IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 108 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

SALUM MADITO ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Kalombola, J.)

dated the 14th day of November, 2018
in
Criminal Appeal No. 4 of 2018
.....

JUDGMENT OF THE COURT

16th & 19th June, 2020

LEVIRA, J.A.

The appellant, the DIRECTOR OF PUBLIC PROSECUTIONS (the DPP) was aggrieved by the decision of the High Court at Dodoma (Kalombola, J.) in (DC) Criminal Appeal No. 91 of 2017 which turned down the decision of the District Court of Manyoni at Manyoni (the District Court). In the District Court, the respondent SALUM MADITO @ NTELA was charged with wildlife offences, to wit, unlawful entry into a game reserve contrary to section 15(1), (2) and unlawful grazing livestock in a game reserve contrary to sections 18(2)(4) and 111(1)(a) of the Wildlife Conservation Act, No. 5 of

2009 (the WCA). He was convicted on both counts on what was referred to by the presiding magistrate as a "plea of guilty" and sentenced accordingly.

The facts of the case were that, on 18th June, 2017 at Muhesi East (Kasanii River) area within Muhesi Game Reserve in Manyoni District in Singida Region, Game Wardens Mainard John and Domisian Christian who were on patrol arrested the respondent within the precincts of the game reserve grazing one hundred (100) head of cattle without permit to enter and graze therein. It was alleged that the respondent was taken to Manyoni Police Station where his statement was recorded and he confessed to have been found in the game reserve grazing the cattle unlawfully and hence, arraigned before Manyoni District Court as intimated above.

It is on record that when the charge was read over and explained to the respondent, he responded as follows:-

> *"**1st Count:** It is true I entered in the game reserve without permit.*
>
> ***2nd Count:** It is true I had one hundred cattle in the game reserve without permit."*

Following that response, the presiding magistrate entered a plea of guilty on both counts.

The record indicates further that, the facts of the case were read out and explained to the respondent who was recorded to have amitted them to be true, correctly recorded and undertook to sign. The prosecution then tendered the certificate of seizure and the respondent's cautioned statement. There having being no objection from the respondent, the said documents were admitted as exhibits PI and PII respectively. The case was adjourned to 20th June, 2017 for production of one hundred head of cattle which were subsequently admitted as exhibit PIII.

On 22nd June, 2017 the respondent was convicted of both counts. In respect of the first count, he was sentenced to pay fine of Tshs. 100,000/= or to serve jail term of one (1) year in default and for the second count to pay fine of Tshs. 200,000/= or to serve jail term of one (1) year in default. The trial court directed the sentences to run concurrently should the respondent fail to pay the fine. In addition, the herd of cattle (exhibit PIII) was forfeited.

The respondent was aggrieved with both, the conviction and sentence and thus, he successfully appealed to the High Court (Kalombola, J.) in DC Criminal Appeal No. 91 of 2017. Before the High Court, the respondent raised two grounds claiming that, the presiding magistrate in the District Court erred in fact and law by failing to record the exact words used by the appellant (respondent herein) when the statement of facts was read out and explained to him. Second, the said Magistrate erred in facts and law by holding that the respondent pleaded guilty while he raised his defence in mitigation.

Having heard the parties to that appeal, the first appellate Judge was satisfied that the first ground of appeal was merited. As she said, indeed, the trial magistrate failed to record the exact words used by the appellant when the statement of facts was read and explained to him. She concluded that it was doubtful if the appellant pleaded guilty. As a result, she allowed the appeal, quashed the conviction and set aside the sentences imposed on the respondent; and hence, acquitted him.

This appeal raises an argument that it was not proper for the said High Court to acquit the respondent having found that his plea was

equivocal. The proper course according to the appellant was for the High Court to order trial *de novo*.

At the hearing of this appeal, the appellant was represented by Mr. Pius Hilla and Leonard Challo both learned Senior State Attorney assisted by Ms. Lucy Uisso, learned State Attorney. The respondent was present in person and had the services of Mr. Fred Peter Kalonga, learned advocate.

Mr. Hilla submitted that the appellant has presented a single ground of appeal challenging the decision of the High Court having found the respondent's plea of guilt doubtful, in the sense that it was equivocal, proceeded to quash the conviction and set aside the sentence meted out to the respondent. According to him, the learned first appellate Judge ought to have remitted the case file to the District Court where the matter originated for fresh plea taking. His stance was fortified by a glaring procedural irregularity that occurred during plea taking.

He referred us to page 5 of the record of appeal where the facts of the case were read out and when the prosecutor finished, the record is silent whether or not the presiding magistrate asked the respondent whether he agreed to those facts. It was his argument that if the

respondent was asked, then the presiding magistrate ought to have recorded the exact words used by the respondent in reply. The learned counsel unveiled that at the same pages, the presiding magistrate recorded respondent to have admitted the facts to be true, correctly recorded and he undertook to sign in lieu of respondent's own words. This, he said, was a fatal procedural irregularity.

In conclusion, Mr. Hilla submitted that, the first appellate Judge misdirected herself as she ought to have quashed the conviction and set aside the sentence and the order made by the presiding magistrate. Thereafter, she should have ordered the case file to be remitted to the District Court for a fresh plea taking. Since this was not done, the learned counsel urged us to make such an order.

On his part, Mr. Kalonga conceded to the line of argument taken by Mr. Hilla and confirmed the submission to be a proper reflection of what transpired. However, he could not find purchase with the prayer made by Mr. Hilla that we order a fresh plea taking. His objection was predicated upon the contention that, during the initial plea taking, the prosecutor prayed to tender seizure certificate and respondent's cautioned statement which were eventually admitted as exhibits PI and PII respectively, but

they were not read out for the respondent to understand their contents. He argued that failure to read out contents of the admitted document is a fatal irregularity. In support of his argument he cited the decision of the Court in **Erneo Kidilo and Another v. Republic**, Criminal Appeal No. 206 of 2017 (unreported) urging us to decline the invitation extended to us by the counsel for the appellant to order for a fresh plea taking. Instead, he said, we should uphold the decision of the High Court and dismiss this appeal.

In a brief rejoinder, Mr. Hilla submitted that the case of **Erneo Kidilo v. Republic** (supra) referred to by the counsel for the respondent is distinguishable from the current one. It was his observation that at page 14 of the said decision, the Court indicated that a retrial was not feasible because certain documentary exhibits necessary for the retrial had been lost, which is not the case herein. Finally, he urged that we should order fresh plea taking for the interest of justice.

We have thoroughly gone through the record of appeal, ground of appeal and the contending submissions of the learned counsel for the parties. We note that the respondent was recorded by the Magistrate to have admitted the facts which were read out. In the circumstances, we think it was unsafe for the presiding magistrate to conclude that the

respondent's plea was unequivocal and proceed to convict him. We agree with the finding made by the High Court that, the respondent's plea was equivocal. This is more so because the respondent's reply to the facts was not recorded as nearly as possible in his own words. The record is silent whether or not the respondent was given an opportunity to dispute or to explain the facts or to add any relevant facts, instead the presiding magistrate reported in general terms as follows:

> *"**Court**: The facts containing the substance of the offence charged read over and explained to the accused person who agree to be true and correctly recorded and undertake to sign."*

We get an inspiration from the decision of the defunct East Africa Court of Appeal in **Rex v. Yonasani Egalu & 3 Others [1942 – 1943] IX – X EACA 65**, where the Court reasoned in the following words:

> *"That in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every*

constituent and that what he says should be recorded in the form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it "unequivocally".

Apart from the aforesaid not being complied with by the magistrate, it can be evidenced by the respondent's mitigation that his plea was not without ambiguity as when given the opportunity, he said as follows:

"I pray for court lenience as I was lost on my way."

The above statement advanced in mitigation put forth an element of defence which we think could not just be ignored by the presiding magistrate. It was in the eyes of the law a recantation of guilt. The procedure to be followed by the court when an accused person pleads guilty to an offence charged was well explained in the case of **Adan v Republic** (1973) EA 445 at page 446 in the following terms –

"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all essential ingredients of the offence charged. If the accused then

admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty. ***The Magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or to explain the facts or to add any relevant facts.*** *If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record the change of plea to "not guilty" and proceed to hold a trial. If the accused person does not deny the alleged facts in any material respect the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. Statement of facts and the accused's reply must, of course, be recorded..." [Emphasis added].*

In our view, the above procedure was evidently flouted in the present appeal negating any assurance that the respondent's plea of guilty was unequivocal.

We therefore allow the appeal, quash the decisions and nullify the proceedings of both courts bellow. We also vacate the forfeiture order. For

the interest of justice of the case, we order re-arraignment of the respondent before the District Court.

It is so ordered.

DATED at **DODOMA** this 18th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 19th day of June, 2020 in the presence of Ms. Judith Mwakyusa, learned State Attorney for the appellant and Respondent present together with Mr. Fred Kalonga, learned advocate for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL

The above said, we find merit in the application. Accordingly, we grant leave to the applicant to appeal to the Court against the decision of the High Court at Dodoma in Miscellaneous Civil Appeal No. 44 of 2016 in terms of section 5 (1) (c) of the AJA. Costs shall be in the intended appeal.

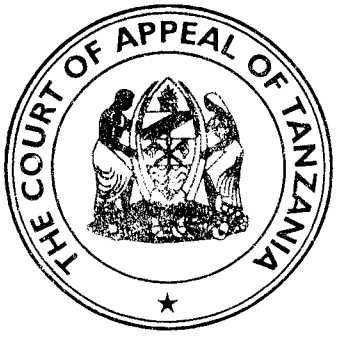
DATED at **DODOMA** this 18th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Ruling delivered on 19th day of June, 2020 in the presence of Ms. Amina Hamisi, learned counsel for the applicant and Mr. Elias M. Machibya and Ms. Magret Mbasha, learned counsels for the 1st Respondent and in the absence of the 2nd Respondent, is hereby certified as a true copy of the original.



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