IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 95 OF 2019

(Appeal from decision of the Resident Magistrate Court of Dar es Salaam at Kisutu Economic Case No. 21 of 2014, before Hon. Huruma Shaidi PRM dated the 19th day of February 2019)

SALVIUS FRANCIS MATEMBO.....1st APPELLANT

MANASE JULIUS PHILEMON.....2nd APPELLANT

YANG FENG GLAN.....3rd APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

7 & 16th October, 2019

J. A. DE-MELLO, J;

The three Appellants were arraigned, charged heard, convicted and sentenced to fifteen years to run concurrently for the 1st, 2nd and 3rd Counts, while the '**shamba** and **buildings in Muheza Maili Saba**' to be confiscated by the Government.

For clarity, the charges levied against them are as follows;

1. **Leading Organized Crime contrary to paragraph 4(1) of the first schedule to section 57 (1) & 60(2) of the Economic and Organized Crime Control Act Cap. 200 RE 2002**
2. **Unlawful Dealing in Trophies contrary to section 80(1) and Part 1 of the schedule of Wildlife Conversation Act No. 5 of**

2009 read together with paragraph 14 (b) of the 1st Schedule to section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act Cap 200 R.E 2002

Aggrieved, they lodged an Appeal mounted on six grounds as hereunder;

1. **That, the Principal learned Resident Magistrate, misdirected himself in fact and in law by failing to make finding that the Respondent case was proved beyond reasonable doubt and went on shifting the burden of proof from the Respondents to the Appellants and fail to consider and analyze properly the evidence adduced by the defence.**
2. **That, the learned Principal Resident Magistrate, misconceived himself in fact and in law, in admitting exhibit P1, P3, P4 the caution statements of the Appellants and fail to make a specific finding on whether they were voluntarily made, subsequently relied on them in convicting the Appellants.**
3. **That, the learned Principal Resident Magistrate, misconceived himself in fact and in law by convincing the Appellants depending on the evidence of PW7, PW8, PW9 AND PW10 which were so unreliable and contradictory and who by their testimonies they were accomplices and had interests of their own to serve in the case.**
4. **That, the learned Principal Resident Magistrate, misconceived himself in fact and in law, in convicting the Appellants basing on theoretical evidence in regard of 860 elephant tusks without the said tusks being physically produced and**

tendered as exhibit contrary to section 101 of the Wildlife and Conversation Act No. 5 of 2009.

5. **That, the learned Principal Resident Magistrate, grossly misdirected himself in fact and in law in convicting and sentencing the Appellant contrary to sections 235 (1) and 312(2) of the Criminal Procedure Act Cap. 20 RE 2002.**
6. **That a notice of intention to Appeal was given within the prescribed period, copy a judgment was received on the 4th day of March, 2019 and a copy of the proceedings was received on the 2nd day of April 2019. The Appeal has been filed within the prescribed period.**

It was on the **24th** of **July 2019** in the presence of **Counsel Majura** for the **1st & 3rd Appellants,** assisted by **Nkoko & China Advocates,** as **Mhinge Karoli** fending for the **2nd Appellant,** with **State Counsel Nasua Candid** representing the **Republic,** that, written submissions prayed, was duly granted by Court. The order had the following pattern; For the Applicants, on or before the **9th** of **August, 2019**, Reply by the Republic on or before the **30th** of **August 2019**, and, Rejoinder if any, on or before the **6th of September 2019**. Judgment was finally slated for the **7th October 2019.** On record, I find all in compliance, except one from the **2nd Appellant** but, also the absence of Rejoinder by the Applicants and, which I find it fine, as it was an option, in case necessary.

With all due respect to **Counsel Majura,** the remarks regarding non existing charge allegedly filed on the **23rd September 2016** as evidenced from **pages 42 - 43** of the Trial Court proceedings and, ended up substituted on

the **3rd of February 2017,** is highly misplaced at this juncture. First, it not being one of the grounds of Appeal for this Court to address but, seemingly an afterthought. Let me remind Counsel that parties as well as Courts being bound by pleadings. See the case of **Anthony Ngoo & Another vs. Kitinda Kimaro Civil Appeal No. 25 of 2014** as it stated;

"The law is settled that parties are bound by their own pleadings"

I will therefore avoid to indulge myself in those lengthy and misplaced arguments, coupled with an ultimate prayer to acquit the Appellants, as I commence with **clause 14** with regard to **1st** and **5th** ground of Appeal in which Counsel submits failure of the Trial Magistrate to comply to **sections 235 (1) and 312 (2) of the Criminal Procedure Act Cap. 20**. It is Counsel's further contention that, proof beyond reasonable doubt was not established for failure by the Trial Magistrate to properly analyze and, evaluate evidence before him. The allegations that, the accused's were telling lies is nothing but, shifting the burden which solely lies with the prosecution. The case of **Longinus Komba** vs. **Republic [1973] TLR No. 39** and, that of **Amiri Mohamed** vs. **Republic [1994] TLR 138** were cited in support of that duty. Cognizant that **PW7, PW8, PW9, PW10** and, **PW11** being accomplices in assisting the Appellants, made them unreliable, disregarding they too participated in that illegal business. In an attempt to define who accomplices are, Counsel referred the case of **Queens Empress** vs. **Morgan Lai ILR 14**, submitting that, their evidences was tainted and hence need for corroboration by other independent witnesses. Neither were their caution statements which were repudiated and retracted. The testimony of **PW11** that, the **3rd Appellant** maintained a Bank account with

Barclays one which was used to pay the **2nd Appellant** was equally unreliable, to implicate the two into the alleged dubious transactions. In absence of corroboration, the caution statements were a nullity, he observed. Cases **of Jackson s/o Mwakatoka & 2 Others** vs. **Republic [1990] TLR 17** and that, of **Shani Kapinga vs. Republic, Criminal Appeal No. 337** of **2007 Iringa Registry (Unreported)** challenging the caution statements relied upon and repudiated but not corroborated, contravening **section 27 (2)** for voluntariness. In this, the credibility of **PW3** was wanting, him being biased. On the **2nd ground** of Appeal, nothing much other than the above could be gathered but stressing the point that, the alleged confession coupled with conflict of interest, the recorder being the investigator as well. The case of **Idd Muhidin@Kibatano** vs. **Republic, Criminal Appeal No. 101 of 2008, Njuguna Kimani & Others** vs. **Regina (1954) EACA 316** both emphasizing on the Courts duty to handle confessions with great caution and, care. Coupled with objections to tender **exhibits P1, P3, & P4** still yet the Trial Magistrate failed to address the same by simply stating it will be unfair at this stage as he admitted them, disregarding resolving its voluntariness. As a whole and, based on these many shortfalls, the judgment of the Trial Magistrates similarly was short of objective evaluation of evidence more so that of the defense which he simply termed as lies. **Cases** of **Mkaina Mabagala** vs. **Republic Criminal Appeal No. 422** of **2013** and that of Michael **Alais** vs. **Republic, Criminal Appeal No. 243 of 2007** to fortify the above argument. Counsel wondered how the Court relied on **PW7, PW8, PW9 & PW10** evidences, which was unreliable, contradicting and accomplices. This was for **ground number 3.** With regard to **ground 4** on **theorizing** as

opposed to **physical stock counting** of the **tusks** ones which were not tendered but admitted, was highly in violation to **section 101** of the **Wildlife Conversation Act No. 5 of 2009** requiring physical production in Court. In the present case he laments, the tusks it was alleged to have already been exported to unknown destination. Many cases demands so as was this one Counsel referred of **Emmanuel Saguda@Suluka & Another** vs. **Republic, Criminal Appeal No. 422B of 2013**. The translation gathered, he suggests, is failure to prove possession or ownership of the alleged **860 tusks** other than pure fabrication. Conclusively, is the conviction and, sentencing which Counsel avers had contravened **sections 235 (1) and 312 (2) of Cap. 20.** The abdicating of its duties, Counsel found the judgment wanting as he prayed for its quashing and setting aside, of its conviction and, sentence.

Replying while vehemently opposing the Appeal, the Republic in care of the drafter **Salum Msemo State Counsel** remarked on the validity and lawfulness of the submissions from the Appellants on two folds as follows;

Title Reads, **"In The Court of Appeal of Tanzania at Arusha, Criminal Appeal No. 125 of 2018** as opposed to what is before this Court and for Appeal Titled; In **The High Court of the United Republic of Tanzania (Dar ES Salaam District Registry) at Dar es Salaam, Criminal Appeal No. 95 of 2019.** This error goes to the root of the matter rendering the submissions misplaced and therefore non in place as was the position drawn in the case of **Godfrey Kimbe vs. Peter Ngonyani, Civil Appeal No. 41 of 2014, (CAT)** for **want of prosecution**. Moreover, State Counsel finds

non filing of the **2nd Respondents** submissions which translates into conceding to the Appeal, as it stands unargued.

This being quite glaring, I find myself constrained as I address the two observations to ascertain whether meritorious or not, before I go into the submission by the Republic and, in length as I had already done for the Appellants. Counsel had referred to **section 359 (1) & (2) of Cap. 20** and, I borrow;

(2) Any Appeal to the High Court may be of fact as well as of law.

True also, there is no submissions towards this Appeal has been lodged by the **2nd Appellant** and which bring me to concede with the Republic of it standing un-argued. Now for the contentious wrong title, I am attracted by a series of cases in this regard but, to mention a few is that of **DPP** vs. **Abdallah Zombe & Others Criminal Appeal No. 254 of 2009** and of **Emil Milinga** vs. **Republic, Criminal Appeal No. 268 of 2014** amongst other issues but on this it was held by the Court of Appeal, as follows;

"On our part we are of the opinion that the notice of appeal has shown that this appeal is from the decision of High Court of Tanzania in Songea. There is no dispute that was a defect...Hence we are of the view the only issue for determination is whether the defect is fatal or not...thereafter an appeal from that decision lies with this Court. See the case of Ereney Gasper Asenga vs. **Republic, Criminal Appeal No. 238 of 2007.**

In the case of **Director TOS Filling Station** vs. **Ayoub and Others, Civil Application No. 3** of **2001** where **Notice of Appeal** was wrongly Titled as in this case, the Court held;

"Taking into account that the notice of appeal is wrongly titled ....., the same is fundamentally defective. Certainly that is not a minor defect, it is a fundamental irregularity which goes to the root of the matter affecting the validity of the notice of appeal which is a vital document with regard to this application...Taking into account that, that was a decision in a civil matter, we think that in a criminal matter its effect would be more alarming as Rule 68 (1) of the Rules mandatorily states that it is the notice of appeal which shall institute the appeal. As pointed out herein above, in the instant appeal, the appellant's notice of appeal is wrongly titled, hence that renders it to be defective. We are of the considered opinion that, such a defect is a fundamental irregularity which goes to the root of the matter affecting the validity of the notice of appeal. For that reason we are firm that the appeal is incompetent.

"The law is that in a Criminal Appeal, it is the notice of appeal that institutes the appeal (Rule 61(1) of the Court of Appeal Rules, 1979 (old Rules) and Rule 68 (1) of the Court of Appeal Rules, 2009 (new Rules). Going by the appellant's notice of appeal we would fully agree with Mr. Kakolaki that it is fatally defective in its reference to the wrong registry number of the case or citation, namely,

Criminal Application No 1 of 2007; instead of the correct reference, i.e. Criminal Revision No 1 of 2007 and in its complete omission to state briefly the nature of the conviction, sentence or order against which it is desired to appeal to the Court as is required under Rule 61(2) old Rules(Rule 68(2) new Rules). These two reasons would have been sufficient by themselves to uphold the purported appeal as incompetent. This was yet another similar position that the case of **Similike Mwanjoka** vs. **Republic, Criminal Appeal No. 138 of 2010**

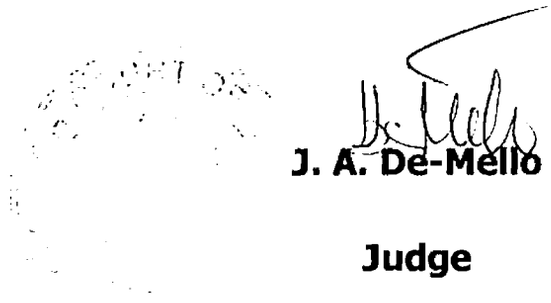
I am increasingly of the view that, not even **Article 107A (2) (e)** featured in our Constitution does away with all rules of procedure in the administration of justice in this country or that every procedural rule can be outlawed by that provision of the Constitution. See **China Henan International Cooperation Goup** vs. **Salvand K.A. Rwegasira, Civil Reference No. 22 of 2005 (unreported)** where it was stated as follows:-

"The role of rules of procedure in the administration of justice is fundamental...that is, their function is to facilitate the administration of justice...".

Not even the **Overriding Objectives Principle** which Courts have been urged to embrace, as amended by **Written Laws Miscellenious Amendment Act No. 3 of 20018** enjoining Courts to deal with cases justly and have due regard to substantive justice.

I will not even entertain the Rejoinder, one which is missing but, interjected by **Counsel Nkoko** to have one out of time, as I had slated the Appeal for judgment, for prayers to file one. The fact that, the submissions are based on a wrong Title, condensed with the aforementioned position, I **Struck Out** the Appeal, it being incompetent in its entirety with costs.

It accordingly ordered.



J. A. De-Mello

Judge

16th October, 2019.