IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 72 OF 2017

(Originating from Economic Case No. 6/2015 Karatu District Court)

ABEL NALINJIGWA.....1ST APPELLANT

IGANGO IGANGO.....2ND APPELLANT

VERSUS.

THE REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

At the District Court of Karatu, the two appellants herein were accused persons in Economic Case No. 06/2015. They stood charged of three counts of Unlawful Possession of Government Trophy contrary to Section 86(1) and (2)(b) of the Wildlife Conservation Act, No. 5/2009 read together with Paragraph 14(d) of the 1st schedule to, and Sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act,Cap. 200 R.E. 2002. They were allegedly found with unlawful possession of five DikDik valued at two million six hundred sixty eight thousands seven hundred and fifty (2,668,750/=); one Lesser Kudu valued at Tshs. Five millions five hundred and fifty one thousand (Tshs. 5,551,100/=) and two porcupine valued at Tshs. Three hundred and twenty three thousand four hundred (Tshs.

323,400/=) all the properties of Tanzania Government without permission from an authorized Authority. The appellants were convicted and sentenced to serve an imprisonment term of twenty (20) years each.

Aggrieved by the said Judgement and conviction, the appellants lodged this appeal raising three grounds of appeal as hereunder:

1. That the learned trial Magistrate erred in law in shifting the burden of proof on the appellant and convicted the appellants solely on evidence of PW1, PW2 and PW3 without independent witness.
2. That, the learned trial Magistrate erred in law and in fact by not complying with the Mandatory Provision of Section 214(1) of the CPA Cap. 20 R.E. 2002.
3. That, the learned trial Magistrate erred in law by not conforming with the Mandatory provisions of Section 34B(1) & (2) (a) – (e) of the Evidence Act, Cap. 6 R.E. 2002.

The appellants prayed that this Appeal be allowed by quashing the conviction, setting aside the sentence and letting them at Liberty. Before this court the appellants appeared in person and unrepresented and Ms. Penina Ngotea learned State Attorney represented the respondent.

The brief background leading to conviction of the appellant and this subsequent appeal is that on 5th December, 2015 at Dumbechand village within Karatu District, PW1was informed by an informer that there were poachers selling meat. That was around 1400 hrs. On the next day, PW1 along with PW3 and two other people proceeded to the scene of crime. On the way they met the two appellants in two bicycles and when they tried to

stop them, the appellants abandoned their bicycles and ran away. They managed to arrest them and took them back to where the bicycles were. They opened their luggage and found with them 5 dead dikdik, one lesser kudu and two porcupine. They then filled a search warrant (EXP2) and took the appellants to Mang'ola police and later on to Karatu Police Station. PW2 prepared a valuation certificate (EXP1). The PW2 prepared an inventory form (EXP3) and the meat was destroyed by an order of the primary court. The appellants were then arraigned in the District court of Karatu where their trial proceeded whereby they were convicted and sentenced to serve the imprisonment term stated above.

The determination of this appeal shall begin with the second ground of appeal that the learned trial Magistrate erred in law and in fact by not complying with the Mandatory Provision of Section 214(1) of the CPA Cap. 20 R.E. 2002. In their submissions, the 1st appellant informed the court that the second appellant shall submit on their behalf. On the second ground of appeal the 2nd appellant submitted that the case was tried by two magistrates without the appellants being informed of the reasons why the magistrates were changed. That in the beginning the case was heard by Hon. A. Mkama and PW1, PW2 and PW3 were heard, that thereafter came in Hon. A Mbonamasabo whereby the prosecution side prayed to recall the PW2 and further prayed to tender the statement of John Buyayo a witness alleged not to have been found.

The 2nd appellant argued that Hon. Mbonamasabo did not explain the reasons why Hon. Mkama could not continue with the hearing of the case and why he took over the case. He hence prayed that this court rectifies the errors committed by the trial court.

After going through the proceedings of the lower court, in her reply, Ms. Ngotea confirmed that the initial trial magistrate Hon. A. A. Mkama is the one who started hearing the prosecution case, the first two witnesses. The records further show that Hon. E. E Mbonamasabo took over and heard the matter until disposal without advancing his reasons to do so. She admitted that Section 214 of the Criminal Procedure Act, Cap. 20 R.E 2002 (The CPA) requires that a magistrate who takes over a case from another magistrate must state reasons for that. That in the current case that was not done and the accused persons were not afforded their right in such circumstances. She argued that owing to that reason, the proceedings of the lower court are a nullity as they did not comply with the law.

Mr. Penina was quick to point out that on the same Section 214(2) of the CPA, this court is empowered to order a retrial in cases where Section 214(1) was not complied with. She cited several authorities supporting the provisions including the case of **Fathal ManjiVs. Republic, 1966 E.A 343**. She further cited the case of **Adam Kitundu Vs. Republic, Criminal Appeal No. 360/2014,**Court of Appeal sitting at Dodoma(unreported) when the circumstances were similar to the current ones whereby a magistrate did not explain how the case was transferred to him, this led the proceedings to be a nullity. That on page 9 of its judgment, the Court of Appeal set aside the sentence of the trial court and

ordered that the matter be heard de-novo at the trial court. She hence prayed that the proceedings of the trial court are nullified and the case be remitted back to the trial court to be heard de novo. The appellants did not make any rejoinder submissions but prayed that they are acquitted.

Having gone through the records of the trial court, I am in agreement with the parties' submissions o the second ground of appeal, that there are some errors on the records of this appeal. One of the errors was particularly the way the trial was conducted. As per the records, the trial begun and took off before Hon. A.A. Mkama, learned Resident Magistrate. On the 16/03/2016, he heard the PW3 and the 30/06/2016 was the last day that the trial came before him. The records further show that subsequent to the 30/06/2016 the matter was tabled before Hon. E.E Mbonamasabo (RM) who heard the case (including recalling of PW2 who was partly heard by Hon. Mkama) until he delivered the judgment subject of this appeal. However, thorough perusal through the records of the trial court, there is no place that the magistrate indicated the reasons for his continuing with the case. As per the cited case of **Adam KitunduVs. Republic** (Supra), the irregularity is fatal and it affects the validity of the proceedings of the trial court.

However, before I proceed to grant the remedial prayers made by the parties, I must point out another irregularity that was conducted by the trial magistrates. It seems that the first appellant is not conversant with Swahili language hence there was all along during trial an interpreter. Needless to say that if a trial is conducted in a language which the accused does not understand, the proceedings and the evidence must be

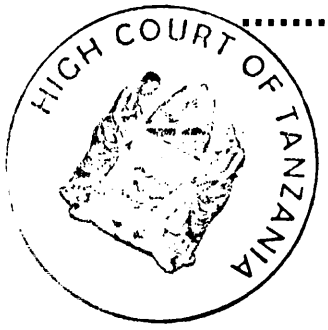
interpreted to him. If they are not interpreted to him so that he can understand them, there is not fair trial to the accused. As a matter of practice and procedure, the interpretation should take place simultaneously with the testimony being given by the witnesses. If that is so, then the interpreter must be tested his reliability and confirmed by administering oath to him/her. However, for the current appeal, there is no place during the witness testimonies at the trial court that the interpreter was sworn by the trial court. It is trite law that whenever there is a trial with an aid of an interpreter, he steps into the shoes of the witness by explaining to the accused and the court (vise versa),the substance of the evidence adduced in court. This makes it mandatory that the interpreter is also sworn to the effect that what he shall interpret in court will be the true interpretation of the court transactions. Where the interpreter is not sworn, it is as good as the witness adduced evidence without being sworn. The trial magistrate ought to have sworn the interpreter before he started interpretation to ensure that what he will interpret shall be the true version of the evidence adduced.The effect is that no reliable evidence was received in court, hence the whole of the prosecution evidence received is hereby set aside.

Having made those findings, the proceedings of the trial court from 31/03/2016 are hereby nullified. Consequently, the judgment and conviction entered against the appellants is hereby quashed and set aside. The file is remitted back to the trial court to start hearing of witnesses afresh with strict adherence to the law. None of the two magistrate, Hon. A. A. Mkama and Hon. E. E. Mbonamasabo shall be assigned the file for hearing, it shall be heard by another magistrate of competent jurisdiction.

Having nullified the proceedings, I see no reason to dwell on the remaining grounds of appeal. The appeal is hereby allowed to the extent explained.

Appeal partly allowed

Dated at Arusha this 20th day of March, 2018



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S. M. MAGHIMBI
JUDGE