IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., MZIRAY, J.A. And MKUYE,J.A.)

CRIMINAL APPEAL NO 206 OF 2017

1. **ERNEO KIDILO**
2. **MATATIZO MKENZA.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Hon. D. B. Ndunguru, SRM, EXTENDED JURISDICTION)

dated the 30th day of September, 2016
in
DC Criminal Appeal No. 38 of 2013

JUDGMENT OF THE COURT

20th & 22nd August, 2019

JUMA, C.J.:

In the District Court of Iringa at Iringa the appellants, ERNEO S/O KIDILO and MATATIZO S/O MKENZA, pleaded guilty to all three counts of:

i) unlawful entry into the national park (Ruaha National Park) contrary to section 21(1), (2) and 29(1) (2) of the National Parks Act [Cap. 282 R.E. 2002];

ii) being found in unlawful possession of Government Trophies (meat of one lesser kudu and meat of one impala valued at 4,784,000/=)

contrary to sections 86 (1), (2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 5 of the First Schedule and section 60 of the Economic and Organized Crime Control Act Cap. 200 R.E. 2002; and

iii) unlawful entry into the national park with weapon (one shotgun reg. number 07/3033 and three round of ammunition) contrary to section 24 (1)(b) (2) and 29 (1)(2) of the National Parks Act Cap. 282.

Particulars of the counts show that the offences were committed on 20th September 2013 at Mabati Makali area inside the Ruaha National Park.

As is the established practice of trial courts, the prosecuting State Attorney (Hopo Charles) read out the facts of the three counts. He narrated that while the Park Rangers were undertaking their routine patrol, they saw human foot-marks within the national park. They suspected the marks belonged to poachers. They followed up to where the two appellants were, and arrested them. The two appellants were found in possession of government trophy (meat of one Lesser Kudu and meat of one Impala), a shotgun, and three bullets which later formed the subject of the charge sheet. The learned State Attorney also narrated that when the appellants

were asked by the Rangers if they had permits to enter the national park or to possess the government trophy; they both replied that they did not have those permits.

The appellants raised no objection when the learned State Attorney offered to tender as exhibits, one shotgun (reg. number 07/3023); three bullets; one cartridge; Inventory Form (exhibit P4) and the Trophy Valuation Certificate (exhibit P5) and their cautioned statements (exhibits P6 and P7). These were duly tendered and admitted and appropriately marked as exhibits. Then, each appellant, one by one; expressed that they admitted the narrated facts and exhibits to be true and correct.

The learned trial Magistrate (Mareng, RM) made a finding that the facts which the learned State Attorney narrated, together with the exhibits which were tendered without any objection from the appellants, disclose the offences for which the appellants were charged. He convicted both appellants as charged. After hearing the appellants' mitigation plea for leniency, he sentenced each appellant as follows. In the first count, appellants were ordered to serve one year imprisonment and to pay a fine of Tshs 10,000/=. In the second count, they were sentenced to serve five (5) years imprisonment and to pay a fine of Tshs. 100,000/=. In the third

count, the appellants were sentenced to two years imprisonment and ordered to pay a fine of Tshs. 20,000/=. All the sentences were ordered to run concurrently.

Despite their pleas of guilty, the appellants were apparently aggrieved. They filed an appeal to the High Court at Iringa which was heard on extended jurisdiction by the Senior Resident Magistrate D.B. Ndunguru (as he then was). They preferred only one ground of complaint, contending before the first appellate court that the learned trial magistrate had imposed an excessive sentence and paid no regard to the fact that they were first offenders.

The first appellate Senior Resident Magistrate (Extended Jurisdiction) made several observations. He observed that although all the three offences for which the appellants were convicted, provided an option to pay fine, that option was neither offered to the appellants nor were reasons provided why imprisonment together with fines were preferred. With respect to the sentences imposed under the first and third counts, the learned Senior Resident Magistrate set aside the punishment of imprisonment. Instead, on the first count, he ordered the appellants to pay a fine of Tshs. 10,000/= or serve one (1) year in prison. On the third

count, he provided the appellants with an option to pay a fine of Tshs. 20,000/= or serve two (2) years in prison in case of default.

With regard to the second count, the learned Senior Resident Magistrate (Extended Jurisdiction) faulted the trial court for sentencing the appellants for offence under section 86(2)(a) of the Wildlife Conservation Act No. 5 of 2009, instead of the required section 86(1),(2) (b). In sum, the first appellate court partly allowed the appeal, and ordered the appellants, for their conviction in the second count, to pay proper sentence of Tshs. 47,840,000/= which as the law prescribes, is ten times the value of the trophies. In case they default, the appellants were ordered to serve twenty (20) years in prison.

On second appeal to this Court, the appellants preferred five grounds of appeal to fault the decision of the learned Senior Resident Magistrate (Extended Jurisdiction). Paraphrased, the appellants' complaints come down to the following: (1) The enhancing of their sentence, which was done without considering the fact that the contents of prosecution exhibits were not read after their respective admission. (2) The facts which the prosecution narrated during the trial do not establish elements constituting the three counts. (3) The value of meats of Lesser Kudu and Impala

(Government Trophy) was not narrated in the facts, even the date of their arrests and subsequent transfer to police custody, were not narrated as facts. (4) That it was an error for the charge sheet to indicate the meat found in their possession was that of Lesser Kudu and Impala, without any proof from Government Chemist. (5) Failure to find that prosecution had totally failed to prove its case beyond reasonable doubt.

At the hearing of this appeal on 20/08/2019, the appellants appeared in person and preferred to first hear the respondent Republic's response to their grounds of appeal. Mr. Abel Mwandalama, learned Senior State Attorney, represented the respondent Republic. The learned counsel referred us to the Notice of Preliminary Objection which was filed earlier by the respondent on 15/08/2019 seeking to strike out this appeal on the ground of incompetence of the memorandum of appeal. Being alive to the recently introduced principle of overriding objective, he prayed to withdraw the objection in order to allow the appeal to proceed on merit as is now required under the principle of Overriding Objective. This principle was introduced into the Appellate Jurisdiction Act (CAP. 141) and the Civil Procedure Code (CAP 33) following their respective amendments by the

Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018].

Adverting to the appellants' grounds of appeal, Mr. Mwandalama submitted that all the five grounds of appeal which are now being raised in this second appeal were not subjected to the proceedings and subsequent decision of the first appellate court. At the first appellate court, the appellants presented only one ground of appeal on excessive sentence. He submitted that the position of this Court with regard to the appellants bringing up of new grounds of appeal, which were neither canvassed nor deliberated on in the first appellate court and decisions made thereon, is reflected in so many decisions. He urged us to reject the appellants' grounds of appeal because they were neither raised, nor decided by the two courts below. The learned Senior State Attorney sought the support for his proposition from two decisions of this Court in **ABEDI MPONZI VS. R.**, CRIMINAL APPEAL NO. 476 OF 2016 and **HASAN BUNDALA @ SWAGA VS. R.,** CRIMINAL APPEAL NO. 416 OF 2013 (both unreported).

Despite his prayer that we should reject all the five grounds of appellants' appeal, Mr. Mwandalama however referred us to a portion of the first ground of appeal which he invites this court consider because it

raises an issue of law. This portion is with respect to the complaints that contents of the exhibits P4, P5, P5 and P7 were not read out after their respective admissions by the trial court. The learned Senior State Attorney submitted that this portion which raises issue of law, can be raised for the first time at the hearing of second appeal. He readily conceded that indeed, the exhibits which the prosecution tendered were not read to the appellants as appears on the record with respect to the Inventory Form (exhibit P4), the Trophy Valuation Certificate (exhibit P5) and cautioned statements (exhibits P6 and P7). He submitted that the position of the Court befalling the failure to read out the contents of exhibits immediately after their admission is to expunge them from the record. He referred us to the case of **LACK KILINGANI VS. R.,** CRIMINAL APPEAL NO. 402 OF 2015 (unreported) where the Court stated:

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone along way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in* ***Robinson Mwanjisi and Three Others vs. R.*** *[2003] T.L.R. 218, at*

*226 alluded to the three stages of **clearing**, **admitting** and **reading out**; which evidence contained in documents invariably pass through, before their exhibition as evidence:*

*'...Whenever it is intended to introduce any document in evidence, **it should first be cleared for admission**, and **be actually admitted**, before it can **be read out**....'*

[Emphasis added]."

Despite conceding that exhibits P4, P5, P6 and P7 were not read out after being admitted, Mr. Mwandalama was not prepared to follow through with the expunging of the exhibits from the record. He argued that the authority of **LACK KILINGANI VS. R.** (supra) does not apply in the circumstances of this appeal, where the first and second appellants are on page 14 of the record to have stated: *"I admit all facts narrated and exhibits tendered before the court to be true and correct"*. This according to the learned Senior State Attorney implies that they were fully aware of the contents of exhibits P4, P5, P6 and P7 even without the reading out of their contents.

He exhorted us that in case we find it appropriate to follow through the authority of **LACK KILINGANI VS. R.** (supra) and we expunge exhibits P4, P5, P6 and P7 from the record, and find the appellants' pleas of guilty were not unequivocal after all, we should order a fresh trial. Otherwise, for reasons he has advanced, the learned Senior State Attorney urged us to dismiss all the grounds of appeal.

When we asked him to respond to the learned Senior State Attorney's submissions, the first appellant reiterated his complains why the first appellate court enhanced his sentence to twenty years imprisonment. He urged us to allow his appeal. On his part, the second appellant submitted that he felt obliged to lodge this appeal because he was not handled fairly during both his trial and first appeal. He too urged us to allow his appeal.

At the very outset, we would like to agree with the learned Senior State Attorney and the authorities of **ABEDI MPONZI VS. R.** (supra) and **HASAN BUNDALA @ SWAGA VS.R. (Supra)** he cited to us; to the effect that the five grounds of appeal which the appellants preferred, are new grounds which were neither raised nor discussed in the first appellate court. In **JOSEPH LEKO VS. R.,** CRIMINAL APPEAL NO. 124 OF 2013 (unreported) a ground of appeal was raised on second appeal contending

that *voire dire* examination was not conducted properly because there was omission by the trial court to show the questions that were put to the child witness. The Court observed:

> *"...Apparently this ground was not raised in the High Court. It is a new ground. The Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal. See the case of* ***SELEMAN RASHID @ DAHA*** *V R Criminal Appeal No. 190 of 2010 and* ***BIHANI NYANNKONGO & ANOTHER V R*** *Criminal Appeal No.182 of 2011(both unreported) among others.."*

Our next point in the determination of this appeal is the issue of law which the appellants raised in their first ground of appeal. It pertains to the right of appeal, where the two appellants before us, pleaded guilty during their trial; and accepted as correct the statement of facts that were narrated, but in this second appeal, they contend that the contents of the exhibits P4, P5, P6 and P7 were not read out making their erstwhile plea of guilty, equivocal.

We do not agree with the learned Senior State Attorney for the respondent for suggesting that the appellants must be taken to have

known the facts contained in exhibits P4 (Inventory Form), P5 (Trophy Valuation Certificate), and P6 and P7 (the appellants' confessional statements) which were not read out in court. Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants. The case of **LACK KILINGANI VS. R.** (supra) is relevant to our proposition that where an accused person pleads guilty to an offence, the obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them and change his plea to NOT GUILTY. In other words, an unequivocal plea of guilty cannot be sustained where contents of admitted exhibits were not read out to any person charged with an offence.

Importance of reading out the contents of exhibits is brought to light by the WILDLIFE CONSERVATION (VALUATION OF TROPHIES) REGULATIONS, 2012 (GN NO. 207 OF 2012). These regulations prescribe values for different types of trophies. They also prescribe the valuation of trophies and information to be filled in any Trophy Valuation Certificate like

exhibit P5. Apart from bearing the name and designation of certifying officer, valuation certificate is divided into seven columns to be filled with such important facts as—(i)-type of trophy; (ii)-Number of pieces of the trophy concerned; (iii) number of species unlawfully killed; (iv) weight in kilograms; (v) value per kg/pieces/species in USD; and (vi) total amount in USD. In the present circumstances, where meat alleged to have been found in possession of the appellants is perishable, contents of Trophy Valuation Certificate (Exhibit P5) bears special significance in any proof of the offence involving Government Trophy.

This Court observed in **SELEMANI JUMA MKWANDA VS. R.**, CRIMINAL APPEAL NO. 10 OF 2004 (unreported), that "*a plea of guilty is an unequivocal acceptance by an accused person of all the inculpatory facts that constitute an offence.*" As we have shown, exhibit P5 (Trophy Valuation Certificate) which was not read out, is replete with factual information relevant to prove the second count of appellants being found in unlawful possession of Government Trophies (meat of one Lesser Kudu and meat of one impala) whose value the first appellate court enhanced to Tshs. 47,840,000/=. The sheer size of facts which exhibit P5 carries, defeats the learned Senior State Attorney's argument that appellants

should be taken to have known all facts that were in the exhibits which were not read out.

After finding the two appellants' plea of guilty to have been equivocal on account of the failure by the prosecution to read out contents of exhibits P4, P5, P6 and P7; the final issue calling for our determination is whether we should order a retrial as urged by Mr. Mwandalama, learned Senior State Attorney. In **LAZARO s/o STEPHANO VS. R.,** CRIMINAL APPEAL NO.9 OF 2013 (unreported) when the Court faced similar question, guidance was sought from the case of **Fatehali Manji V R.** (1966) E.A. 343 to the effect that: "...*each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires*". We shall be guided accordingly in this appeal before us.

One major reason why we think a retrial will not serve the best interests of justice is the incompleteness of the record. We were told by court registry staff that Exhibits P4 (Inventory Form), P5 (Trophy Valuation Certificate), and P6 and P7 (the appellants' confessional statements) are all missing from the Court file. It will not be fair in the circumstances of this appeal, to subject the appellants to a fresh trial.

the two appellants and set aside their respective sentences. The appellants are to be set free unless otherwise lawfully held.

Order accordingly.

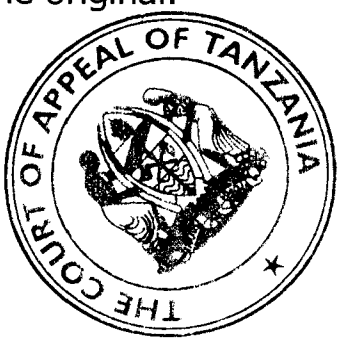
DATED at **IRINGA** this 21st day of August, 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

This Judgment delivered on this 22nd day of August, 2019 in the presence of Appellants in person and Mr. Adolf Maganda, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL