

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CRIMINAL APPEAL NO. 340 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1.KILO KIDANG'AI 2.MARIA HONGA 3.SEKSTA DEWITA	}RESPONDENTS
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**(Appeal from the decision of the High Court of Tanzania
at Shinyanga).**

(Makani, J.)

dated the 7th day of September, 2018

in

Criminal Appeal No. 118 of 2017

JUDGMENT OF THE COURT

22ND & 30TH October, 2019

LILA, J.A.:

Kilo Kidang'ai, Maria Honga and Seksta Dewita, the respondents herein, were jointly and together charged before the Resident Magistrates' Court of Simiyu with the offence of disturbing the habitat of biological diversity contrary to sections 180(c) and 193(1)(a) of the Environmental Management Act, No. 20 of 2004 (the EMA). They were convicted as charged. They were ordered to pay a fine of TZS. 1,000,000/= each and in default to serve two years imprisonment. In addition, the trial magistrate ordered their respective livestock be

forfeited to the Government. They opted to pay the ordered fines to avoid being incarcerated in the prison. However, as they were aggrieved they preferred an appeal to the High Court challenging their convictions, sentences and the order of forfeiture. The High Court reversed the trial court decision, quashed their respective convictions and set aside the consequent sentences and the order of forfeiture. It then ordered the forfeited 665 cows and 2 donkeys be returned to the respondents.

The Director of Public Prosecutions (the appellant) was aggrieved; hence the present appeal in which he preferred a three – point memorandum of appeal. However, at the commencement of the hearing, Mr. Deusdedit Rwegira, the learned Senior State Attorney, who appeared in her behalf, in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), sought leave of the Court to raise and argue a new ground of appeal not specified in the memorandum of appeal. He expressed his desire to concentrate on challenging only the propriety of the High Court order of returning the forfeited livestock to the respondents. He sought to do so on the sole ground that:-

"That the first appellate court erred in law to order that the forfeited livestock be returned to the respondents"

That prayer was not objected to by Mr. Shilinde Ngalula, the learned advocate, who appeared for the respondents. We readily granted the prayer. Mr. Rwegira, thereafter, opted to abandon all the grounds raised in the former memorandum of appeal.

The background facts from which this appeal arose is not complicated. It was the prosecution case that the six respondents, on 11/9/2017 at around 11:00 hrs, were found by D.8341 D/C Said (PW1), Pius Gaspar (PW2), G. 8276 D/C Manfred (PW4) who were on patrol at Makao Wildlife Management Area (WMA) grazing 283 cows and 7 donkeys (the livestock) which were said to have disturbed the habitat of biological component, that is, fauna and flora. The respondents took to their heels leaving behind the livestock which were seized and taken to a certain camp within the WMA. Peter Nyamalaga (PW3), an Environmental Officer in Meatu District, visited the WMA and prepared an Environmental Impact Assessment Report (Exhibit P.1) which revealed the extent of destruction. On 12/9/2017 the respondents

resurfaced and went to the camp claiming back their livestock whereat the 1st respondent identified 46 cows, 2nd respondent identified 137 cows and 7 donkeys and the 3rd respondent identified 100 cows. They were arrested and later charged.

The respondents, in their respective defences, denied the charge claiming that on the material date their livestock were not grazing in the WMA but in their respective areas outside the WMA hence their livestock were wrongfully seized.

At the conclusion of the trial, the trial court was satisfied that the prosecution had established the case against the respondents and proceeded to convict, sentence them and made the orders as hinted above. They paid the fines but still preferred an appeal to the High Court where they successfully argued two legal points that the charge was fatally defective and that the livestock do not fall within the ambit of substances, equipment and appliances contemplated in section 193(1) of the EMA. Their convictions were thereby quashed and the sentences set aside. With regard to the paid fines and the forfeited livestock, the High Court ordered that:

*"For avoidance of doubt, the appellants are entitled to a refund of the fine of TZS 1,000,000/= paid by each of them and **it is further ordered that the forfeited livestock, the 665 cows and 2 donkeys be duly returned and handed over to the appellants.**"*(Emphasis added)

It is this bolded limb of the judge's order that is the subject of the appeal.

Arguing in support of the appeal, Mr. Rwegira had it that although the forfeiture order was made under section 193(1)(a) of the EMA, that Act is silent on the mode of carrying out the order hence need to resort to the provisions of section 351 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) which, not only empowers the court to order forfeiture, but also provide for the mode of carrying out the order. He specifically made reference to section 351(4) of the CPA which, according to him, empowers the Government, where the forfeited property is livestock or anything subject of speedy decay, to proceed with the carrying out of the order of forfeiture by disposing the same without recourse to court for necessary orders or directions. He

was emphatic that the Government could do so at any time irrespective of whether or not there is an appeal pending in court. He went further to argue that even the order for staying the sale of the forfeited livestock was ineffectual inasmuch as it was issued without due regard to the provisions of section 351(4) of the CPA which vest the Government with an automatic right to carry out the forfeiture order in respect of livestock and articles subject to a speedy decay at any time. In exercise of such powers, he said the forfeiture order was carried out and the forfeited livestock were already sold by the Government at the time the High Court rendered its judgment hence there was nothing to be returned to the respondents. As to what would be the remedy available to the respondents, he was of the view that the respondents have another avenue to pursue their rights under section 351(2) of the CPA such as by instituting a civil action against the Government where, if they succeed to prove their claims, they would be compensated for the sold livestock through the consolidated fund where the proceeds of the sale of the forfeited livestock were deposited.

On our prompting, Mr. Rwegira readily conceded that the record does not show that the livestock were already sold at the time the High Court pronounced its verdict on the appellants' appeal and that such

information was not brought to the attention of the first appellate Judge. He was, however, quick to point out that various correspondences contained in the record of appeal in Criminal Appeal No. 46 of 2018 which he had earlier on withdrawn, were sufficient to appraise the learned Judge with that fact. The correspondences under reference were a letter from the Judge In-Charge to the respondents dated 13/11/2017, the counter affidavit resisting the application for stay/suspension of sale of the forfeited livestock in which the court broker averred that if the application would be granted he stood to suffer loss for the advertisement of sale of the livestock he had already made for one week. The other document relied upon is the proclamation of sale that the auction of the livestock was scheduled to be conducted on the 17th and 18th of November, 2017.

On our further prompting whether the stay order was still valid at the time the High Court made the order of returning the forfeited livestock to the respondents, Mr. Rwegira readily conceded that they preferred an appeal against the grant of an order of stay of sale of the forfeited livestock, but had withdrawn the same hence the stay order remained valid until the date the High Court rendered its verdict in

which it quashed the respondents' convictions, set aside the order to pay fine and ordered the refund of the paid fine and the return of the forfeited livestock to the respondents.

The above notwithstanding and for the foregoing reasons, Mr. Rwegira impressed on us that the first appellate Judge's order was made in excess of its jurisdiction as it was contrary to the contemplations of the provisions of section 351(4) of the CPA hence it should be quashed and set aside and the respondents be directed to abide by the law in pursuing their right.

Mr. Ngalula, on his part, was brief and focused in opposing the appeal. He argued that as there was a stay order, then the first appellate Judge, at the time of making the order that the livestock be returned to the respondents, was sure that the livestock were still there in the hands of the Government after the forfeiture order was made. He pointed out that the learned Senior State Attorney's assertion that the livestock were already sold when the impugned order was made is not borne out by the record as there is nothing on record to prove so. He, instead, argued that the livestock are still there and was insistent

that the High Court order should be complied with. He pressed us to dismiss the appeal for want of merit.

Mr. Rwegira had nothing to say in rejoinder other than reiterating his earlier submissions.

We, on our part, after a careful examination of the sole ground of appeal raised by the appellant and the parties' counsel's submissions before us, are of the considered view that the main issue for our consideration and determination in this appeal is a narrow one; whether the High Court order for the return of the forfeited livestock to the respondents following their respective convictions being quashed was proper and lawful.

Carefully looking at the way the ground of appeal is couched and Mr. Rwegira having confirmed that during his submissions, it is evident that the appellant did not take issue with the High Court findings in respect of the respondents' convictions being quashed and setting aside of the sentences including both orders to pay the fine and forfeiture made by the trial court. The appellant has only taken issue with the order that the forfeited livestock be returned to the respondent.

There is no controversy that the respondents' conviction and sentences are directly linked with the forfeiture of their respective livestock. The issue of forfeiture cannot be isolated with their convictions. The confiscation and/or forfeiture order was made after conviction. The forfeiture order was made in terms of the provisions of section 193(1)(a) of EMA with which the respondents were charged. For ease of reference, that section provides that:

"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 conviction of the accused; or

(b) If it is satisfied that an offence was committed 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 Government and, be or

disposed of in the manner as the court may determine."

It is worth noting at the very outset that the reasons that led to the appellants' appeal being successful is that the charge was found to be fatally defective and that livestock do not fall in the ambit of any of the categories of things outlined in the afore cited section 193(1)(a) and (b) of EMA. There is no appeal by either party on those findings.

In making the order of forfeiture, the learned trial magistrate categorically indicated that:

"In addition to that, the livestock of each respective convict are hereby forfeited to the Government under section 193(1)(a) of the Environmental Management Act No. 20/2004"

In view of the proposition of section 193(1) of EMA quoted above, we entirely agree with the learned Senior State Attorney that the EMA is silent on the mode of disposal of a forfeited property. It, however, stems out clearly that the disposal of the forfeited property will be carried out in the manner the court will determine. That dispels the learned Senior State Attorney's assertion that after the forfeiture order

is made, the Government may proceed to carry out the order without recourse to the court.

The learned Senior State Attorney relied on the provisions of section 351(4) of the CPA in supporting his contention that after the forfeiture order is made in respect of livestock and things subject of speedy decay, the Government may proceed to carry out the order without involvement of the court. Much as we agree with Mr. Rwegira that that section provides for the mode of dealing with the forfeited livestock, we do not agree with him that that sub-section should be read in isolation of the rest of the sub-sections. For ease of reference we propose to quote that provision (section 351 of the CPA) in extensor as hereunder:

"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) *When 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.*
- (5) *In this section any reference to:-*
- (a) *"property" includes, in the case of property regarding which an offence appears to have been committed, not only such*

property as has been originally in the possession or under the control of any party, but also any property into or for which it is exchanged and anything acquired by such conversion of exchange, whether immediately or otherwise;

(b) facilitating the commission of an offence includes the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection.”

It is vivid that the above provision of the law provides for the mode of execution of the order of forfeiture or confiscation, generally. The two terms are applied synonymously and/or interchangeably. Under that provision, forfeiture order is made if the person charged is convicted of the offence charged and the property found in his possession has been used or is intended to be used for the purpose of committing or facilitating the commission of the offence. Further, like the provisions of section 193(1) of the EMA, the provisions of section

351 of the CPA, in unambiguous words provides that the forfeited property shall be disposed of as the court may direct. It stipulates that the court may direct the property be kept or sold and if sold direct how the proceeds thereof should be held until the true owner is established and if six months lapse without any one establishing ownership such proceeds shall be paid into and form part of the Consolidated Fund. In all, the court is vested with vast powers on how to deal with the forfeited property during disposal including to direct destruction, keeping, selling, detention and delivery to any person entitled to it [section 351(1)(b), (2) and (3)]. Relevant to the appeal before us is the mode of disposal of the forfeited property provided under section 351(4) of the CPA which was relied on by Mr. Rwegira. Carefully examined, two characteristics are attached to that provision. It is both prohibitive and permissive. It is prohibitive in the sense that it bars disposal of forfeited properties which are not livestock or properties which are subject of speedy and natural decay when there is an appeal relating to them pending in court or otherwise until the appeal period has passed. The court is thereby disempowered to direct the disposal of such properties. On the other hand, it is permissive for it allows livestock and properties subject to speedy and natural decay be

disposed of even before the appeal is disposed of or the appeal period has passed. That is for obvious reasons that if not so dealt with they are likely to perish and or be totally extinguished hence cause great loss or affect the case. In essence, therefore, that provision classifies the forfeited properties into two categories, that is, perishable and non-perishable ones and provides for a distinct procedure of how each category should be handled in the disposal process. It does not therefore oust the court's power to direct how the forfeited properties should be disposed of as stipulated in sub-sections (2) and (3) of section 351 of the CPA. It actually guides the court on what to consider before exercising its statutory duty of directing how the forfeited properties should be disposed of. It goes without saying, therefore, that the provisions of section 351(4) of the CPA should not be read disjunctively from other sub-sections but must be read in conjunction with other sub-sections. In all situations the court's involvement for directions is inevitable.

It is also noteworthy that the above provision takes cognizance of modes of disposal of the properties forfeited provided by the specific provisions contained in the written law under which the conviction was founded which should take precedence to those stated in it [section

351(3) of the CPA]. For instance, in the instant case, since the appellants were convicted under the provisions of the EMA, the court determining the disposal is enjoined to apply the modes of execution of the disposal order provided under the EMA.

A follow-up issue which calls for determination is whether in the instant case there was need to resort to the provisions of section 351 of the CPA?

The foregoing discussion in respect of the provisions of sections 351 of the CPA and 193(1) of EMA reveals one common feature which is attached to them, that is, the disposal of a forfeited property is to be determined by the court. Admittedly, as opposed to the former provision, the later provision runs short of details as to which directions the court is warranted to give and other necessary factors to be considered in the process of disposing a forfeited property. In that accord, a resort to section 351 of the CPA when the court determines the mode of disposing a forfeited property under the provisions of section 193 of EMA is unavoidable.

In conclusion and with all due respect, the above discussion points to the direction that there is nothing in both sections 193(1) of EMA

and 351 of the CPA suggestive or out of which it can be inferred that the Government can directly proceed to carry out the forfeiture order made by the court by disposing the forfeited property be it by way of destroying, keeping or detaining, selling or delivering the same to anybody found to be entitled to it without a court direction as Mr. Rwegira seemed to suggest.

Having laid down the above legal foundation, we now turn to consider and determine the issue whether the High Court order that the forfeited livestock be returned to the respondents was proper and legal?

There was no controversy, in the present case, that the forfeiture order was made after the respondents were convicted of the offence they were charged with. As amply demonstrated above, a forfeiture order is imposed on a person who is convicted of the offence charged. That is in terms of both sections 351 of the CPA and 193(1) of the EMA. The forfeiture of the livestock was directly linked with the respondents' convictions and sentences. As to what happens when the conviction against the appellant is quashed, the Court, with lucidity, gave a direction in the case of **EX.F 7153 D/C Dickson Muganyizi vs.**

(unreported) that:

*"Therefore, if a court makes a confiscation and/or forfeiture order as part of the sentence or orders imposed on a person convicted and the conviction is subsequently quashed, **the quashing of the conviction discharges the instrument of the forfeiture order. The confiscation and/or forfeiture order is linked to the conviction and sentence. In the instant case, the High Court having quashed the conviction against the appellant, the forfeiture order was thereby discharged.** This is the practice in all the Commonwealth countries and the legal position is similar to that in Tanzania under the Crime Proceeds Act, (supra)."*(Emphasis added)

Another pertinent issue that comes to fore which require to be answered is; what follows after the discharge of the forfeited instrument? This issue need not detain us so much. This Court in the

case of **Eriot Ezekiel Dzombe vs. Republic**, Criminal Appeal No. 248 of 2013 (unreported) made it clear that, in terms of the provisions of sections 353 and 358 of the CPA, the trial court and this Court has the power and jurisdiction to order the return of the properties tendered as exhibits to the person who appears entitled to such properties. That position is also in line with the earlier Court's observation in the case of **Aidan Mwalutenga vs Republic**, Criminal Appeal No. 207 of 2006, CAT (unreported). In that case the appellant's conviction with the offence of murder by the High Court was quashed, the death sentence and the forfeiture order of his gun set aside by the Court on appeal. In respect of the forfeited gun the Court stated that:

"The trial court upon conviction of the appellant also forfeited his gun with serial No. 213442L which was admitted as Exhibit P3. Since the appeal has been allowed, the forfeiture order is equally quashed and set aside. The shotgun should be restored to the appellant."

Since the facts in the above cases are considerably identical with the present case, we fully ascribe to those legal propositions. It follows therefore that after the respondents' convictions were quashed, the

forfeiture order was discharged and the respondents were entitled to an order that the forfeited livestock be returned to them. In the circumstances, we are in agreement with Mr. Ngalula that the first appellate Judge was proper to order the return of the forfeited livestock to the respondent.

Before we conclude, we find ourselves obliged to, albeit briefly, comment on Mr. Rwegira's assertion that the forfeited livestock were already sold by the Government at the time the High Court made an order for the return of the same to the respondents was made hence there was nothing to be returned. With respect, there is nothing on record showing or supporting that argument and, in our considered view, it was an assertion from the bar not supported by any proof. Notwithstanding the existence of various administrative correspondences and counter affidavit by the court broker, there is no court direction that the livestock be sold. Mr. Rwegira humbly and readily conceded to that. Consequently, the forfeited livestock could not be lawfully sold. The first appellate Judge was therefore proper and justified to make that order, and we cannot fault her order. It is, further not insignificant to note that although counsel for both sides were concurrent that there was an order of the High Court suspending

the sale of the forfeited livestock, with respect, that fact is not borne by the record in Misc. Criminal Application No. 25 and 26 of 2017 lodged by the applicants. Conversely, that application was resisted by way counter affidavits accompanied with notices of preliminary objection from all the then respondents which, on 15/12/2017, were overruled by the High Court (Makani, J.). Dissatisfied, the appellant (the DPP) lodged in this Court Criminal Appeal No. 46 of 2018 seeking to challenge that decision which was, however, withdrawn at the instance of the appellant on 22/10/2019. In essence, therefore, after the appellant's points of objection were dismissed and the resultant appeal being withdrawn, it follows that the respondents' application to suspend the sale of the forfeited livestock remains not determined on merits and is, legally speaking, still pending in the High Court. That notwithstanding, in the absence of a court order directing disposal of the forfeited livestock, the first appellate court was justified to make disputed order.

Lastly, it is, on record that the 1st respondent identified 46 cows, the 2nd respondent identified 137 cows and 7 donkeys and the 3rd respondent identified 100 cows making a total of 283 cows and 7 donkeys. Both Mr. Rwegira and Mr. Ngalula had no qualms with that

fact. We accordingly direct that only 283 (say two hundred eighty three) cows and 7 (say seven) donkeys which were properly identified by the respondents as being their properties shall be returned to them and the same should be distributed in accordance with the number of livestock identified by each respondent.

All said, save for the number of livestock to be returned to the respondents, the appeal is dismissed in its entirety.

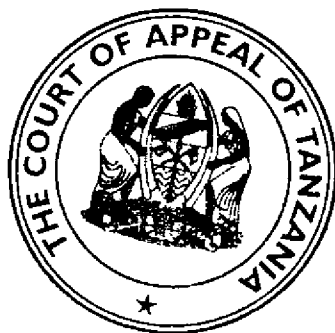
DATED at TABORA this 29th day of October, 2019


S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

This Judgment delivered this 30th day of October, 2019 in the presence of Mr. Miraji Kajiru Senior learned State Attorney, and Mr. Kamaliza Kamoga Kayaga Advocate holding brief of Mr. Shilinde Ngalula for Respondents, is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL