

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A., And MASHAKA, JA.)

CRIMINAL APPEAL NO. 157 OF 2018

VICENT KIOJA @NGELEJA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Rumanyika,J.)

dated 6th day of June, 2018

in

Criminal Appeal No. 8 of 2018

.....

JUDGMENT OF THE COURT

18th & 25th March, 2022

MASHAKA, JA.:

Before the Resident Magistrate's Court of Tabora at Tabora, Vicent Kioja @ Ngeleja, the appellant stood charged with the offence of unlawful possession of government trophy. He was convicted and sentenced to five years imprisonment. Aggrieved by the sentence, the Director of Public Prosecutions (the DPP) appealed to the High Court at Tabora which enhanced the

sentence in exercise of its revisional powers. Being dissatisfied with the decision by the High Court in favour of the DPP, the appellant has brought this appeal premised on four grounds of appeal. In brief, the grounds were that, **firstly** the appellant was not arrested with the alleged government trophy, **secondly** the first appellate court erred to rule and condemn the appellant without evaluating the whole evidence which was tendered before the trial court in Criminal Case No. 24 of 2014 and Economic Case No. 38 of 2016, **thirdly** the learned High Court Judge erred in enhancing the sentence to twenty years at the stage of determining whether the appeal before him was competent and **fourthly**, the learned High Court Judge failed to determine the preliminary objection raised.

As it will become clear later, the determination of the appeal will turn on grounds three and four which touch on the issue whether the High Court was right in exercising its revisional powers under section 373 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002 now 2019] (the CPA) to enhance sentence after holding that the respondent's appeal was time barred.

To appreciate the nature of the issue for our consideration and determination in this appeal, it will be necessary to highlight the salient facts. As alluded to earlier, the Resident Magistrate's Court of Tabora convicted the appellant as charged on the offence of unlawful possession of government trophy contrary to section 86 (1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) read together with paragraph 14 (d) of the First Schedule to and sections 57 and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 (EOCCA).

According to section 86 (1) and (2)(b) of the WCA, the offence attracts a sentence of twenty years imprisonment upon conviction. However, the trial court passed a sentence of five years instead of the prescribed one of twenty years imprisonment. The DPP was aggrieved by the sentence and preferred an appeal to the High Court at Tabora requesting to make an appropriate sentence as provided by the law.

In his reply to the arguments in support of the appeal before the High Court, the appellant made a contention that the appeal

was time barred for being lodged beyond the forty-five days prescribed by section 379 (1) (b) of the CPA. The High Court agreed with the appellant and observed that the appeal ought to have been dismissed. Instead of doing so, the first appellate court resorted to revisional powers under section 373 (1) of the CPA in a bid to correct the sentence imposed by the trial court. Acting under the said provision, the High Court enhanced the sentence to twenty years which has resulted in the present appeal.

We note from grounds one and two in the memorandum of appeal that the appellant is raising complaints on his conviction. However, since the merits of the appellant's conviction was not a subject of the appeal in the impugned decision, we think grounds one and two are not properly before the Court for determination. The issue for our determination shall be restricted to the complaints on the enhanced sentence; whether upon finding that the appeal was time barred, liable to be dismissed, was it proper for the High Court to resort to its revisional powers under section 373 (1) of the CPA and whether the appellant was given an opportunity to be heard before enhancement of the sentence.

At the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. John Mkony, learned State Attorney represented the respondent Republic. The appellant adopted the grounds of appeal and opted to let the learned State Attorney respond and reserved his right to re-join, if need arises.

Mr. Mkony conceded to the complaints but argued that much as the appeal was time barred, the High Court had power to correct the illegal sentence through revision in the manner it did. According to him, the High Court should have given an opportunity to the appellant to be heard before enhancing the sentence. Mr. Mkony thus urged the Court to quash the order enhancing the sentence.

On his part, the appellant requested the Court to set aside the sentence imposed by the High Court in the appeal which was time barred.

After examining the record and the submissions of the learned State Attorney on the issue, we think the first appellate court made an error in resorting to revisional powers to enhance

the sentence, subject of the complaint in the appeal it had already held that it was time barred. The High Court did so without even affording the appellant the opportunity to be heard as required by section 373 (2) of the CPA which states: -

"(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection".

Admittedly, having appreciated that the sentence was illegal, the High Court was enjoined to correct the error in the exercise of its revisional powers. However, such powers should have been exercised according to the law and not in an appeal which was time barred. As it stands, the order of the first appellate court meant to grant the relief sought in the time barred appeal. That was not proper.

In view of that, we find merit in the appeal and allow it. We accordingly set aside the order which enhanced the sentence and substitute thereto an order dismissing the appeal before the High Court.

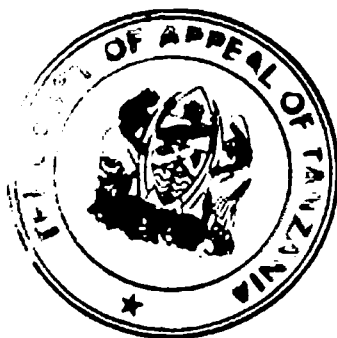
DATED at **TABORA** this 24th day of March, 2022.

A.G. MWARIJA
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of March, 2022 in the presence of the Appellant in person and Ms. Jaines Kihwelo, 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