IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL NO. 49 OF 2013

(Originating from Criminal Case No 108 of 2013 MBINGA district Court at MBINGA)

AIDAN NDOMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Last Order: 11th November, 2013

Date of Judgment: 26th February, 2014

JUDGMENT

FIKIRINI, J:

The appellant Aidan Ndomba, was charged and convicted upon his plea of guilty before the Mbinga District Court in Criminal Case No. 108 of

2013 for unlawful possession of Government Trophy contrary to **section 86 (1) (2) (b) of the Wildlife Conservation Act** [Act No.5 of 2009].

Following the appellant's plea of guilty, the trial court convicted and sentenced the appellant to serve three years in jail in conformity with **section 170 (1) (a) of the Criminal Procedure Act** [Cap 20 R.E 2002]. However, the appellant is now challenging the conviction and sentence to be excessive. He was also challenging the trial court resort to jail term instead of fine. Finally, he challenged his conviction without there being no certificate for valuation of the alleged property. With the above list of challenges the appellant preferred this is his appeal.

At the hearing of this appeal, the appellant appeared in person and defended himself, while the respondent was represented by Mr. Wilbroad Ndunguru, learned State Attorney. Before I proceed, I find it appropriate to elaborate the summary of facts which led to this appeal.

The appellant was arraigned on 27/06/2013 before the Mbinga District Court for unlawful possession Government Trophy of meat of one Eland valued at Tshs. 2,788,000/= and grater Kudu valued at Tshs. 3,608,000/=. All the properties were valued at Tshs.6, 396,000/=,the property of the Government of the United Republic of Tanzania. It was the prosecution's case that the appellant was found in possession of the

sentenced him to serve three years in jail.

At the hearing of the appeal the appellant had nothing to say. On the other hand, Mr. Ndunguru, learned State Attorney opposed this appeal by supporting both the appellant's conviction and sentence. Regarding the ground that, the sentence was excessive, Mr. Ndunguru argued that, the said sentence was not excessive at all considering the law in place and applied by the trial magistrate. According to the law the sentence is that of imprisonment for a term not less than 20 years and not more than 30 years, while fine option had to be 10 times the value of the properties the accused had been found in possession. Mr. Ndunguru however, admitted to the fact that, the trial court did not give the appellant an option for paying a fine, but according to him, that error is not fatal and if so, still this court can correct that error.

Examining the absence of certificate of valuation, Mr. Ndunguru, was of an opinion that, the trial court did not see the need to have such a certificate since the appellant pleaded guilty to the alleged charge, and

more so, such certificate would have been needed only to ascertain the value and identification of the alleged Government Trophy. In order to support this argument, Mr. Ndunguru referred this court the case of **Rashid Kiranda V. R [1990] T.L.R. 5.**

According to Mr. Ndunguru, ***one,*** using of **section 86 (1) (2) (b) of the Wildlife Conservation Act**, only on the charge sheet while the same was to be read together with **section 57 and the 1st schedule of the Economic Organised Crime Controlled Act, Cap 200 R.E 2002**, was an error, but an error which did not occasion injustice or prejudiced the appellant. ***Two,*** had the provisions of **the Economic Organised Crime Controlled Act,** be invoked in the instant case, then by virtue of **section 26 (2) of the Economic Organised Crime Controlled Act,** this would have then require the consent of the State Attorney and certificate of transfer as per **section 12 (3)** of Cap 200 to empower the District Court to entertain the case. Otherwise the matter ought to have been triable in the High Court.

Mr. Ndunguru, was however, quick to point out that the errors made by the prosecution at the trial court can be rectified by this court. In his opinion the above irregularities are not fatal, since the provisions used in charging the Appellant was sufficient, thus he prayed this court to rectify

the errors by virtue of **section 388** of **the Criminal Procedure Act** [Cap 20 R.E 2002].

From the above submission by Mr. Ndunguru for the respondent and the grounds of appeal advanced, the issue is whether this appeal has merits or not. In dealing with the appeal before me, I would like to start with the issue of irregularities observed as submitted on by the respondent's counsel. The issue is therefore whether the irregularities observed are fatal or not, and if yes, what is the consequences to this appeal. First, as correctly stated by Mr. Ndunguru the charge preferred against the appellant pursuant to **section 86 (1) (2) (b) of the Wildlife Conservation Act**, was to be read together with provisions from **the Economic and Organised Crime Control Act**. ***Second,*** by virtue of **section 12 (3) of the Economic and Organised Crime Control Act**, the alleged offence requires the DPP's consent. Otherwise the District court could not have processed the case as the law requires such cases to be tried before the High Court. By not including provision of **section 57 and the 1st schedule of the Economic Organised Crime Controlled Act,** the DPP's consent was therefore not required.

As much as there's valid argument in Mr. Ndunguru's submission that this court pursuant to **section 388 of the Criminal Procedure Act**

can rectify the error, but at this stage I do not think the court can do anything. I say so because, if this court does anything be it, amendment or modifying of the charge at this stage of appeal, then obviously, the appellant will have no opportunity to respond on the modified or amended charges. This is will be contrary to the minimum standards required to be complied by the court in order to oversee fair trial to any accused person including the appellant. If this court decides to act now as suggested by the respondent's counsel chances are these will happen, one the appellant will not be in a position to understand the nature of the charges; and two, will have no opportunity to plead the charge and of course to exercise the right to of challenge the rectified charges preferred against him. Court of Appeal has on many occasions reminded on the minimum standards in order to encourage and maintain fair trial. **See: Mussa Mwaikunda V. R, Criminal Appeal No. 174 of 2006 (CAT-MBEYA) (Unreported)** at page 8 when approving the case of **Regina Versus Henley [2005] NSWCCA 126** (a case from West South Wales Court of Criminal Appeal) which quoted **Smith, J.** in **R V Prosser (1958) VR 45 at page 48**, where the standards were elucidated to be:

1. to understand the nature of the charge;

2. ***to plead the charge and to exercise the right of challenge;***
3. *to understand the nature of the proceedings, namely that, it is on inquiry as whether the accused committed the offence charged;*
4. *to follow the course of proceedings;*
5. *to understand the substantial effect of any evidence that may be given in support of the prosecution;*
6. ***to make a defence or to answer the charge.***

[Emphasis is mine]

In the instant appeal, even though the appellant pleaded guilty to the charge, but the apparent discrepancies such as, absence of certificate of consent from the DPP or any State Attorney and certificate of transfer allowing the case be determined at the subordinate court in conformity of **section 12 (3)** and **26 (1) of the Economic and Organised Crime Control Act,** then I find those errors as being incurable defects. This is because the trial court which had no jurisdiction to determine that case, determined the case. What has transpired in this case, has rendered the entire proceedings and judgment of the trial court to be nullity. This has been also illustrated in the Court of Appeal in **Nico s/o**

Mhando and 2 others V R, Criminal Appeal No. 332 of 2008 (CAT-IRINGA) (Unreported) at page 9, the Court cited with approval the case of **Rhobi Marwa Mgare and 2 Others V R, Criminal Appeal No.192 of 2005 (Unreported)**, where it was held;-

*"...**it follows that, in the absence of the DPP's consent and Certificate of transfer of the economic offence to be tried by Tarime District Court, in terms of section 12 (3) and 26 (1) of the Act, the subordinate court had no jurisdiction to try the case.** The trial was therefore a nullity and the ensuring convictions and sentences nothing but nullifies. **Even, the proceedings before the High Court on first appeal were a nullity.** "*[Emphasis is mine]

See also:

1. **Samwel Mwita V R, Consolidated Criminal Appeal Nos. 34, 35,36, 66 of 2009;**
2. **David Mwita Marwa and 2 Others V R, Criminal Appeal No. 251 of 2010;**

3. **Kaganda John and Another V R, Criminal Appeal No. 356 of 2009;**
4. **Amri Ally @ Becha V R, Criminal Appeal No. 151 of 2009;**
5. **Dotto s/o Salum @ Bulwa V R, Criminal Appeal No. 5 of 2007 (All Unreported)**

This is an unfortunate situation whereby both the trial court and the prosecution hurried to procure the appellant's plea of guilty and conviction, which is contrary to the law. **See: Samson Kitundu V R, Criminal Appeal No. 195 of 2004 (CAT- MWANZA) (Unreported) at page 6).** Besides, hurrying taking the appellant's plea but the exercise was doomed as trial court acted without having jurisdiction to entertain the matter.

Regarding the absence of the existence of the certificate of valuation of the alleged property in which Mr. Ndunguru, considered such error is curable, since the appellant had admitted to be in possession of trophy. Mr. Ndunguru referred this court to **Rashid's case (supra)** in support of his position. I beg to disagree with Mr. Ndunguru, because the cited case law is distinguishable to the instant appeal to the extent that, even though the appellant admitted to the possession of alleged Government Trophy, but in that cited case, the appellant was properly charged. All

the appropriate provisions of the law that is; **section 56 (1) and (2) and paragraph 16 (a) of the Economic and Organised Crime Control Act** together with **section 67 (1) and (2) of the then Wildlife Conservation Act,** were what was in the charge preferred against the appellant in the above case, whereas in the instant case, the appellant was only charged with **section 86 (1) (2) (b)** of **the Wildlife Conservation Act.**

The above cited case despite not suiting the present situation in relation to charge sheet but was still relevant. The relevancy to the present appeal is to the extent that, where the value of the property involved is a necessary element in assessment of the sentence, then the value of the alleged property must be strictly proved by credible evidence. In the present appeal the value of the property which was a necessary element was neither proved with credible evidence nor a certificate of valuation produced to that effect as required by section 86 (1) (2) (b) of the Wildlife Conservation Act. **See: Abdalla Ali V R [1969] H.C.D 298.**

This was important as it would have assisted the court in assessing the appropriate sentence in the event the accused is found guilty. For the sake of clarity and avoidance of doubts, this section reads;-

86 (1) Subject to the provisions of this Act, a person shall not be in

possession of, or buy, sell or otherwise deal in any government trophy.

(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-

(b) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and ***the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both.*** [Emphasis is mine]

From the above stated reasons, I am satisfied that, this one ground was sufficient to dispose of the appeal. However, I have decided to quickly look at the retrial issue as that would have been the case with defective charges. The fact the prosecution side did not call any witness and the matter was still fresh, retrial would have been appropriate. But there are few things to consider before that option is put in place. **See: Dickson s/o Ramadhan Gingo V R, Criminal Appeal No. 43 of 2007 (CAT-IRINGA) (Unreported)** at pages 18 and 19, the Court cited with an approval the case of **Fatehali Manji V R [1963] EA 343 at page 344,** the then East Africa Court of Appeal had this to say;-

"...in general, ***retrial will be ordered only when the original trial was illegal or defective;*** *it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;...****an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person"*** [Emphasis is mine]

However, in the present circumstances, I hesitate to order retrial because, if I do so, then it will not serve any legal purpose rather than for an academic one since, the records of the trial court reveals that, the alleged government trophy were disposed following the order of the trial court in its judgment, (see page 4 of the typed judgment). Therefore if retrial is ordered the case will then proceed without its fundamental evidence which is the exhibit already ordered to be destroyed. Since production of the said exhibit would be necessary element to prove the alleged offence, lack of it will lead to the collapse of the case. That will in my view unfair treatment and will cause injustice to the Appellant.

Going by the above analysis, I find this appeal to have merits. Consequently, I proceed to quash the conviction and set aside the sentence imposed and any orders by the trial court. The appellant should be released from prison forthwith unless lawful held by other lawful cause. It is so ordered.

Judgment Delivered this 26th February, 2014 in the presence of Aidan Ndomba the appellant and Mr. Medalakini Emmanuel for the respondent/republic.

P.S.FIKIRINI

JUDGE

Right of Appeal Explained.

P.S.FIKIRINI

JUDGE

26th FEBRUARY, 2014