IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 13 OF 2016

(Originating from the decision of District Court of Ilala at Samora in Economic Case No. 4 of 2013)

SEIF NASSORO MHANDO ---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

JUDGMENT

MUTUNGI, J.

In the present appeal, the appellant is aggrieved by the decision of the District Court of Ilala in Economic Case No. 4 of 2013 upon being sentenced to pay a fine of Tshs. 72,000,000/= or in default thereof to serve twenty (20) years in jail.

The said sentence was metted out after the appellant was charged and convicted with unlawful possession of the Government Trophies contrary to section 86 (1) (2) (a) (ii) and (3) of the Wildlife Conservation Act No. 5 of 2009 as

read together with paragraph 14 (d) of the first schedule and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E 2002].

According to the charge sheet, it is alleged on 1st April, 2013 the appellant was found in possession of 10 elephant tusks the property of the Government of the United Republic of Tanzania at Buguruni Kisiwani area within Ilala District in Dar es Salaam valued at Tshs. 72,000,000/=.

The facts leading to the appeal are as follows; No. E. 9903 DSSGT LAMECK (PW1) a Police Officer working at Buguruni Police Station in the investigation department alleged on 01/04/2013 was directed by the acting OCCID one Inspector Shirima that, there is someone at Buguruni Kisiwani in possession of elephant tusks. PW1 went there with Dcpl Salum and Dcpl Hamisi in the company of an informer and ELIAS KOROSO (PW2) who is the Game Warden from the Ministry of Natural Resources and Tourism. They were shown the residence of the alleged culprit hence they (Police Officers) surrounded the same. The ten-cell leader SALUM SAID DEGE (PW3) was called to the scene. Upon entering into the said house, they searched and found ten elephant tusks

which were admitted as Exhibit P.2 collectively and the search warrant was admitted as Exhibit P.1.

According to PW2 the said tusks weighed 14 kg valued at Tshs. 72,000,000/= as per the valuation certificate which was admitted as Exhibit P.3. Further, the appellant was arrested and sent to the Buguruni Police Station. No. 3822 DSSGT ELIA (PW4) proceeded to record the appellant's caution statement which was admitted as Exhibit P.4.

On the other side, the appellant strongly disputed to have been found with the alleged items. He went further by testifying that he was arrested with his colleague who was subsequently released. He admitted the said tusks were found therein after the said search was done.

In the end, the appellant was convicted and sentenced as earlier stated. Basically, the appellant is aggrieved with the said conviction and sentence as a result he has preferred to appeal herein.

In the appeal at hand, the appellant has raised 15 grounds of appeal, but in my objective analysis these fall under five categories. One; the charge sheet was defective for having

been subjected to un-procedural alteration in terms of the value of the said elephant tusks. Two; the appellant is challenging the admissibility of the caution statement (Exhibit P.4) since no inquiry was conducted by the trial court after being objected to. Three; the prosecution side failed to prove the alleged offence beyond reasonable doubts since there are contradictions in the evidence of the prosecution side. More so, there is no certificate of seizure. Four; the trial court's judgment is not in conformity with the law. Five; the conviction and sentence are unlawful since the trial court did not conduct a preliminary hearing before the trial.

When this appeal was called up for hearing, the appellant appeared in person and defended himself while the respondent was represented by Tuli Helela/Kandedi Nasua learned State Attorneys. The appellant had nothing more to submit instead he prayed the court to consider his grounds of appeal.

On the other hand, regarding the first ground of appeal, the respondent submitted the said amendment of the charge was on the value of the trophies, though it was not read over to the appellant. The State Counsel quickly suggested the

same is curable under section 388 of the Criminal Procedure Act [Cap. 20 R.E 2002] since it had not prejudiced the appellant and caused injustice. The respondent side further insisted all the prosecution witnesses testified to the effect, the appellant was found in possession of the said Government Trophy. She referred this court to the case of **SUMARI HAU AND 4 OTHERS VERSUS REPUBLIC, CRIMINAL APPEAL NO. 305 OF 2007 (CAT-AR) (UNREPORTED).**

The issue here will be whether the alteration made on the charge sheet is curable or otherwise.

The court records specifically the charge sheet which established the charge against the appellant indicates originally the value of the said elephant tusks was Tshs. 12,320,000/=. Thereafter there is an alteration by using a pen to indicate the value of the same to be Tshs. 72,000,000/= in conformity with the testimony of PW2 who testified the value was on the latter amount.

In my settled view, I disagree with the respondent's position that, the said alteration is curable under section 388 of the Criminal Procedure Act (supra). This is because the case

cited by the respondent **SUMARI HAU AND 4 OTHERS (SUPRA)** is not relevant herein. The same dealt with the issue of a substituted charge sheet whereas the circumstances in this case relate to the alteration on the charge sheet.

The law relating to the alterations on the charge sheet is well settled. In one occasion, the Court of Appeal of Tanzania in the case of **ZEBEDAYO MTETEMA VERSUS REPUBLIC, CRIMINAL APPEAL NO. 484 OF 2015 (CAT-TBR) (UNREPORTED)** where it was found the enabling law was written by hand and there was no initial (signature) or date when such alteration was made. This scenario is quite similar to that which had transpired in the trial court. The Court of Appeal of Tanzania decision in resolving that issue held;

> *"In the instant case, there is no order of the court to make the alterations seen therein. Also no signature and date when such alterations were made.* ***It is very dangerous to rely on the authenticated alterations. Surely, the defect rendered the charge sheet incurably defective. We therefore find all the proceedings before the trial court and the High Court a nullity..."*** *[Emphasis is mine]*

In the event, I find the authenticated alteration on the charge sheet in the trial court incurably defective hence section 388 of the Criminal Procedure Act cannot be invoked to cure the same. In my settled view it renders all the proceedings and judgment of the trial court a nullity. There was no order to confirm the said alteration nor the date and signature of the maker of the alteration.

To add salt to the wound, there is no evidence at all as to whether the alteration was read over to the appellant. Having said so, I could end up here and order a retrial but for the sake of justice I hesitate to make such an order.

In the case of **DICKSON S/O RAMADHAN GINGO VERSUS REPUBLIC, CRIMINAL APPEAL NO. 43 OF 2007 (CAT-IR) (UNREPORTED)** at page 18 and 18, the Court of Appeal of Tanzania cited with approval the case of **FETEHALI MANJI VERSUS REPUBLIC [1963] EA 343** where the East African Court of Appeal had this to say;

> *"...In general a 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 purposes of enabling the prosecution to fill up gaps in its evidence at the first trial...each case must depend on its particular facts and circumstances and 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]*

In the instant appeal, I find a retrial order is not an appropriate remedy herein as it would cause injustice on the appellant's side since it will enable the respondent to fill the gaps on their case as far as the adduced evidence is concerned. For that reason, I had to go further into the merits of the appeal to ascertain as to whether there is sufficient evidence to sustain the appellant's conviction on the offence charged therein.

Having observed as above and considering this is the first appellate court, obviously its duty is well settled. In the case of **DIRECTOR OF PUBLIC PROSECUTIONS VERSUS ACP ABDALLAH ZOMBE AND 8 OTHERS, CRIMINAL APPEAL NO. 358**

OF 2013 (CAT-DSM) (UNREPORTED) at page 29, the Court of Appeal had this to say, and I quote;

> *"Before we go into the merits or otherwise of the appeal, we wish to point out at this juncture that this being a first appeal,* ***this court is entitled to re-evaluate and re-appraise the evidence, to determine whether or not the High Court had erred in its approach to evaluating the evidence or had acted on a wrong principle and come to its own conclusion"****. [Emphasis is mine]*

Again, in the case of **ERNEST S/O SEVENTE MGIMBA VERSUS REPUBLIC, CRIMINAL APPEAL NO. 236 OF 2009 (CAT-IR) (UNREPORTED)** at page 9, the Court went further by stating the following;

> *"It is a rule of law that an appellate court should not interfere with the findings of facts made by a trial court unless the finding is based on skewed premises and has led to miscarriage of justice".*

The same legal position has been amplified in the cases of **JAFFARI MFAUME KAWAWA VERSUS REPUBLIC [1981] T.L.R 149** and **SALUM MHANDO VERSUS REPUBLIC [1993] T.L.R 170**.

voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence... *" [Emphasis is mine]*

Since there is non-compliance of the law as stated above, I find it was wrong for the trial magistrate to rely on Exhibit P.4 in convicting the appellant.

There is yet the question of proof in this appeal. The respondent's side had suggested the remaining evidence suffices to sustain the appellant's conviction. The learned State Attorney went further by submitting that, Exhibit P.1 was a certificate of seizure which proved the guilt of the appellant and she cited the case of **ABDALLAH SAID MWINGEREZA VERSUS REPUBLIC, CRIMINAL APPEAL NO. 258 OF 2013 (CAT-DSM) (UNREPORTED)** to back up her position. In this case it was held that even when the said certificate was ignored but there was still sufficient evidence to implicate the appellant in that case, then a conviction could be entered. She was obviously suggesting the said scenario be applied herein.

From the outset, I disagree with the learned State Attorney on the following reasons. The ten elephant tusks were tendered by PW1 which were subsequently admitted as Exhibit P. 2 collectively. However, in my settled finding it is uncertain if really the said tusks were retrieved from the appellant's house after conducting the alleged search.

The prosecution never tender a certificate of seizure as alleged by the respondent herein. They merely tendered a search order (Exhibit P.1) contrary to section 38 (3) of the Criminal Procedure Act Cap. 20 R.E 2002.

Section 38 (3) of the Criminal Procedure Act states as follows;

> ***"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner*** *or occupier of the premises or his near relative or other person for the time being in possession or control of the premises,* ***and the signature of witness to the search, if any"****. [Emphasis is mine]*

In the case of **BAVEN HAMIS AND 2 OTHERS VERSUS REPUBLIC, CRIMINAL APPEAL NO. 99 OF 2014 (CAT-DSM)** at page 14 the Court of Appeal of Tanzania held;

> *"Generally, a search has to be preceded by a written authority, either Police in charge of a Police Station (search orders) or by a court (search warrant) and* ***where anything is seized in pursuance of such power a receipt of acknowledgement has to be issued (section 38 (3) of the Criminal Procedure Act...*** *" [Emphasis is mine]*

In the circumstances of the appeal and in line with the above legal position, PW3 merely alleged to have witnessed the alleged search but there is no proof to indicate whether PW1 issued a certificate of seizure to confirm that the appellant was found in possession of the said elephant tusks as the law requires. Therefore, the issue of possession herein was not proved beyond reasonable doubt.

For that reason, I find the cited case of **ABDALLAH SAID MWINGEREZA** (supra) is distinguishable with the circumstances of the instant appeal. In that case, the

certificate of seizure was properly tendered in court as an exhibit without an objection from the appellant as Exhibit P.3. Moreover, in that case, the appellant had signed the same in conformity with section 38 (3) of the Criminal Procedure Act (Supra).

Further, in the defense the appellant in that case never denied to have signed the same and more so there was other sufficient evidence from PW1 and PW2 to prove the appellant was found in possession of the pistol and seven rounds of ammunition. As a result, the Court of Appeal was of the view that even if Exhibit P.3 is ignored, still there was other sufficient evidence to prove the alleged offence. Whereas in the instant appeal, section 38 (3) of the Criminal Procedure Act was not complied with.

In its totality considering the above, it can well be settled that the prosecution had failed to prove the alleged offence beyond reasonable doubt. The same suffices to dispose the appeal.

In the upshot, I allow the appeal and I hereby quash the entire judgment and proceedings of the Ilala District Court in

Economic Case No. 4 of 2013 and order the appellant be released with immediate effect unless held for another lawful cause. It is so ordered.

B. R. Mutungi

JUDGE

30/04/2018

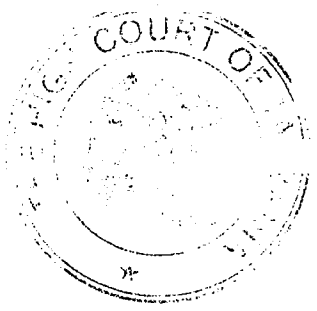
Right of Appeal Explained.

B. R. Mutungi

JUDGE

30/04/2018

Read this day of 30/4/2018 in presence of the appellant and Miss. Lilian Rwetabula (S.A) for the respondent.



B. R. Mutungi

JUDGE

30/04/2018