IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 369 OF 2018

EMMANUEL RICHARD @ HUMBE.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mlyambina, J.)

dated the 25th day of December, 2018
in
HC. Criminal Appeal No. 153 of 2018

JUDGMENT OF THE COURT

17th March & 14th April, 2021

MKUYE, J.A.:

The appellant, Emmanuel Richard @ Humbe was arraigned before the Resident Magistrate's Court of Dar es Salaam at Kisutu on a charge of unlawful possession of Government trophy contrary to section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002. Upon a full trial, he was convicted and sentenced to twenty years imprisonment and to pay a fine of Tshs. 32,775,000/=. Aggrieved, he appealed to the High Court

but his appeal was dismissed. Still protesting his innocence, he has appealed to this Court fronting both a substantive memorandum of appeal containing five (5) grounds of appeal and two supplementary memoranda of appeal each consisting two (2) grounds of appeal, to which we do not intend to reproduce them. He has also filed a written submission in support of his appeal.

When the appeal was called on for hearing, the appellant appeared in person while linked through a video conference from Ukonga Central Prison whereas the respondent Republic was represented by Ms. Elizabeth Mkunde assisted by Ms. Tully Helela, both learned State Attorneys.

When the appellant was given the floor to elaborate his grounds of appeal, he, in the first place prayed to adopt his grounds of appeal as well as his written submission. He then implored us to consider them and allow the appeal with a view to setting him free so that he can join his family.

On the other hand, Ms. Mkunde responded on all the grounds of appeal and we are thankful for that. However, for a reason to become apparent shortly, we have found it prudent to deal with ground No. 1 in

the 2nd memorandum of appeal as we think, it has the effect of disposing of the whole appeal without necessarily discussing the other grounds. The said ground states as follows:

> "The *1st appellate court Judge erred in law by, sustaining the appellants' conviction without observing that there was noncompliance of section 231 (1) of the CPA, (Cap 20 R.E. 2002) as:*
>
> *(i) The trial court failed to explain again the substance of the charge to the appellant before entering his defence;*
>
> *(ii) The trial court failed to inform the appellant of his right to call witnesses under section 231 (1) (b) of CPA (Supra) as no answer is recorded by the trial magistrate regarding the same before calling him to enter his defence.*

Basically, the main complaint by the appellant is that the substance of the charge was not explained to the appellant by the trial court before he gave his defence; and that he was not given his right to call witnesses as the record of appeal is silent on whether he intended to call a witness or not. It is his firm view that, this violated the right of fair

trial to the appellant (accused) as provided under the Constitution. To show that this vitiated the trial against him he has referred us to the case of **Maduhu Sayi Nigho v. Republic**, Criminal Appeal No. 560 of 2016 (unreported).

In response to the said ground of appeal, Ms. Mkunde readily conceded that neither the charge was explained to him nor was he asked if he intended to call a witness after the prosecution had closed its case as required by section 231 (1) of the CPA. Nevertheless, she was quick to state that the appellant was not prejudiced as he was given an opportunity to defend himself.

We have examined the ground of appeal together with the arguments from either side. Section 231 (1) of the CPA provides as follows:

> " *At the close of the evidence in support of the charge, if it appears to the court that a case is made 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 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 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".* [Emphasis added]

The thrust of the above cited provision is that it imposes a duty on the trial court to explain again the substance of the charge to the accused if it is satisfied that a prima facie case has been established. Apart from that, the provision requires the trial court to explain to the accused his right as to the mode of giving his defence whether on oath or affirmation or not; and whether he has a witness to call. In which case it is mandatorily required to record the answer thereof from the accused.

In this case, as shown at page 45 of the record of appeal, the learned State Attorney closed the prosecution's case and the trial

magistrate marked it closed. From pages 45 to 47 of the record of appeal, the trial magistrate made his ruling on whether or not the available evidence established a prima facie case and concluded that the same was made and that the appellant has a case answer requiring him to make his defence or call witnesses for his defence. Thereafter the record of appeal shows nothing except some words at page 47 as hereunder:

> *"Accused rights states:*
> *I will testify under oath"*

After going through the above excerpt, the learned State Attorney changed her earlier stance and submitted that it depicts that the appellant was accorded with opportunity as stated under the law.

However, on our part, having examined those words, we do not agree with the learned State Attorney's proposition that the appellant was given such an opportunity. It is our considered view that the appellant was not only denied the right to call witness but also the substance of the charge was not explained to him. This is so because no answer to that effect from him was recorded by the trial court. Even assuming that all the rights were explained to the appellant still, the record of appeal is silent on what was the reply by the appellant, particularly, on how he

intended to exercise his right to call witnesses which is mandatorily required to be recorded. Even if we assume that the appellant's reply that he would testify under oath was in relation to the rights explained to him, it is not sufficient to show if all what was required to be informed under section 231 of the CPA was explained to him.

In the case of **Frenk Benson Msongole v. Republic,** Criminal Appeal No. 72A of 2016 (unreported), the Court discussed the provisions of section 231(1) of the CPA and stated as follow:

> *"It is crystal clear that, before the accused person makes his defence, the trial court is mandatorily required to address him on the rights and the manner in which he shall make his defence."*

Also, in the case of **Maduhu Sayi Nigho** (supra), it was not shown the manner the appellant would give evidence and whether or not he would call witnesses. The Court observed as follows:

> *"... The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such right 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."

Again, in order to show the seriousness of non-compliance of section 231 (1) of the CPA, in the case of **Mabula Julius & Another v. Republic,** Criminal Appeal No. 562 of 2016 (unreported), the Court discussed the import of the said section and stated as follows:

"... failure by the trial court to record whether the appellants would call witnesses in terms of section 231 (1) (b) prejudiced the appellants. The infraction, on the authority of the decisions cited above, is fatal. It vitiated all subsequent proceedings"

Yet, in the case of **Cleopa Mchiwa Sospeter v. Republic,** Criminal Appeal No. 51 of 2019, (unreported) the Court considered the situation where the trial court failed to explain to the appellant the substance of the charge of rape after the prosecution had closed its case, and to inform him of his right to give evidence whether on oath or affirmation and his right to call witness in his defence. After having done so, it stated that failure to comply with the mandatory provisions of section 231 (1) and (2) of the CPA vitiated the subsequent proceedings.

Applying the principles propounded in the above cited authorities, we are settled in our mind that the trial magistrate failed to comply with section 231 (1) of the CPA and, thus, prejudiced the appellant as he was not able to utilize his right of calling his witnesses and to prepare a proper defence.

Admittedly, in the ruling on whether the appellant had a case to answer, the trial magistrate ruled that a prima facie case was established to require the appellant to make his defence and call witnesses for his defence. That however, in our view, was a mere conclusion to the ruling on the case to answer. It did not offer any explanation of the accused's right to call a witness as per the dictates of section 231 of the CPA.

Before we conclude on this issue, we wish to point out another anomaly which is equally crucial on the right of the appellant. Page 52 of the record of appeal shows that it was the trial magistrate who closed the defence case instead of the appellant. For ease of reference, we reproduce what the trial magistrate stated as follows:-

> *"As the witness has no other witness except this testimony, the defence of the accused do come to an end."*

This, however, sounds strange. We say so because, as alluded to earlier on, there is nowhere in the record of appeal where the appellant indicated that he will not call any witness. It is not clear as to where the trial magistrate got the notion that the appellant was not calling a witness. In connection with this, we think, considering that the substance of the charge was not explained to the appellant; that the appellant was not asked if he would call a witness or witnesses; and the fact that his case was closed by the trial magistrate, we have no hesitation in agreeing with the appellant that the anomaly was fatal and it prejudiced him. This, in consequence, vitiated the proceedings thereof.

As to the effect of such anomaly, we are of the considered view that it is incurable under section 388 of the CPA as it has the effect of denying the appellant a fair trial as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002 to the prejudice of the appellant.

In the circumstances, we find that this is a fit case for exercising our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019. We, thus, nullify the proceedings of both the trial

court and the High Court, quash the conviction and set aside the sentence meted out against the appellant.

Having done so, the next question is on way forward that is, whether this is a fit case for ordering a retrial or not.

We have examined and considered the entire evidence in this case and we are of the view that this is not a fit case for an order for a retrial. After scanning the evidence available, we have observed that the credibility of evidence in areas such as the time of arrest and seizure and recording of the appellant's statement is confusing. While PW1 said it was at 12:00 hrs, PW2 said it was at 00:00 hrs and PW5 added that he recorded the appellant's statement under caution at 02:45 to 03:45 hrs. On top of that, whereas PW1 said the bag containing the government trophy was opened at Machinga Complex, PW 2 said it was opened at Msimbazi Police Station. Besides that, the evidence on the chain of custody which is very crucial in this case is also doubtful. In addition, in the course of hearing, the learned Senior State Attorney conceded that most of the documents were irregularly admitted during the trial and urged us to expunge them.

Considering all these factors, we do not order a retrial of the appellant. Instead, we order for his immediate release unless he is held for other lawful reasons.

It is so ordered.

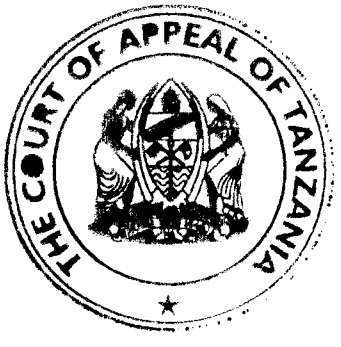
DATED at **DAR ES SALAAM** this 13th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Judgment delivered this 14th day of April, 2021 in the presence of the Appellant in person - linked via video conference from prison and Ms. Tully Helela, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL