IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 355 OF 2017

ANANIA CLAVERY BETELA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Arufani, J.)

dated the 14th day of August, 2017
in
Criminal Appeal No. 254 of 2016

....

JUDGMENT OF THE COURT

4th & 22nd May, 2020

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania at Dar es Salaam (Arufani, J.) in Criminal Appeal No. 254 of 2016 affirming the decision of the Resident Magistrate's Court of Coast Region at Kibaha convicting Anania Clavery Betela, the appellant, of unlawful possession of government trophy and sentencing him to twenty years' imprisonment and payment of TZS. 1,980,000,000.00 as a fine. The offence was laid under section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 ("the WCA") read together with Paragraph 14 (d) of the First Schedule to

and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 RE 2002 ("the EOCCA").

It was alleged before the trial court that the appellant, on 23rd May, 2014 at Vigwaza Village within Bagamoyo District in Coast Region, was found in possession of government trophy, to wit, twenty-eight pieces of elephant tusks valued at TZS. 198,000,000.00, the property of the Government of Tanzania without a permit.

To prove its case, the prosecution produced six witnesses whose evidence was augmented by nine pieces of documentary and physical exhibits. The prosecution case, on the whole, presented the following narrative: Veneranda Stephen Njokantala (PW4), a nurse working at Rwembe Village in Kilosa, engaged the appellant on a contract executed on 10th February, 2013 (Exhibit P.8) to drive and operate her saloon car, a Toyota Mark II registered as T.129 ARH, as a taxicab. The arrangement was that the appellant would only ply within Kilosa and that he would need permission from PW4 for trips outside Kilosa. On 22nd May 2014, PW4 expected the appellant to remit to her weekly collection from the business but the latter did not do so. On the following day, his phone was unreachable and he was nowhere to be seen.

Unbeknown to PW4, the appellant had left Kilosa and was driving the taxicab on his way to Dar es Salaam. As fate would have it, the car was involved in an accident around 01:00 hours on 23rd May, 2014 at Vigwaza village located between Mlandizi and Chalinze along the Tanzania-Zambia highway. According to Mambo Khalfani (PW6), a security guard at a nearby TSN petrol station, the accident rendered the car immobilized. The appellant, then, had the car pushed from the highway and, with permission, he parked it at the petrol station where he remained until 20:00 hours when police officers got there.

Assistant Inspector Selemani Zuberi Madua (PW5), a police officer in charge of investigation at the Head Office in Dar es Salaam, adduced that he travelled along with two junior police officers from Dar es Salaam to the petrol station on 23th May, 2014 following being tipped by a whistleblower that the appellant's car had some illegal consignment. On arriving at the petrol station, they found the car but the appellant fled the scene upon noticing the police officers. The appellant was apprehended and brought back a short while later. There and then, the car was searched and a red/black bag (Exhibit P.4) was retrieved from the boot, its contents being twenty-eight pieces of elephant tusks (Exhibit P.5). The certificate

of seizure of the tusks (Exhibit P.10), signed by four persons including the appellant, PW5 and PW6, was admitted in evidence as was the certificate of seizure of the motor vehicle (Exhibit P.9).

According to PW5, the appellant along with the tusks were conveyed on 24th May, 2014 to the supposed Task Force Offices at Mikocheni in Dar es Salaam. Later that day at the said offices, PW1 D.7847 D/Sgt Beatus interrogated the appellant and recorded his cautioned statement (Exhibit P.1) by which he confessed to have been found in possession of the seized tusks. Three days later, PW2 Bakari Nyakongoa, a Wildlife Officer, went to the said offices and examined the tusks and assessed their value. According to him, the tusks weighed 33.6 kilogrammes and were worth TZS. 198,000,000.00. The trophy valuation certificate and list of the tusks as marked were admitted, respectively, as Exhibits P.2 and P.3.

There was further evidence that the tusks were subsequently conveyed and handed over to D/SSgt Hamisi of Chalinze Police Station who stored them until 8th January, 2016 when they were handed over to PW3 No. E.9305 D/Cpl Philipo, of the same station, for tendering in court on that very day by PW2.

The appellant's defence was a general denial of liability. He adduced that he was arrested at Chalinze on 21st May, 2014 as he was travelling back to Mang'ula from Dar es Salaam where he had gone to look for a market for his rice produce. He charged that the prosecution witnesses including his alleged employer (PW4) lied to the trial court against him.

In its judgment, the trial court was impressed by the prosecution case. It held that it was sufficiently proven that the appellant was found in possession of the tusks which were seized from a car over which he had control as he was its driver. In consequence, the court convicted and sentenced him as hinted earlier. Rather surprisingly, however, the court, for an obscure cause, refrained from acting on the cautioned statement against the appellant. It is remarkable that on the first appeal, the learned Judge noted the omission but then held that the statement could not have been lawfully acted upon because it was recorded by PW1 outside the prescribed four basic hours in violation of section 50 and 51 of the Criminal Procedure Act, Cap. 20 RE 2002. Nonetheless, the learned Judge upheld the conviction and the corresponding sentence.

Still discontented, the appellant has appealed to this Court on five grounds raised in the Memorandum of Appeal lodged on 16th February,

2018. On 22nd January, 2020 he lodged a supplementary Memorandum of Appeal containing six grounds of appeal. This memorandum is more focused and subsumes the gist of the complaints raised in the earlier one.

At the hearing of the appeal, the appellant was self-represented whereas the respondent appeared through Ms. Elizabeth Mkunde and Ms. Candid Nasua, learned State Attorneys.

In his oral argument, the appellant quite understandably abandoned the original memorandum but adopted and focused on the contents of his supplementary Memorandum of Appeal whose thrust is the following complaints: **one**, that the chain of custody of the supposedly seized tusks was broken. **Two**, that Exhibits P.2, P.3, P.6 and P.10 were not read out in court after they were admitted in evidence. **Three**, that the tusks (Exhibit P.5) were wrongly admitted PW2 having failed to lay the foundation on how they came into his possession before tendering them in evidence. **Four**, that there was no proof that PW2 was a gazetted officer competent to examine and assess the value of the tusks. And **finally**, that the appellant being a first offender ought to have received a milder sentence.

Beginning with the complaint regarding the chain of custody of the tusks, the appellant argued that the tusks were not labelled at the petrol station by PW5 who allegedly seized them; that there was no documentary proof that the tusks were received and stored at the Task Force Offices at Mikocheni; that the person who had the custody of the tusks at the said offices was not called as a witness; that the said D/SSgt Hamisi who took custody of the tusks from 27th May, 2014 after they were conveyed from the Task Force Offices to Mlandizi was a material witness but was not called to testify; and that PW3 adduced that he took possession of the tusks from D/SSgt Hamisi from Chalinze Police Station but there was no explanation how the tusks reached there from Mlandizi where they were supposedly stored as stated by PW5. On this basis, it was argued that there was no proof that Exhibit P.5 was the tusks that were allegedly retrieved from the seized taxicab at the petrol station. Reliance was placed on the **Director of Public Prosecutions v. Shiraz Mohamed Sharif** [2006] TLR 427 at 430 as well as the unreported decisions of the Court in **Moses Muhagama Laurence v. The Government of Zanzibar**, Criminal Appeal No. 17 of 2002; **Hussein Said Said @ Baba Karim @ White v. Republic**, Criminal Appeal No. 298 of 2017; **Asante Mohamed @ Kotoko v. Republic**, Criminal Appeal No. 169 of 2016; and **Kisonga**

Ahmad Issa & Another v. Republic, Criminal Appeal No. 171 of 2016 consolidated with Criminal Appeal No. 362 of 2016.

The appellant then attacked the handling of Exhibits P.2, P.3, P.6 and P.10, contending that their respective contents were not read out in court after the documents were admitted in evidence. On the authority of **Rashid Amir Jaba & Another v. Republic**, Criminal Appeal No. 204 of 2008 (unreported), he urged that the said exhibits be expunged. Relying on the case of the **Director of Public Prosecutions v. Sharif s/o Mohamed @ Athumani & Six Others**, Criminal Appeal No. 74 of 2016 (unreported), the appellant argued that Exhibit P.5 was wrongly admitted in evidence on reason that PW2 failed to lay the foundation for his competence to tender it as he did not say how he came by possession of the tusks. As regards the grievance that PW2 was not gazetted, the appellant referred to PW2's evidence starting from page 21 of the record of appeal, contending that the said witness omitted to state if he was a gazetted Wildlife Officer competent to examine and assess the suspected pieces of government trophy.

Finally, the appellant contended that he ought to have received a milder punishment under the EOCCA, not the harsher penalty under the

WCA. He cited the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported) where the Court confirmed a milder punishment levied under the EOCCA instead of the harsher sentence under the WCA on the basis of the principle that penal statutes must be interpreted in favour of the accused person.

On the other hand, Ms. Mkunde valiantly opposed the appeal. Beginning with the chain of custody of the tusks, she conceded that the tusks were not labelled at the petrol station immediately after they were seized from the taxicab but that the said oversight was trifling as the tusks remained in PW5's custody and control until when they were subsequently marked and labelled by PW2. She further argued that the tusks were subsequently handed over by PW5 to D/SSgt Hamisi at Chalinze Police Station and that they stayed in the latter's custody until when they were passed on to PW3 on 8th January, 2016 for tendering in court by PW2, which happened on that day. The learned State Attorney characterized the assertion attributed to PW5 at page 37 of the record of appeal that the tusks were handed over to D/SSgt Hamisi at Mlandizi, contending that it must have been a slip of the pen as the evidence was clear that the tusks were conveyed from Mikocheni to Chalinze. She disputed that failure to

produce D/SSgt Hamisi as a witness was fatal to the prosecution case because he was not a material witness.

As regards the handling of Exhibits P.2, P.3, P.6 and P.10, Ms. Mkunde conceded to the alleged irregularity and urged that the four documents be discounted. However, on the authority of **Issa Hassan Uki** (supra) she quickly put up a rider that the testimonies of PW2, PW3, PW5 and PW6 sufficiently covered the contents of the exhibits liable to be expunged.

Coming to the grievance that the tusks (Exhibit P.5) were wrongly admitted without PW2 having established any foundation for admission, Ms. Mkunde refuted the allegation as she submitted that PW2 was competent to tender the tusks in evidence and that what happened to the tusks from their seizure to the point they were tendered in evidence was fully explained by the testimonies of PW3, PW5 and PW6. She added that the absence of paper trail to document each and every step in the movement of the tusks did not ruin the prosecution case because such property is not easily tampered with. As regards PW2's competence to examine and evaluate the tusks, the learned counsel submitted that the impugned evaluation and valuation was conducted in accordance with

section 86 (4) and 114 (1), (2) and (4) of the WCA. She insisted that PW2 was a Wildlife Officer as defined by section 3 of the WCA and that there was no requirement for such officers to be gazetted.

On the impugned sentence, the learned State Attorney supported the appellant's position and urged that, as held in **Issa Hassan Uki** (supra), a milder sentence under the EOCCA should have been imposed on the appellant. Save for the concession as regards sentence, Ms. Mkunde prayed that the appeal be dismissed.

Rejoining, the appellant maintained that the chain of custody was severed on the ground that although the tusks were seized on 23rd May, 2014, they were not labelled until 27th May, 2012. That there was no documentary proof on the movement of the tusks from Mikocheni to Mlandizi and finally to Chalinze. And that PW3 took the tusks from D/SSgt Hamisi who was not called as a witness but no detail was given as to how and when PW2 took possession of the tusks and then tendered them in evidence.

We have carefully examined the record and considered the competing arguments of the parties. To resolve the issues of contention in this appeal, we find it logical to address, at first, the second and fourth

grounds of appeal in succession. Then, we shall interrogate conjointly the issues of chain of custody along with the manner in which the tusks (Exhibit P.5) were admitted in evidence after being tendered by PW2, which are the subject of Grounds One and Three. Finally, we shall deal with the propriety of the sentence, in the event we sustain the appellant's conviction.

As hinted earlier, Ms. Mkunde conceded to the second ground of appeal as formulated above that Exhibits P.2, P.3, P.6 and P.10 were not read out in court after they were admitted in evidence. Admittedly, these impugned documents are key exhibits: Exhibit P.2 was the trophy valuation certificate; Exhibit P3 was the list of seized elephant tusks with their corresponding weight; Exhibit P.6 constituted certified copy of the handing over of the tusks: and Exhibit P.10 was the certificate of seizure of the tusks. Indeed, the record of proceedings bears out that none of the said exhibit was read out at the trial after admission. It is settled that such an omission is fatal as it violates the fair trial right of an accused person to know the content of the evidence tendered and admitted against him – see **Issa Hassan Uki** (supra) and **Rashid Amir Jaba & Another** (supra) cited by the appellant. Earlier in the case of **Robinson Mwanjisi & Three**

Others v. Republic [2003] T.L.R. 218 at 226, the Court outlined a three-stage practice for handling a document sought to be admitted in evidence thus:

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

We would emphasise that failing to read out a document that has been cleared for admission and then actually admitted in evidence is wrong and prejudicial. In consequence, we find merit in the second ground of appeal and proceed to expunge Exhibits P.2, P.3, P.6 and P.10. However, we wish to interject our agreement with Ms. Mkunde that even without these four discounted exhibits, their contents, as we shall demonstrate herein below, were sufficiently covered by the testimonies of PW2, PW3, PW5 and PW6.

Coming to the complaint in the fourth ground of appeal, we respectfully agree with the learned State Attorney that PW2, as a Wildlife Officer, was duly authorized to examine and assess the value of the seized tusks. We hasten to observe that the competence of this witness to examine the tusks was not contested at the trial nor was he cross-

examined on it by the appellant. That apart, we note that the designation "Wildlife Officer" is defined under section 3 of the WCA to mean:

> *"a wildlife officer, wildlife warden and wildlife ranger engaged for the purposes of enforcing this Act."*

For the purpose of enforcement and court proceedings, section 86 (4) of the WCA empowers wildlife officers, among others, to examine any trophy and issue a certificate of value thereof:

> *"(4) In any proceedings for an offence under this section, a certificate signed by* ***the Director or wildlife officers from the rank of wildlife officer****, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall* ***be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein."***
> [Emphasis added]

We think the above provision tells it all. It expressly empowers any wildlife officer, aside from the Director of Wildlife, to examine a trophy and issue a certificate stating the value thereof and other relevant facts. Such certificate would, then, constitute, on its face, proof of the facts stated

therein. In the premises, we cannot infer gazettement of a holder of the position of wildlife officer as a pre-condition for examining and certifying the value of trophy. Certainly, we note that there exists under section 7 (6) of the WCA for gazettement of wildlife officers exercising licensing powers delegated to them by the Director of Wildlife. However, that provision does not govern the exercise of the valuation of trophies under section 86 (4) of the WCA. Thus, the fourth ground fails.

Next, we deal with the first and third grounds of appeal. As stated earlier, they assail the chain of custody of the tusks (Exhibit P.5) along with the manner in which they were admitted in evidence upon being tendered by PW2.

To begin with, we would reiterate that when the police investigate a crime as happened in this case, the relevant provisions controlling the chain of custody is the Police General Order (PGO) No. 229 made by the Inspector General of Police in exercise of his powers under section 7 (2) of the Police Force Auxiliary Services Act, Cap. 322 R.E. 2002. These provisions guide the handling of exhibits by the police from seizure to exhibition as evidence in court. In this regard, the Court held in **Paul Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007

(unreported) that where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence relates to the alleged crime. In the premises, we are enjoined in the instant case to examine the handling of the tusks from the moment of their seizure.

For a start, both PW5 and PW6 adduced that the tusks were retrieved from the appellant's car at the petrol station on 23rd May, 2014 around 20:00 hours. According to PW5, the appellant along with the tusks, at that point not yet marked or labelled, were conveyed to the Task Force Offices at Mikocheni in Dar es Salaam. The tusks were stored there but remained under the control of PW5. Three days later, that is on 27th May, 2014, PW5 handed them over to PW2 who, then, having examined, marked and labelled them, confirmed that they were twenty-eight pieces of elephant tusks weighing 33.6 kilogrammes valued at TZS. 198,000,000.00. Subsequently, PW5 transported the tusks and handed them over to D/SSgt Hamisi, the storekeeper at Chalinze Police Station.

We wish to interpose here and state that we agree with Ms. Mkunde that the assertion that PW5 handed over the tusks to D/SSgt Hamisi at

Mlandizi Police Station was a slip of the pen. The trial court found in its judgment at page 69 of the record that the tusks were indeed handed over to D/SSgt Hamisi at Chalinze. Besides, taking judicial notice of the fact that the crime was uncovered at Vigwaza falling within the geographical precincts of the Chalinze Police Station in Bagamoyo/Chalinze District, the tusks could not have been handed over at Mlandizi Police Station in Kibaha District.

Finally, PW3 collected the tusks from D/SSgt Hamisi on 8th January, 2016 who then conveyed them to the trial court and on that very day they were tendered in evidence by PW2 (the Wildlife Officer). All the three witnesses – PW2, PW3 and PW5 – identified Exhibit P.5 as the property that they had handled at different stages after they were impounded from the car.

Certainly, in the instant case there is no chronological documentation or paper trail showing the seizure, custody, control, transfer, analysis and disposition of the tusks. Nonetheless, the testimonial accounts of PW2, PW3, PW5 and PW6 sufficiently explained the handling of the tusks from their seizure to exhibition at the trial. As we held in **Issa Hassan Uki** (supra), elephant tusks constitute an item that cannot change hands easily

and thus it cannot be easily altered, swapped or tampered with. We took the same stance in **Song Lei v. Director of Public Prosecutions**, Consolidated Criminal Appeals No. 16A of 2016 and 16 of 2017 (unreported) where, relying on our earlier decision in **Vuyo Jack v. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported), we held, as regards rhinoceros' horns, that:

> *"In our considered view, since rhino horns are items which cannot easily change hands and in the absence of any evidence that Exhibit P.13 was mishandled or handled by any other unidentified person, we are satisfied that it was at all time, from seizure to its tendering at the trial under the control and supervision of PW5 and the chain of custody was not broken."*

The rationale for the above position is to avoid treating the principle governing the determination of the chain of custody as a straitjacket but one that has to be relaxed whenever an item that is not amenable to being easily altered or corrupted is involved. In this regard, the Court observed in **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) that:

"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

We recall that in his oral argument, the appellant placed heavy reliance on five decisions of the Court on chain of custody. Having read them all, we do not think that they advance his position in view of the differing circumstances of the instant case as we have explicated. Beginning with **Shiraz Mohamed Sharif** (supra), we noted in that case that the chain of custody of the drug capsules or tablets allegedly defecated by the respondent was held broken because it was unclear to whom a witness (PW6) handed over the capsules at some point and further that at another point the whereabouts of the capsules were again completely unexplained. Again, in **Moses Muhagama Laurence** (supra),

the handling of forty-six packets of bhang, the subject matter of the case, for over thirteen days was unaccounted for. In **Hussein Said Said @ Baba Karim @ White v. Republic** (supra), the Court held the chain of custody broken in respect of two empty cartridges of ammunition (Exhibit P.1) because no witness adduced evidence on how that exhibit was kept after being retrieved from the scene of armed robbery before it was dispatched to the Forensic Bureau.

The case of **Asante Mohamed @ Kotoko** (supra) too is irrelevant as it concerned custody of a television set and a motor vehicle on which no evidence, either oral or documentary, was adduced on how they changed hands. Finally, the case of **Kisonga Ahmad Issa** (supra), an appeal against a murder conviction, has no bearing on the issue of chain of custody of an exhibit.

As to the criticism that Exhibit P.5 was erroneously admitted in evidence before PW2 had laid the foundation for his competence to tender it in evidence, we find it without merit. It is evident from the proceedings at pages 22 and 23 of the record, that PW2 established fully his familiarity with the tusks (Exhibit P.5) that he examined, marked and labelled them at the Task Force Offices at Mikocheni on 27th May, 2014. That testimony

sufficiently established the foundation of his ability to identify and authenticate that particular exhibit – see pages 11 and 12 of the typed decision in **Sharif s/o Mohamed @ Athumani & Six Others** (supra), cited to us by the appellant. Even though he did not have immediate custody of the tusks before he tendered them, he was competent to do so as he was knowledgeable about it having examined it and assessed its value as an expert – see, for instance, **Director of Public Prosecutions v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016 ; and **Director of Public Prosecutions v. Mirzai Pirbakhshi @ Hadji and Others**, Criminal Appeal No.493 of 2016 (both unreported). At any rate, PW3, who testified on the same day in succession to PW2, tied the loose ends by telling the trial court that he had brought the tusks (Exhibit P.5) after collecting them earlier that day from D/SSgt Hamisi at Chalinze Police Station. Accordingly, we find no substance in the first and third grounds of appeal as we are satisfied that the prosecution sufficiently proved that the tusks exhibited at the trial were the ones seized from the car at the petrol station at Vigwaza.

Finally, as regards the propriety of the sentence imposed on the appellant, we recall that the offence of unlawful possession of government

trophy of which the appellant was convicted was laid under section 86 (1) and (2) (b) of the WCA read together with Paragraph 14 (d) of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA. For ease of reference, we extract the text of section 86 (1) and (2) (b) as follows:

> *"86.-(1) Subject to the provisions of this Act, a person shall not be* ***in possession of,*** *or buy, sell or otherwise deal in* ***any government trophy.***
>
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *(a) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy does not exceed one hundred thousand shillings, to imprisonment for a term of not less than five years but not exceeding fifteen years or to a fine of not less than twice the value of the trophy or to both; or*
>
> *(b) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds*

one hundred thousand shillings, ***to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both.****"* [Emphasis added]

In the instant case, since the trophy the subject matter of the charge was a part of African elephant specified in Part I of the First Schedule to the WCA and that its value was TZS. 198,000,000.00, well beyond the threshold value of TZS. 100,000.00, the appellant had to suffer punishment in accordance with the provisions of section 86 (2) (b) above. Naturally, we are cognizant that the charged offence being an economic offence in terms of section 57 (1) of the EOCCA, had its punishment also regulated by the general provisions of section 60 (2) and (3) of that law which, at the time the charged offence was committed, provided as follows:

> *"(2) Subject to subsection (3), any person convicted of an economic offence shall be liable to* ***imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penai measure in this Act.***

(3) In considering the propriety of the sentence to be imposed the Court shall comply with the principle that:

a) approved offence which is the nature of organized economy or public property, in the absence of mitigating circumstances, deserves the maximum penalty.

b) any other economic offence may be sentenced with a sentence that is suitably deterrent; and

c) a child shall be sentenced in accordance with the provisions of the Law of the Child Act." [Emphasis added]

In view of the duality of the punishment provisions, which at the material time was coupled by the absence of a statutory direction on what punishment is applicable, we are bound to follow our stance in **Issa Hassan Uki** (supra) that recourse must be had to the statutory provision imposing a milder punishment on the basis of the principle that penal statutes should be interpreted in favour of the accused person. In the premises, we think that by expressly providing for an option of a fine, the punishment under section 86 (2) (b) of the WCA is more favourable to an accused person than the provisions of section 60 (2) of the EOCCA. We

say so because it is an elementary principle of sentencing that a first offender should be given an opportunity to pay a fine where Parliament provides for a sentence of imprisonment and an option of a fine – **Rev. Christopher Mtikila v. Republic**, Criminal Appeal No. 87 of 2005 (unreported). We thus find merit in the fifth ground of appeal.

Taking account of the fact that the appellant was a first offender in addition to his mitigating circumstances that he was the sole caregiver to his supposedly young family and had spent two years in remand prison, we are of the considered view that the justice of the case militated against the appellant being sentenced to both fine and imprisonment under section 86 (2) (b) of the WCA. Instead, as a first offender he should have been given the opportunity to pay the fine and that the applicable custodial penalty should have been imposed as an alternative in default – **Rev. Christopher Mtikila** (supra). We thus find merit in the fifth ground of appeal.

Perhaps, we should interpose by way of a postscript that we are aware that section 60 (2) of the EOCCA was subsequently amended by section 13 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 to address the issue of duality of the punishment provisions under

the EOCCA and other written laws that we have confronted in this matter. The said provisions, as amended, read as follows:

> *"(2) Notwithstanding provision of a different penalty under any other law and subject to subsection (3), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both that imprisonment and any other penal measure provided for under this Act;*
>
> ***Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence."*** [Emphasis added]

It is clear that the above proviso postulates that a penalty under any other written law for a corruption or an economic offence would be applicable only if it is greater than what is prescribed under section 60 (2) above.

Given the above exposition, we conclude that the appeal lacks merit save for our finding on the propriety of the sentence. Consequently, we uphold the appellant's conviction and order that the twenty years'

imprisonment imposed on him be served in default of payment of the fine of TZS. 1,980,000,000.00. Except for the adjustment of the sentence, the appeal stands dismissed.

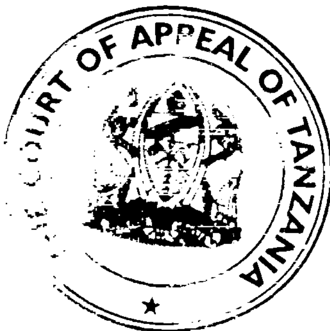
DATED at **DAR ES SALAAM** this 21st day of May, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May 2020, in the Presence of the Appellant in person-linked via video conference and Ms. Mwanaamina Kombakono, Senior State Attorney assisted by Brenda Nicky, State Attorney for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL