"ORIGINAL"

IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 82 OF 2019
(Originating from the Resident Magistrate Court of MANYONI
Economic Case No. 36 of 2017)

RAMADHANI SAID @ KITOWEO.....1ST APPELLANT

MOHAMED RASHID SANDA.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Mansoor, J:

12TH AUGUST 2020

The appeal arises out of the judgment dated 30TH May 2019, passed by the District Court of Manyoni in Economic Case No. 36 of 2017.

The appellants were convicted with the offence of unlawfully possession of Government trophies contrary

to sections 80 (1), 84 (1), 111 (1) (a) and 113 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and section 57 (1) and 60 (1) of the Economic and Organized Crimes Control Act, Cap 200 (R:E 2002), as amended by section 13(b)(2)(3)(4) and (16(a) of the Written Laws (Miscellaneous Amendment)Act No. 3 of 2016. They were sentenced to serve a jail term of Twenty (20) Years, under Section 13(b)(2)(3)(4) and (16(a) of the Wildlife Conservation Act No. 5 of 2009.

They were also convicted with the offence of unlawfully dealing with the Government trophies contrary to sections 80 (1) , 84 (1) and 111 (1) (a) and 113 (1) and (2) of the Wildlife Conservation Act, no. 5 of 2009 read together with paragraph 14 of the First Schedule to and section 57 (1) and 60 (1) of the Economic and Organized Crimes Control Act, Cap 200 (R:E 2002), as amended by section 13(b)(2)(3)(4) and (16(a) of the Written Laws (Miscellaneous

Amendment)Act No. 3 of 2016. For the 2nd count, the appellants were sentenced to serve a jail term of Twenty (20) years under Section 13(b)(2)(3)(4) and (16(a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The first accused was convicted of the 3rd count which is possession of weapon c/s 103 and 113 (1) and (2) of the Wildlife Conservations Act No. 5 of 2009; he was sentenced to serve a jail Term of 20 years, and for the 4th count, the first accused was convicted for the offence of unlawful possession of firearms c/s 20 (1) (a) (2) of the Firearms and Ammunition Act No. 2 of 2015, he was sentenced to serve 20 years in Jail. The sentences were ordered to run consecutively.

The facts of the case in brief shows that the accused persons were not found with the trophies but the first accused was apprehended by the game warden on 10th June 2017 at night hours in the Majumukila Area in Kiyombo within Sikonge District, and he was

found in possession of one Rifle with Reg No. 496006. Upon being interrogated, he mentioned the 2nd accused as his ally, and he also confessed during interrogations that he has used the Rifle to kill Four Elephants and One Giraffe. It is the testimony of PW2 Assistant Inspector Kaitira that he did not arrest the 1st appellant in the game reserve while hunting, he arrested the 1st appellant at Majumukila Area, the 1st appellant had a gun, the gun was seized and a certificate of seizure was prepared and duly signed. The gun and the certificate of seizure (PIV and PV) were tendered in court and received as evidence. It is the testimony of PW2 that the 2nd appellant was mentioned by the 1st appellant as his ally, he also said that they arrested the 2nd appellant at his house, and upon searching him they found nothing.

The two appellants were interrogated at the police, they confessed that they had killed the four elephants and one giraffe, and the appellants were charged for the offence of unlawful dealing in Government Trophies i.e.

Elephant tusks obtained after killing four elephants, and unlawful dealing with Government Trophies i.e. Killing one giraffe. The 1st appellant was charged with two other extra counts of unlawful possession of firearms under the Ammunition Act, and possession of weapon in certain circumstances under the Wildlife Conservation Act.

The Appellants filed an appeal contesting the conviction; they contend that the case against them was not proved beyond reasonable doubt, and that their defense was not considered. They also contend that the Learned Trial Magistrate failed to give justifiable reasons for the conviction. That the proceedings at trial was marred by irregularities.

Due to Covid 19 pandemic, the case was ordered to be heard by written submissions, the appellants, were represented by Advocate Nkamba Josia Mashuda.

The Counsel argued that there was procedural irregularities and the requirements of Section 214 of the Criminal Procedure Act was not observed, in that there was changes of Magistrates, but the procedures were not observed. The counsel also argues that the charges were defective as the accused were charged under the wrong provisions of the law. She argues further that Section 80(1) and 84 (1) of the Wildlife Conservation Act No. 5 of 2009 is for the offence of manufacturing an article from the trophy or carry the business of trophy without the license. She says the particulars shown in the charge does not reflect anything contained in Section 80 (1) and 84 (1) of the Wildlife Conservation Act as the appellants were not found manufacturing articles from the trophy, or dealing in anyway with the trophies without the license.

The State Attorney agreed that the Magistrate erred in convicting the 1st appellant with the Forth Count as she did not have the consent of the Director of the

Public Prosecution, as the offence fell under section 20 and 21 of the Firearms and Ammunition Act are economic offences and required the consent of the DPP. That being the case the conviction entered against the 1st appellant on the 4th Count is quashed and set aside. It follows therefore that the sentence of 20 years imprisonment on the 4th count against the 1st appellant is also quashed and set aside.

Regarding the change of magistrate, Section 214 of the Criminal Procedure Act reads:

214.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may

be, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.

(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.

In this case, the records show that the case started with Hon Chilongola, and then it was taken over by Hon Kiama, who concluded the trial and convicted and sentenced the accused. Section 214 of the Code deals with the procedure to be followed when any Magistrate after having heard and recorded the whole or any part

of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who exercises such jurisdiction.

It is one of the important principles of criminal law that the Judge or Magistrate who hears and records the entire evidence must give judgment. Section 214 is an exception to the rule that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. The Section is intended to meet the case of transfers of Magistrates from one place to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer. Section 214 empowers the succeeding Magistrate to pass sentence or to proceed with the case from the stage it was stopped by his preceding Magistrate. Under Section 214 (1), successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he

may recall that witness and examine him, but there is no need of re-trial.

In fact Section 214 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred or is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 214 is that second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it. The successor Magistrate therefore did not err in deciding to continue with the proceedings from the point she took over, and she did not commit any procedural irregularities as alleged.

Regarding the defective charge, I agree with the submissions of the Learned Counsel for the appellants, in that the accused were charged for unlawful dealing of trophies, and the particulars totally contradicted the ingredients of the offence created under section 80 (1)

and 84 (1) of the Wildlife conservation Act. The offence is manufacturing an article from the trophy for sale or carrying on the business of a trophy dealer without a license. The particulars of the offence stated something else altogether, that the appellants were actually hunting the elephants and the giraffe, and they is nowhere showing that they used the elephants to manufacture articles for sale, or that they were doing the business of trophy dealers without the license. The charge sheet was totally ambiguous, it has confused even the appellants and they were denied a chance to prepare for effective defense. As held in the case of **Pastory Lugongo vs. R Criminal Appeal No. 251 of 2014** (unreported) in which the case of **Abdallah Ally vs. R Criminal Appeal No. 253 of 2013**, also unreported was cited with approval, the court held that:

> *"....being found guilty on a defective charge, based on wrong 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. Wrong and non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware that he was facing a serious charge...."

Also as held in the case of **Jonas Ngolida vs. R, Criminal Appeal No 351 of 2017** (unreported) since there was irregularities in the charge sheet, thus denying the accused/appellants their basic rights of knowing what exactly the charges they were facing, the defects affected the rights of the parties and prejudiced their rights, thus they received an unfair trial and the appeal with regards to the 1st and 2nd count is hereby allowed, the conviction and sentence passed on these two counts is quashed and set aside.

Even if we determine the merits of the appeal on these two counts, the prosecution failed completely to discharge the burden of proof. In the submissions by

the State Attorney is that the appellants were not found with the trophy, but they confessed when interrogated. Thus, the appellants were convicted only basing on the cautioned statements which were admitted at Trial as Exhibit PVI and PVII. The statements were received at Trial without objections, and so they were not retracted. The confessions of accused need to be corroborated in material particulars before it can be acted upon, they said they have used the Rifle and the SMG to kill the elephants and the giraffe, they mentioned the other people whom they hunt together, these people were never arrested, and there was no explanation given by the prosecution as to why the people mentioned by the appellants in their statements were not apprehended, the court ought to have been really satisfied that the accused indeed confessed without any influence, torture or promise especially since in this case the accused were lay persons and did not have legal representations. At page 37 of the proceedings as well as page 33 of the proceedings, it shows that the statements were tendered

and accepted as exhibit but the examination in chief of the witnesses who tendered the documents proceeded, before the contents of the statements were read over to the accused persons in court, the witness was testifying on the contents of the cautioned statements before the appellants knew what was written in the cautioned statements. The cautioned statements were read over to the accused persons after the examination in chief was done. This was un-procedural, and it denied the appellants a fair trial. Again, after the statements were read over to them, they were not asked if they agree to the contents of the statements read over to them, the court did not ask the appellants if they agree what was written in the statements were their own words, they were not asked, and this also denied their right to fair trial and it cannot be said that there was no objection in tendering the documents as the contents of the documents were not known to the appellants before it was accepted as evidence.

Apart from procedural defects on admission of these statements as exhibits, it was still not open to the Court to convict on the uncorroborated confessions of the accused. I am however aware that a conviction upon the uncorroborated confession is not illegal but here the prosecution only presumed that the appellants did kill the elephants and the giraffe, they did not see them red -handed killing those animals using a gun. The presumption was rebutted and that is why there was a trial and the appellants denied even committing the offence or making the statements, the confessions of a rebuttable presumption should have found a corroboration; it is necessary to bear in mind section 122 of the Evidence Act, which provides that:

> *"The Court may presume the existence of any fact which it thinks likely to have happened, regard being that to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

If the Court had received the evidence that the appellants were captured on the spot with the trophy then acting on the appellant's cautioned statement would have been proper as the statement would have been corroborated by the actus Reus, i.e. being found in possession of the trophies. The confessions were denied, that is why there was a trial, and the appellants even gave their defense that they did not give the statement at all to the police, See pages 48 and 49 of the proceedings in which the appellants denies completely to have recorded the statements or knowing the police officers who recorded the statements. The statements should have been tested by an enquiry. In any case these confessions were retracted since the accused had cross examined the persons who tendered these statements, see page 37 of the proceedings which depicts the fact that the appellants denied recording these statements:

"XXD by DW1

I did not find you with the elephant tusks, I did not explain if I arrested you, I recorded your cautioned statement"

These shows that the appellants did not agree that they recorded statements voluntarily or what was recorded in the statements were their own words and the facts therein are presumed facts and they were rebutted, and the prosecution were duty bound to find corroboration of the statements of the appellants which were rebutted. There should be other material evidence relating to the fact that the appellants indeed were found with the trophies or manufacturing articles from the trophies or selling the articles made from the trophies or dealing as the trophy dealers without any license. No material evidence was forthcoming from the prosecution, it was totally unsafe for the Court to convict the appellants solely on their rebutted confessions without any material corroborations. As

held above the charge in count 1 and 2 were not proved beyond reasonable doubt to the satisfaction of the court, thus the appellants are acquitted on Count No. 1 and 2, the conviction and sentence is quashed and set aside.

Regarding the 3rd count of possession of weapon in certain circumstances under section 103 of the Wildlife Conservation Act No. 5 of 2009, PW2, and the raiding team found the first appellant with the Rifle 306, on the issue of whether he owns the Rifle lawfully or not, this Court cannot go back to determine on the proceedings which were conducted illegally i.e. Without the DPP Consent, thus the issue as to whether the 1st appellant had the license to own the Rifle and he was owning it unlawfully was not determined at all as the Count on Section 20 of Ammunition Act was found to be an improper charge and the Magistrate did not have the jurisdiction to determine on it, if follows therefore the proceedings which supported this charge cannot be used by this Court to determine whether the 1st

appellant was owning the Rifle with or without the license. I understand that a seizure note was prepared in the 1st appellant's presence and his signature was obtained on the seizure note. The seizure note and the gun were exhibited in court as evidence. However, the issue to be determined under count No 3 is not that the 1st appellant was found in unlawful possession of the weapon, he could be possessing it legally, the issue under section 103 of the Wildlife Act is whether the 1st appellant who was found in possession of the weapon, the Rifle was using it or was about to use it for the purpose of committing an offence under the Wildlife Act, which means that the Rifle was used in killing the four elephants and the one giraffe. Since this count is closely connected with Counts 1 and 2 hereinabove in which the court found that there was no evidence to connect the appellants with the offence of killing the animals or using the parts of the animals to manufacture any article for sale or even carrying on the business of dealers of trophy without the license, then count No 3

also cannot stand as even though the 1st appellant was caught in possession of the Rifle, there was no evidence forthcoming which proved that the Rifle was used by the 1st appellant to kill any animal unlawfully.

The 1st did not deny that he was found with the gun but the question of illegal ownership of the gun was determined by the Court when considering count No 4, and since that count was dropped by the prosecution, this court cannot refer or reevaluate the evidence adduced on the charge which was dropped to determine an issue of illegal possession of the gun. It follows therefore that there was no convincing evidence to convict the 1st appellant under Section 103 of the Wildlife Conservation Act, as there was no proof that the 1st appellant has used the Rifle to kill the animals or was about to use the gun for killing the animals, as the only evidence available, which is the cautioned statements of the appellants were not accepted as evidence by this court.

Section 103 of the Act, reads:

103. A person who is found in possession of any weapon or any other object in circumstances which raise a reasonable presumption that he has used or intends or is about to use the same for the purpose of the commission of the offence under this Act, shall, unless he shows lawful cause for such possession , commits an offence, and shall be liable on conviction to a fine of not less than two hundred thousand shillings but not exceeding five million shillings or to imprisonments for a term of not less than one year but not exceeding three years or both.

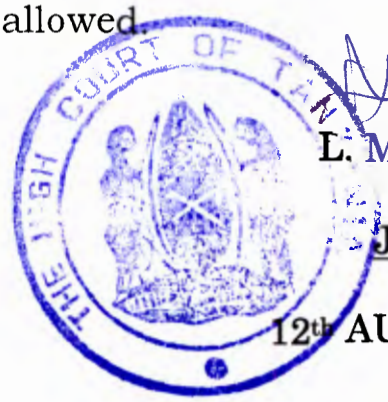
This section imposes the burden of proof on the prosecution to prove that the 1st appellant was using the Rifle to commit the offence under the Wildlife Act or was about to commit the offence under the Act using the Rifle, and since the prosecution had failed to prove that

fact beyond reasonable doubt, the 3rd count on the charge sheet also remained unproved, and so the 1st appellant is acquitted , and the conviction and sentence passed by the Trial Court on this count is also quashed and set aside.

Therefore, the appeal on the 1st, 2nd and 3rd counts succeeds and noted that the 4th count was dropped by the prosecution. The conviction and sentence passed against the appellants on these three counts are quashed and set aside, the appellants, Ramadhani Said Kitoweo and Mohamed Rashid Sanda are ordered to be released from imprisonment unless they are lawfully held for any other lawful cause.

The conviction and sentence on the 4th count also are quashed and set aside for the charge under Section 20 of the Arms and Ammunition Act was dropped since the Magistrate did not have the consent of the DPP to try the offence.

Appeal allowed.



L. MANSOOR

JUDGE

12th AUGUST, 2020

Judgement delivered in Court today in the presence of the Appellants, MS. Magili, State Attorney for the Respondent Republic and MRS. MARIKI the Court Clerk.

L. MANSOOR

JUDGE

12TH AUGUST 2020