IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 339 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. KISHINADIRI DEGESHI
2. MAMATI MANOGA
3. OLJORA ARIJAB } **..... RESPONDENTS**

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)
(Makani, J.)

dated the 7th day of September, 2018
in
Criminal Appeal No. 119 of 2017
.....

JUDGMENT OF THE COURT

22nd & 31st October, 2019

NDIKA, J.A.:

This is an appeal by the Director of Public Prosecutions (the DPP) from the judgment of the High Court of Tanzania at Shinyanga (Makani, J.) dated 7th September, 2018 in Criminal Appeal No. 119 of 2017 allowing the joint appeal by Kishinadiri Degeshi, Mamati Manoga and Oljora Arijab (the first, second and third respondents respectively) against conviction and sentence. Even though a variety of questions were canvassed by the parties and determined by the courts below, in this appeal the DPP only questions the propriety and tenability of an order made by the High Court in favour of the

respondents for restitution of livestock which had been forfeited to the government pursuant to an order of the Resident Magistrate's Court of Simiyu at Bariadi (the trial court) dated 27th October, 2017.

To appreciate the context within which the above contested issue arises, we give the factual antecedents to this appeal as follows: the respondents were jointly and together tried in the Resident Magistrate's Court of Simiyu at Bariadi for disturbing the habitat of biological diversity contrary to sections 188 (c) and 193 (1) (a) of the Environmental Management Act, 2004, Act No. 20 of 2004 (the Act). The prosecution alleged that the respondents on 13th September, 2017 at or about 10:00 hours at Gibagambajiga area located at Makao Wildlife Management Area within Meatu District in Simiyu Region were found unlawfully disturbing the habitat of a component of biological diversity, to wit, fauna and flora, by grazing six hundred and sixty-five head of cattle and two donkeys in that area in contravention of the Wildlife Management Guidelines.

The respondents having denied the aforesaid accusation, a full trial ensued in the course of which the prosecution produced four witnesses and tendered six hundred and sixty-five head of cattle and two donkeys (Exhibit P.1) allegedly seized at the scene of the crime. In their defence, all the respondents gave evidence which was supported by one witness. Although it

was undisputed that the first and second respondents jointly owned five hundred sixty-five head of cattle and the two donkeys of seized livestock (Exhibit P.1) and that the rest were owned by the third respondent, all the respondents disputed having let their livestock graze in Makao Wildlife Management Area, allegedly a habitat of a component of biological diversity.

The trial court convicted the respondents of the charged offence and sentenced each of them to pay a fine of TZS. 1,000,000.00 or, in default, to serve a two years' term of imprisonment. In addition, the court, purportedly acting in terms of section 193 (1) (a) of the Act, ordered that the seized cattle and donkeys be forfeited to the Government.

In their appeal before the High Court, the respondents raised eight grounds of complaint. In essence, they contended that they were wrongly tried and convicted on an incurably defective charge; that the trial court failed to evaluate the evidence on record; that the prosecution case failed to pass the threshold of proof beyond a reasonable doubt; and finally, that the forfeiture order was wrongly made under the provisions of section 193 (1) (a) of the Act.

In its judgment, the first appellate court mainly dealt with the propriety of the charge against the respondents. Having examined the charging

section 188 (c) of the Act in the light of the provisions of sections 132 and 135 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) on the mode in which offences are to be charged, the learned first appellate Judge agreed with the respondents that the impugned charge was so defective that it could not be saved by the curative provisions of section 388 of the CPA. The relevant part of her judgment appears at page 170 of record of appeal, reading thus:

> *"The statement of offence and particulars of offence quoted have only mentioned section 188 (c) of the EMA without the supporting sections 66, 67 and 68 of the EMA. As explained hereinabove, the absence of these latter sections results into the offence not to be properly created. And without the specific charging provisions the appellants, then the accused, were not afforded the opportunity to know what they were charged with and specifically they did not know the guidelines and measures they had contravened in terms of sections 66, 67 and 68 of the EMA. Mr. Tawabu pointed out that the only section that creates the offence is section 188 (c) of the EMA but as explained above, the said section cannot survive without sections 66, 67 and 68 of the EMA. The omission of these sections to support the charging*

section 188 (c) of the EMA is fatal and hence rendering the charge sheet defective."

Premised on the above finding, the learned appellate Judge, then nullified the trial proceedings in entirety and, in consequence, quashed and set aside the conviction, sentence and forfeiture order against the respondents. We find it instructive to excerpt from page 173 of the record of appeal the relevant portion of the judgment containing the said holding and the corresponding consequential order:

> *"Having established that the charge sheet is defective, it follows therefore that* ***the entire proceedings of the trial court are a nullity for offending the appellants' rights to fair trial*** *because the appellants cannot be taken to have pleaded to the charge, which did not sufficiently create the offence according to the law or otherwise does not reflect the proper particulars of the offence.* ***In that respect, the trial proceedings are quashed and the conviction, sentence and order are set aside.*** *"*[Emphasis added]

While aware that her findings and holding on the first ground of appeal were sufficient to dispose of the appeal before her, the learned Judge felt impelled, for the sake of argument, to deal with the propriety of the

forfeiture order which, as stated earlier, was supposedly made under section 193 (1) (a) of the Act. Having examined the said provisions, the learned Judge held that while the said provisions allow forfeiture to the Government of "substances, equipment and appliances used in the commission" of an offence under the Act, livestock could not be subject to such a forfeiture order. She reasoned that livestock was, on a plain and ordinary meaning, not of the same genus as substances, equipment and appliances contemplated under the said provisions. We deem it instructive, once again, to extract the relevant passage from her judgment at page 174 of the record thus:

> *"According to Oxford Dictionaries.com, substance is defined as a particular kind of matter with uniform properties; equipment is defined as the necessary item for a particular purpose; and appliance is a device or piece of equipment designed to perform a specific task. With due respect, therefore, livestock cannot be substance neither an equipment nor an appliance. Livestock includes cattle, goats, pigs, horses, mules and all other domesticated animals (section 3 of the Wildlife Conservation Act). In view thereof, the order for forfeiture of livestock by the trial court under section 193 (1) (a) of the EMA was not proper ....* ***In essence, the order to forfeit 665***

cows and 7 donkeys was illegal. [Emphasis added]

Consequently, the learned Judge allowed the appeal and ordered a refund of the fine of TZS. 1,000,000.00 paid by each respondent. She further ordered that the forfeited livestock be handed back to the respondents.

The aforesaid judgment aggrieved the Republic and the DPP has thus appealed to this Court. Initially, the appeal was predicated on three grounds of appeal, which we need not reproduce herein. But at the hearing of the appeal before us, Mr. Deusdedit Rwegira, learned Senior State Attorney representing the DPP, abandoned the said grounds after he had sought and obtained leave of the Court under Rule 81 of the Tanzania Court of Appeal Rules, 2009 to introduce and argue a new ground of appeal not specified in the Memorandum of Appeal on record. Needless to say, Mr. Ngalula Shilinde, learned counsel appearing for the respondents, had no objection to the course taken by his learned friend. The sole ground of appeal contends:

"that the first appellate court erred in law in ordering that the forfeited livestock be returned to the respondents."

In his argument before us, Mr. Rwegira stoutly criticized the restitution order, submitting that it was made without due consideration of the effect of

the provisions of section 351 (4) of the CPA on the trial court's forfeiture order. According to him, by dint of the said provisions the forfeiture order, whether made erroneously or not, had been automatically executed when the High Court vacated it on 7th September, 2018 and issued the restitution order. While acknowledging that the said provisions only entailed an automatic suspension of execution of any forfeiture order under section 351 of the CPA over any property until the period allowed for appealing has passed or, when an appeal has already been presented, until the disposal of the appeal, he contended that the said provisions expressly excepted suspension of execution of forfeiture orders on livestock or any property subject to speedy or natural decay. Given this position, the learned Senior State Attorney argued that by the time the impugned restitution was ordered there were no cattle or donkeys to be restored to the respondents;for, they had all been sold.

Mr. Rwegira beseeched us to reverse the restitution order for a further reason that it gave false expectations to the respondents for recovery of the livestock. The order was thus non-executable and could foment chaos and discontent. On how the plight of the respondents should be addressed, he submitted that they should seek other legal recourse to vindicate their rights, one of which being to institute a civil action against the Government seeking

to be paid the proceeds of the sale of the forfeited livestock in terms of section 351 (2) of the CPA upon establishing an entitlement thereto.

When probed by the Court on whether the record of appeal placed before the learned first appellate Judge contained any notification or other proof of the sale of the forfeited livestock, Mr. Rwegira maintained, rather startlingly, that the sale had indeed been effected and that the said forfeited farm animals were nowhere to be handed back to the respondents. However, he relented in the end and conceded that there was no such proof on record, but still urged us to allow the appeal and set aside the restitution order.

Mr. Shilinde, on the other hand, sharply disagreed with his learned friend, arguing that apart from the forfeiture order made under section 193 (1) (a) of the Act being illegal, it could not be issued or regulated under section 351 of the CPA. It was his submission that the learned first appellate Judge did not have to take into account the provisions of section 351 of the CPA before she made her restitution order; for, the said provisions were inapplicable.

It was Mr. Shilinde's further submission that there was no proof before the High Court that the forfeited livestock had been sold or disposed of in any manner whatsoever and that the restitution order was made prudently

on the assumption that the forfeited farm animals were yet to be sold. He concluded by urging us to uphold the consequential order of restitution and proceed to dismiss the appeal.

Rejoining, Mr. Rwegira rehashed the line of argument that the assailed restitution order was non-executable and, for that reason, it ought to be vacated.

We have keenly scrutinized the record of appeal in the light of the contending submissions of the learned counsel for the parties. As indicated earlier, the only sticking point is whether the restitution order was properly made by the High Court.

We think, in order to determine the propriety of the restitution order, we must first examine, albeit briefly, section 193 (1) (a) of the Act under which the forfeiture order was levied.The said provisions stipulate as follows:

> *"193. -(1) The court, before which a person is charged with an offence against this Act or any regulations made under this Act, may direct that, in addition to any other order –*
>
> *(a) upon the conviction of the accused; or*
>
> *(b) if it is satisfied that an offence was committed orders notwithstanding that no*

(b) if it is satisfied that an offence was committed orders notwithstanding that no person has been convicted of the offence,

order that the ***substances, equipment and appliances used in the commission of the offence be forfeited to the Governmentand, be or disposed of in the manner as the court may determine.*** [Emphasis added]

In our view, the above provisionsneed no expounding or embellishing, for they are self-explanatory. In essence, on a plain and ordinary meaning section 193 (1) confers on the court of trialthe discretionary power to forfeit to the Government any substance, equipment or appliance used in the commission of an offence either upon conviction of the accused or upon being satisfied that an offence was committed even where no person has been convicted of the offence.Moreover, despite the apparent imprecision in the phrase "and, be or disposed of in the manner" in the above provisions, we would construe that expression to mean that where an order of forfeiture is levied against any substance, equipment or appliance, the court would still retain the power to direct the disposal of such forfeited property in a manner it may determine. Nonetheless, we acknowledge that unlike section 351 of the CPA which contains under subsections (2) and (4) the modes and

When viewed in the above light, we think, section 193 (1) of the Act is not only self-governing but also all encompassing. In the instant case, it is common cause that, acting in terms of these provisions, the trial court levied against the seized livestock the forfeiture order on 27th October, 2017. The record bears out that no further order on disposal of the said forfeited livestock was ever made under those provisions.

At this point it is necessary to remark that the parties herein brought to our attention the proceedings in the High Court at Shinyanga in Miscellaneous Criminal Application No. 26 of 2017 instituted on 10th November, 2017 by the respondents against the DPP, the Wildlife Management Area Makao – JUHIWAPOMA and a court-appointed court broker known as Abajaja Company Limited seeking a stay of execution of the forfeiture order. Having perused that record, we take judicial notice of the following facts: **first**, that the forfeiture order was sought to be executed by selling the forfeited farm animals by way of public auction on 17th and 18th November, 2017. **Secondly**, that the Honourable Judge in Charge, High Court, Shinyanga vide a letter to the first respondent refered as J/HCT/SHY/C/Vol.I/79/81 of 13th November, 2017 intimated that he had revoked the appointment of Abajaja Company Limited as court broker for the

auction of the livestock and suspended the scheduled auction until a further direction to be issued by the High Court, Shinyanga. **Thirdly**, through a counter affidavit deposed by Christopher Rute Kabenga on behalf of the court broker and lodged on 24th November, 2017, it was averred that if the auction were to be stayed the court broker would suffer loss from costs incurred for advertisement of the proclaimed auction. That averment confirms that at the time no sale had been effected. **Fourthly**, on 15th December, 2017 the High Court at Shinyanga (Makani, J.) dismissed several points of preliminary objection against the respondents' application, which, by then, had been consolidated with another similar application (Miscellaneous Criminal Application No. 25 of 2017) lodged by three other persons against the DPP, JUHIWAPOMA and Abajaja Company Limited. **Finally**, although both learned counsel were concurrent that the High Court in the end stayed the proposed sale of the forfeited livestock, the records in respect of the consolidated Miscellaneous Criminal Applications No. 25 and 26 of 2017 are silent on that aspect. At any rate, however, the record before us contains not even a scintilla of proof that the forfeited farm animals were sold at any point in time.

Mr. Rwegira was at pains before us to criticise the learned first appellate Judge's restitution order in that it was made without taking into

account the provisions of section 351 (4) of the CPA. The thrust of his argument, as stated earlier, was that if learned Judge had done so, she would have realised that the forfeiture order was, in terms of those provisions, swiftly executed and that there were no forfeited livestock to be restored to the respondents when she issued the restitution order. Conversely, Mr. Shilinde disagreed, arguing that the said provisions were inapplicable.

With respect, we think Mr. Rwegira's submission is based upon a reading of subsection (4) in isolation of the preceding three subsections. In the premises, we deem it necessary to examinesection 351 (1) to (4), which we reproduce as follows:

> *"351. -(1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension-*
>
> > *(a) has been used for the purpose of committing or facilitating the commission of any offence; or*
> >
> > *(b) was intended by him to be used for that purpose,*

that property shall be liable to forfeiture and confiscation and ***any property so forfeited under this section shall be disposed of as the court may direct****.*

(2) Where the court orders the forfeiture or confiscation of any property as provided in subsection (1) of this section but does not make an order for its destruction or for its delivery to any person, ***the court may direct that the property shall be kept or sold and that the property or, if sold, the proceeds thereof shall be held as it directs until some person establishes to the court's satisfaction a right thereto****; but if no person establishes such a right within six months from the date of forfeiture or confiscation, the property or the proceeds thereof shall be paid into and form part of the Consolidated Fund.*

(3) The power conferred by this section upon the court shall include the power to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of such property, ***but shall be exercised subject to any special provisions regarding forfeiture, confiscation, destruction, detention or delivery contained in the written law under which the conviction was had or in any other written law applicable to the case.***

(4) Where an order is made under this section in a case in which an appeal lies ***the order shall not, except when the property is livestock or is subject to speedy and natural decay, be carried out*** *until the period allowed for presenting the appeal has passed or, when an appeal has been presented, until the disposal of the appeal."* [Emphasis added]

Briefly, subsection (1) above stipulates that upon an accused person being convicted of an offence, the property used or intended to be used in the commission of any offence would be liable to forfeiture to the Government. It is imperative at this point to stress that the phrase**"any property so forfeited under this section shall be disposed of as the court may direct**" raises two points: first, the catchphrase **"under this section"** means that section 351 applies only if the forfeiture of the property concerned was made under that section. Secondly, the expression "**shall be disposed of as the court may direct**" means that the property so forfeited to the Government is not automatically dispensable, expendable, transferable or alienable at the will of the Government upon the forfeiture order being made but it shall be disposed of at the discretion of the court.

Next is subsection (2) above, which governs the court's discretion to direct the disposal of the property forfeited or confiscated under subsection

(1). It gives discretion to the court to direct that the property so forfeited to be kept or sold and that the property or, if sold, the proceeds thereof should be held as it directs until some person establishes to the court's satisfaction a right thereto. It is also our view that subsection (3) takes cognizance of special provisions for forfeiture or confiscation or destruction made under any other written law (including section 193 (1) of the Act) and then limits the application of section 351 where such special provisions exist.

Finally, as regards subsection (4), we agree with Mr. Rwegira that the said provisions entail an automatic suspension of execution of any order including a forfeiture order made under that section, except an order over livestock or any perishable property, until the period allowed for appealing has passed or, when an appeal has been presented, until the disposal of the appeal. However, with respect, we do not agree with him that the exclusion of livestock or perishable property from the automatic stay of execution implies an automatic and swift disposal in any manner whatsoever of such property.

Taking into account the above position of the law, we now consider the issue whether the High Court had to take into account the provisions of section 351 (4) of the CPA before issuing the restitution order.

We should hasten to say that we are of the decided view that the above provisions were not necessarily applicable to the instant case for the following reasons: first and foremost, as indicated earlier the trial court's forfeiture order was not made under section 351 of the CPA but the provisions of section 193 (1) of the Act and that the respondents had been convicted under section 188 (c) of the that Act. Section 193 (1) constitutes special provisions for dealing with forfeiture and disposal of property forfeited under the Act. So, there was generally no need to resort to the provisions of section 351 of the CPA. Secondly, subsection (3) of section 351 of the CPA clearly subjects the application of section 351 in its entirety to whatever special provisions on forfeiture and disposal of forfeited property contained in the written law under which the conviction was made. In that sense, section 351 suggests that the special provisions of section 193 of the Act prevail over it. Thirdly, independently of the existence of the express provisions of section 351 (3) of the CPA as we have explained, section 351 being a provision in a statute of general application may not apply where there is a special provision in a specific statute dealing with the same subject. This Court so heldin the case of **John Sendama v. Republic**, Criminal Appeal No. 279 'B' of 2013 (unreported) as follows:

"Normally, such a statute [of general application] would not apply where there is a specific legislation in existence on a specific subject, unless the wording of the particular provision suggests otherwise by the use of such words as 'Notwithstanding.'"

The above stance is also reflected in A.B. Kafaltiya's **Interpretation of Statutes**, Universal Law Publishing Co. Pvt Ltd., New Delhi, India, 2008 where the learned author opines at page 5 that:

"The principle that a general provision should give way to a specific provision is well-settled. Where legislature gives two directions one covering a large number of matters in general and another to only some of them, its intention is that the latter direction should prevail over the former one. When there is a conflict between provisions of special enactment and those of general enactment operating in the same field, the provisions of special enactment should prevail."

Based on the foregoing discussion, it is our finding that the learned appellate Judge did not generally have to take into account section 351 (4) of the CPA in the manner suggested by the learned Senior State Attorney. However, we acknowledge that in its absolute discretion the High Court could have resorted to section 351 of the CPA as provisions of general application

so as to fill gaps in the special provisions of section 193 (1) of the Act especially on disposal of forfeited property as these provisions are lacking in specific modes of disposal.

To extend the argument further, we think that if the forfeited livestock were dealt with under section 351 of the CPA as alleged, the forfeiture order would still not have any automatic execution under subsection (4) and that the court would still have retained its absolute discretion under subsection (1) of that section to direct the disposal of the livestock so forfeited to the Government. We reiterate that such property was not automatically dispensable, expendable, transferable or alienable at the will of the Government. Its disposal had to be at the discretion of the court.

The above position apart, we are of the decided view, in fairness to the learned appellate Judge, that there was no material before her suggesting that the forfeited cattle and donkeys had been sold or disposed of in any manner whatsoever rendering nugatory whatever restitution order she was bent to issue. We scanned the entire records before us and found no shred of proof of the alleged sale. It is no wonder that despite his initial recalcitrance on that aspect, Mr. Rwegira finally relented and conceded to the absence of proof of the alleged sale.

All said and done, we find no merit in the sole ground of appeal as we hold the impugned restitution order faultless except for its noticeable generality, which we remedy by ordering that five hundred sixty-five head of cattle and two donkeys of the seized livestock be restored to the first and second respondents who jointly owned them as per the record and that the remaining one hundred head of cattle be handed back to the third respondent.The appeal inevitably stands dismissed.

DATED at **TABORA** this 30th day of October, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2019 in the presence of Mr. Deusdedit Rwegira, learned State Attorney for the respondent/Republic and Mr. Kumaliza Kamoga Kayaga, holding brief of Mr. Shilinde Ngalula for the Appellant is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL