IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 30 OF 2020
(Originating from the Resident Magistrates' Court of Manyara, at Babati Economic Case No. 3 of 2017)

MAMAI KIROYA ..... 1st APPELLANT

JUMA SENDO MELAU ..... 2nd APPELLANT

MATHAYO LEYANI LAIZER ..... 3rd APPELLANT

Versus

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

JUDGMENT

24th September & 13th November, 2020

Masara, J

In the Resident Magistrates' Court of Manyara sitting at Babati (the trial Court), **Mamai Kiroya**, **Juma Sendo Melau** and **Mathayo Leyani Laizer** stood charged with the offence of being found in Unlawful Possession of Government Trophy, contrary to Section 86(1)(2)(c)(ii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59(a)(b) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016, read together with Paragraph 14 of the First Schedule to Sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 [R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) Act No 3 of 2016. All the accused persons denied to have committed the offence against which they were charged. The trial Court convicted all the Appellants and sentenced them to serve twenty years imprisonment. Dissatisfied by both conviction and sentence imposed

on them, the Appellants have preferred an appeal to this court on the following grounds as reproduced verbatim:

a) *That, the learned trial Magistrate erred in law and in fact in convicting the Appellants basing on exhibit P1 Certificate of Seizure) contrary to the law;*
b) *That, the learned trial court (sic) erred in law and in fact for convicting the Appellants herein the prosecution (sic) side failed to prove their case beyond all reasonable doubts;*
c) *That, the learned trial court (sic) misled herself in law and in fact when she (sic) failed to scrutinize and evaluate the evidence on record;*
d) *That, the whole trial court proceedings and decision were unfair and bad in law lacking (sic) legal legs to stand; and*
e) *That, the learned trial Magistrate erred in law and in fact by not complying with the provision of section 234(2)(b) of the CPA Cap 20 R.E 2002.*

Basing on those grounds the Appellants pray that the Court allows the appeal entirely by quashing the whole proceedings and decision of the trial court, setting aside conviction and sentence and let them at liberty.

The Prosecution evidence can be summarized from the record as follows: On 25/10/2017 at 01:00hrs, Salvatory Mtui (PW1), park ranger, Lazaro Nenjada (PW3), Village Game Scout and SSGT Omary Likundas (PW5), Game ranger, along with other three people were on patrol at Ndedo area within the conserved areas in Kiteto District. While on patrol, they saw three people skinning an impala they had hunted. They managed to apprehend them. Those apprehended were the Appellants herein. The first Appellant had a knife skinning the impala, the second Appellant was holding the impala's leg while the third Appellant had a torch lighting for the two. PW1 filled in the certificate of seizure. He tendered the certificate of seizure which was

admitted as exhibit P1. PW1 is said to have sent PW3 to go and call the Ndedo Village Executive Officer. They took the Appellants to Ndedo village office, whereupon the Acting VEO, Shinini Lembada (PW4), arrived. PW4 wrote the Appellants' statements for the purpose of record keeping in the office. The Appellants were taken to Babati Police Station in the same night, with the impala carcass, the knife they had and its cover as well as the torch. The knife, its cover and the torch were tendered and admitted as exhibit P2 collectively.

On reaching Babati Police Station, PW1 handed over the impala meat, the knife, the knife cover as well as the torch to D 7540 SSGT Masoud (PW7) the exhibit keeper, for safe custody. On the same night, E 6749 D/CPL Donald (PW6), DC Fadhil and DC Luis interrogated the Appellants. The Appellants admitted that they were arrested at Ndedo Village but denied to be found with the Impala meat.

On 26/10/2017 Christopher Peter Laizer (PW2) conducted valuation of the impala meat, which he valued at 390$. He made a valuation report which was admitted as exhibit P3. PW2 returned the impala meat to PW7 for safe custody, and handed over the valuation report to the police. On the same day, PW6 took the impala carcass from the exhibit keeper to the court for disposal. He prepared an inventory form, took it to Babati District Court with the impala meat, where an order to destroy the carcass was granted. The carcass was disposed at the court premises. The inventory form was tendered and admitted as exhibit P4. PW6 also went to the scene of crime,

collected evidence with the aid of PW4 and drew a sketch map which was admitted as exhibit P5.

PW7 stated how he was summoned by the OC CID Babati to go and collect exhibits. He was handed with the Impala meat, a knife and its cover, and a torch which he kept in the exhibit room. The next day, he handed over the impala meat to PW2 who conducted valuation and returned it to him. Later he handed it to PW6 who took it to court for signing the inventory and destroying the same. He kept the torch, knife and its cover until 23/1/2018 when he handed them to PW1 to take them to court as exhibits. All the movement of was done through signing of the chain of custody form. He tendered the chain of custody form which was admitted as exhibit P6.

After closure of the prosecution evidence, the Appellants testified on oath. They denied involvement in the commission of the offence, stating that it was framed against them. The first Appellant testified that on 25/10/2017 at 6:00hrs he was at his home brushing his teeth when PW3 arrived and arrested him without informing him the reasons for his arrest. He was taken to Ndedo office where he met the second Appellant. PW4 made a call to one Melayeke, requesting the phone numbers of the TANAPA officers. Having received the numbers, PW3 called the officers who arrived at 18:00 along with PW4. DW1 was interrogated and his particulars taken. They were taken to Babati Police Station at night together with the third Appellant whom they met at Ndedo village, where he stayed for a month. He was interrogated and harshly beaten until when he admitted and signed his statement. DW1 told

the court that he has personal conflict with PW4 over land dispute. The Appellants were arraigned to court on 9/11/2017.

The second Appellant (DW2) testified that on 25/10/2017 at 01:00hrs, he was at his home drinking local brew when PW4 arrested him claiming that he was making noise at night. He was taken to Ndedo offices and stayed there until the next day at 17:00hrs, when the park officers arrived with a black plastic bag in their motor vehicle. Both DW2 and the third Appellant were forced to pick the meat in the plastic bag. Outside the plastic bag, there was also a knife and a torch. They were taken to Babati Police station where they stayed for a month and then they were interrogated and the next day they were taken to court.

The third Appellant (DW3) testified that on 25/10/2017 at 10:00hrs he was going to a shop when he met two people who arrested him. He was taken to the village office where he met DW1. They stayed up to 17:00hrs when all the three Appellants' details were taken, they were taken to Babati Police Station. On 27/10/2017 about 08:00hrs he was beaten harshly while being interviewed until he signed some papers he did not know. DW3 added that he never saw meat at Ndedo, and among those who arrested him was PW2. He also stated that he saw the knife and torch for the first time at the court.

When the appeal came up for hearing, the Appellants appeared in person unrepresented, and fended for themselves. The Respondent was represented by Ms Tusaje Samwel, learned State Attorney. The learned State Attorney opposed the appeal and supported the conviction and sentence.

The first Appellant submitted on behalf of the others. Submitting in support of the grounds of appeal generally, the Appellants contended that the trial court conducted trial without following legal procedures. While PW1 was tendering the certificate of seizure, it was objected but the court admitted it without ruling of the objection or conducting trial within trial. The Appellants added that the certificate of seizure and exhibits P3 and P6 were wrongly admitted as they were not read or explained after they were admitted. Further, they averred that exhibits P4 and P5 were tendered by the prosecutor and not the witness, which is contrary to law.

The Appellants further complained that the court did not inform them the need to recall witnesses who had testified after substitution of the charge. They contended that the magistrate was supposed to address them that they needed to recall those witnesses for cross examination. Basing on those reasons, the Appellants pray the appeal to be allowed.

Contesting the appeal, Ms Tusaje argued that it is not a legal requirement to conduct inquiry where the certificate of seizure is objected, that is only conducted with respect to confessions or cautioned statements. The that it was explained. To support that argument, she cited the case of ***Chrizant John Vs. Republic***, Criminal Appeal No. 313 of 2015 (unreported). She insisted that even without exhibit P1, still the evidence of PW1, PW3, PW4 and PW5 proved that the Appellants were found in possession of the impala meat. To cement her argument, she referred to the case of ***Mandera Maskini @ Kasalama Vs. Republic***, Criminal Appeal No. 3471 of 2015.

Regarding exhibit P3, Ms Tusaje stated that it was not read but its contents were explained. Similarly, that Exhibit P6 was not read, but she was confident that the prosecution paraded all the necessary witnesses and prayed for the same to be expunged. Regarding exhibits P4 and P5 she stated that they were tendered by the witness, the prosecutor was reiterating what the witness asked.

Regarding the second ground of appeal, the learned State Attorney stated that the evidence of PW1, PW3, PW4 and PW5 and that of PW2 who proved that the meat was impala, proved the case against the Appellants beyond all reasonable doubts. She stressed that oral evidence is the best evidence as per section 61 of the Evidence Act, Cap 6 [R.E 2019]. To bolster her argument, Ms Tusaje cited the case of ***Saganda Saganda Kasanzu Vs. Republic***, Criminal Appeal No. 53 of 2019 (unreported).

On the third ground of appeal, it was Ms Tusaje's contention that the trial court analyzed the evidence of both sides as it can be seen from the typed judgment. Submitting on the fourth ground of appeal, the learned State Attorney argued that the trial court was competent to try the case. On the last ground of appeal, Ms Tusaje underscored that the substitution of the charge was in relation to a section, and it has occasioned no injustice. Any omission thereof is curable under section 388 of the Criminal Procedure Act, Cap 20 [R.E 2019], she said.

I have carefully gone through the trial court record and the submissions made by both the Appellants and the learned State Attorney. The pertinent

issues for determination in this appeal appear to be whether the trial was properly conducted including admission of exhibits P1, P3, P4, P5 and P6, whether the trial court properly analyzed the evidence and lastly is whether the prosecution proved the case against the Appellants on the required standard.

To begin with the first issue, it was the Appellants' complaint that exhibit P1 which is the certificate of seizure, exhibit P3 the Valuation report form and exhibit P6 the chain of custody form were admitted but they were not read or their contents explained. The learned State Attorney on the other hand admitted that they were not read but stated that exhibit P1 and P3 were explained at pages 12 and 19 respectively. As far as exhibit P6, she conceded that it was neither read nor explained and prayed for the same to be expunged.

It is trite law that failure to read or explain the contents of documents tendered as exhibits will prejudice the accused as they will not be in a position to prepare defence. In this stance, I am guided by the Court of Appeal decisions for example ***Kingolo Sumni Amma Aweda Vs. Republic, Criminal*** Appeal No. 393 of 2013, ***Chrizant John Vs. Republic*** (supra) and **Nkolozi Sawa and Another Vs. Republic**, Criminal Appeal No. 574 of 2016 (all unreported).

The learned State Attorney was of the view that exhibit P1 was explained at page 12 of the typed proceedings. That part reads:

> *"Xd continues: The accused persons were Juma Sendo, Mathayo and Mamai Kiroya. We seized from them are (sic) Impala Carcass, one*

torch and one knife. The accused signed and other witnesses signed and other witnesses (sic) SSgt Omary PTE Seleman, CPL Clement and PTE Hamis ....."

Those were PW1's explanations which were made soon after exhibit P1 was admitted. The learned state Attorney sought refuge on the decision in ***Chrizant John Vs. Republic*** (supra)where the court made the following observation:

"In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the Doctor who conducted the autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also that his advocate was given chance to cross examine her, it cannot be accepted that the Appellant was denied opportunity to know the contents of exhibit P1"

In all respects, the circumstances obtained in the case of ***Chrizant John*** are distinguishable. The certificate of seizure was an important document which needed to prove the object of the offence and whether the seizure was done in accordance with the law. I thus hold that failure to read the exhibit P1 was fatal. It is accordingly expunged.

The same applies to exhibit P3, which after being admitted was not read. PW2's alleged explanation is couched in the following words:

"Xd Continues: Exhibit P3 shows that I identified impala meat and valuated (sic) the same at USD 390, equivalent to Tshs 897,000/= as one USD was Tshs 2300 on the date of valuation. The meat was still fresh. The valuation was conducted at Bäbati Police station."

The above explanation relates to the value attached to the exhibit. It does not however relate to the grounds that made the witness to conclude that

the object he valued was wildlife meat. As far as exhibit P6 which was admitted at page 44 of the proceedings, as conceded by the learned State Attorney, it was neither read nor its contents explained. It is liable to be expunged from court record, as I hereby proceed to expunge it. It is therefore the finding of this court that exhibits P1, P3 and P6 contravened the procedure of admissibility as their contents were not read. They are accordingly expunged from the court record.

With regard to the faulted procedure of admissibility, I will right away agree with the learned State Attorney that trial within trial and inquiry are conducted only on the admission of a confession and /or cautioned statement. In ***Saganda Saganda Kasanzu Vs Republc***, (supra), the same complaint was made and the court stated:

> *"With respect, we wish to state that this complaint is misconceived. There is no single point in time the courts conduct trial within trial or inquire except when the voluntariness of the accused's confession is examined. In the current matter nothing of that nature was put forth. The Appellant's objection to the admission of the four pieces of elephant tusks could not at any stretch of imagination attract an inquiry."*

I subscribe to the above position of the law.

The other complaint was on admission of exhibits P4 and P5 which the Appellants complained that they were tendered by the prosecutor and not the witness. On her part, Ms Tusaje contended that the prosecutor did not tender the exhibits rather he reiterated what the witness asked. I have gone through the trial court record, when exhibits P4 (the inventory form) and P5 (the sketch map of the crime scene) were sought to be tendered by PW6,

he prayed the same to be admitted as evidence. What the Public Prosecutor said was a repetition of the request by PW6. I therefore agree with the State Attorney that the said exhibits were properly admitted.

The Appellants also raised a complaint that they were not asked whether they would like to call the witnesses who had testified and subject them to cross examination after the charge was substituted. I have noted that the charge was substituted twice: that is, on 9/7/2018 and 8/10/2018. While praying for substitution of the charge, the State Attorney informed the court that the subject of the substitution was to amend/restructure the sections, and it was specifically pleaded by the prosecution that the amendment would not affect the evidence already tendered. The court did not say anything thereafter. That was wrong.

Section 234 of the Criminal Procedure Act, Cap. 20 [R.E. 2002] allows the court to order amendment of a charge or substitute the charge at any stage of the trial where the charge appears to be defective either in substance or form. The prosecution can also pray for substitution of the charge. The law gives the accused the right to demand that the witnesses or any of them be recalled and give their evidence afresh so that the he can cross examine them where the charge has been substituted. The provisions of section 234 appear to be couched in mandatory terms. Section 234 provides:

> *"(1) Where at any stage of a trial it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition o f a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required*

amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection-

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration o f or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."

Although the word used in Section 234 (2) (b) and (c) is "may", courts have interpreted the same to be non-discretional. In Ezekiel Hotay Vs. R, Criminal Appeal No. 300 of 2016, CAT (Unreported), the Court of Appeal had this to say:

"According to the preceding cited provision (section 234), it is absolutely necessary that after amending the charge, ***witnesses who had already testified must be recalled and examined****. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. (****In) failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value.*** *Given the shortcomings in the procedure, which with respect the High Court failed to detect, we are not inclined to vouch that the appellant's conviction was safe. We therefore exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap 141, R.E 2002 and revise and quash the*

lower courts' proceedings and judgment and set aside the sentence." (Emphasis added)

Further, in **Godfrey Ambrose Ngowi Vs. R,** Criminal Appeal No. 420 of 2016, CAT (Unreported), the Court of Appeal confronted with the same issue had this to say:

> *"It was argued by the appellant that, after the charge had been substituted which was after six witnesses had already testified, the provisions of section 234 of the CPA, were not complied with. Indeed, that is the position of law. And the rationale was stated in the case of* ***Ramadhan Abdallah Vs Republic*** *[2002] TLR 45, where the Court stated that:*
>
> > *".. we wish to state that the rationale for section 234 is easy to discern. A new charge sheet is introduced after some witnesses have already testified. The new offence charged may consist new ingredients and or may attract different consequences."*
>
> *The above holding was followed in the case of* ***Nyiga Kinyalu Vs Republic,*** *Criminal appeal No. 64 of 2012 (unreported). The fact that in the instant appeal the provision of section 234 was flouted as conceded by Mr. Mwinuka,* ***there was no way in which the proceeding against the appellant could stand.***" (Emphasis added.

Based on the decisions of the Court of Appeal cited above, which decisions are binding to this Court, the fact that the trial Court flouted the requirements of Section 234 of the CPA is fatal to its ultimate decision. The Appellants cannot be said to have received a fair trial as the Court did not inform them of their rights after the charge was substituted not once, but twice. According to case law the evidence of the first five witnesses (who had testified before the first amendment) and six witnesses (before the second amendment) has no evidential value.

The learned state Attorney was of the view that the non-compliance did not occasion injustice and that the same is curable under Section 388 of the CPA. Considering the authorities above stated I do not agree with her. Furthermore, having discounted the evidence of the first six witnesses, only the evidence of PW7 remains. PW7 is the exhibit keeper whose evidence has no bearing to the commission of the offence.

There is yet another procedural mishap that was done by the trial Magistrate whose consequences are akin to the defiance of Section 234 of the CPA. When Ms. Gasabile, RM, took over hearing of the case from her predecessor, Kamuzora, SRM, she only recorded that she was taking over following transfer of her predecessor and that hearing should proceed under Section 214(1). Considering that five witnesses had already testified before she took over, she ought to have asked the Appellants whether they had any objection for proceeding with the evidence as already taken or whether they needed such witnesses to be recalled. As this issue was not subjected to comments from parties herein, I need not push it further. The first issue, with the exception of the admissibility of exhibits P4 and P5, is accordingly answered in the affirmative.

Having sustained the first issue in the affirmative, I see no need to traverse the other issues. It is undoubtful that without the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 the Prosecution evidence cannot sustain the charge against the Appellants. That said, it is therefore held that the trial of the Appellants was a nullity for failure to comply with the mandatory requirements of the law. The conviction and sentence met against the

Appellants cannot be sustained. Ordinarily, this Court ought to order a retrial before a different magistrate. However, I desist to do so on the basis of the other issues raised in this appeal. Whether or not a retrial should be ordered depends on whether the evidence tendered by the Prosecution proved the charges against the Appellant beyond reasonable doubts. A retrial should not be ordered if its consequence will be prejudicial to the Appellants. If a retrial was to be ordered in this case, the Prosecution would probably use the opportunity to fill in gaps apparent in their case.

In the upshot, the Appeal is allowed in its entirety, conviction met against the Appellant is accordingly quashed and the sentence set aside. The Appellant should forthwith be released from prison unless he is otherwise held for another lawful cause

It is so ordered.

Y. B. Masara
JUDGE

13th November, 2020.