**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)**

**CRIMINAL APPEAL NO. 73 OF 2021**

**PAULO KAPARAGE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**[Appeal from the Decision of the High Court of Tanzania at Tabora]**

**(Kihwelo, J.)**

**dated the 16th day of December, 2020**

**in**

**Criminal Appeal No. 120 of 2019**

.....

# JUDGMENT OF THE COURT

*26th September, & 3rd October, 2023*

**LILA, JA:**

The Appellant was arraigned before the Resident Magistrates' Court of Tabora at Tabora (the trial court) to answer a charge coached thus: -

***"STATEMENT OF OFFENCE***

***UNLAWFUL POSSESSION OF WEAPONS IN A GAME RESERVE*** *c/s 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (CAP. 200 R.E.*

*2002) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.*

***PARTICULARS OF OFFENCE***

***PAULO s/o KAPARAGE*** *on the 20th day of September, 2018 during night hours at Luganzo area within Luganzo Game Controlled Area (Mpanda line) in Kaliua District, Tabora Region was found in possession of 1 muzzle loader without a permit.*

***Dated*** *at* ***Tabora*** *this 25th day of September, 2018..."*

Being an economic offence, the Prosecution Attorney In-Charge of the Prosecution Services, Tabora Office, in terms of section 26(1) of the Economic and Organized Crime Control Act (the EOCA), read together with Government Notice No. 284 of 2014 and Part II of the Second Schedule of the EOCA, consented to the trial of the appellant by the trial court instead of the Corruption and Economic Crimes Division of the High Court. He also issued a Certificate in terms of section 12(3) of the same laws certifying trial of the appellant by that court.

The following constitutes the essential background facts giving rise to this appeal. Upon the charge being read and explained to the appellant, he responded stating that ***"It is true"***. The trial court entered a plea of guilty to the charge. Subsequently, facts constituting the offence were read out by the prosecution which, as are relevant in the determination

of this appeal, we take pain to reproduce them as reflected at pages 9 to 10 of the record of appeal: -

> ***"FACTS***
>
> *Personal particulars are as per the charge sheet. On 20th day of September, 2018 during night hours at 02:00 hours the watchmen of the* ***game reserve*** *namely Lazaro Silivano, Frank Joseph Matiku and Godfrey Japheth Gamba were on patrol. While at* ***Ikobelo area*** *they found the accused person in the game reserve. The accused person was arrested when he was questioned he told them that he is namely (sic) Paulo Kapalage. They searched the place where the accused person was and found him in unlawful possession of the gun make gobore. When the accused person was asked if at all he has the permit of owning the gun he said no. They did fill in the certificate of seisure which was prepared by one Godfrey Nzamba. The accused person did sign on the said certificate of seizure. They brought the accused person to their Zonal Office. The accused person was questioned by the police officer No. 2134 DC Zipa where the accused person confessed to his offence that he was found in unlawful possession of the gun which he was using for poaching the wildlife. The charge has been read to the accused person who pleaded guilty.*

*The gun which was found with the accused person unlawfully is herein Court."* (Emphasis added)

The gobore, cautioned statement and certificate of seizure were tendered and admitted as Exhibit P1 collectively.

Again, called upon to comment on the facts adduced, the appellant responded thus: -

> *"It is true that they found me at my home place which is within the* ***game reserve*** *and I was possessing the gun make gobore."* (Emphasis added)

The facts admitted as true by the accused convinced the trial court that the charge was proved and proceeded to convict and sentence the appellant to serve twenty (20) years jail term. He was aggrieved and appealed to the High Court where his appeal was heard to its completeness by the late Bongole J. but he did not survive to compose the judgment. Kihwelo J. (as he then was) succeeded him and composed the judgment ending up with the dismissal of the appeal in its entirety. Aggrieved by that decision, the Appellant filed the present appeal bringing to the fore four grievances. However, before hearing of the appeal could start earnestly, Ms. Grace Lwila, learned State Attorney, sought and was granted leave to argue a point of law on which, she said, the appeal could

turn on. The point of law was that the charge was fatally defective hence vitiated the plea of guilty entered by the appellant.

As it was the case before both courts below, the appellant appeared before us in person and unrepresented. Ms. Lwila, as shown above, represented the respondent Republic. She supported the appeal on the ground stated above.

When we were perusing the record, it came to light that the proceedings upon which the appellant's conviction was founded was problematic to which we felt impelled to put the matter right before dwelling on the appeal before us. It is amply clear that the trail magistrate, in conducting plea of guilty proceedings under section 228 of the Criminal Procedure Act (the CPA), adopted a procedure for conducting a preliminary hearing which is governed by section 192 of the CPA the purpose of which is to determine matters not in dispute so as to relieve the prosecution from the burden of summoning witnesses on matters not disputed by an accused person. For ease of reference, we quote the provisions of section 192 of the CPA: -

> *"1) Notwithstanding the provisions of Section 229 and 283, if an accused person pleads not guilty, the court shall as soon as is convenient hold a preliminary hearing in open court in the*

*presence of the accused or his advocate if he is represented by an advocate and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditions trial.*

*2) .....*

*3) At the conclusion of a preliminary hearing held under this section the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands signed by the accused and his advocate and by the public prosecutor, and then filed."*

On the other hand, on plea of guilty, section 228(2) of the CPA stipulates that: -

*"(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears sufficient cause to the contrary."*

Admittedly, the two provisions do not expressly provide for the manner of conducting proceedings in their respects a lacuna which court's decisions have duly and fully filled including their giving a distinction

between them which we find ourselves compelled to seize this opportunity to remind judicial officers.

The procedure of conducting plea of guilty proceedings under section 228 of the CPA is quite distinct from the procedure of conducting preliminary hearing proceedings in terms of section 192 of the CPA. The Court had an occasion, when faced with an akin situation, to lucidly illustrate the position in the case of **Hyansint Nchimbi vs Republic**, Criminal Appeal No. 109 of 2017 (unreported) and, for clarity, we quote: -

> *"We have found it opportune to, once again, draw the attention of magistrates to the difference between the procedure under section 228 of the CPA and that obtaining under section 192 of the CPA. The former provision applies when an accused admits the charge and the facts. The facts that are adduced under section 228 of the CPA are not by any means in a form of a Memorandum, but they are mere facts supporting the charge. The latter provision applies during the preliminary hearing when the accused has pleaded not guilty and the prosecution adduces facts with the view of ascertaining which of them are not disputed so as to speed up trial and avoid the costs of calling witness to undisputed facts. At the end of the*

*procedure under section 192 of the CPA, A Memorandum of undisputed fact, if there be any, is prepared. At the end of the procedure under section 228 of the CPA a conviction is probably entered."*

Then, applying the principles in the case before it, the Court said: -

*"In the case at hand, the facts that were recorded by the court were titled Memorandum of facts. With respect, this was wrong in view of what we have shown above, because even if the appellant had been called upon to respond to them, he would not have responded to a Memorandum. It is perhaps necessary to reiterate the procedure which should be followed when an accused pleads guilty."*

There is no doubt that the ultimate result of holding a preliminary hearing under section 192 of the CPA is to expedite the trial by not calling unnecessary witnesses to prove undisputed facts hence shorten the trial period of the case. The Court acknowledged this benefit in Criminal Appeal No. 19 of 2003, **Kalist Clemence @ Kanyaga vs The Republic** (unreported) wherein it was stated: -

***"Section 192** of the Criminal Procedure Act, Cap. 20 Revised Edition 2002 appears under Part (c) of **"Trial Generally."** That Part has a heading –*

***"Accelerated Trial and Disposal of Cases."***

*The obvious inference is that* ***Section 192*** *is intended to achieve the speeding up of criminal trials. Under that Section, one of the ways of speeding up a trial is that as soon an accused person pleads not guilty to a charge the trial court should hold a hearing termed* ***"preliminary hearing"*** *during which matters which are undisputed will be identified so that evidence to prove such matters will not unnecessary be called. That will mean that witnesses will not be summoned to prove that which is not disputed. That which is accepted as undisputed is taken by the trial court as proved."* (Emphasis added)

As to what procedure should be adopted in conducting a plea of guilty proceedings under section 228 of the CPA, the Court cited the case of **Adam vs Republic** (1973) EA 445, cited in **Khalid Athuman vs Republic,** Criminal Appeal No. 103 of 2005 (unreported), which laid down the procedure thus: -

*"When a person is charged, the charge and the particulars should be read out to him so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused*

*then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formerly enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of the facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."*

Violation of the procedure under section 192 of the CPA has therefore no effect of rendering the trial a nullity by vitiating the proceedings in the event it is not completely or improperly conducted as the prosecution will only be placed at a disadvantage that it shall be obligated to call and adduce evidence to prove every material fact (See: **Joseph Munene and Another vs The Republic,** Criminal Appeal No. 109 of 2002 (unreported).

We entirely subscribe to the principles and procedure laid down above which should have been observed by the trial magistrate in the present case.

As it happened in **Hyansint Nchimbi vs. Republic (supra)**, the appellant in the instant appeal, admitted as true facts contained in the memorandum of undisputed facts extracted from the facts narrated during a preliminary hearing to which he also signed which is normally conducted in terms of section 192 of the CPA. In terms of that provision, the admitted facts could not therefore result in his conviction. To put matters in order, in situations where an accused person admits all the facts placed before him during preliminary hearing under section 192 of the CPA and such facts constitute all the elements of the offence charged, the proper procedure to be followed is to cause the appellant be reminded the charge for him to plead guilty after which the procedure on plea of guilty, as explained above, should take course. In all, the learned trial magistrate was in error to adopt a procedure suited in preliminary hearing in conducting plea of guilty proceedings but, as stated above, this does not vitiate the proceedings.

Reverting to the instant appeal, Ms. Lwila was not only brief but also focused in arguing the point she raised. She contended that the charge was fatally defective in terms of the offence charged. Elaborating, she

argued that an offence under section 17 of the Wildlife Conservation Act No. 5 of 2009 (WCA) stands where one is found in possession of a weapon in a Game Reserve and the offence turns out to be an economic offence in terms of paragraph 14 of the First schedule to the EOCA. That section does not apply in a Game-Controlled Area. Since the particulars of the charge were explicitly clear that the accused was alleged to have been found with a gobore at Luganzo area within Luganzo Game Controlled Area, the proper charging section was not section 17 of WCA but section 20(1)(b) of WCA read together with para 14 of the First Schedule to the Economic and Organized Crimes Control Act (EOCA) which renders it to be an economic offence. Not only that, she further submitted that the offence under section 17 of the WCA, being an economic offence, carries a stiffer sentence of twenty (20) years jail term in terms of section 60(2) of the EOCA as opposed to the offence under section 20 of the WCA which is non-economic offence which carries a sentence of a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three years in terms of section 20(4) of WCA.

In furtherance of the anomaly, Ms. Lwila argued that the charge alleged that the offence was committed on 20/9/2018 when Luganzo was still a Game Controlled Area as its status was elevated to a Game Reserve vide Government Notice No. 460 published on 25/6/2021. It was wrong

in the circumstances, she insisted, for the appellant to be charged with the offence of unlawful possession of a gobore in the Game Reserve by then. Taking all these circumstances together, she submitted that the offence charged against the appellant could not stand and his plea of guilty should be taken to have been made out of a misconception with the effect that it should be taken to be equivocal.

Before Ms. Lwila had to rest her case, it came to our notice that while the particulars of the charge stated that the appellant was found and arrested having in possession of a gobore at Luganzo Area within Luganzo Game Controlled Area (Mpanda Line), facts narrated in support of the charge mentioned Ikobelo Area to which variance we engaged her to address us. Without mincing words, she readily conceded to that patent variance adding that Ikobelo Area is quite a different place and there was no mention that such area is within Luganzo Game Controlled Area. Having said all the above, she beseeched the Court to find the charge fatally defective to which the appellant could not have validly pleaded guilty, convicted and sentenced. She was confident that the infractions discussed merit the appeal with a deserving order of the appellant being set at liberty rather than being retried.

For obvious reasons of being a layperson, there was no substantial contribution from the appellant other than concurring with the learned

State Attorney's argument that he should be set free so as to allow him regain his freedom and let him join his family he has missed for years.

We have seriously considered the arguments by the learned State Attorney and we are not ready to do an injustice to her for not commending her for her clear, well-researched and well-presented submission. We share views with her.

It is patently clear that the charge under consideration was wrongly brought against the appellant under the afore-mentioned provisions. The facts narrated were squarely within the scope of the offence committed under section 20(1) (b) of the WCA as it is wide and covers offences committed in a Game Reserve or Game Controlled Area. Section 17 of WCA applies only to a situation where one is found in possession of a weapon in a Game Reserve but, as rightly submitted by the learned State Attorney, Luganzo Area, at that material time, was not yet a Game Reserve only to be so later on 25/6/2021 vide Government Notice No. 460. That being so, there could be no question of charging him under section 17 of WCA. The charge could not stand. Ms. Lwila has suggested that the offence could be charged under section 20(1)(b) of WCA but went further to submit that such an offence would not be economic offence in terms of paragraph 14 of the First Schedule to the EOCA. We entirely agree with her as an offence under that section is not among the section cited in

paragraph 14 of the First Schedule to the EOCA. But worse still, the record is vivid that the appellant was charged with an economic offence and the imperative requirements of issuing a consent and certificate before trial could commence were complied with. Clearly that was wrong. In our strong view, it is a fact that the offence charged and the facts narrated fitted squarely into neither of the above discussed provisions.

We are well aware that the offence section and the particulars of the offence complement each other and anomalies in the charging section (offence section) are sometimes cured by particulars of the offence, but in this case they did not and, instead enhanced the ailments ending up with a total confusion. In such circumstances and in cases of variance between the charge and facts about the area where the appellant was arrested having in possession of the gobore, the Court has pronounced itself that there is need for prosecutors and the court to regularly check and amend the charge so as to accord with the facts or evidence prior to composition of a judgment in line with section 234 of the CPA. The Court provided that guidance in **Sylvester Albogast vs Republic,** Criminal Appeal No. 309 of 2015 (unreported) and stated as follows: -

> *"This, is not however to say that prosecutors cannot make mistakes in drafting charges. But where there are such mistakes, the law has also*

*provided a solution. The remedy, as suggested by this Court in* ***Leonard Raphael and Another v. The Republic,*** *Criminal Appeal No. 4 of 1992 (unreported) is that: -*

*"Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the cause of trial the evidence is at variance with the charge and discloses an offence not laid in the charge, they should invoke the provisions of section 234 of the CPA 1985 and have the charge amended in order to bring it in line with the evidence."*

Despite the variance being so obvious, the prosecution did not seize the above opportunity to rectify the anomaly by amending the charge so as to cite a proper offence section and particulars of the offence which accords with the nature of the offence committed and then adduce facts which constitute all the ingredients of the offence.

Ms. Lwila also argued on the different sentences the two provisions attract as being different. In sentencing the appellant to serve 20 years imprisonment, it appears that the trial magistrate did so purportedly in compliance with section 60(2) of EOCA. With respect, this was a serious misconception under the circumstances of this case that the charge was fatally defective.

What effect have the above infractions turns out to be our last issue to consider. It is a settled law that under section 360(1) of the CPA no appeal lies against a conviction resulting from a plea of guilty. However, there are exceptional circumstances to that general rule which permit the plea of guilty to be challenged as were expounded by the Court in the case of **Laurence Mpinga vs. Republic** [1983] T.L.R 166. In this case the Court observed that: -

> *"(i) An appeal against a conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand;*
>
> *(ii) an accused person who has been convicted by any Court of an offence "on his own plea of guilty" may appeal against the conviction to a higher Court on any of the following grounds:*
>
> 1. *that, even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;*
> 2. *that he pleaded guilty as a result of mistake or misapprehension;*
> 3. *that the charge laid at his door disclosed no offence known to law; and*

*4. that upon the admitted facts he could not in law have been convicted of the offence charged."*

The bedrock on which the above factors rest is arraignment on a proper charge. It is, therefore, imperative that a trial court satisfies itself, first, that the accused is arraigned on a proper charge before the propriety of his plea is examined. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the specific offence known to law. Taking cognizance of this requirement, in **Charles Adrian Chaki vs. Republic**, Criminal Appeal No. 399 of 2019 (unreported), the Court listed that requirement as one of the matters to be considered to determine unequivocalness of a plea of guilty.

Our discussion above leads us to no other destination other than agreeing with the learned State Attorney that the substance of the charge was ambiguous and legally incomprehensible. We are alive to the 'prejudice test' that considerations as to prejudice should follow upon a complaint by the appellant and in this case there is no such complaint. But, we think, in peculiar circumstances obtaining in this case where violations of the procedure are obvious and serious, the court, as a fountain of justice and where justice rests and, the more so, where justice is administered justly and irrespective of being learned in legal matters,

is justified to intervene and see to it that laws are followed to the letter. The learned State Attorney had seen such need and we entirely agree with her that, considering the defect of the charge, nature of the facts narrated which were at variance with the charge and the manner the court conducted the plea proceedings, cumulatively, the appellant was prejudiced. It is obvious that the appellant pleaded guilty to a fatally defective charge out of ignorance or misconception. The appellant, a lay person, did not know that he was pleading to such an incurably defective charge. On the authorities above, his plea of guilty was vitiated and was, legally, equivocal. We are impelled to hold, as we hereby do, that his conviction and sentence were therefore bad in law and cannot be sustained.

Ms. Lwila was not in favour of an order for retrial. She gave no reasons. But we think she was right. In the circumstances of this case where the charge is incurably defective, it is against reason to order the record to be remitted to the trial court for the appellant to face trial as there is, in law, no charge to be tried upon.

In the end, we have no reason not to go along with Ms. Lwila's argument that this point of law disposes the appeal rendering it wholly unnecessary to consider the appellant's grounds of appeal.

In fine, invoking our powers of revision under section 4(2) of the Appellate Jurisdiction Act, we hereby nullify the proceedings and judgments of both courts below, quash and set aside both the conviction and sentence meted on the appellant and we order his release from prison forthwith if not held for another lawful cause.

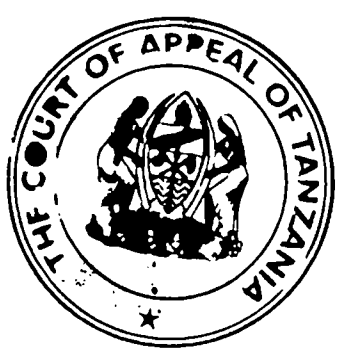
**DATED** at **TABORA** this 2nd day of October, 2023.

S. A. LILA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA
**JUSTICE OF APPEAL**

Judgment delivered this 3rd day of October, 2023 in the presence of the Appellant in person and Mr. Steven Mnzava, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**