IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 16 OF 2018

EX-D.8656 CPL SENGA s/o IDD NYEMBO ..... 1ST APPELLANT

EX-G.553 PC ISSA MTAMA .....2ND APPELLANT

PROSPER MALETO .....3RD APPELLANT

SEIF NDUMUKA .....4TH APPELLANT

AMRI BAKARI ..... 5TH APPELLANT

SAID KADULO NDUMUKA .....6TH APPELLANT

RAMADHANI ATHUMANI ..... 7TH APPELLANT

MG. NO.167 MUSA MOHAMED .....8TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Munisi, J)

Dated the 13th day of September, 2017

in

Criminal Appeal No.203 of 2016

.....

JUDGMENT OF THE COURT

15th July & 07th August, 2020.

WAMBALI, J.A.:

The appellants, Ex-D.8656 CPL Senga s/o Idd Nyembo, Ex-G.553 PC Issa Mtama, Prosper Maleto, Seif Ndumuka, Amri Bakari, Said Kadulo Ndumuka, Ramadhani Athumani, and MG. No.167 Musa Mohamed

together with one person, namely, Hamidu s/o Hamad Salum, not party to this appeal, appeared before the Court of Resident Magistrate of Coast Region at Kibaha in Economic Case No.1 of 2013 where they faced two counts as per the information found in the record of appeal. The first count concerned the unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c) (ii) and 3 (b) of the Wildlife Conservation Act, No.5 of 2009 read together with paragraph 14 (d) of the First Schedule to, and section 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act [Cap 200 R.E.2009].

It was alleged in the particulars of the information in respect of the first count that the appellant together with Hamidu s/o Hamad Salum jointly and together on or about 28th day of July, 2013 at Kauzeni checkpoint area within Kisarawe District in Coast Region, were found in unlawful possession of Government Trophies to wit; 70 pieces of Elephant Tusks, weighing 306.5kgs valued at Tanzania Shillings eight hundred fifty million and five hundred thousand (Tshs.850,500,000/=) only, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

On the other hand, the second count concerned leading Organized Crime contrary to Paragraph 4(1) (d) of the First Schedule to, and section

57 (1) and 60 (2) both of the Economic and Organized Crime Control Act [Cap 2009 R.E.]

It was thus alleged in the particulars in respect of the second count that the appellants together with Hamid s/o Hamad Salum jointly and together on or about 28th day of July, 2013 at Lukumbulu village within Kisarawe District in Coast Region, did intentionally acquire and possess Government Trophies to wit; 70 pieces of Elephant Tusks, weighing 306.5kgs valued at Tanzania Shillings eight hundred fifty million and five hundred thousand (Tshs.850,000,000/=) only, without a permit from the Director of Wildlife.

As it were, after the charges were read over and explained to them at the trial court they all denied the allegation and thus a full trial commenced. The prosecution side relied on five witnesses and ten exhibits to prove its case whereas the appellants defended themselves.

In the end, the trial court evaluated the evidence for both sides of the case and it ultimately found the present appellants guilty in both counts as charged. Consequently, it convicted and sentenced each appellant to imprisonment for twenty years. In addition, each was sentenced to pay a fine of 8,500,000,000/=. However, Hamid s/o Hamad Salum who was the 9th accused was acquitted as it was found that there was no evidence to prove his guilt.

The appellants' appeal to the High Court to challenge the findings of the trial court was dismissed, hence this appeal. To express their disagreement with the High Court's decision, the appellants lodged two sets of the Substantive Memoranda of Appeal. Notably, the first, second, third, fifth, seventh and eighth appellants lodged a joint memorandum of appeal comprising eleven grounds of the same appellants followed by a supplementary memorandum of appeal comprising fourteen grounds of appeal. Moreover, they lodged written submission in support of the appeal. The fourth and sixth appellants lodged a separate memorandum of appeal comprising ten grounds of appeal but they did not lodge the written submission to support their appeal.

Nonetheless, for the purpose of this judgment we do not intend to reproduce or attempt to summarise the respective grounds of appeal for the reason which will be apparent shortly.

At the hearing of the appeal, the appellants' appearance was through a video conference which was linked from the courtroom to Ukonga Central Prison in Dar es Salaam. On the other side, the respondent Republic was duly represented by Mr. Salim Msemo, Mr. Candid Masua and Ms. Tully Helela all learned State Attorneys who from the very outset did not support the appellants' appeal.

It is noteworthy that in the course of hearing the sixth appellant's submission concerning the complaint that he was not given the right to cross examine some witnesses for the prosecution and the defence, we had to revisit the record of proceedings in order to address the complaint appropriately it being a point of law. In the result, it came to our attention that the trial court's proceedings were marred by some procedural irregularities which we thought might have adversely affected fair hearing for both sides of the trial. To be specific the most glaring procedural irregularities are the following: One, failure of the trial court to give each of the appellants the right to cross-examine witnesses. Two, failure of the trial court to give each of the appellants the right to object or otherwise to the tendering and admission of exhibits. We noted from the record of appeal that the way the trial magistrate recorded the said proceedings left some doubts on whether the appellants fully participated in the trial. Notably, in some parts unrepresented appellants were simply lumped or grouped together and thereafter jointly shown to have either said nothing concerning the cross examination of a particular witness or before a particular exhibit was tendered by a witness and admitted into evidence by the court. This was irrespective of the fact that in the Coram of the respective date each accused was recorded to be present personally. Indeed, in some instances, each accused was shown to have

said something or that he had nothing to say when he was given the opportunity to cross examine a witness or to object or otherwise to the admission of the respective exhibit. However, in other occasions that was not the case as mostly they were lumped together as we have alluded to above as if they jointly stated the same thing at the same time.

In the circumstances, we invited parties to comment on the said procedural irregularities. On his part, Mr. Msemo readily conceded that according to the record of proceedings of the trial court, there is no dispute that in some instances the trial magistrate indicated that each of the appellant either objected to the tendering of certain exhibits or participated in cross-examining witnesses for the prosecution and the defence. However, in other instances, he submitted, the trial magistrate simply indicated, save for those appellants namely first, second, fifth and eight, who were represented by Mr. Nkwela learned advocate, that the rest, that is, the third, fourth, sixth, seventh and ninth accused persons who were unrepresented jointly and together showed that they had no objection to the tendering of such exhibit or that they did not wish to cross-examine the respective witness.

Nevertheless, Mr. Msemo submitted that the irregularity was not fatal as it was purely based on a style of recording the proceedings which was adopted by the trial magistrate. To this end, Mr. Msemo firmly

submitted that no right of hearing was denied to any of the appellants especially those who were unpresented and therefore, according to him, the error is curable under section 388 of the Criminal Procedure Act, Cap. 20 R.E.2002. The learned State Attorney emphasized that the appellants fully participated at the trial and thus the omission of a trial magistrate to indicate clearly that each appellant was given opportunity to participate in the trial cannot be construed in any way that it denied them the right to be heard. The learned State Attorney who according to the record of proceedings was among the team of prosecutors at the trial sought to convince us that to his knowledge the trial magistrate gave each appellant the opportunity to participate in the trial contrary to the allegation of the sixth appellant that he was not given opportunity to cross examine some of the witnesses including his co accused during their defence. To this end, he urged us to disregard the procedural irregularities and proceed to determine the appeal on its merits or otherwise.

On their part, save for the sixth appellant who emphatically emphasized that he was not given the right to cross-examine some witnesses or say anything concerning the exhibits which were tendered at the trial, the rest left upon the Court to determine the matter in

accordance with the trial court's record of proceedings in the record of appeal.

Having heard the parties' contending views on the issue of the alleged procedural irregularities, we think, it is appropriate at this juncture to make reference to the specific part of the trial court's record of proceedings for fair determination of the issues in controversy.

At pages 100 – 101 of the record of appeal it is noted that the record of proceedings during the testimony of PW3 indicates as follows in respect of the request by said witness to tender a certificate of value for the 35 elephant tusks:

> *"..... I pray to tender it as an exhibit:*
> *Mr. Nkwera - No objection*
> *3rd accused - no objection*
> *4th accused - no objection*
> *6th accused – no objection*
> *7th accused – no objection*
> *9th accused – no objection*
> *Court – admitted and marked as exhibit P8."*

However, later when PW3 prayed to tender a letter of handing over of the 70 elephant tusks that were sent to the strong room the record indicates as follows:

> *"I pray to tender it as an exhibit to this matter*

MR. MKWERA ADVOCATE – No objection
3rd, 4th, 6th, 7th and 9th accused – No objection
Court: Admitted and marked as exhibit P9"

That is not all as at page 102 of the record of appeal the record of proceedings in respect of a request to tender the Occurrence Book in the course of PW3 testimony indicates that the learned trial magistrate adopted the following style:

" I also signed in the book used to store those elephant tusks.
PP: Your honour I pray to show a copy of OB "Book" that was used to hand over the elephant tusks.
MR. MKWERA – No objection
Other accused - No objection
Court – admitted and marked as exhibit P10"

As it can be seen from the reproduced part of the trial court's proceedings above, despite being lumped together the unrepresented accused were not even shown by their identity or title as it was the case before, but simply as "other accused".

The lumping together of unrepresented accused also happened when DW9 who was the 9th accused wanted to tender exhibit D2.

From the reproduced part of the proceedings, it is evident that while during the admission of exhibit P8 Mr. Mkwera learned advocate on

behalf of the 1st, 2nd, 5th and 8th accused persons who are currently the first, second, third and fourth appellants respectively and the 3rd, 6th, 7th and 9th accused who are the fifth, sixth, seventh and eight appellants respectively were duly given opportunity to say whether they objected to the admission of the said exhibit or otherwise, to the contrary, during the tendering of exhibits P9 and P10 that was not the case. We say so because as indicted therein only Mr. Mkwera, learned advocate on behalf of the respective appellants was given such opportunity.

On the other hand, the rest of the unrepresented appellants stated above, were just lumped together to show that they had no objection in respect of the admission of exhibit P9. Worse still, in respect of the admission of exhibit P10 the rest of the unrepresented accused were simply referred to as "*other accused*" to show that they jointly had no objection to the tendering of the said exhibit.

We are settled that in view of the record of proceedings reproduced above it cannot be said with certainty that each of the said accused was given the opportunity to say whether they objected or not as it was the case in respect of exhibits P1, P2, P3, P4, P5, P6, P7 and P8. This was not proper. We are mindful of the submission of Mr. Msemo who wished to impress on us that as he was one of the prosecutor at the trial, he could confirm that each of the accused who was unrepresented was given the

opportunity to say whether he objected or not before exhibits P9 and 10 were admitted into evidence. With respect, we do not share the learned State Attorney's submission as the record of the court speaks louder of what transpired against what he wished us to believe from his statement from the Bar. We must emphasize that the record of the court is always taken to be authentic unless the contrary is proved. It is in this regard that in **Halfani Sudi v. Abieza Chichili v. The Republic** (1998) TLR 557 the Court stated that: -

> " *A court record is a serious document; it should not be lightly impeached; there is always a presumption that a court record accurately represents what happened".*
>
> [see also **Otto Kalist Shirima v. The Republic,** Criminal Appeal No. 234 of 2008 (unreported)].

In the circumstances, we hold a firm view that the record of the trial court reflects what transpired and we cannot therefore trust and rely on the learned State Attorney's submission from the Bar to the contrary.

It is noted that exhibits P9 and P10 are crucial to the determination of the appeal and thus the complaint of the appellants that they were not given opportunity to say whether they objected to the admission or otherwise of the respective exhibits cannot be simply taken lightly or

ignored as it involves the right to be heard before an adverse decision is taken by the competent court.

On the other hand, as we have alluded to above, according to the record of proceedings of the trial court in the record of appeal, the style adopted by the trial magistrate to record what transpired during the appellants defence by lumping together unrepresented appellants leads to the conclusion that they were not given opportunity to cross-examine their co appellants namely, the first, second, third, fifth and eighth accused. This is vividly reflected at pages 124 (for DW1), 128 (for DW2), 132 (for DW3), 136 (for DW5), 144 (for DW6) 149 (for DW7). It is noted that in the respective pages, save for DW9 who was indicated to have cross examined other co-accused, the rest of the unrepresented accused were lumped together and it was indicated as follows:

"3rd, 4th, 6th and 7th accused- Nil"

It follows that the cumulative effect of the procedural unfairness during the trial cannot be said to have not greatly denied the appellants their right to be heard which in effect prejudiced them as rightly submitted by the sixth appellant. Consequently, we hold a firm view that the procedural unfairness affected the entire trial as it involved both the case for the prosecution and the defence.

Failure of the trial magistrate to give each of the appellants the opportunity to say whether they objected or otherwise to the admission of exhibit and to cross-examine witnesses breached the rule of natural justice, which entails that justice must not only be done but must manifestly be seen to be done. Indeed, the right of hearing is not only a fundamental procedural aspect in the court proceedings, but it is also a fundamental constitutional right in Tanzania by virtue of Article 13(6) (a) of the Constitution. It is in this regard that in **Mbeya - Rukwa Auto parts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 251, the Court stated as follows:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of the equality before the law, ..."*

[See also **Dishon John Mtaita v. The Director of Public Prosecutions**, Criminal Appeal No.132 of 2004 (unreported)].

Moreover, in **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) the Court held that: -

> *"The right of a party to be heard before an adverse action or decision is taken against such a party has*

been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a beach of the principles of natural justice".

In the present appeal, considering what transpired at the trial as evidenced in the reproduced parts of the trial court's record of the proceedings above, we entertain no doubt that the style which was adopted by the trial magistrate, in lumping together the appellants to indicate that they had no objection or that they did not wish to cross examine a particular witness was, to be precise, to deny each of them the right to be fully heard as required by the law. Besides, it was a serious misdirection which greatly prejudiced them. Indeed, there was no procedural fairness to the parties in the proceedings as it is evident in the record of appeal. Granting each party any opportunity to be heard in the proceedings embraces the principles of natural justice and addresses every question of fairness of the procedure or due process. Thus, granting some parties the right to be heard while denying others such right may be broad enough to include the rule against bias, since a fair hearing must be unbiased.

It follows that where there is no fair procedural hearing like in this case, the proceedings are vitiated. To emphasize this point, in **The Director of Public Prosecutions v. Sabinus Inyasi Tesha and Raphael J. Tesha** (1993) TLR 237, it was held that a denial of a right to be heard in any proceedings would definitely vitiate the proceedings.

In the circumstances of this case, we are settled that the proceedings, findings and judgment of the trial court were invalid having occasioned miscarriage of justice due to the glaring irregularities we have demonstrated above.

It is important to emphasize that the trial court record of proceedings must indicate clearly that a party was given opportunity and show whether he utilized it or otherwise. Thus where there is more than one accused in a particular case, as it was in the present case, each one must be given the opportunity to cross-examine the witness and where he refrains, it should also be shown so in very clear terms. It is not a practice that two or more accused lumped together can be recorded to have cross examined or refrained to cross-examine a particular witness.

We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is a fundamental one to any judicial

proceedings and thus the denial of it will usually result in the decision in the case being overturned.

Unless, a party has waived his right to cross examine the witness, the testimony of a witness cannot be taken as legal evidence unless it is subject to cross-examination. Consequently, the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of cross-examination (see **Kabulofwa Mwakalile & 11 others v. Republic** (1980) TLR 144).

In the result, considering the irregularities which occasioned miscarriage of justice, in terms of Section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, we exercise the powers of the Court to revise and nullify the trial court's proceedings and judgment, quash the convictions and set aside the sentences and the order for payment of fine. Similarly, we nullify the proceedings and judgment of the High Court in Criminal Appeal No. 203 of 2016 as the same emanated from null proceedings.

Consequently, in view of the circumstances of this case, we are of the settled opinion that this is a fit case in which a retrial must be ordered for the interest of justice. In the result, we order a retrial to be conducted

before another magistrate of competent jurisdiction as soon as practicable.

Meanwhile, the appellants should remain in custody pending a retrial. We so order.

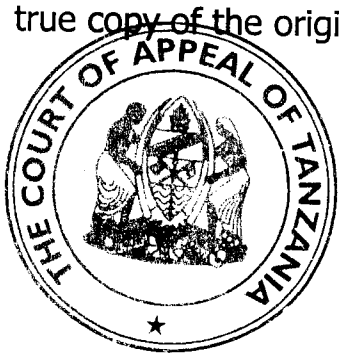
DATED at **DAR ES SALAAM** this 4th day of August, 2020

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 07th day of August, 2020 in the presence of the appellants – linked via video conference and Ms. Tully Helela, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL