IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: JUMA, C.J., WAMBALI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 509 OF 2019

AMOS S/O MASARANGA @ SARYA ..... 1ST APPELLANT
DAVID S/O MWITA @ MAHANGA ..... 2ND APPELLANT

VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma)

(Ng'umbu, RM EXT. JUR.)

dated the 17th day of October, 2019

in

Criminal Appeal No. 18 of 2019

JUDGMENT OF THE COURT

20th & 25th October, 2021

MASHAKA, J.A.:

The appellants, Amos Masaranga @ Sarya and David Mwita @ Mahanga were arraigned before the District Court of Serengeti District at Mugumu and convicted of four counts. Firstly, unlawful entry into the National Park contrary to sections 21(1) and (2) and 29(1) of the National Parks Act, Cap 282 R.E. 2002 as amended by Act No. 11 of 2003 (the NPA). Secondly, unlawful possession of weapons in the National Park contrary to section 24(1)(b) and (2) of the NPA.

Thirdly, unlawful possession of government trophies to wit; one dried skin of wildebeest contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended (the WCA) read together with paragraph 14 (d) of the First Schedule of the Economic Organized Crime Control Act Cap 200 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 (now R.E. 2019) (the EOCCA). Fourthly, unlawful possession of government trophies to wit; one dried skin of Topi contrary to section 86 (1) and (2) (c) (iii) of the WCA read together with paragraph 14 (d) of the First Schedule of the EOCCA. They were subsequently sentenced to imprisonment for one year each in respect of the first and second counts respectively and twenty years for the third and fourth counts respectively. The sentences had to run concurrently. Their first appeal to the High Court which was transferred to the Resident Magistrate's Court of Musoma and heard by Ng'umbu, RM exercising Extended Jurisdiction was not successful. Undeterred they have appealed to the Court.

Briefly the facts giving rise to the appeal as pursued by the prosecution during trial can be stated as follows. It is alleged that on the 1st June, 2018 the appellants were arrested by park rangers at Samaki area in the Serengeti National Park within the Serengeti District, Region of Mara without the permission of the Director of Wildlife. After the arrest, they were searched by

the said rangers and were found in possession of weapons namely; two 'pangas', one knife and four trapping wires without a permit having failed to satisfy the said park rangers that the said weapons were not intended for the purpose of hunting, killing, wounding or capturing of any animal. They were also found in unlawful possession of government trophies namely; one dried skin of a wildebeest valued at TZS. 1,417,000.00 and one dried skin of a Topi valued at TZS. 1,744,000.00. The said trophies were the property of the United Republic of Tanzania. They were then taken to the Mugumu Police station together with the items and later charged in the District Court. The prosecution called three witnesses, that is, the two park rangers, namely Jumanne Timbius @ Wambura and Driku Abbas Shaban (PW1 and PW2) and the wildlife warden Wilbroad Vicent (PW3) to prove their case.

The appellants denied the allegations. The first appellant stated that he was not arrested in the National Park. He testified that he was arrested in a farm near the National Park. While the second appellant testified that he was at his home when police officers came to his home and told him that he was a suspect and was subsequently taken to the Mugumu Police Station.

The trial court found that the prosecution had proved its case beyond a reasonable doubt against the appellants. They were accordingly convicted and sentenced as mentioned above.

Before the Court, each of the appellants raised four grounds of appeal, which are similar. But for the reasons which will be apparent soon, we do not find the need to reproduce them herein.

At the hearing of the appeal, the appellants though unrepresented, were not physically present in Court, they were remotely linked through video conference facility from the Musoma prison. Whilst the respondent Republic was represented by Mr. Valence Mayenga, learned Senior State Attorney assisted by Mr. Yese Temba and Mr. Roosebert Nimrod Byamungu, learned State Attorneys. When called upon to argue their appeal, the appellants asked the Court to invite the respondent to respond to their grounds of appeal after which, if need arises, they would make a rejoinder.

From the outset, Mr. Mayenga supported the appellants' appeal, advancing different reason from the complaints raised by the appellants in the grounds of appeal. The reason is on the propriety of the charge sheet. Submitting on the charge sheet, it was his contention that there are two charge sheets in this appeal as reflected at pages 1 – 7 of the record of appeal. He explained that although the charge sheet at pages 5 – 7 seemed to have been substituted, initially when it was read out at the trial court the appellants were not called upon to plead, as at that stage the District Court of Serengeti had not been given the jurisdiction to try it by the DPP. He argued further that at page

17 of the record, after the certificate was issued by the DPP, a charge was read over and explained to the appellants and were asked to plead thereto. However, it is indicated that the record of appeal does not show that the trial court substituted the former charge sheet dated 4th June, 2018 as reflected at pages 5 – 7. Therefore, he maintained that there is no dispute the charge sheet which was read over and explained to the appellants on the 19th September, 2018 and they took pleas after the DPP issued the consent and the certificate conferring jurisdiction on the trial court, at page 1 of the record of appeal reads '*admitted on 28/06/2018 and signed by RM*', there is no indication that it was formally substituted.

Mr. Mayenga argued that a further confusion is caused by the fact that while the judgment of the trial court, the third count reads unlawful possession of government trophies contrary to section 86 (1) and (2) (c)(iii) of the WCA, the judgment of the first appellate court on the same count reads unlawful possession of government trophies contrary to section 86 (1) and (2) (c)(ii) of the WCA read together with paragraph 14(d) of the First Schedule to and sections 57(1) and 60(2) of the EOCCA as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. He expounded that these provisions referred in the judgment of the first appellate court were not cited in the second charge sheet, but they are found in the first charge sheet. In the

circumstances, Mr. Mayenga submitted that the appellants were found guilty, convicted and sentenced on a charge that was not formally placed before the trial court, in accordance with the law as it was not formally substituted.

Consequently, Mr. Mayenga prays to the Court to quash the proceedings and judgements of the trial and first appellate courts, set aside the sentences by invoking the revision power under section 4(2) of Appellate Jurisdiction Act, [CAP 141, R.E. 2019] (the AJA) and the appellants be set free. On their part, the appellants concurred with the submissions of the learned Senior State Attorney and prayed the Court to allow the appeal and set them free.

At this point, we find it pertinent to examine the two charge sheets along the submissions from the respondent Republic and the appellants. One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned. The court has to put the charge or charges to the accused and require him to plead. In the present case, the offences against the appellants were both economic and non-economic and the procedure for the economic offences is provided under the EOCCA. Section 28 of the EOCCA provides that: -

> *"28. Except as is provided in this Part to the contrary, the procedure for arraignment and for the hearing and determination of cases under this Act shall be in accordance with the provisions of the Criminal Procedure Act."*

This brings us to section 228(1) of the Criminal Procedure Act, [Cap 20 R.E. 2019] (the CPA) which stipulates the duty and responsibility of the trial court to read out the charge to the accused person so that he can answer to whether he admits or denies the offence against him. The respective section provides that: -

> *"228. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

The cited provision is a mandatory requirement that has to be complied with by the trial court. This requirement enables the accused to know the nature of the offence he is charged with and to be able to prepare his defence. Any failure to read over the charge to an accused is fatal and renders an entire trial a nullity (see **NAOCHE OLE MBILE v. THE REPUBLIC** (1993) T.L.R. 253).

In this appeal, there is no doubt as alluded to above that as reflected at page 17 of the record of appeal, the charges were read over and explained to the appellants who pleaded not guilty in respect of all four counts, hence the trial started until the conclusion, they were accordingly convicted and sentenced. Admittedly, we are of the view that the charge sheet which was read over was the one dated 28th June, 2018 as it was after the consent and the certificate of the DPP conferring jurisdiction to the trial court was duly filed

on the same date as reflected at page 12 of the record of appeal. We have no doubt that the said charge sheet is the one which was relied by trial magistrate to convict and sentence the appellants as reflected in the judgment. It is indeed unfortunate that in the impugned judgment of the first appellate court, Ng'umbu, RM with Extended Jurisdiction made reference to the charge sheet dated 4th June, 2018 in respect of the 3rd and 4th counts which was read over to the appellants before the DPP issued a certificate conferring jurisdiction to the trial court.

Therefore, on the face of the record, it may seem that the trial court complied with the provisions of section 28 of the EOCCA and section 228 (1) of the CPA as when the appellants were arraigned on 19th September, 2018, they were called upon to take plea as alluded to above. However, the crucial question is whether the said charge sheet which was relied upon by the trial court was legally introduced at the trial court to form the basis of the court record.

In the first place, we need to point out that though the charge sheet which was admitted at the trial court on the 28th June, 2018 was not formally substituted as required by the law, its authenticity is questionable. This is so because the consent and certificate of the DPP conferring jurisdiction on the trial court to try both economic and non – economic offences accompanied the charge sheet were signed by the Principal State Attorney at Musoma on the 5th

February, 2018. It is interesting to note that the said date was before the alleged date, that is, 1st June, 2018 when the appellants committed the offences.

In our respectful view that was a fatal anomaly as the trial court wrongly relied on the charge sheet which was not only doubtful but also not formally placed before the court by order of substitution as required under section 234 of the CPA. Indeed, according to the record of appeal there is no evidence that before the 19th September, 2018 when the appellants were required to plea to the charge after the consent and certificate by the DPP were duly filed, the prosecutor prayed to substitute the charge sheet dated 5th February, 2018 in place of the former charge sheet dated 4th June, 2018. There is also no evidence in the record of appeal that the trial magistrate issued a formal order substituting the charge which he later relied upon in convicting and sentencing the appellants. We only note from the record of appeal at page 5 that the former charge was crossed over and the abbreviation "SBT" inserted, presumably indicating it was substituted. However, there is no signature of the trial magistrate or date of substitution indicated therein as an acknowledgement that the said charge sheet was substituted.

Secondly, it is unfortunate that the first appellate court did not deal with this problem but rather it added the confusion on the proper charge sheet which was placed before the trial court for the trial of the appellants. As correctly

stated by Mr. Mayenga, Ng'umbu, RM with extended jurisdiction in his judgment reproduced at pages 71 and 72 of the record of appeal, the provisions of the law cited in respect of the third and fourth counts are found in the first charge sheet dated 4th June, 2018. However, the said provisions were not part of the judgment of the trial court as found at pages 44 – 46 of the record of appeal which were relied upon to convict and sentence the appellants.

Thus, we invoke our revisional power under section 4(2) of the AJA, to nullify the proceedings of the trial and first appellate courts, quash the convictions and set aside the sentences meted out against the appellants for being a nullity.

Ordinarily, after having quashed the entire proceedings of the two lower courts, a retrial would have been ordered. However, in this case as the circumstances of what we deliberated above leads to the finding that there was no formal charge before the trial court, a retrial will not be practicable. In our view, the error amounted to an abuse of the court process which caused a miscarriage of justice on the part of the appellants. Therefore, it would not be in the interest of justice to order a retrial. Besides, an order for retrial will only help the prosecution to correct the error. This will go contrary to the settled position that a retrial should not be ordered where prejudice will be caused on the appellants as stated in **Fatehali Manji v. R** [1966] E.A. 343.

We therefore concur with Mr. Mayenga that the appellants are entitled to be set free. Ultimately the appeal is allowed. We order the immediate release of the appellants from custody unless they are held for another lawful cause.

DATED at **MUSOMA** this 23rd day of October, 2021.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of October, 2021 in the Presence of Mr. Kainumera Anesius, Senior State Attorney, Mr. Mafuru Moses, learned State Attorney for the Respondent/Republic, the 1st Appellant and 2nd Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL