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

CRIMINAL APPEAL NO. 200 OF 2020

GHATI NYANGI @ CHACHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 48 of 2019)

JUDGMENT

14th April and 5th May, 2021

KISANYA, J.:

At the District Court of Serengeti at Mugumu, Ghati Nyangi @Chacha, the appellant herein stood charged with three counts namely, Unlawful Entry into the Game Reserve; Unlawful Possession of Weapons in the Game Reserve; and Unlawful Possession of Government Trophies, contrary to the law. The charges were to the effect the appellant was on 25th May, 2019 found at Ikorongo Grumeti Game Reserve in Serengeti National Park and that, he was in possession of one panga and four hind limbs of wildebeest (government trophy) without permits to that effect.

As the appellant pleaded not guilty to the charges, the prosecution paraded four witnesses in its endeavor to prove the charges. PW1 Hamis

Lilanga Ncheye and PW4 Gina Mwataba @ Gilala introduced themselves as game scout and park ranger respectively from Grumet Game Reserve. They were among officers who arrested the appellant on the material day. PW1 also tendered the Certificate of Seizure (Exhibit PE1) in relation to one panga and four hind limb of wildebeest found in possession of the appellant. The said panga was tendered in evidence (Exhibit PE2).

Another witness is PW2 Wilbroad Vicent. He testified how he identified and valued the trophies alleged to have been found in possession of the appellant. In terms of the Trophy Valuation Certificate (Exhibit PE3) tendered by PW3, the said four hind limbs of wildebeest were valued at Tshs 2,860,000/=. On his part, PW3 F.5834 D/C James investigated the case. He applied to the magistrate for an order of disposing the trophies. His oral evidence was supplemented by an Inventory Form (Exhibit PE4).

On 22/05/2020, the trial court made a ruling that the appellant had a case to answer. It went on to address the appellant in terms of section 231 of the Criminal Procedure Act, Cap. 20, R.E. 2019 (the CPA). He informed the trial court that he intended to give evidence on oath and call two other witnesses. However, the appellant defaulted to appear on 03/06/2020 and 17/06/2020 when the matter was called on for defence hearing. The trial court proceeded to issue the judgment without hearing his defence. At the

end he was convicted as charged and sentenced to two years' imprisonment for the first and second counts and twenty years' imprisonment for the third count. The trial court went on to order the sentence to commence after the arrest of the appellant. The records display that the appellant appeared before the trial court on 05/10/2020 where the judgment and sentence were read over to him.

He was aggrieved by the decision of the trial court and filed the appeal at hand. For the reasons to be stated herein, I find it not necessary to reproduce them.

At the hearing of this appeal, the appellant appeared in person while Mr. Nimrod Byamungu, learned State Attorney appeared for the respondent.

At the very outset, Mr. Byamungu prayed to submit on legal issues pertaining to irregularities in the proceedings of the trial court. The leave was granted after considering that the appellant had not raised issues related to irregularities in the said proceedings. However, the appellant retained his right to reply on the issue raised by the respondent.

Mr. Byamungu commenced his submission by pointing out that the appellant was convicted in absentia. He argued that the provision of section 227 of the CPA which regulates the matter were not complied with.

His argument was based on two reasons. *One*, that the record does not show whether the trial court had satisfied itself that the appellant could not be found. *Two*, that the record does not show whether the appellant was heard on the reasons for his non-appearance. Therefore, Mr. Byamungu urged me to quash the conviction, set aside the sentence and order the trial court to comply with section 227 of the CPA.

When probed by the Court, Mr. Byamungu readily conceded that the third count on unlawful possession of government trophies was not proved for want of value of trophies. He submitted that the trophy was valued by a park warden (PW3) who had no such mandate under section 86(4) of the WCA. He was of the view that other offences were proved. However, the learned State Attorney reiterated his submission that the case be remitted to the trial court for compliance with section 227 of the CPA.

Responding, the appellant admitted that he did not defend himself. However, he asked for the court to set him free on the ground that all offences were not proved.

I have thoroughly read the proceedings and considered the submissions made by both parties. Admittedly, there is procedural irregularity on the manner in which the trial court convicted and sentenced the appellant in

absentia after defaulting to appear to enter his defence.

I am mindful that section 227 of the CPA empowers the trial court to dispose the case by delivering the judgment and pass the sentence if the accused person defaults to enter appearance on the date fixed for defence hearing. However, before arriving at that decision, the trial court is duty bound to be satisfied that the accused's attendance cannot be secured without undue delay or expense. The said section is reproduced hereunder for ease of reference: -

> *227. Where in any case to which section 226 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the close of the prosecution case or on the date fixed for the passing of sentence,* ***the court may, if it is satisfied that the accused's attendance cannot be secured without undue delay or expense****, proceed to dispose of the case in accordance with the provisions of section 231 as if the accused, being present, had failed to make any statement or adduce any evidence or, as the case may be, make any further statement or adduce further evidence in relation to any sentence which the court may pass:..." (Emphasize supplied)*

The requirement set out in the above cited provisions is not cosmetic. It has to be complied with and evidence to such effect reflected in the proceedings. In that regard, the record is expected to reveal, among others, the efforts made to locate the accused. This may include issuing of arrest warrant against the accused and calling his sureties to show cause as to why legal action cannot be taken against them. The procedure set out in section 227 of the CPA aims at ensuring that the accused is accorded the right to be heard.

In the instance case, the appellant was admitted on bail when the PW2 had adduced his evidence. He appeared throughout the prosecution case. He failed to appear when the case was fixed for the defence case hearing on 3/06/2020. The prosecution addressed the trial court as follows:

> *"The matter is coming for defence hearing, we pray for another defence hearing date."*

Following that prayer, the trial court adjourned the matter to defence hearing 17/06/2020. No order of arresting the appellant or calling his sureties issued by the trial court on that day.

The appellant also failed to appear on 17/06/2020. This is what transpired on 17/06/2020.

> *"**PP:** The matter is coming for defence hearing, we pray for a*

judgment date as the accused persons (sic) waives his right after absconding the bail.

SGN:...RM
17/06/2020

Court: *Prayer granted.*

SGN:...RM
17/06/2020

ORDER

1. *Judgment on 29/06/2020.*
2. *A/W & S/C issue afresh.*

SGN:...RM
17/06/2020

In the light of the above, it is apparent that the trial court did not satisfy itself whether the appellant's attendance could not be secured without undue delay or expense. Yet, it went on to fix the judgment. It is not known as to why the said orders of issuing arresting warrant of the appellant and/or calling his sureties were not made before arriving at the decision of proceeding with the matter. All in all, the trial court rushed in setting the date of judgment. It did not comply with its statutory duty.

Further to that, it is trite law that the accused convicted in absentia must be heard before being confined to the prison. See **Mtwa Michael Katusa vs the Republic**, Criminal Appeal No. 577 of 2015, (unreported), where the Court of Appeal held: -

"We are satisfied that failure to afford the appellant an opportunity to be heard before his incarceration was contrary to the principles of natural justice. This violated a fundamental right that no person shall be condemned without a hearing which is enshrined under article 13(6) (a) of the Constitution of the United Republic of Tanzania, [CAP 2 R.E. 2002]. This error was raised as a 2nd ground of appeal in the first appellate Court. However, it was not addressed. Since, the appeal before the first appellate Court stemmed on null proceedings, there was no valid appeal before that Court."

The Court of Appeal went on to cite with approval its decision in **Fwede Mwanajuma & Another vs the Republic,** Criminal Appeal No. 174 of 2008 (unreported), that:

"*We do not therefore think that the legislature could have intended to deprive an absentee accused under section 227 not to be heard upon arrest as his colleague in section 226 because in both case the end result is that convictions are entered in absentia. We do not see how the prosecution would be prejudiced if the ... given an opportunity to be heard*"

In the present case, Mr. Byamungu was right when he contended that, the appellant was not given an opportunity to be heard before being sentenced to imprisonment. It is on record the trial court ordered that the sentence would commence after his arrest. Although the appellant appeared before the trial court on 5/10/2020, nothing suggesting he was

heard. Thus, it is not known as to whether he had sufficient case for non-appearance when the case was called for defence.

The said omission breached the appellant's right to be heard. The law is settled that proceedings held in breach of the right to be heard is a nullity. The decision arising from vitiated proceedings cannot stand.

Therefore, I exercise the revisional powers vested in this Court by section 373 of the CPA by nullifying the proceedings of the trial court from the stage when the case proceeded in the absence of the appellant. As a result, the conviction is hereby quashed and the sentence set aside.

Lastly, I am obliged to ponder the best way forward. In so doing I am guided and required to consider the best interests of justice. See also stated in **Fatehali Manji Vs R**, [1966] EA 343).

Mr. Byamungu urged me to remit the case to the trial court for compliance with the law. However, as shown herein, he conceded that the third count was not proved. I agree with him on that. This is because the value of trophy was not proved for the court to impose the proper sentence. Evidence to such effect was given by a warden ranger who has no such authority in terms of sections 86 (4) and 3 of the WCA. The law requires the trophy valuation to be conducted by the Director of Wildlife, wildlife

officer, wildlife warden and wildlife ranger and not otherwise. In the absence of the evidence as to the value of trophy the third count cannot stand even if the case file is remitted to the trial court.

I have also considered whether the second count on unlawful possession of weapons in the game reserve was proved. PW1 and PW4's evidence was to the effect that the appellant was found in possession of one panga in the Game Reserve. In terms of the particulars of the charge sheet and section 17(3) of the WCA, the prosecution was also duty bound to prove that the appellant failed to satisfy PW1, PW4 and other officers that the said panga was intended to be used for other purposes other than hunting, killing, wounding or capturing of wild animals. Such evidence was not given by PW1, PW4. Therefore, it is my considered view that the second count was not proved.

In the premises, does the interest of justice requires the matter to proceed against the appellant for first count on unlawful entry into the Game Reserve? I have considered that under section 15(2) of the WCA, the punishment to this offence is "fine of not less than one hundred thousand shillings, but not exceeding five hundred thousand shillings or to imprisonment for a term of not less than one year but not exceeding three years or to both". In this case, the appellant was sentenced to 2 years. He

has already served 7 months. It is also on record that he was in custody from 25/08/2019 when he was arrested to 4/11/2019 when he was admitted on bail. In the circumstance, I find that it will not be in the interest of justice to remit the case to the trial court for purposes of hearing the appellant on the first count only.

In view thereof, I order for the immediate release of the appellant from prison unless he is held for some other lawful cause.

DATED at MUSOMA this 5th day of May, 2021.

E. S. Kisanya
JUDGE

COURT: Judgment delivered through link on the 5th day of May, 2021 in the appearance of the appellant and Mr. Nimrod Byamungu, learned State Attorney for the respondent.

E. S. Kisanya
JUDGE
05/05/2021