IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 42 OF 2019

(Arising from Economic Case No. 22 of 2017 of the District Court of Bariadi at Bariadi)

SAKA MGEMA @ ILANGA.....1ST APPELLANT

ROBE BOBA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 28/4/2021
Date of the judgment: 21/5/2021
MKWIZU,J

The appellants were charged on four counts of unlawful entry into the Game Reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act no. 5 of 2009 (the WCA), unlawful possession of weapons in the game reserve contrary to section 17 (1) and (2) of the WCA read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 RE 2002] (EOCA) as amended by section 13 and 16 of the Written Laws (Miscellaneous Amendments) Act no. 3 of 2016 , unlawful hunting contrary to section 47 (a) (cc) of the WCA read together with paragraph 14 of the first schedule to

and section 57 (1) and 60 (2) of the EOCA as amended by section 13 and 16 of the Written Laws (Miscellaneous Amendments) Act no. 3 of 2016 and unlawful possession of Government Trophies contrary to section 86 (1), (2) (c) (iii) of the WCA as amended by section 59 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the EOCA as amended by section 13 and 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged by the prosecution that on 20.02.2017 at 16.30 Hrs without permission of the Director of Wildlife appellants were found at Mbuga ya Mwangarang'a in Maswa Game reserve within Bariadi District in Simiyu Region with one knife, one panga and four animal trapping wires. They were also on the same day, time and location found in unlawful possession of twenty-two Wildebeest valued at USD 14.300 equivalent to Tshs. 31,259,800/= the property of the Tanzania government.

After a full trial appellant were found guilty on the 1st, 2nd and 4th counts, convicted and accordingly sentenced. They were however acquitted on the 3rd count. On the 1st count the appellants were sentenced to pay fine to the

tune of 200,000- or one-year imprisonment in default and 20 years imprisonment in respect of each of the 2nd and 4th counts. Dissatisfied, appellants lodged a joint petition of appeal with four grounds of appeal that:

1. That in respect of the 1st count, the prosecution did not establish their allegation
2. That in respect of the 2nd count, the weapons alleged to have been in our possession are fabricated story
3. That pursuant to 4th count, the government trophies alleged to have been our possession was a victimizing word usually used by the prosecution side to persuade the court that, the sentence imposed by trial court was excessive.

At the hearing, the court revealed that 2nd appellant was not conversant with the court language. He was only fluent in Sukuma language, his mother tongue. On that situation, an interpreter, one Kwimba Lylyalya Jota was invited to assist the 2nd appellant after she was sworn in.

Both appellants were in person without any legal representation. They adopted their grounds to form part of their submissions and urged the court

to let the learned State Attorney reply on their grounds before they could make any rejoinder if need be.

Mr. Enosh Gabriel Kigoryo, learned State Attorney for the republic/ respondent supported the appeal. His support was necessitated by an uncluttered noticed procedural irregularity in the proceedings.

Pointing to the identified procedural irregularities, Mr. Kigoryo submitted that at page 14 of the proceedings, trial court was notified that 2nd appellant is not conversant with the court's language, it on that ground took steps to call an interpreter to assist the appellant. The interpreter at this stage was Mbeke William. However, at page 32 of the record there was a change of an interpreter from one Mbelke William to Masunga. The records is to the effect that Masunga was just reminded that he is still under oath but the records do not show whether he took oath at any stage of the proceedings or not. He argued that, the second interpreter was indicated by only one name of Masunga and therefore it is not certain if he is the same Mbeke William or another person. This, argued Mr. Kigoryo is a serious irregularity.

Mr. Kigoryo argued further that, during defence, particularly when DW1 was giving his defence, 2nd appellant had no interpreter. And at page 40, again, there was another interpreter by the name of Leornard Sayi who was just reminded that he is under oath. He was not sworn. The learned State Attorney suggested that the proceedings contravened the provisions of section 211 of the Criminal Procedure Act, Cap 20 R:E 2019. He on this point cited the case of **Dastun Makwaya and Another V R,** Cr. Appeal No 179/2017 (unreported) stating that failure to provide an accused with a reliable interpreter is a fatal omission rendering the proceedings a nullity.

The learned State Attorney said, the proper remedy would have been for the court to order a retrial, but owning to the evidence on the records, this would not be a proper remedy. He contended that, at page 16 to 17 of the records, the exhibits were irregularly admitted. PW1 gave explanation about the said exhibit before he was shown the same but failed to identify the same as the one, he personally made after the said exhibit was handled to him by the prosecuting attorney.

Again, pointed out Mr. Kigoryo, in page 21, the prosecution tendered exhibit without following the principles enunciated in the case Robinson **Mwanjesi**

V R. (2003) TLR 218.He argued that, the 22 wildebeest were admitted by the court without proper identification by the valuer. He said, the said exhibits were tendered by PW3 without them being properly identified by PW1 a wildlife expert and therefore it is not certain as to whether what was tendered by PW3 were the same government trophies examined, identified and valued by PW1.

In addition to that, stated the learned State Attorney, the prosecution failed to tender in court the seizure certificate and no reason why the same was not tendered. He on the above reasons, prayed for the court to allow the appeal after it has taken into account the case of **Fatehal Manji V R**. (1966) EA 341.

On rejoinder appellant had nothing significant to submit. They all prayed for acquittal. That is all.

I will begin with the requirements of section 211 of the CPA, Cap 20 RE 2019.The section reads:

"211.- (1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him"

It is a mandatory requirement of the law under the above provision that if a trial is conducted in a language which the accused is not conversant with, the proceedings and the evidence must be interpreted to him failure of which renders the trial unfair and therefore a nullity. This is so because an accused person cannot be said to have understood the trial without a proper interpretation of the proceedings.

I have carefully examined the records of the trial court. The appellant were arraigned before the trial court on 22nd February, 2017. The charge was read to the accused, fortunately the accused person's pleas was not recorded for lack of the DPP's consent and certificate by the trial court. On 18th May, 2017 after the trial court has obtained the required consents and certificates read the charge to the accused persons (now appellants) and recorded their plea followed by the preliminary hearing. No interpreter was availed to the second appellant until 14th August 2017 (page 14 of the proceedings) when 2nd

appellant informed the court of his inability to follow up the proceedings due to language barrier. Without delay, trial court availed the second appellant with an interpreter by the name of Mbeke William. The interpreter was sworn and thereafter assisted the 2nd appellant. It is on the records that to cure the mischief that had happened, the charge was read again to the accused persons and their pleas were recorded afresh then the court went ahead to record PW1, PW2 and PW3's evidence before the adjournment of the trial to another date. On 19/1/2018 the prosecution brought another witness PW4. On this date, another interpreter featured on the records. He was recorded by only one name of Masunga. The court reminded him that he is still under oath. However, the proceedings does not shows when the oath was administered on. PW4, is the prosecution's last witness, after his evidence the case was scheduled for ruling on a case to answer on 8th February, 2018. The ruling at page 36 of the proceedings was delivered to the parties without an interpreter. Appellants were addressed under section 231 of the CPA and their answers were recorded again without interpretation of the proceedings to the 2nd appellant.

It is evident from the records that 1st appellant gave his defence first, at this time, 2nd appellant had no interpreter. While giving his defence, 2nd appellant

was assisted with an interpreter by the name of Leonard Sayi. Again, the court did not administered oath to this interpreter. Lastly, the judgement of the court was delivered on 20th April, 2018 without it being interpreted to the 2nd appellant.

Indeed, as intimated by the learned State Attorney, this was a fatal omission that renders the proceedings a nullity because 2nd appellant was not afforded a reliable interpretation of the courts proceedings and therefore he was prevented from understanding the proceedings. The trial was for that reason unfair. In **Mussa Mwaikunda V R** [2006] TLR 387, the court of appeal had time to explain what constitutes a fair trial. The court said:

> *"Perhaps it is useful to digress a bit and state here that there must be minimum standards which have to be complied with if an accused person is to undergo a fair trial. As stated in Regina V. Henley (2) (a case from New South Wales Court of Criminal appeal) quoting Smith J.in R. V. Prosser (3) at page 48 the standards are:*
>
> *(a) To understand the nature of the charge,*
>
> *(b) To plead to the charge and to exercise the right of challenge*

(c) To understand the nature of the proceedings namely, that is an inquiry as to whether the accused committed the offence charged

(d) To follow the course of the proceedings.

(e) To understand the substantial effect of any evidence that may be given in support of the prosecution

(f) *To make a defence or to answer the charge"*

Given the circumstances of this case, it is without doubts that, 2nd appellant did not follow the course of the proceedings. He was on that ground denied a fair trial. Faced with a similar situation, Court of appeal in **Mpemba Mponeja v. Republic**, Criminal Appeal No. 256 of 2009 (unreported) said:

" We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellants right to understand and follow up proceedings of the case against him. It was a fatal omission."

On the effect of non-compliance with the provisions of section 211 of the CPA, Court of appeal in **Dastan Makwaya and Another V the Republic**, criminal appeal No. 179 of 2017 (unreported) said:

"We have also found it prudent to emphasize the compliance with the requirement provided under section 211(1) of the CPA .... The question is how will such an accused person follow up his case and in such a case would there be ***a fair trial to him?. We think no****.*

Taking into account the requirement stated in the provisions of section 211(1) of the CPA together with the authorities from the decision of this Court shown above, we are of the view that the ***effect of such an anomaly renders the proceedings and judgment of the High Court a nullity****." (Emphasis added)*

For the above reasons, I am persuaded to find the trial as against the 2nd appellant a nullity and proceed to quash his conviction and set aside the sentence meted against him.

The proper remedy after the above ordered would have been to order a retrial. However, the learned State Attorney has invited this court not to take such a recourse. Why? he said, the prosecution case was not proved to the required standards. On this, Mr. Kigoryo explained to the court three irregularities on the proceedings that he finds fatal. ***One,*** that PW1 tendered the evaluation report in court without proper identification of the said

document. ***Secondly***, that the trophies were tendered without them being properly identified by the valuer PW1, and ***thirdly*** that, the seizure certificate was without explanation not tendered in court. Reliance was made on the case of **Fatehali Maji's case (supra).**

I have revisited the records. As rightly sated by the learned State Attorney, PW1 tendered in court valuation report. He gave explanation on the said document before he was shown the same. Nonetheless, PW1 failed to identify the same as the same document he gave explanation of after having been shown it in court by the learned prosecuting Attorney. Therefore, it is not certain as correctly asserted to by Mr. Kigoryo whether the valuation report/ certificate made by Pw1 is the same document that was tendered in court as exhibit P1.It should be emphasized here that Value of trophy is an important ingredient of the offence of unlawful possession of Government trophy under section 86 of the WCA. It has an effect in imposing a sentence against the accused person. Not proving the same weaken the allegations.

Yet again, exhibit P1, valuation report/ certificate was tendered in court without being read out in court after being admitted. This is contrary to the settled law in our jurisdiction that once a document is cleared for admission

and admitted in evidence, it must be read out in court. See for instance the case of Robinson **Mwanjesi V R.** (2003) TLR 218. Consequently, Exhibit PE1 is hereby expunged from the record because the omission to read it out occasioned failure of justice to the appellants who had no opportunity to know the contents therein.

Similarly, it is evident from the records that Exhibit P2 was tendered in court by PW3.These were the weapons and the alleged government trophies. However, PW1, the expert who technically dealt with the said exhibit and identified them as trophies was not led to identify the exhibit as the same trophies he had identified and valued. Though I understand that Pw3 was an arresting officer who had time to see the said trophies, but he was not an expert to lead the methodical identification. Given such a situation, it cannot be said with certainty that the trophies that were found with the appellants are the same trophies examined, identified, valuated and certified by PW1 and that they are the same trophies that were tendered in court. As a result, exhibit P2 is also expunged from the records.

Lastly is the issue of non- tendering by the prosecution the seizure certificate to prove that the appellants were found in possession of the alleged weapons

and government trophies. This issue should not detain the court further. Under section 106(1) of the Wildlife Conservation Act, an authorized officer has the mandate to enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage in his possession and seize the government trophy or weapon. PW2 and PW3 testified that appellant were arrested with the alleged weapons and government trophies in the game reserve. This happened when the arresting officers were on their normal patrolling duties. Thus, seizure certificate was not necessary in the circumstance of this case. This point is baseless.

That notwithstanding, I am satisfied that prosecutions failed to exercise their obligation of proving the case beyond the required standards. The accusations against the appellants could not have been complete without the proper tendering of the alleged government trophies, weapons and the valuation report by PW1. Having expunged from the records exhibit P1 and P2, I find no evidence to grounds appellants conviction. I thus, on such a situation, agree with the learned State Attorney that ordering a retrial would be to allow the prosecution to fill in the gaps.

Consequently, I allow the appeal, quash the conviction and set aside the sentence mated against the appellants. The appellants **SAKA S/O MGEMA @ ILANGA** and **ROBE S/O BOBA** are to be released from prison forthwith unless held therein for other lawful cause. It is so ordered.

DATED at **Shinyanga** this **21st day** of **May**, 2021.

E.Y MKWIZU
JUDGE
21/5/2021

Court: Right of appeal explained.

THE HIGH COURT OF TANZANIA

E.Y MKWIZU
JUDGE
21/5/2021