IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 47 OF 2018

SALUM MOHAMED SOUD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Shinyanga)

(Kibella, J.)

dated the 14th day of December, 2017

in

Criminal Revision No. 8 of 2017

.....

RULING OF THE COURT

3rd & 10th July, 2023

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania sitting at Shinyanga (Kibella, J.) dated 14/12/2017 made in Criminal Revision No. 8 of 2017. The revisional proceeding was conducted in respect of the decision of the District Court of Shinyanga in Economic Crime Case No. 3 of 2017. In that case, the appellant, Salum Mohamed Soud was charged with and convicted of two counts preferred under the Wildlife Conservation Act, No. 5 of 2009 (the WCA) read together with the

Economic and Organized Crime Control Act, Chapter 200 of the Revised Laws (the EOCCA).

In both counts, the appellant was charged with the offence of unlawful possession of Government trophies contrary to s. 86 (1) and 2 (b) of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60(2) of the EOCCA. In the first count, it was alleged that on 22/7/2017 at Mwalugoye area within the Municipality and the Region of Shinyanga, the appellant was found with ten (10) Indian Blue Peacock valued at USD 150 equivalent to a total value of TZS 3,300,000.00, the property of the United Republic without a permit from the Director of Wildlife.

As for the second count, it was alleged that, on that same date and place, he was found in possession of one Common Duiker, one Impala, one Bohor Reedbuck, one Wildbest, eight Vulturine Guinea Fowl and five Egyptian Gees all total valued at TZS 8,118,000.00 the property of the United Republic without a permit of the Director of Wildlife.

When he was arraigned on 10/8/2017, the appellant pleaded guilty to both counts. He also admitted as correct, the facts which were read over to him. Following his plea of guilty, he was convicted of both counts and

sentenced to pay a fine of TZS 33,000,000.00 or twenty years imprisonment in the first count and TZS 16,000,000.00 or ten years imprisonment in the second count. The appellant paid the fine.

About two months after the conclusion of the case by the trial court, the High Court initiated *suo motu*, revisional proceeding under s.44 (1) (a) of the Magistrates' Courts Act, Cap. 11 of the Revised Laws. At the hearing, the parties were required to submit on the propriety or otherwise of the sentence meted out to the appellant. The learned High Court Judge heard Ms. Ndaweka, learned Senior State Attorney who represented the Republic and Mr. Paul Kaunda, learned counsel who represented the appellant. The appellant did not appear at the hearing on 11/10/2017 and also on the date of the ruling which was handed down on 14/12/2017.

In his ruling, the learned High Court Judge found that, in sentencing the appellant in the second count, the learned trial Resident Magistrate did not consider the provisions of s. 86 (2) (ii) of the WCA as amended by the Written Laws (Miscellaneous Amendments) No. 2 Act, 2016 (Act No. 4 of 2016). He observed that, after the amendment, the sentence for a person convicted of the offence of being found in unlawful possession of Government trophies of the value exceeding TZS 1,000,000.00, is a

mandatory term of imprisonment of not less than twenty years but not exceeding thirty years and in addition a fine of an amount equal to ten times the value of the trophy.

Having considered that provision, the learned Judge decided that, the sentence imposed on the appellant in that count, was illegal. He thus proceeded to sentence the appellant to a minimum term of imprisonment of twenty years and in addition, a fine of TZS 50,780,000.00. It was ordered however, that TZS 16,434,000.00 be set off from the fine as an already paid amount.

The appellant was aggrieved by the ruling and therefore, by a notice of appeal lodged on 10/1/2018, he preferred this appeal. In his notice, he expressed his intention to be present at the hearing of the appeal.

By 4/11/2019, the appeal was ready for hearing. However, on that date and despite two subsequent sessions, in which the matter was fixed for hearing on 6/7/2022 and 25/10/2022, hearing could not proceed because of non-appearance of the appellant. The reason for his consistent absence as explained by his advocates, is illness, as the result of which, it was contended, he had to travel to India for medical treatment at Apollo Hospitals, Chennai. It was contended further that, since then he has not

returned home. Following the promise by the counsel for the appellant on 25/10/2022, that the appellant would appear if the hearing was to be adjourned to another sessions, the Court granted the prayer for adjournment on the condition that it should not allow any further adjournment. The appeal was consequently fixed for hearing on 3/7/2023 during the present Court Sessions. When the appeal was called on for hearing on that date, Mr. Frank Samwel, learned counsel appeared for the appellant. The respondent Republic was represented by Mr. Shaban Mwegole, learned Senior State Attorney. He was being assisted by Ms. Wampumbulya Shani and Mr. Leonard Kiwango, both learned State Attorneys.

As has been for the previous sessions however, hearing of the appeal could not proceed on account of the same reason; the absence of the appellant who, as stated above, had indicated in his notice of appeal that he would wish to be present at the hearing. Being alive to the Court's last order, Mr. Samwel, on whose promise to procure the attendance of the appellant, the appeal was adjourned on 25/10/2022 for the last time, came with a different approach. He moved the Court to proceed with the hearing of the appeal notwithstanding the absence of the appellant. He argued

that, even though the appellant was not physically present in Court, he was deemed to have appeared since he was represented by an advocate. He relied on the provisions of rules 30 (1) and 80 (2) & (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Rule 30 (1) of the Rules provides that:

> *" 30-(1) Subject to the provisions of rules 31 and 33, a party to any proceedings in the Court may appear in person or by advocate."*

As to rule 80 (2) and (4), the same states as follows :-

> *"80-(1) .... N/A.*
>
> *(2) Where an appellant is represented by an advocate or has lodged a statement under rule 74 or is in prison it shall not be necessary for him to attend personally at the hearing of his appeal, unless the Court orders his attendance; but if an appellant is on bail he shall attend at the hearing of his appeal or with the leave of the Registrar, shall before the time of the hearing attend at the High Court at the place where the bail bond was executed and submit himself to the order of that court pending disposal of the appeal.*
>
> *(3) .... N/A*

(4) Subject to the provisions of sub-rule (3), if on the day fixed for the hearing of an appeal the appellant does not appear in person or by advocate and has not lodged a statement under rule 74, the appeal may be dismissed or may be heard in his absence; save that where an appeal has been dismissed under this sub-rule, the Court may restore it for hearing if it is satisfied that the appellant was prevented by any sufficient cause from appearing when the appeal was called for hearing."

The learned counsel implored upon us to find that, by having been represented by an advocate, the appellant was deemed to have appeared and the Court would thus be justified to proceed with the hearing of the appeal.

Ms. Shani opposed the arguments made by the learned counsel for the appellant. She submitted that, since Mr. Samwel has failed to procure the attendance of the appellant as promised on 25/10/2022, the best option for him is to pray to withdraw the appeal with leave to refile it when the appellant is ready to appear in Court. Mr. Samwel was not prepared to take the course proposed by the learned State Attorney. He reiterated his

submission that the appeal should proceed to hearing because the appellant was represented by an advocate.

We have duly considered the submissions of the learned counsel for appellant and the learned State Attorney. We note from the record that on 4/11/2019, the Court gave a guidance on how to avoid further delays in the hearing and disposal of the appeal caused by the absence of the appellant. The previous advocate for the appellant, Mr. Mpaya Kamara had moved the Court to proceed with the hearing of the appeal in the absence of the appellant on account that he had waived his intention to be present at the hearing. However, the Court declined to act on the assertion of the learned counsel and observed that, if "*the appellant so wished, he ought to have formally notified the Court on the waiver*". Although the appellant attempted to act in accordance with the proposition made by the Court by submitting a copy of a letter sent to the Registrar through the appellant's father, Mohamed Soud Said, on 14/7/2022 when the appeal was called on for hearing, the Court considered that letter which was attached to the affidavit of the said Mohamed Soud and declined to act on it. It also declined the prayer by Mr. Kamara that, since the appellant was

represented, hearing could proceed in his absence. In its ruling handed down on that date, the Court held *inter alia* that:-

> *"**One**, the Court found it unsafe to act on the advocate's prayer based on assertions from the bar and by way of an obiter, stated that if the appellant had wished to seek for a waiver, he ought to have formally notified the Court. It is our considered view that, that was the Court's opinion on the basis of the material that was placed before it on that day. It was not a direction of the Court that the appellant should do so in the future dates. **Two**, the Court adjourned the hearing of the appeal in order to give or enable the appellant to exercise his desire to be present at the hearing of the appeal. In other words, that was the basis of the Court's order for adjournment which was geared towards enabling the appellant to appear in Court on the next hearing date to be fixed by the Registrar."*

The Court went on to state as follows:

> *"Moreover, we are mindful of the fact that the notice of appeal institutes a criminal appeal under Rule 68 (1) of the Rules, and that it entails a right of hearing on the appellant. This being the case,* ***we wonder whether some contents of the***

> ***notice of appeal can be waived by way of a letter***. *Unfortunately, both learned counsel were unable to give us authority in that regard.... Given the circumstances and the nature of the appeal before us, we are constrained to agree with the learned Senior State Attorney that prudently, the appeal should not be heard in the absence of the appellant. In other words, we find that we cannot depart from the previous Order dated 4th November, 2019 in which the Court found it proper to give accord to the appellant's desire to be present at the hearing of the appeal."*
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> [Emphasis added].

It is unfortunate that despite that decision, Mr. Samwel persistently urged us to proceed to hear the appeal in the absence of the appellant reiterating his argument that his representation entails the presence of the appellant.

On the basis of the foregoing reasons, we decline the prayer made by the learned counsel for the appellant. Since this was the last date on which the appeal was adjourned for hearing and the appellant has not appeared in person in compliance with the requirement contained in his notice of appeal, in terms of rule 4 (2) (a) and (b) of the Rules, we hereby dismiss

the appeal with leave to the appellant to refile it within twelve months from the date of delivery of this ruling.

DATED at **SHINYANGA** this 10th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 10th day of July, 2023 in the presence of Mr. Frank Samwel, learned counsel for the Appellant, Mr. Leonard Kiwango and Ms. Upendo Mwakimonga, both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL