IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 92 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. **MALIMI SENDAMA**
2. **MBEHO NGASA**
3. **KONGWA TURUTU**
4. **MADUHU MBULI**

..... RESPONDENTS

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

dated the 16th day of March, 2018
in
Criminal Appeal No. 147 of 2017

.....

JUDGMENT OF THE COURT

5th & 7th November, 2019

NDIKA, J.A.:

By its "*ex parte* judgment" dated 16th March, 2018 in Criminal Appeal No. 147 of 2017, the High Court of Tanzania sitting at Shinyanga (Kibella, J.) allowed the joint appeal of Malimi Sendama, Mbeho Ngasa, Kongwa Turutu and Maduhu Mbuli, respectively, the first, second, third and fourth respondents herein, against the decision of the District Court of Bariadi District at Bariadi (the trial court). In consequence, the High Court quashed and set aside the separate convictions, sentences and forfeiture orders made against the respondents in respect of the charge on three counts of unlawful

entry into a game reserve, unlawful grazing in a game reserve and unlawful destruction of vegetation in a game reserve. That decision aggrieved the Republic and so the Director of Public Prosecutions (the DPP) has appealed to this Court.

The story behind this case, reduced to its essentials, is as follows. The respondents were jointly and together charged in the trial court on three counts. On the first count, they we charged with unlawful entry into a game reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) read together with the Government Notice No. 275 of 1974. It was alleged that on 8th November, 2017 at or about 13:00 hours the respondents were found at Longolambogo area in Maswa Game Reserve within Itilima District in Simiyu Region without any written permit from the Director of Wildlife having been sought and obtained. In respect of the second count, they were charged with unlawful grazing of livestock in the game reserve contrary to sections 21 (1) and (2) and 111 (1) (a) and (3) of the WCA, it being alleged that the respondents were found, on the same date and at the same time and place stated in respect of the first count, "grazing 458 livestock (sic) without any written permit" from the Director of Wildlife having been sought and obtained. The offence charged on the third count was unlawful destruction of vegetation in the game reserve contrary to

sections 18 (1), (2) and (4) and 111 (1) (a) and (3) of the WCA, the allegation being that the respondents were found on the same date and at the same time and place destroying vegetation by grazing livestock without any written permit from the Director of Wildlife having been sought and obtained.

The prosecution case was based on the testimonies of four witnesses. It was, briefly, adduced that Baraka Dominico (PW1), the Game Warden of Maswa Game Reserve, was accompanied by four game officials including PW3 Michael Shirima and PW4 Joel Yesaya on patrol within the precincts of the game reserve on 8th November, 2017 at 1.00 p.m. About 150 metres away, they saw several cowhands driving a herd of cattle within the reserve. Sensing that arrest was in the cards, the said herdsmen fled away leaving behind the cattle. PW1 and his colleagues, then, seized the abandoned cattle whose count was four hundred and fifty-eight. They moved them to a nearby cowshed at a place called Kambi ya Faru. On the same day the matter was reported at the Bariadi Police Station.

Three days after the cattle were seized, the respondents showed up and claimed to own separately three hundred and thirty-one head of the cattle. However, it is unclear why the figure of the seized cattle that were

admitted in evidence at the trial as Exhibit P.1 rose to three hundred and thirty-nine. Based on the evidence given by PW1, PW3 and PW4, it was averred that the respondents entered the game reserve and that were found grazing their cattle within the precincts of the game reserve area and that they had no permit from the Director of Wildlife appointed under section 7 of the WCA. In the course of grazing their cattle, they destroyed the vegetation in the game reserve.

The respondents denied the accusation against them. On the part of the first, second and third respondents, they claimed that certain game officials found them on the fateful day grazing their cattle at their respective areas near the game reserve but outside its boundaries. To their surprise, the game officials turned vindictive; they seized the cattle for no reason and drove them inside the game reserve. On his part, the fourth respondent adduced that he was at his home on the fateful day when his cattle were seized by the game officials from his cowhand, Nzela Maduhu. He bemoaned that he was arrested and then charged despite producing to the police a relevant permit that he got from the village authorities on 12th November, 2017.

The learned trial Resident Magistrate found the charges proven beyond a reasonable doubt. Accordingly, he convicted them of the offences and

sentenced each to three years' imprisonment on each of the three counts, which were to run concurrently. In addition, the court ordered the forfeiture to the government of the seized cattle (Exhibit P.1).

Being aggrieved, the respondents jointly appealed to the High Court against their respective convictions, sentences and forfeiture order on five grounds of grievance.

When the appeal came up for the hearing before Kibella, J. on 9th March, 2018, the respondent Republic, through Ms. Salome Mbughuni, learned Senior State Attorney, assisted by Mr. Moses Mafuru, learned State Attorney, prayed for the stay of the hearing of the appeal on the ground that they had lodged a notice of appeal to this Court against the ruling handed down on 8th February, 2018 in Miscellaneous Criminal Application No. 32 of 2017, a matter arising from and incidental to that appeal. To be sure, in that application the respondents had successfully prayed for the freezing of the sale of the forfeited cattle pending the hearing and determination of the appeal. It was the learned State Attorneys' argument that the appeal should only be heard after this Court had determined the appellant's appeal. The respondents, through Mr. Audax T. Constantine, learned advocate, fiercely opposed the stay of the hearing prayed for, on grounds that we need not reproduce herein.

On 13th March, 2018 the learned Judge, in the presence of Ms. Mbughuni and Mr. Mafuru, on the one hand, and Mr. Constantine, on the other, delivered his ruling rejecting the stay prayed for on the reason that the appellant's appeal to this Court from the ruling in the application for stay of execution had no bearing in the appeal before him and that the hearing and determination of the appeal before him would not pre-empt the merits of the said appeal to this Court. In addition, he held that the appellant's intended appeal against the aforesaid ruling was on an interlocutory matter and that it was unmaintainable. He thus ordered the appeal to proceed to the hearing as it had been scheduled. At that point, all hell broke loose. As shown at pages 72 and 73 of the record of appeal, both Ms. Mbughuni and Mr. Mafuru, rather dramatically and unprecedentedly, elected to leave the court and took no further part in the hearing. The hearing, then, proceeded with Mr. Constantine addressing the grounds of appeal.

On 16th March, 2018, the learned Judge delivered what he termed *ex parte* judgment allowing the appeal. That outcome was mainly predicated on the learned Judge's finding, upholding the first ground of appeal, that the case disclosed a dispute over ownership of the tract of land on which the respondents' cattle were allegedly found grazing and that such dispute had to be resolved in a civil action before criminal charges could be brought

against the respondents by the appellant. We think we should let the record of appeal, at page 94, to speak for itself:

> *"As rightly argued by [Mr. Constantine], the issue of ownership was well raised. And it is trite that where such a situation occurs the court should stop the criminal proceedings and advise the complainant to bring a civil action to determine the claim of ownership as was held in the cases rightly cited by [Mr. Constantine], the case of* ***Ismail Bushaija v. Republic*** *[1991] TLR 100,* ***Sylvery Nkangaa v. Raphael Albertho*** *[1992] TLR 110 and the case of* ***Alinyo and Another v. Republic*** *[1974] 1 EA 544."*

The learned Judge went on to conclude that:

> *"Proceeding with a criminal charge under the circumstances was wrong as the dispute of ownership of land was not determined through a civil court. Therefore, I am in agreement that the trial court went wrong when it proceeded with that case under the circumstances."*

Besides, the learned Judge upheld several other grounds of appeal and held that the charges against the respondents herein were unproven beyond a reasonable doubt and that the custodial sentences imposed on the respondents who were mere first offenders and in the absence of

aggravating circumstances were unjustified. In consequence, the High Court quashed the convictions and set aside the sentences and the forfeiture order. The forfeited three hundred and thirty-nine head of cattle were ordered to be returned to the respondents.

In this appeal, the DPP initially raised five grounds of complaint in the Memorandum of Appeal lodged on 24th December, 2018 as follows:

1. *That the trial (sic) Judge erred in law and in fact by deciding to hear the appeal ex parte and deprived the appellant's right to be heard.*
2. *That the trial (sic) Judge erred in law and in fact by deciding the appellant's fate of the appeal to the Court of Appeal while the appeal was not yet determined by the Court of Appeal.*
3. *That the trial (sic) Judge erred in law and in fact in holding that there was a dispute of ownership of land in Criminal Case No. 213 of 2017 in the District Court of Bariadi District at Bariadi.*
4. *That the trial Judge misdirected himself in holding that livestock does not mean cattle and that there was a variance between the charge and the evidence.*
5. *That the trial (sic) Judge erred in holding that prosecution was not proved beyond reasonable doubt while the case was proved beyond reasonable doubt.*

Pursuant to Rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the DPP lodged a Supplementary Memorandum of Appeal on 31st October, 2019 raising one more ground of appeal thus:

1. *That the first appellate Judge erred in law to entertain the appeal before him while the issue of land ownership between the appellant and the respondents was not determined.*

When the appeal came up for hearing before us on 5th November, 2019, Messrs. Miraji Kajiru and Deusdedit Rwegira, learned Senior State Attorneys, appeared for the DPP. Mr. Constantine, appeared for the respondents as he did in the courts below.

Before the hearing commenced in earnest, Mr. Kajiru intimated to the Court that the DPP would only argue the single ground of grievance contained in the Supplementary Memorandum of Appeal and urged us to mark the five grounds contained in the original Memorandum of Appeal abandoned. On further reflection, the DPP, this time through Mr. Rwegira, prayed under Rule 81 (1) of the Rules to argue a new ground of appeal not raised in the original or supplementary Memorandum of Appeal, instead of the sole point in the supplementary Memorandum. The said new ground was:

1. *That the first appellate court erred in law for not nullifying the trial court's proceedings and the judgment thereon after satisfying itself that the issue of land ownership between the parties was not yet determined in a civil court.*

We granted leave to the DPP to argue that new ground as a sole point of grievance, there being no objection from Mr. Constantine.

In his submissions, Mr. Rwegira argued that when the prosecution case was examined in tandem with the defence evidence, a dispute over land ownership emerged in the sense that the swathe of land where the respondents were found grazing their cattle was individually claimed by the respondents as their rightful property while it was the prosecution case that the said land fell within the precincts of Maswa Game Reserve. However, while supporting the High Court's holding that the instant case disclosed a land dispute and that after such a situation had occurred the trial court should have stopped the criminal proceedings and directed that the issue be resolved in a civil action, the learned Senior State Attorney faulted the High Court for failing to make two consequential orders: first, that the court omitted nullifying the trial court's proceedings and the judgment thereon; and second, the court failed to direct that the land dispute be referred to a court or tribunal of competent jurisdiction for the resolution of the land

dispute and that the DPP should only take appropriate action once the land question is finally resolved.

When probed by the Court on the appropriate order to be made on the forfeited livestock, Mr. Rwegira conceded that it was right that the said livestock be returned to the respondents as the forfeiture order could not be maintained once the convictions against the respondents were quashed. He thus beseeched us to allow the appeal.

Mr. Constantine was in accord with his learned friend's submissions. Relying on the decision of the case in **Kusekwa Nyanza v. Christopher Mkangala**, Criminal Appeal No. 233 of 2016 (unreported), he supported the High Court's decision on the correct approach to deal with a land dispute in civil court before criminal proceedings are entertained. However, like his learned friend, he was perturbed that the High Court shied away from nullifying the premature trial court's proceedings and the decision thereon. He also agreed that after the convictions and sentences were quashed and set aside, it was proper that a restitution order be made over the forfeited cattle in favour of the respondents.

We have examined the record of appeal and taken account of the concurring submissions of the learned counsel of the parties on the sole ground of grievance in this appeal.

To begin with, we agree with the learned counsel for the parties that the evidence on record, on the whole, disclosed a dispute over ownership of the tract of land on which the respondents' cattle were allegedly found grazing and that the High Court rightly decided that such dispute was a civil matter that had to be resolved in a civil court before criminal charges could be brought against the respondents by the appellant. The same position was taken by the High Court in the cases of **Sylvery Nkangaa** (supra) and **Ismail Bushaija** (supra) which the learned Judge referred to in his judgment. This Court cited those two cases with approval in the case of **Simon Mapurisa v. Gasper Mahuya**, Criminal Appeal No. 221 of 2006 (unreported) where it was held that:

> *"**Disputed ownership of iand is not resolved in criminal proceedings**. The law on that issue is that where there is a dispute regarding boundaries of adjacent private land or ownership of a part or whole of adjacent land, such dispute is resolved in a civil court. From then onwards, encroachment onto the land of the other could be a trespass and a criminal*

charge can be brought against the offending party."

[Emphasis added]

See also the case of **Kusekwa Nyanza** (supra) which followed the stand taken in **Simon Mapurisa** (supra).

As intimated earlier, both learned counsel submitted in unison that the High Court, having held that the criminal proceedings in the instant case ought to have been preceded by a civil action over ownership of the disputed tract of land, should have nullified the trial court's proceedings and the decision thereon. We agree with them and hold that it was not enough that the High Court quashed the respective convictions against the respondents and set aside the sentences and the forfeiture order. In our view, the premature trial court's proceedings and the decision thereon cannot, in the circumstances of this case, be left to stand. Thus, it behoves this Court to do what the High Court ought to have done, which was, first, to nullify the trial court's proceedings and the judgment thereon, as we hereby do; and secondly, to direct that the land dispute be referred to a court or tribunal of competent jurisdiction for the resolution of the land dispute. Should the DPP be minded to initiate fresh criminal proceedings against the respondents, he should do so once the land question is finally resolved.

Certainly, there was no controversy over the tenability of the order for restitution of the forfeited cattle made by the High Court following the forfeiture order being set aside. Both learned counsel for the parties supported the restitution unreservedly. On our part, we endorse the ordered restitution particularly in view of our recent decision in the **Director of Public Prosecutions v. Kilo Kidang'ai and Two Others**, Criminal Appeal No. 340 of 2018 (unreported) where we quoted from our earlier decision in **Ex.F.7153 D/C Dickson Muganyizi v. Republic**, Consolidated Criminal Appeal Nos. 261 and 264 of 2013 (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 Commonwealth countries and the legal position is similar to that in Tanzania...."* [Emphasis added]

Nonetheless, we noted a minor error in the restitution order which we must rectify. While the respondents in their respective defence evidence claimed ownership of a total of three hundred and thirty-six head of cattle, the High Court mistakenly ordered all three hundred and thirty-nine head of cattle tendered in court as Exhibit P.1 be returned to the respondents. We thus adjust the restitution order by ordering that only three hundred and thirty-six head of cattle be returned to the respondents in the following breakdown: the first respondent – eighty-eight head of cattle; the second respondent – one hundred and thirty-two; the third respondent – twenty-three; and the fourth respondent – ninety-three.

Before we take leave of the matter, we wish to make passing remarks on two issues. The first one concerns the somewhat incorrect but innocuous misdescription by the learned High Court of his judgment on the appeal as an "*ex parte* judgment." On this issue, it is our view that none of the provisions of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) contemplate an *ex parte* judgment being rendered on appeal on the reason that the hearing was conducted in the absence of the respondent. Certainly, the DPP was entitled to appear and take part in the hearing in terms of section 366 of the CPA. But the decision by the two State Attorneys to leave the court amounted to a

waiver by the DPP of his right to address the court in reply and that the hearing cannot be said, strictly speaking, to have been conducted *ex parte*.

We are fortified in our view by the decision of the defunct East African Court of Appeal in **Badrudin Hasham Lakhani and Another v. Pyarali Hasham Lakhani** [1978] LRT n.26, brought to our attention by Mr. Constantine, where the said Court held that:

> *"When the suit, the subject of this appeal, was decided, it had been set down for hearing, not for ex parte proof. The appellants were represented by an advocate, who, on being refused an adjournment, elected to leave the court and take no further part in the hearing. Such a state of affairs was considered by this court in Din Mohamed v. Lalji Visram (1937) 4 EACA 1,* ***when it was held that if counsel, duly instructed, on being refused an adjournment, elects to leave the court and takes no further part in the case, that fact does not constitute the proceedings ex parte****. That decision was approved, and held to be binding on this court, in*
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> *Finaughty v. Prinsloo [1958] EA 657."* [Emphasis added]

In our view, the above statement of principle is by the same token applicable to the criminal appeal before the High Court. Thus, the learned

Judge erred to describe his decision as ***ex parte*** **judgment.** In law, it was simply a **judgment**. We must hasten to say, however, that the said error was innocuous.

We now move on to the second aspect, which relates to the apparently odd conduct exhibited by the two learned State Attorneys who left the court and refrained from participating in the hearing of the appeal before Kibella, J. after he had rejected their prayer for a stay of the hearing of the appeal. Granted that this disquieting aspect was not an issue in this appeal, it would have been agreeable not to advert to it but, we think, doing so and passing such conduct over in silence might send a wrong signal that this Court condones such conduct. We have no doubt that the said behaviour, bordering on contempt of court, was utterly deplorable. It was not just discourteous but also it tended to undermine the authority of the High Court right after it had rendered a decision that the two learned State Counsel were discontented with. Besides being an affront to judicial authority, the learned State Counsel's behaviour could amount to a breach of the recently promulgated Code of Ethics and Professional Conduct for Law Officers and State Attorneys, G.N. No. 600 of 2019, which seeks to uphold professional and honourable conduct of State Attorneys especially in court proceedings.

Here we have in mind, for example, the provisions of Rule 9 of the Code on justice and the administration of justice. That rule stipulates as follows:

> *"9. Every Law Officer and State Attorney has a duty to-*
>
> *(a)* ***encourage public respect for justice*** *and to uphold and strive to improve the administration of justice;*
>
> *(b)* ***treat the court with candour, courtesy and respect*** *and shall not attempt to influence court decisions by use of deceptive or reprehensible methods;*
>
> *(c) deal with other lawyers fairly, courteously and in good faith; and*
>
> *(d) uphold the integrity and reputation of the legal profession and promote principles of fairness, justice and honesty."* [Emphasis added]

We certainly wonder in whose interests was the refusal to take part in the proceedings made. Had the learned State Attorneys acted as consummate professionals, they would have stayed put and participated in the proceedings knowing quite well that the DPP had recourse to appeal to this Court against the impugned ruling of the High Court. It is hoped that this kind of conduct will never recur; for, apart from being inimical to sound

administration of justice it demeans the very office of the DPP that the two State Attorneys are serving and were bound to be representing in court on that fateful day.

In the upshot of the matter, we allow the appeal as we find merit in the sole ground of complaint. In consequence, we nullify the trial court's proceedings and the decision thereon and direct that the land dispute be referred to a court or tribunal of competent jurisdiction for the resolution of the land dispute. The DPP may only take appropriate measures once the land question is finally resolved. The restitution order in favour of the respondents made by the High Court is sustained subject to the adjustment made herein.

It is so ordered.

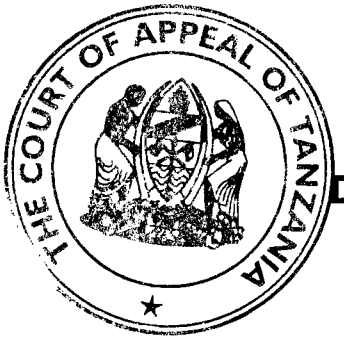
DATED at **TABORA** this 6th day of November, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2019 in the presence of Mr. Tumaini Pius learned State Attorney for the appellant/Republic and Mr. Audax Theonest Constantine, counsel for the respondents, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL