

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CRIMINAL APPEAL NO. 36 OF 2020

*(Arising from the Judgment of the District Court of Serengeti at Mugumu
In Economic Case 41 of 2017)*

MAKURU S/O DAMLIANUS MBURA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Hearing: 26th October, 2020

Date of Judgment: 26th October, 2020

KISANYA, J.:

This appeal emanates from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 71 of 2017 dated 31st December, 2018. In that decision, Makuru Damianus Mbura, the appellant herein was convicted of “Unlawful Possession of Government Trophy, contrary to section 86 (1) and (2) (ii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by sections 13 and 16 of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. In the result, the appellant was sentenced to twenty years’ imprisonment.

In brief, the context giving rise to the present appeal is that, the police received an information from their informer that, the appellant was in unlawful possession of government trophies. Therefore, on 4th March, 2017 at about 2240 hours, PW2 and other police officers went to search the appellant's house. Luckily, he was present at his home place. Upon searching his house, one elephant tusks weight 2.8 kg was found and taken to Mugumu Police Station where Police Case File No. MUG/IR/873/2017 was opened. Thereafter, the elephant tusk was identified and valued at Tshs. 32, 370, 000/= by PW1 who also tendered the Trophy Valuation Certificate (Exhibit PE1). On the other hand, the elephant tusk was tendered by PW2 and admitted in evidence as Exhibit PE2

The appellant fended himself. He called no witness. The record is not clear as to whether he was informed of his right to call witnesses. In his evidence, the appellant contended that the elephant tusks was not found at his house. He stated that, he found the same in the police's vehicle. The prosecution did not cross examine him. Thus, his evidence was not challenged.

At the end, the trial court was convinced that, the prosecution had proved its case beyond all reasonable doubts and went on to convict and sentence the appellant as stated herein.

Determined to challenge both conviction and sentence, the appellant preferred the petition of appeal before this Court. The grounds registered therein are as follows:

1. That, the prosecution was contradictory and insufficient to convict the appellant.

2. That, the trial proceeded without consent of Director of Public Prosecutions and Certificate Conferring Jurisdiction to the Subordinate to try an economic offence.
3. That, the trial court erred in admitting wrong exhibits.
4. That the evidence adduced by the defence was not considered.

When this matter was placed before me for hearing today, the appellant appeared in person while the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney. Hearing was conducted through video link, both parties connected from the Court to Musoma prison and the National Prosecution Service in Mara Region respectively.

In addition to the grounds stated in the petition of appeal, the Court probed the parties to address on two issues. First, whether the charge was read over to the appellant as required under section 228 of the Criminal Procedure Act, Cap. 20, R.E. 2002 (the CPA). Second, whether the provision of section 231 of the CPA was complied with by informing the appellant of his right to call witness.

Addressing the Court, the appellant prayed to adopt his petition of appeal. He contended that he was denied the right to call witnesses and that, the questions put to the prosecution's witnesses were not recorded by the trial court. The appellant went on to state that, he was not found with the elephant tusk and that, PW3 did not witness the search.

In reply, Mr. Byamungu addressed the Court on the above two issues on plea taking and compliance with section 231 of the CPA. He submitted that the appellant's plea was not taken as required under section 228(1) of the CPA on the reason that, it is not clear as to whether the substance of the charge was stated to him. In that regard, the learned State Attorney moved the Court to nullify the

proceedings of the trial court on the ground what proceeded thereto was a nullity.

As regards compliance with section 231 of the CPA, Mr. Byamungu argued that, the appellant reply on whether he wanted to call witness was not recorded. He was of the view that, the said omission vitiated the proceedings from the moment when his right was denied. However, considering that the plea was not taken, Mr. Byamungu reiterated his position that, what was conducted before the trial court was a nullity. He therefore, moved the Court to order retrial of this matter. The learned counsel was of the view that, this is a fit case for making an order for retrial.

I have prudently considered the parties' submissions and the evidence on record I am of the considered view that, this appeal can be disposed of by addressing matters related to irregularities during trial.

Starting with the second ground of appeal, the appellant complains that, the trial proceeded without consent of the DPP and Certificate conferring jurisdiction to the subordinate court to try the economic offence. Mr. Byamungu did not address this ground. It is common ground that, the offence of unlawful possession of government trophy levelled against the appellant is an economic offence. Therefore, in terms of section 12(3) of EOCCA the trial court (Serengeti District Court) had no jurisdiction to try the said case unless the DPP confers jurisdiction to it. Also, the trial cannot commence unless the DPP consent to the prosecution of the appellant with the said offence has been filed in Court. Therefore, a subordinate court has no jurisdiction to hear and decide a case founded on economic offence without receiving the DPP's consent and certificate conferring jurisdiction.

I have examined the typed and hand written proceedings and noted that, the prosecution filed the DPP's consent and certificate on 10/08/2017. Both instruments were signed on 3rd August, 2017. Thereafter, preliminary hearing was conducted on 19th October, 2017 and trial commenced on 2nd February, 2018. In that regard, I find that, the DPP's consent and certificate were duly filed before the trial. I accordingly dismiss this ground.

The second issue for consideration is whether the charge was read over and explained to the appellant. This issue is based on section 228 (1) of the CPA which impose a mandatory obligation to the trial court to take the plea of the accused before the commencement of the trial: The said section reads:

"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"

The essence of the above cited provision is to facilitate the accused to comprehend the nature of the charge or offence that he is facing and enable him to prepare his defence. Hence, failure to comply with the above provision renders the entire trial a nullity. See **Naoche Ole Mbile v. Republic** [1993] TLR 253 where it was held that:

"1. One of the fundamental principles of our criminal justice is that at the beginning of the criminal trial the accused must be arraigned, ie the court has to put the charge or charges for him and required him to plead;

(2) Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity".

In the present case, I have noted that the appellant was brought for the first time before the trial court on 7/03/2017. The charge was read and explained to him. As rightly submitted by Mr. Byamungu, the appellant was not required to plead

thereto because the trial court had no jurisdiction to try the offence. Therefore, no plea was taken on 7/03/2017.

As stated herein, the DPP's consent and certificate conferring jurisdiction to the trial court to try the case were filed on 10/08/2017. The law is settled that, trial of an economic offence commences after obtaining the DPP's consent and certificate conferring jurisdiction. In that regard, upon receiving the DPP's consent and certificate, the trial court was duty bound to take the appellant's plea. This was not done in the case at hand. It was until 19/10/2017 when the case came up for preliminary hearing where the appellant was reminded of the charge and the trial court recorded to have taken his plea. This is what transpired on that day:

“COURT: Charge is remanded to the accused person who is asked to plead thereto.

SGN:I.E. NGAILE –DRM

19/10/2017

Accused plea:- “Sio kweli”

COURT: EPNG...”

It is my considered view that, reminding an accused person of the charge against him is not the same thing as stating or reading to him the substance of the charge as required under section 228(1) of the CPA. Therefore, I agree with Mr. Byamungu that, it is not clear as to whether the substance of the charge was stated to the appellant. Likewise, it is not known what exactly the appellant was reminded of by the trial court. Since the substance of the charge was not stated to the appellant, it is uncertain as to what he pleaded to. Further, plea was not taken immediately before the commencement of the prosecution's case on 8/2/2018. In view thereof, the conclusion is that, the appellant was not accorded

the right to know the charge preferred against him. This in itself renders the trial a nullity.

There is yet another issue that need this Court's attention. It relates to compliance with the provision of section 231 (1) of the CPA. Pursuant to this provision, upon making a ruling that, the accused person has a case to answer, the trial court is required to address him on two things. One, that he has the right to defend himself on oath. Two, that he has the right to call witness. Thereafter, the trial court is required to record the accused person's reply in respect of both rights. Partial compliance to the provision of section 231 of the CPA renders the trial a nullity. See **Maduhu Sayi @ Nigbo vs R**, Criminal Appeal No. 360 OF 2017, CAT at Shinyanga (unreported) when the Court of Appeal held:

“ the record does not show the manner in which the appellant elected to give his evidence and whether or not he intended to call witnesses. The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such rights after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel.”

The record in the case at hand shows that the appellant was addressed in terms of section 231 (1) of the CPA. It was recorded that the appellant replied that he would give evidence on oath. His answer or reply on how he wanted to exercise the right to call witness was not recorded. This suggests or raises a doubt on whether the appellant was informed of the right to call witnesses. Therefore, I find that, the appellant was prejudiced. See also, **Mabula Julius and Another vs R**, Criminal Appeal No. 562 OF 2016, CAT at Shinyanga (unreported) where similar stance was taken. This is more so when it is considered that, his case was closed by the trial court. He did not pray to close the defence case.

In view of the foresaid, the proceedings of the trial court were vitiated by the failure to comply with the provisions of sections 128(1) and 231 of the CPA. I am therefore constrained to exercise the revisional powers of this Court as hereby do, nullify the proceedings of the trial court. Consequently, the judgment of the trial court as well as the sentence imposed on the appellant are hereby quashed and set aside.

On the way forward, Mr. Byamungu asked me to make an order for retrial. It is true that the recourse that follows when the proceedings are nullified is the order for retrial. However, an order for retrial is issued depending on the circumstances of each case. For instance, it cannot be issued if the prosecution will be given time to fill in the gaps noted in its case. See **Shaban Said vs R**, Criminal Appeal No. 267 of 2009, CAT at Mwanza (unreported) where the Court of Appeal held:

“It is trite law that a retrial should not be ordered where it will serve the purpose of giving the prosecution an opportunity to fill in the gaps in its case.”

The Court of Appeal went on to cite the case of **Fatehali Manji v. R.**, (1966) E.A. 343 where it was stated that:

"In general, a retrial may be ordered only where 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 purposes of enabling the prosecution to fill in gaps in its evidence at the first trial..... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it "

In the present case, the appellant's first ground was to the effect that, the prosecution evidence was contradictory and insufficient. I have examined the evidence of the police officer (PW2) who went to search the appellant's house and PW3 who was called on to witness the search. I agree with the appellant

that, PW3 did not witness the search. He reached at the appellant's house at the time when the appellant had been caught. Further, no certificate of seizure was tendered to show that, the appellant was found with the said elephant tusk and the persons who witnessed the search. Since the search was conducted in the dwelling house, an independent witness was a mandatory requirement under section 106 (1) of the Wildlife Conservation Act, 2009. As evidence to such effect is wanting, I am of the considered view that, it will not be in the interest of justice for the Court to make an order for retrial.

In the event and for the reasons stated herein, I order that the appellant be released from prison forthwith unless otherwise lawfully detained.


DATED at MUSOMA this 26th day October, 2020.




E. S. Kisanya
JUDGE

COURT: Judgment delivered through video link this 26th October, 2020 in the appearance of the appellant and in the absence of the respondent. B/C Maiga present.




E. S. Kisanya
JUDGE
26/10/2020