

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
CRIMINAL APPEAL NO. 32 OF 2020

(Arising from Economic Case No.51 of 2016, the District Court of Bariadi at Bariadi)

LENGA MIANO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

31st August & 16th October, 2020

Mdemu, J.;

Lenga Miano, referred to as the Appellant in this appeal, was charged in the District Court of Bariadi for three counts, namely:- unlawful entry into Game Reserve contrary to the provisions of section 15(1) and (2) of the Wildlife Conservation Act No. 5/2009, read together with GN No. 275 of 1974; unlawful hunting in the Game Reserve contrary to section 47(a)(aa) of the Wildlife Conservation Act No. 5 of 2009, read together with Paragraph 14(d) of the First Schedule to and section 57(1) of the Economic and Organized Crime Control Act, Cap. 200 and unlawful possession of government trophies contrary to the provisions of section 86 (1) and (2)(b) of the Wildlife Conservation Act No. 5 of 2009, read together with Paragraph 14(d) of the First Schedule to and section 57(1) of the Economic and Organized Crime Control Act, Cap. 200.

As to the first count, the prosecution alleged that, on 06th day of September, 2016 at Nyabubele Village, within Maswa Game Reserve, in Bariadi

District, Simiyu region, the Appellant, together with Five Others were found in the said area without having written permit from the Director previously sought and obtained. On the second count, the prosecutions alleged that, on 06th day of September 2016 at Nyabubele Village, the Appellant together with Five Others were found hunting scheduled animals to wit; 22 Thomson Gazelle valued at USD 11,000 the property of Tanzania Government. On the third count, it was alleged that, on 06th day of September 2016 at Nyabubele Village, the Appellant together with five others were found in unlawful possession of government trophies, to wit; 22 thomson gazelle valued at USD 11,000 equivalent to Tshs. 24,089,450/= the property of Tanzania Government.

Brief facts of the case are that, on 06 September, 2016 at 06:00 p.m., while on patrol, PW2 and PW3 found the Appellant and another at Nyabubile area in possession of 22 carcasses of thomson gazelle which were carried on a bicycle. They had no permit. The Appellant was arrested together with the said exhibit and sent to Bariadi Police Station where a caution statement was recorded.

Though the accused denied to have committed the offence and that, he was arrested away from the Game Reserve with nothing, yet, finally, he was convicted of three offences as charged and sentenced accordingly. This was on 28th of September, 2016. Aggrieved by that decision, the Appellant preferred this instant appeal on four grounds which may be summarized into two as follows: **One**, the trial court violated the mandatory provisions of section 12(3), 12(4) and 26(1) of the Economic and Organized Crime Control Act, Cap 200 on consent and certificate of DPP. **Two**, the prosecution case was not proved at the required standard.

The appeal of the Appellant was heard on 31st of August, 2020. On that date, the Appellant appeared unrepresented whereas the Respondent Republic had the service of Mr. Nestory Mwenda, learned State Attorney who supported the appeal, but as shall be observed later on, he urged a retrial. Submitting in support of the appeal, the Appellant simply prayed to adopt all his grounds of appeal as his submission.

Mr. Mwenda on his part submitted that, on 8th of September, 2016, a charge was read in court in respect of only two accused persons who were also named in the consent filed under section 12(4) of Cap. 200. He went on submitting that, preliminary hearing got conducted whereby PW1 testified thereafter. He further said that, on 27th of September, 2016, the Prosecuting Attorney read a new charge to the 3rd, 4th, 5th and 6th accused persons. He added further that, on 6th of October, 2016 the charge against all accused persons, save for the Appellant, who was the then second accused, was withdrawn.

With that information, Mr. Mwenda came to the conclusion that, there was a need for the prosecution to file a new consent as that filed on 8th of September, 2016 ceased after adding new accused persons. Following the non-filing of new consent, Mr. Mwenda was of the view that, the trial court had no jurisdiction to try the case. He then referred me to the case of **Adam Seleman Njalamoto v. R, Criminal Appeal No. 169 of 2016**(unreported).

It was Mr. Mwenda's view that, with such defects, the proceedings and decision of the trial court should be quashed and sentence be set aside. However, Mr. Mwenda prayed for an order for retrial contending that, conditions set in the case of **Fatahel Manji v. R, (1966) EA 343** have been met

as the evidence of PW1, PW2, PW3 and PW4 is watertight and that, exhibits were disposed in presence of the Appellant.

In his rejoinder, the Appellant just prayed to be released contending that, he did not commit the offence he stood charged and subsequently convicted and sentenced.

I have heard the position of both parties. I have also duly considered all grounds of appeal together with the entire evidence on record. With the available record, I entirely agree with Mr. Mwenda's views because, as the consent filed on 08th of September, 2016 was in respect of the charge with only two accused persons, and since that charge was substituted, then the new charge containing 6 accused persons ought to have accompanied by a new consent as well. As the substituted charge died with its consent, then, the Appellant in the new economic charge was prosecuted without consent. That means, the trial court acted without jurisdiction according to the cited case of **Adam Seleman Njalamoto**(supra). Accordingly, proceedings and the resultant judgment, conviction and sentence in economic case No. 51 of 2016 of the District Court of Bariadi are hereby nullified.

As said, Mr. Mwenda urged for a retrial. The only issue for determination under the circumstances is whether this case is a fit one for ordering retrial according to the principles stated in cited case of **Fatahel Manji** (supra). According to the record, during preliminary hearing, at page 2 of the typed proceedings, the Appellant together with another person committed the offence on 06th of September, 2016 at 06:00 am, while the alleged to be eye witnesses, that is, PW2 and PW3 testified to have found the Appellant with

another committing the offence on the same date but at 06:00PM. the difference in time of committing the offences raises doubt.

Also, at the preliminary hearing, the Appellant together with another, were found hunting in the game reserve while the testimony of PW2 and PW3 is to the effect that, the Appellant and another were found pushing their bicycles carrying government trophies. This too casts doubt to the prosecution case.

Worst still, the alleged to be eye witnesses, that is, PW2 and PW3 testified to have seen only two people in the game reserve and managed to arrest one. If it was so, why then was the Appellant prosecuted together with other 5 accused persons? This situation depicts doubts to the prosecution side as against the Appellant. To the level of substituting the charge and to the withdraw of the case against all the accused, save for the Appellant, there is no explanation on how they were connected.

With those doubts, one may conclude that, the prosecution seek an order for retrial in order to fill such gapes in their case against the Appellant. Under the circumstances, I am compelled to accept the version of the Appellant in his defence at page 13 of the proceedings that: -

"I was arrested when I was at home. There passed through the road a motor vehicle. It stopped and people come towards me. They told me stand up. I was sent to their car where I embarked it and I was brought to Bariadi. That is all."

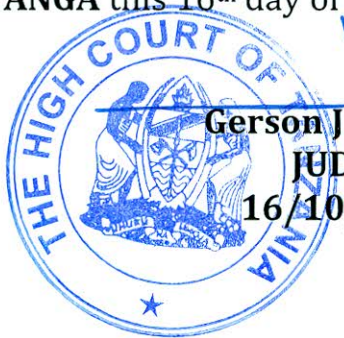
In my humble opinion, the prosecution case *ab initio* was speculative and rests on uncertainties so to speak. In totality, I have noted the following in the prosecution case: **One**, it is not known how the Appellant was arrested. **Two**, it is not open why the evidence of the prosecution talks of two suspects to be arrested but yet the charge, substituted though, had 6 accused persons. **Three**, much as the prosecution testified to have found two persons with a bicycle, yet they arrested one, that is, the Appellant on that day. It is not clear on record how did the then 2nd accused got in the charge as the record is silent as to when he was arrested.

One last point to note, **four**, is the possibility of having a bicycle loaded with 22 thomson gazelle, the government trophies. This, in my view, may not be possible in the eyes and mind of any ordinary citizen.

With that stance, I find that this is not a fit case to make an order for a retrial. I thus order immediate release of the Appellant unless, he is held therein for some other lawful cause.


Gerson J. Mdemu
JUDGE
16/10/2020

DATED at SHINYANGA this 16th day of October, 2020.



Gerson J. Mdemu
JUDGE
16/10/2020