

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A., FIKIRINI, J.A, And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 127 OF 2020

EX. MT 66807 SGT GEORGE KWISEMA.....1st APPELLANT
NIA BAKARI.....2nd APPELLANT
SHAFII MUHIBU MUHIBU.....3rd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT
(Appeal from the Judgment and Decree of the Resident Magistrate Court
with Extended Jurisdiction at the Resident Magistrate of Dar es Salaam
at Kisutu, Dar es Salaam)
(Mrangu, SRM-Ext. Juris.)

dated the 21st day of January, 2020

in

Extended Jurisdiction Criminal Appeal No. 104 of 2019

.....

JUDGMENT OF THE COURT

14th February & 7th March, 2023.

FIKIRINI, J.A.:

Ex. MT 66807 Sgt George Kwisema, Nia Bakari, and Shafii Muhibu Muhibu, hereinafter referred to as the first, second, and third appellants respectively, dissatisfied with the decision of Resident Magistrate Court with Extended Jurisdiction at the Resident Magistrate's Court of Dar es Salaam at Kisutu, in Criminal Appeal No. 104 of 2019, preferred an appeal

to this Court consisting of a total of fifteen (15) grounds, nine (9) in the memorandum of appeal initially filed on 3rd December, 2020 and six (6) from the supplementary memorandum of appeal filed on 8th February, 2023, accompanied with a list of authorities filed on 9th February, 2023 and written submission filed on 10th February, 2023.

The genesis of this appeal is the charges preferred against the appellants and another person not part of this appeal on two counts: **one**, unlawful possession of Government trophies, contrary to sections 86 (1) and (2) (c) (ii) and (3) (b) of the Wildlife Conservation Act No. 5 of 2009 (the Wildlife Act) read together with paragraph 14 (d) of the First Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Cap 200 R. E. 2002 (the EOCC) and **two**, unlawful dealing in Government trophies contrary to sections 80 (1) and 84 (1) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (b) 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.

The particulars of the offences were that the trio, on the various dates between 24th May, 2016 and 2nd June, 2016 and places within Dar es

Salaam Region and Lindi, unlawfully accepted and transported Government trophies, namely ten (10) pieces of elephant tusks valued at Tanzania Shillings One Hundred Ninety Eight Million (Tzs. 198, 000,000/= only) without a permit or dealers licence from the Director of Wildlife when they were arrested on 2nd June, 2016 at Mbagala Kibondemaji area within Temeke District in Dar es Salaam Region.

All four denied the charges. After a full trial in which the prosecution fielded eight (8) witnesses while the defence had four (4), including one of them not a party to this appeal, who was acquitted. At the same time, the appellants were convicted and sentenced to twenty (20) years on each count, and the sentences were to run concurrently. Disgruntled, they appealed against the decision, and after hearing the parties, the Resident Magistrate with Extended Jurisdiction dismissed the appeal and upheld the trial court's decision. As intimated earlier, the appellants approached this Court, appealing against the decision.

In the present appeal, we will not replicate all the grounds of appeal because the first ground of appeal on unprocedural irregularity will, in our view, suffice to dispose of the appeal. The ground is couched as follows:

1. That, the learned 1st appellate court grossly erred in law and fact by holding that 2nd and 3rd appellants were not prejudiced for the failure of the trial court to afford them an opportunity to cross-examine PW1, who tendered exhibit P2 (a subject matter) and basis of their conviction.

We invited parties to address us on the above ground when the matter came for a hearing. The appellants, who appeared unrepresented, let the respondent Republic go first. Ms. Flora F. Masawe, learned Principal State Attorney assisted by Ms. Lilian Rwetabura and Ms. Imelda Mushi, both learned Senior State Attorneys appeared for the respondent Republic. In particular, Ms. Masawe addressed us on the 1st ground of appeal we thought would dispose of the appeal.

Ms. Masawe outrightly conceded that procedural irregularity existed when the 2nd and 3rd appellants were not allowed to object or agree to the tendering of exhibits P1, P2, and P3 and cross-examine PW1. Ms. Masawe contended that the omission was fatal and it did prejudice the appellants. She, too, admitted that the omission resulted in an unfair trial. Fortifying

her position, she cited the case of **Ex. D. 8656 CPL Senga Idd Myembo & 7 Others v. R, Criminal Appeal No. 16 of 2018** (unreported).

She thus prayed, under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, (the AJA), for the Court to nullify the trial court proceedings, quash the conviction, set aside the sentence, and order retrial before a different magistrate.

On their part, the appellants welcomed the concession. The first appellant opposed the prayer for retrial, arguing that the time they spent in custody awaiting trial and later after the trial should be considered. The second appellant urged us to follow procedure and to consider that they did not occasion the predicament. The third appellant supported both the first and second appellants' submissions.

We wish to express outrightly that it is a fundamental principle of law that substantial justice should at all times be observed. Courts that are duty bound to dispense justice must always protect a person's constitutional rights, including the victim and offender. This Court recognizes the freedoms and rights provided for in the Constitution of the United Republic of Tanzania under Article 13 (6) (a). The Article's emphasis

is the promotion and protection of those rights. A right to a fair trial is central to properly adjudicating all matters before the courts. Therefore, an accused person's rights must be considered and, where possible, upheld throughout the trial process. Incidentally, a recognition that justice must be done by ensuring fairness and equity for the persons involved and in all aspects of the trial is what the appellants are inviting us to appraise.

Fortunately, this is not an uncharted area as we had previously decided on the like scenarios. In the case of **Ex. D. 8656 CPL Senga Idd Myembo & 7 Others** (supra) cited to us by Ms. Masawe, the Court quoted from other previously decided cases of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251, in which the Court in underscoring upholding of natural justice, that one must be heard before being condemned had this to state:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law...."

Similarly, in the famous case of **Abbas Sheraly & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported), the decision made before the **Mbeya-Rukwa Autoparts & Transport Ltd** (supra) and **Dishon John Mtaita v. The Director of Public Prosecution**, Criminal Appeal No. 132 of 2004 (unreported), the Court stressing on the right to be heard held that:-

"The right of a party to be heard before an adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of the principles of natural justice."

The consequence of such procedural irregularity is that it vitiates the proceedings.

Before us, the issue is whether the irregularity complained of by the appellants and admitted by Ms. Masawe can vitiate the proceedings. We answer that any irregularity's fatality depends highly upon whether or not it

occasioned a miscarriage of justice. And if it has, then it is incurable. In the present appeal, the questionable proceedings are found on pages. 26 – 33 of the record of appeal when Inspector Khalid Almas (PW1) testified. The first incident was on tendering and admission of exhibits, and the second was when the appellants were denied the opportunity to cross-examine PW1. On page. 28, while tendering the search order, the prosecutor prayed to tender the document, and Mr. Komba, who was advocating for the first appellant, objected. The objection was overruled, and the search order was admitted and marked as exhibit P1 without addressing the second and third appellants to object or agree with the exhibit sought to be tendered. Again, on page. 29, PW1 prayed to tender ten (10) pieces of elephant tusks. Mr. Komba did not object, and the tusks, a sulphate bag, one plastic bag, one black bag, and five clothes were collectively admitted and marked exhibit P2. Finally, on page. 32 a motor vehicle with registration number T. 477 AXS, Suzuki Grand Vitara, was tendered, and Mr. Komba did not object hence admitted and marked as exhibit P3.

Nowhere in the proceedings has it been reflected that Mr. Komba represented the second and third appellants. Therefore, the trial

Magistrate's proceeding to admit those exhibits after only Mr. Komba had been asked has breached the principles of natural justice, that a party should not be condemned unheard. Failure to let each appellant object or agree to the admission of the intended exhibits is, in our view, fatal. Likewise, not giving the appellants chance to cross-examine PW1 as indicated on pages. 32-33, while they have not shown indication to waive that right, was fatal. As correctly stated in the ¹ **Ex. D. 8656 CPL Senga Idd Myembo & 7 Others** (supra), that:-

"We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is fundamental to any judicial proceedings, and thus, the denial of it will usually result in the decision in the case being overturned. Unless a party has waived his right to cross examine the witness, the testimony of a witness cannot be taken as legal evidence unless it is subject to cross-examination."

The above position affirms the decision in **Mbeya-Rukwa Autoparts & Transport Ltd.** (supra) that the right to be heard, which has been

enshrined in our Constitution, was not observed as it is in the present appeal.

As a result of the procedural irregularity, no fair hearing can be said to have taken place. In the case of **The Director of Public Prosecutions v. Sabinus Inyasi Tesha & Another** [1993] T. L. R. 237, the Court considered the denial of a right to be heard fatal, which would vitiate the proceedings. In the present case, we support the appellants' and the learned Principal State attorney's concession on the concern raised in the first ground of appeal and, in the circumstances, conclude that the proceedings, conviction, and judgments of the two lower courts were invalid for failure to observe the procedure in place and consequently occasioning a miscarriage of justice.

Therefore, we uphold the first ground of appeal and invoke the provision of section 4 (2) of AJA to revise and nullify the trial court's proceedings and judgment, quash the conviction, and set aside the sentence. The proceedings and the judgment before the Resident Magistrate's Court of Dar es Salaam with Extended Jurisdiction in Criminal

Appeal No. 127 of 2020 are equally nullified since they germinated from the nullified proceedings.

We also order a retrial before another magistrate of competent jurisdiction. Since the appellants are in custody, which we order, they remain so, the hearing of the matter be expedited.

We so order.

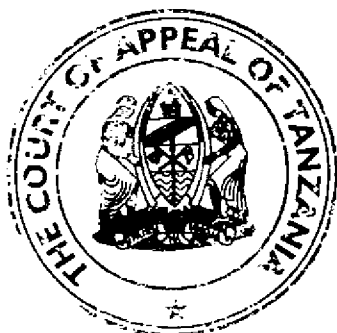
DATED at DAR ES SALAAM this 7th day of March, 2023.


R. K. MKUYE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 9th day of March, 2023 in the presence of person 1st, 2nd and 3rd Appellants and Mr. Mwasimba Hezron, learned Senior State Attorney for the Respondent/Republic both appeared through Video Link from Ukonga prison is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL