IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 417 OF 2018

NG'WAJA JOSEPH SERENGETA @ MATAKO MEUPE....................APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

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

(Magoiga, J.)

dated the 16th day of November, 2018
in
HC. Criminal Appeal No. 239 of 2018

JUDGMENT OF THE COURT

12th July, & 2nd August, 2021

KITUSI, J.A.:

This is an appeal against the decision of the High Court sitting on appeal from the decision of the Resident Magistrates' Court of Morogoro, at Morogoro. Before that trial Court, the appellant known as Ng'waja Joseph Serengeta @ Matako Meupe, was charged with one count of being in an unlawful possession of Government Trophies Contrary to Section 86 (1) (2) (b) and (3) of the Wildlife Conservation Act No. 5 of 2009 [Cap 283] (WCA) as amended by the written Laws (Miscellaneous Amendments) Act No. 4 of 2016 read together with Paragraph 14 of the first schedule to and section 57(1) and 60(2) of the Economic and Organized Crimes Control Act,

[Cap 2003 R. E. 2002] as amended by the written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged that the appellant was found within Malinyi District in Morogoro Region in possession of three pieces of elephant tusks valued at USD 15,000.00 equivalent to Tshs. 33,454,500/= the property of the Government of the United Republic of Tanzania without a permit. Six witnesses testified for the prosecution in proof of those allegations and the appellant gave an affirmed testimony in defence, protesting his innocence. However, the trial Court accepted the prosecution's version of the matter, convicted the appellant and sentenced him to a jail term of 5 years.

What transpired thereafter renders some of the issues raised by the appellant in this appeal totally misconceived. The appellant did not challenge the decision of the trial Court but the case went to the High Court on appeal at the instance of the respondent Republic. The Republic's main complaint at the High court was the sentence that was imposed on the appellant, alleging it to be illegal for being below the stipulated minimum.

After hearing the parties on that lone ground of appeal, the High Court allowed the appeal and enhanced the sentence from 5 years to 20 years imprisonment.

The appellant is aggrieved and has appealed hereto on nine grounds of appeal eight out of which challenge the conviction, which the appellant insists, ought to have been quashed. These are grounds 2, 3, 4, 5, 6, 7, 8 and 9. Specifically, ground 9 summarizes the purported appeal against the conviction by petitioning us to find that the case against him was not proved beyond reasonable doubt.

At the hearing of this appeal which the appellant appeared in person, the respondent Republic was represented by Ms. Cecilia Shelly and Ms. Anunciatha Leopard learned Senior State Attorneys and Ms. Ashura Mnzava, learned State Attorney. At the outset, we wanted them to address the issue whether the appeal against conviction is maintainable in view of the fact that there was no such appeal to the High Court.

The appellant being an unrepresented lay person, could not comprehend this rather technical issue. He casually addressed issues quite unrelated to that, attacking the authenticity of documentary exhibits and drawing our attention to some discrepancies in the prosecution evidence.

On the other hand, Ms. Shelly submitted that grounds 2-9 of this appeal, which purport to raise issue with the propriety of the conviction, cannot be entertained by us because they are new. Although the learned

Senior State Attorney presented this argument without citing to us any basis, we have to decide the issue, anyway.

After hearing the arguments on this point, we think this is a question of jurisdiction, and ours flows from the Constitution of the United Republic, 1977, Article 117(3) and the Appellate Jurisdiction Act, [Cap 141 R.E. 2002], (the AJA). The common principle under Article 117 (3) of the Constitution and section 4 of the AJA is that the Court may not determine matters not raised and determined before the High Court or Resident Magistrate with extended jurisdiction. Case law on this principle are abound and a few instances will suffice to drive the point home. These are; **Halid Maulid V. Republic,** Criminal Appeal No. 94 of 2021 and **Damiano Qadwe V. Republic,** Criminal Appeal No. 317 of 2016 (both unreported). In both cases the case of **Mohamed Said V. Republic,** Criminal Appeal No. 9 of 2014 (also unreported) was cited, and the following paragraph reproduced.

> *"We wish to stress the obvious that the appellate jurisdiction of this Court is to hear appeals which result from the decisions of the High Court and/or from the subordinate courts with extended jurisdiction. This is in terms of the provisions of Article 117 (3) of the Constitution of the United*

> *Republic of Tanzania of 1977 Cap 2 of the R. E 2002 ... and section 4(1) of the AJA [the Appellate Jurisdiction Act]".*

We take the above position to be a reflection of both law and logic, because the appellant's decision in this case not to appeal to the High Court against the conviction entered by the trial Court, must be construed to be what it meant, that he was not aggrieved. The appellant's attempt to challenge the conviction at this stage is therefore not only legally untenable but illogical too. We emphasized this position in **Damiano Qadwe V. Republic** (supra) where we reproduced the following paragraph from **Asael Mwanga V. Republic,** Criminal Appeal No. 216 of 2018 (unreported): -

> *"Now all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactory, the appellant could resort to this Court.* ***What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.***
>
> *We must, therefore* ***decline to turn this Court into a first appellate court from decisions of the District Court. In the result, we express***

no opinion on the grounds of appeal which the appellant brought to this court."

And so are the eight grounds in this appeal, that is, ground 2, 3, 4, 5, 6, 7, 8 and 9, whatever their would - be merits, we decline to pronounce ourselves on them, lest we wrongly sit on first appeal. These are not even new grounds as submitted by the learned Senior State Attorney, but there was never any appeal to the High Court by the appellant. Therefore, we shall only consider ground 1 which is phrased as here under: -

> *"The learned 1st Appellate Judge grossly erred in law by enhancing the Appellant sentence under the Wildlife Act notwithstanding that he was the first offender, thus would have (sic) accorded him milder sentence under the Economic and Organized Crimes Control Act, [Cap 200 R.E. 2002].*

In dealing with the issue of sentence, the learned High Court Judge appreciated the relevant law as amended by Act No. 3 of 2016 and concluded as follows: -

> *"It is crystal clear as day light that following the amendment of the Wildlife Conservation Act No. 5 of 2009 as amended by Act No. 4 of 2016, the minimum sentence of the offence the respondent was charged is 20 years and the maximum sentence*

is thirty years. ***It is also clear from the trial record that the respondent is a first offender and considering the mitigating factor as submitted in the trial Court and given the fact that the minimum statutory sentence is twenty years,*** *I am inclined to exercise my powers under section 366 (1) (b) of the Criminal Procedure Act [Cap 20 R.E. 2002] by substituting the sentence of five years and enhance the sentence to that of twenty years statutory minimum imprisonment" (emphasis ours)".*

Submitting on the first ground of appeal, Ms. Sheily argued that the sentence of 20 years as enhanced by the High Court is not excessive although she conceded that the appellant being a first offender, should have been given an option of a fine in terms of section 86 (2) (b) of the WCA. She invited us to vary the sentence as it was done in the case of **Anania Clavery Betela V. Republic,** Criminal Appeal No. 355 of 2017 (unreported).

On his part the appellant did no more than pray that justice be done to him. We note that he had earlier presented a list of authorities citing the cases of **Issa Hassan Uki V. Republic,** Criminal Appeal No. 129 of 2017; **DPP V. Sharif Mohamed @ Athuman and Six Others V. Republic,**

Criminal Appeal No. 74 of 2016 and; **Mwaimu Dismas and Two Others V. Republic,** Criminal Appeal No. 343 of 2009 (all unreported).

The relevancy of the last two cases cited by the appellant eludes us because the decisions in those cases have nothing to do with sentencing. Incidentally, the case of **Issa Hassan Uki** (supra) which the respondent Republic also included in their list of authorities is quite handy on the subject under discussion. It is relevant for the principle that where a sentencing provision provides for a milder sentence, courts should be inclined to impose that sentence to first offenders.

In our case, the learned High Court Judge considered the fact that the appellant is a first offender but limited that fact to being a factor for deciding whether the sentence should be 20 years or 30 years. Certainly, that approach was not consistent with our decision in **Anania Clavery Betela** (supra) where we stated: -

> *"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....."

Two months after that decision, we took the same position in the case of **Mwinyi Jamal Kitalamba @ Igonza and 4 Others V. Republic,** Criminal Appeal No. 348 of 2018 (unreported)]. Consistent with our previous decisions, the appellant should have been given an option of paying a fine equal to ten times the value of the trophies.

This, we think, is what the appellant has in mind in suggesting that he should have been sentenced to a milder sentence under the Economic and Organised Crimes Control Act, [Cap 200, R.E 2002] (EOCCA). With respect, that is no longer the position following the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 whose section 13 amended section 60 (2) of the EOCCA to read: -

"Notwithstanding provisions of a different 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 ours).

Since those amendments of the EOCCA by Act No. 3 of 2016, and the WCA by Act No. 4 of 2016, both of which came into force on 8th July 2016, the law now requires courts to impose a sentence which is higher than any other provided by the EOCCA. The cases of **Issa Hassan Uki; Anania Clavery Betela** and; **Mwinyi Jamal Kitalamba @ Igonza** (supra), though relevant to sentencing in economic crime cases, involved offences that were committed before 8th July, 2016. Therefore, the appellant's suggestion, citing **Issa Hassan Uki** (supra) in support, that under the current law, there would be a sentence milder than what was imposed by the High Court, holds no water.

Our conclusion based on the foregoing, is that in ground 1 of appeal, the appellant has not made a case for our interference with the sentence, despite the fact that he is a first offender. We therefore find no merit in the appellant's first ground of appeal challenging the legality of the sentence.

In the end, the appeal has no merit and stands dismissed in its entirety.

It is so ordered.

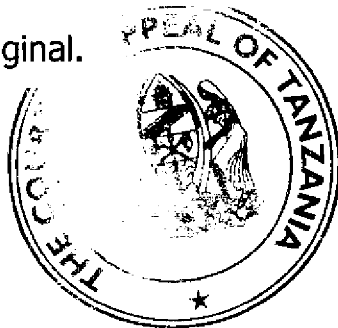
DATED at **DAR ES SALAAM** this 29th day of July, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of August, 2021 in the presence of the appellant in person and Ms. Estazia Wilson, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL