IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO.161/2019

(Arising from The Mbozi District Court, Vwawa in Economic No.4/2016,)

1. CRETUS S/O SAKU .....1st APPELLANT

2. FURAHA JACKSON .....2nd Appellant

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order 26. 5.2020

Date of Judgment: 28.05.2020

Dr. A.Mambi, J.

In the District Court of Mbozi, Vwawa, Songwe, the appellants found guilty and convicted for an offence of unlawful possession of government trophies c/s 86 (1) and (2) (c) of the Wild Life Conservation Act, 2009 read together with the Economic and Organized Crimes Act, Cap 200 [R.E.2002]. They were convicted as charged and sentenced to 20 years imprisonment.

Aggrieved, the appellants filed their petition of appeal containing the nine grounds of appeal.

The matter was scheduled for hearing online. During hearing which was done virtually, where all parties were connected electronically, the appellants were unrepresented while the respondent (Republic)) was represented by the learned State Attorney Mr Davis Msanga.

The appellants adopted their grounds of appeal and had nothing to add.

In response, the learned State Attorney briefly considered with the grounds of appeal. He argued that the prosecution did not prove the case beyond reasonable doubt at the trial court since there was contradiction on the evidence of PW1, PW2 and PW6. He argued PW6 who was an independent witness denied to have signed the seizure document. He also doubted if the charge sheet was read to the accused persons at the trial court.

I have thoroughly gone through the grounds of appeal raised and the submissions by the republic. In my considered view the main issue is whether the prosecution proved the case beyond reasonable doubt or not. The State Attorney has raised the doubt that the prosecution did not prove the case beyond reasonable doubt due to contradictory evidence. The appellant in their second ad six grounds of appeal have raised the same concern that the prosecution did not prove the case beyond reasonable doubt.

I have gone through the records such as proceedings and observed that some of the key prosecution witnesses such as PW1, PW2 and PW6 testified contradictory evidence. The records show that PW2

and PW6 were the one who said that they arrested the appellants with the government trophy. They testified that they were with the independent witness (PW6). However in his evidence PW6 denied that he did not sign the seizure document and he appeared to have not seen those trophies. This in evidence my view creates a lot of doubt and the credibility of the witnesses is questionable.

It is true that the law under section 106 of the Wild Life Conservation Act, 2009 provides that it is mandatory to involve the independent witness during search of any dwelling house. However, in my considered view, since the witness (PW6) denied to have signed the seizure document it means he was not even aware of the government trophies that were alleged to be in possession of the appellants. In my considered failure to properly involve the independent witness meant that the prosecution evidence became questionable given the fact that even PW1, PW2 and W6 testified contradictory evidence. This implies that the prosecution failed to properly discharge their duty of proving the case beyond reasonable doubt against the appellants. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. Indeed the prosecution has the burden of proof in criminal cases. This includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof of most of the issues in the case beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt.Therefore the prosecution had to establish beyond

any reasonable doubt that the appellants committed the offence they were charged. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Failure to do so left a lot of questions to be desired. That should benefit the appellant. It is trait law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case against the accused beyond reasonable doubts.

Looking at the other grounds of appeal, in my view since my findings has revealed the prosecution failed to prove their case against the accused person/the appellants beyond reasonable doubt and since the magistrate failed to observe that, I don't see any need of discussing other grounds of appeal. Failure of the prosecution to discharge its duty of proving their case against the appellants can be reflected from the trial records where the evidence of prosecution was full of doubt which ought to have benefited the appellants. It is a settled law that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case.

On the other hand, I have also noticed other irregularities which I need to highlight here for future reference. The trial records such as proceedings does not show if the charge sheet was read to the accused persons. It is trait law that the prosecution facts and charge sheet must be read to the accused and he has to state if he admits all those essential elements of the offence charged, the magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The accused must also be informed the offence under which he is charged so that he can properly plea and defend himself basing on clear content of the charge sheet. There are various authorities that have addressed an issue of plea and the requirement of reading the charge sheet to the accused. For instance in the case of ***Adan v Republic (1973) EA 445***, cited by the case of ***Khalid Athumani v. R, Criminal Appeal NO. 103 OF 2005***, (unreported), it was explained that:

> *"When a person is charged,* ***the charge and the particulars should be read out to him****, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements,* ***the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty****. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete,* ***should give the accused an opportunity to dispute or explain the facts or to add any relevant facts****. If the*

accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

The court in similar situation in ***Abdallah Ally Vs The Republic*** (Criminal Appeal No 253 of 2013) observed and held that:-

"... being found guilty on a ***defective charge*** *based on wrong charge or and/or non - existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below ... In view of the foregoing shortcomings,* ***it is evident that the appellant did not receive a fair trial in court.***

Reference cans also be made to the persuasive decision of the court in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162 where **Lord Denning L.J** observed and stated that:

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

the accused persons.

In view of the foregoing shortcomings, it is evident that the appellants did not receive a fair trial in court. It is a general rule that, the accused person must be given the benefit of doubt as underscored by the court in the case of ***Director of Public***

Prosecutions v Elias Laurent Mkoba and Another [1990] TLR 115 (CA).

This means that if the accused is charged and such charges are not read to him, as seen in our case, he will be denied right to know what evidence has been given and what statements have been made affecting him and this cans go to the root of the case by affecting his right to be heard as observed in the above case

It is trait law that an accused has to state if he admits all those essential elements of the offence charged, the magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The Trial Magistrate was duty bound to comply with section 228 of the Criminal Procedure Act, Cap 20 [R.E.2002] which reads as follows:

> *"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) If the accused person admits the truth of the charge,* ***his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.***
>
> *(3)* ***If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***
>
> *(4)* ***If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.***
>
> *5)(a) If the accused pleads–*
>
> *(i) that he has been previously acquitted of the same offence; or*

(ii) he has obtained a pardon at law for his offence, the court shall first try whether not in fact such plea is true.

(b) If the court holds that the evidence adduced in support of such plea does not sust the plea, or if it finds that such plea is false in fact, the accused person shall be requi to plead to the charge.

(6) After the accused has pleaded to the charge read to him in court under this secti the court shall obtain from him his permanent address and shall record and keep it".

This means that the appellants were denied his right to know what evidence from the prosecution and what was the content on the statement has been made affecting him so that he can properly defend himself basing on the content of the charge sheet. This court can also borrow a leaf from the relevant persuasive decisions from other common law jurisdictions such as England. For instance **Lord Denning L.J**. in a persuasive decision of ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162. **Lord Denning L.J** observed and pointed out that:

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision made Appeal by the Court of Appeal in ***MEYYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was held that:

"In this country, natural justice is not merely 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, and declares in part"

"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa

uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na ***haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

"....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"

For the reasons, I am of the settled view that the guilt of the appellants were not proved beyond reasonable doubt, thus the prosecution had not established the guilt of the appellant beyond all reasonable doubts. I am thus satisfied that the evidence by the prosecution side was not strong enough to convict the appellants.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due the fact that the trail court failed to observe some legal principles on the detriment of the appellant.

In the circumstances, the conviction is quashed and the sentence is set aside and order that the appellants be free from the charges

they were facing unless they are otherwise charged with other charges.

Dr. A. J. Mambi

Judge

28.05. 2020

Judgment delivered in Chambers this 28th day of May 2020 in presence of both parties.

Dr. A. J. Mambi

Judge

28.05. 2020

Right of appeal explained

Dr. A. J. Mambi

Judge

28.05. 2020