IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA

CRIMINAL APPEAL NO. 3 OF 2020

(Originating from Karatu District Court Economic No. 10 of 2017)

UMBEE SLAKHMAY.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

06/05/2020 & 10/06/2020

GWAE, J

In the District Court of Karatu at Karatu, the appellant was charged, tried and convicted of offence of unlawful possession of government of trophy contrary to section 86 (1) and (2) (c) (ii) of the World Conservation Act No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 read together with paragraph 14 of the 1st Schedule thereto.

The offence with which the appellant stood charged with is on two counts; **firstly**, being found in unlawful possession of dik dik meat and **secondly,** being in found in unlawful possession of bush pig meat worth Tshs. 1,194,648/=. She was then sentenced to a mandatory minimum sentence to twenty **(20) years** jail) each count.

The appellant was further indicted, tried, prosecuted and convicted of an offence of unlawful possession of weapons in certain circumstance. He

was sentenced to **one (1)** year imprisonment. And the imposed sentences were ordered to run concurrently.

The District Court was conferred with jurisdiction by the DPP after the state Attorney in-charge at Arusha had exercised his power under section 12 (3) of the Economic and Organized Control Act, Cap 200 Revised Edition, 2002 by issuing a certificate for trial of the economic case by a subordinate court dated 10th April 2019.

Feeling aggrieved by both conviction and sentence, the appellant had presented his petition of appeal containing five grounds of appeal

1. That, the appellant trial court erred in law and in fact to convict the appellant basing on the defective sheet
2. That, the trial court erred in law and fact to convict and sentence the appellant relying on the evidence of PW1, PW2 and PW3
3. That, the trial court erred in law and in fact by relying on exhibit PE4 contradictory to law and Procedure
4. That, the trial court erred in law and in fact by to evaluate the evidence by defence side which raised reasonable doubt
5. That, the trial court erred in law and in fact in its judgment when it held that the prosecution had proved its case beyond reasonable doubts

On 6th May 2020 when this appeal was called on for hearing, the appellant appeared in person whereas **Ms. Adelaide Kasala**, the learned senior state attorney appeared for the DPP. The DPP's representative focusedly supported this appeal on the ground that, section 228 of Criminal

Procedure Act, Cap 20, Revised Edition, 2002 (Act) was not complied with by the trial court. According to the learned senior state attorney provision of section 228 (1) of the Act coaches to mandatory compliance. Due to the alleged non-compliance with the requirement of the law, she then prayed for an order nullifying the trial Court proceedings and decision thereof and case be tried denovo. The appellant merely argued that he does not know how to write and read.

Having looked at the trial court record, it is clearly observed that, the accused person now appellant was not procedurally arraigned after the DPP's transfer of the trial of the case by the subordinate court. The certificate was issued 10th April 2019 and on 18th April 2019 the appellant was brought before the trial court whereby the prosecutor informed the trial court that the consent from the DPP had been obtained for trial by the District Court. However the proceedings from when the notice of consent was given to when the preliminary hearing was conducted on 16th May 2018 reveal that nothing like reading the substance of the charge to the appellant was done.

The appellant, to my considered opinion was to be addressed by the trial court in terms of provisions of section 228 of CPA which is applicable in arraignment of an accused person and hearing of economic offences as provided for under section 28 of the Economic and Organized Crimes Act, Cap 200 Revised Edition, 2002. Section 228 (1) of CPA reads;

> "228.-(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 to be the truth of the charge".

As rightly argued by the learned state attorney, the provision of the law cited above coaches to mandatory requirement. Hence the learned Resident Magistrate ought to have complied with taking into account that, initially that is on 30th August 2017 the appellant's plea was taken but not by a competent court since the offences with which the appellant was charged are economic offences triable by the High Court by virtue of section 3 (1) Cap 200 nor did the trial court had jurisdiction to take plea on 3/5/2018 when the charge was substituted.

The trial court was therefore duty bound to take the appellant's plea immediately after it had been conferred with power effectively from 18th April 2019 that is after obtaining consent to try the case otherwise all proceedings, decision and subsequent orders are nothing but a nullity as argued by the DPP's representative.

Now, therefore I have to ascertain if an order of retrial is safer or prejudicial to the appellant. I would like to be guided by a decision of the defunct East African Court of Appeal in **Manji v Republic** (1966) EA 343 where it was correctly held;

> "In general, a retrial may 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 in the gaps in its evidence at the first trial ...each case must depend on its own facts and in order for the re-trial should only be made where the interest of justice requires..."

In our preset case, I have however considered the length of period spent in prison by the appellant, circumstances of the case particularly the documentary evidence namely; inventory which plainly indicates that, the

appellant was not incorporated in the destruction exercise of the alleged government trophies. An exhibit capable of incriminating an accused in a criminal case cannot be destroyed through an order of a court of law without associating such an accused person. By doing so it will certainly prejudice him of a right of a fair hearing.

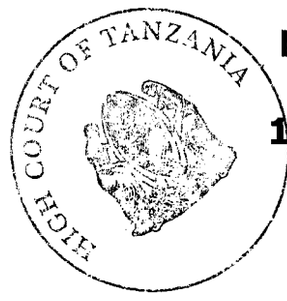
It is in that view, an order of re-trial is not preferable since the prosecution may be in position to cure or rectify defects appearing in its evidence. I would like to subscribe my finding in **Matheo Ngua and 3 others v. D.P.P**, Criminal Appeal No. 452 of 2017, Court of Appeal sitting at Mbeya delivered its decision on 3rd April 2020 where the appellants were found guilty of unlawful possession of Government Trophy and sentenced to 20 years jail each and a fine of Tshs. 5,000,000/=

> "Once again, we share Mr. Mtenga's views, because the defects in the tendering of the certificate of seizure and the omission to have the appellants participate in the exercise of destroying the meat were grave. While an order of retrial may give the opportunity to rectify some of the defects or fill the gaps which we should guard against, the other defect cannot be rectified and that renders.....prosecution case weak. Nothing for instance can be done about omission to have the appellant take part or be present at the time of destroying the meat. So an order of re-trial will be an exercise in the futility"

Considering the defect aforementioned, I unhesitatingly think that it is not proper to order trial denovo.

Consequently, the trial court proceedings and decision thereto are nullified however in the circumstances surrounding the charge as explained herein above I therefore order immediate release of the appellant from prison custody forthwith unless held therein for different lawful cause.

It is so ordered



M.R. GWAE
JUDGE
10/06/2020