed in unison that each of them was to be issued with a transit pass and an import certificate after payment of applicable inspection service charge and import taxes once their respective consignment and its corresponding documentation had been verified and cleared. This evidence was obviously disputed by Mr. Mwakalinga who claimed that an import certificate ought to have been issued well in advance of any importation of timber. But as we have already indicated, the courts below marshalled capable arguments to support their rejection of Mr. Mwakalinga's claim and we found no good cause to disturb that finding.

Furthermore, the Directive from the Ministry signed by the then Director of Forestry, Dr. Felician Kilahama, which was not contested by the prosecution, lends credence to Mr. Mwangosi's evidence. This Directive is without doubt an authoritative communication that enumerated the requisite documentation for importing timber from Mozambique according to the law and summarized the corresponding legal procedure for such imports. What is germane to our deliberation now is the content of Paragraph 2 (iii) of the said Directive. We find it instructive to reproduce Paragraphs 2 (ii), (iii) and (iv) thus:

"(ii) Mbao lazima zigongwe nyundo (FD Na. 148) na Afisa Misitu wa Wilaya ya Mtwara zikiwa bandarini na kisha kutoa kibali cha kuzisafirisha (TP).

(iii) ***Mfanya biashara ni lazima alipie gharama za huduma itakayotolewa kwake ('Service Charge') ili apewe 'Import Certificate.'***

(iv) Baada ya kukamilisha nyaraka zinazohitajika mfanya biashara aende Ofisi ya TRA kulipia ushuru wa forodha na kupatiwa stakabadhi." [Emphasis added]

At this point, we find it apposite to cast our mind back to our decision in **DPP v. Seleman Aziz Ally** (supra) in which we took the view that Paragraph 2 (iii) above instructs that an import certificate would only be issued by the local forest officials upon payment of an inspection service charge after the timber consignment has been inspected and marked. For avoidance of doubt, the said Directive suggests that the said officials had powers to do so in terms of section 6 (2) and (3) of the Act, which permits delegation of such powers by the Director of Forestry.

Again, as we held in **DPP v. Seleman Aziz Ally** (supra), it is our view that the concurrent finding of both courts below on the timing of issuance of an import certificate finds support from two further considerations: first and foremost, even though the term "import certificate" is not defined under the Act or the regulations, on its plain and ordinary meaning, a certificate is "a

document in which a fact is formally attested" – see **Black's Law Dictionary**, Eight Edition at page 239. In this sense, an import certificate, being a document giving an *ex post* attestation of a fact as to importation, is a record that gives key details of a particular consignment that has actually been imported.

Secondly, the unequivocal wording in the prescribed format of the import certificate in the First Schedule to G.N. No. 181 of 2007 leaves no doubt that such document provides an *ex post facto* declaration of what has already been imported. For clarity, we reproduce the prescribed format as hereunder:

"TANZANIA

THE FOREST ACT (NO. 14 2002) FORM NO. FD. 38

IMPORT CERTIFICATE

Permission is hereby granted to .....
to .....
..... to import through an import entry .....
The forest produce/products described herein is consigned
to .....
..... at
.....
.....
..... **such forest produce/products have been inspected** at
.....

.....

By an authorized inspector .....

(name and signature)

1. Type of product .....
2. Country of origin .....
3. Property marks .....
4. Quantity (M^3)

   .....
5. Valid until

   .....
6. Signed .....

   Director of Forestry
7. Place of

   issue.....
8. Date of issue .....
9. Remarks .....

   Type of product can be logs, boards, planks, sleepers, carvings, handcrafts, timber, poles, firewood, tannin, charcoal, sandalwood, etc." [Emphasis added]

The emboldened text above emphasises our point that an import certificate, being an attestation that the imported forest produce *"has been inspected"* by an authorized inspector in the country, presents an *ex post* attestation of importation. It is, accordingly, a written assurance or official representation that a certain consignment of forest produce as particularized therein has been duly imported into the country – see **DPP v. Seleman Aziz Ally** (supra). This reasoning matches up with Mr. Mwangosi's evidence and

negates Mr. Mwakalinga's testimony on the timing of issuance of the import certificate.

The upshot of the matter is that we agree with the courts below that the respondents fully accounted for their possession of the timber in issue; for apart from producing their respective documentation that they themselves or their registered businesses were authorized dealers in forest produce, each of them was on course of being issued with, inter alia, an import certificate for the timber in issue that was seized from them.

Based on the foregoing analysis, this appeal cannot succeed. We dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 26th day of July, 2019

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL