IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: JUMA, C.J., MWARIJA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 560 OF 2016

MADUHU SAYI @ NIGHO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Shinyanga)

(Makani, J.)

dated the 4th day of November, 2016
in
Criminal Appeal No. 47 of 2015

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RULING OF THE COURT

12th & 17th August, 2020

MWARIJA, J.A.:

In the District Court of Bariadi, the appellant was charged with four counts under the National Parks Act [Cap. 282 R.E. 2002] (the NPA) and the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA). In the 1st count, he was charged with the offence of unlawful entry into a national park contrary to s. 21 (1) and (2) of the NPA; that on 7/11/2012 at about 14:00 hrs, he was found having entered into Serengeti

National Park at Nyaruboro hills area within Bariadi District in Shinyanga Region without written permit from the Director of National Parks.

In the 2nd count he was charged with unlawful possession of weapons in a national park contrary to s. 24 (1) (b) and (2) of the NPA. It was alleged that on the same date, place and time as stated in the 1st count, the appellant was found in possession of one knife, one machete, and five trapping wires (the weapons) without any permit and without satisfactory explanation that the weapons were not intended to be used for the purpose of hunting, wounding or capturing animals. It was indicated in the charge that the offence is an economic crime under the First Schedule to the EOCCA.

In the 3rd and 4th counts, the appellant was charged with the offence of unlawful hunting in a national park and being in unlawful possession of Government trophies contrary to sections 23 (1) of the NPA and 86 (1) and 2 (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) respectively. The offences were also shown to be falling under the EOCCA. It was the prosecution's allegation that on the same date, place and time as stated in the 1st count, the appellant was found with four tails and thirty two dried pieces of wildbeest meet valued at TZS 4,108,00.00, eight fresh

pieces of meat and one tail of zebra valued at TZS 1,896,000.00, one dried skin of grant's gazelle valued at TZS 711,000.00 and four pieces of fresh warthog meat valued at TZS 711,000.00 (the trophies) without any written permit from the Director of the National Parks. On the basis of that quantity, it was alleged that the appellant killed four wildbeests, one zebra, one grant's gazelle and one warthog all total valued at TZS 7,426,000.00 the property of Tanzania Government.

The appellant denied the charge and therefore, the case had to proceed to trial whereupon the prosecution relied on the evidence of four witnesses while the appellant relied on his own evidence in defence.

The background facts leading to the arrest and arraignment of the appellant can be briefly stated as follows. On 7/11/2012 at about 14:00 hrs, the Game Rangers of Serengeti National Park (the National Park) by the names of Christian Mrema and Raymond Bernard were on patrol at Nyaruboro hills as part of their routine work. While patrolling, they noticed a trace indicating that a person had passed there and they thus decided to follow the trail. After an unspecified distance, they saw the appellant whom they arrested. They took him to Bariadi police station where D/Cpl

Masalu (PW4) recorded the appellant's statement and later prepared the charge.

At the trial, the two Game Rangers testified as PW2 and PW3 respectively. In his evidence, which was supported by that of PW3, PW2 testified that he arrested the appellant at a bushy area on Nyaruboro hills within the National Park having in his possession the weapons and the Government trophies. He sought to tender the weapons and despite objection by the appellant, the same were admitted in evidence as exhibit P3 collectively. On his part, Jesca Mathias a Game Officer who testified as PW1, said that she identified the meat, skin and animal parts to be those of a wildbeests, zebra, grant's gazelle and a warthog. She also valued and prepared a valuation report to that effect. The witness tendered the inventory and valuation report and the same were admitted in evidence as exhibits P1 and P2 respectively.

In his defence, the appellant testified that on the material date of his arrest, he was at the area bordering the National Park searching for his brother's goats which had run away after a hyena had invaded them in their hut. While in that process, he met a certain young boy who was running. When he asked him as to why he was on his heels, the boy

replied that certain persons were chasing him. Shortly thereafter, he went on to state, a motor vehicle belonging to the National Park arrived and PW2 and PW3 who were in that motor vehicle arrested him. He was taken to the National Park camp and later to Bariadi police station where the charge against him was prepared and later on, he was taken to court.

In its decision, the trial court found that the prosecution evidence particularly that of PW1, PW2 and PW3 had sufficiently proved the case against the appellant on all counts. The learned Resident Magistrate was of the view that the appellant was found in the National Park while he did not have any written permit of the Director of National Parks. He found further that, from the evidence of PW2 and PW3, the appellant was found in possession of the weapons and the Government trophies. The trial Magistrate believed the evidence of PW1 that the pieces of meat, skin and tails were of the animals described in the 4th count; that is to say, wildbeests, a zebra, a grant's gazelle and a warthog having a total value of TZS 7,426,000.00.

Upon that finding, the learned trial magistrate convicted the appellant and sentenced him to pay a fine of TZS 10,000.00 or one year imprisonment in the 1st count and a fine of TZS 20,000.00 or two years

imprisonment on the 2nd count. On the 3rd count, he was sentenced to pay a fine of TZS 50,000.00 or three years imprisonment while on the 4th count, he was sentenced to pay a fine of TZS 20,000.000.00 or twenty years imprisonment. The sentences were ordered to run consecutively.

The appellant was aggrieved and therefore, preferred an appeal to the High Court. Having considered the appeal, the High Court found that the weapons which were received as exhibit P.3 collectively, were improperly admitted in evidence because, despite the objection by the appellant, the trial court did not assign reasons for overruling that objection. The same were thus expunged from the record. As a consequence, the learned first appellate Judge was of the view that the remaining evidence on the 2nd and 3rd counts was, in the circumstances, insufficient to warrant the appellant's conviction. She therefore quashed the appellant's conviction on those counts.

With regard to the 1st and 4th counts, the learned Judge upheld the finding of the trial court that the evidence of PW1, PW2 and PW3 sufficiently established the appellant's guilt on those counts. She therefore, sustained the conviction and sentences imposed by the learned trial magistrate.

The appellant was further dissatisfied with the decision of the High court hence this second appeal. He challenges that decision on three grounds which, for reasons which will be apparent herein, we do not intend to consider them.

At the hearing of the appeal which was conducted through video conferencing (Shinyanga High Court and Shinyanga Prison), the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney, Mr. Nassoro Katuga, learned Senior State Attorney and Ms. Edith Tuka, learned State Attorney.

Before the appeal could proceed to hearing, Mr. Katuga sought and obtained leave to argue a point of law to the effect that the trial was defective for the trial court's failure to comply with the provisions of s.231(1) of the Criminal Procedure Act [Cap.20 R.E. 2002] (the CPA). He submitted that from the record, after the closure of the prosecution case, in terms of s. 231(1) (a) and (b) of the CPA, the trial magistrate ought to have informed the appellant of the rights accorded to an accused person under that section. The section provides as follows:-

"231-

(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made up against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of section 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right -

(a) To give evidence whether or not on oath or affirmation, on his own behalf, and

(b) To call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer, and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

The learned Senior State Attorney submitted that, from the record, although it is shown that the learned Resident Magistrate informed the appellant of the rights stipulated under s. 231 (1) of the CPA, his answer

was not recorded as required by s. 231(1) (b) of the CPA. The trial magistrate merely recorded that the appellant had replied "that he will defend himself." According to Mr. Katuga, since the record does not show that the appellant was informed of his rights as regards the manner of giving his defence, whether or not on oath or affirmation or the right to call witnesses, he was not accorded a fair hearing.

The learned Senior State Attorney submitted yet another point that, according to the record, the preliminary hearing was not properly conducted. This, he said, is because s. 192 (3) of the CPA was not complied with. The said provision requires that, after the facts of the case have been read over to the accused persons, a memorandum of undisputable facts shall be prepared and read over to the accused person before he signs it. Mr. Katuga submitted that the record does not show that the trial magistrate discharged that duty. However, since the appellant did not admit any of the incriminating facts, it was the learned Senior State Attorney's submission that the omission is curable under s. 388 of the CPA because it did not prejudice the appellant.

In his reply, the appellant did not have any useful argument to make as regards the point at issue, understandably because the matter involved

a point of law. He merely urged us to allow his appeal and release him from prison where he had been incarcerated for eight years. To that prayer, Mr. Katuga urged us to determine it as the justice of the case may require.

Having heard the learned Senior State Attorney and the appellant, the matter which arises for our consideration centres on the effect of the omission by the trial court to fully comply with s. 231 (1) of the CPA. It is trite position that where a trial court fails to comply with the provisions of s. 231 (1) of the CPA such non-compliance vitiates the trial. In the case of **Cleopa Mchiwa Sospeter v. The Republic**, Criminal Appeal No. 51 of 2019 (unreported) in which a similar situation occurred, we stated as follows:-

> *"... this Court has oftentimes held that failure to comply with the mandatory provisions of s. 231 (1) of the CPA vitiates subsequent proceedings."*

We cited *inter alia,* the case of **Maneno Mussa v. Republic** (Criminal Appeal No. 543 of 2016) [2018] TZCA 242 (19 April, 2018) TANZLII. In that case, the Court observed that non-compliance with s. 231

(1) of the CPA which safeguards the rights of an accused person to a fair trial, is a fatal omission.

In the case at hand, as submitted by Mr. Katuga, the record does not show the manner in which the appellant elected to give his evidence and whether or not he intended to call witnesses. The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such rights after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel.

That being the position, we hereby invoke the provisions of s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and hereby nullify the proceedings and the judgments of both the trial court and the High Court, quash the appellant's conviction and set aside the sentences which were upheld by the High Court.

Having considered that the omission had the effect of denying the appellant a fair trial and the fact that he has served almost over one third of his imprisonment term, we do not find it appropriate to order a re-trial.

We thus order that he be released from prison forthwith unless he is otherwise lawfully held.

DATED at **SHINYANGA** this 14th day of August, 2020.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 17th day of August 2020, in the Presence of the Appellant in person via video link and Mr. Jukaeli Reuben Jairo, State Attorney for the Respondent is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL