IN THE HIGH COURT OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 27 OF 2020

[Appeal from the Judgment of the District Court of Manyoni at Manyoni in Criminal Case No. 48 of 2017, Hon. S.T. KIAMA, Resident Magistrate]

JOHN ZAKARIA @ NDONDA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

6th May, 2021 & 2nd August, 2021

M.M. SIYANI, J.

The appellant herein one John Zakaria @ Ndonda, was arraigned at the District court of Manyoni at Manyoni and indicted for unlawful entry into a game reserve, unlawful possession of a weapon in a game reserve, unlawful possession of Government trophies and unlawful destruction of vegetation in a game reserve. The charges were preferred under sections 15 (1) (2), 17 (1) (2), 111 (1) (d), 86 (1) (2), (c) (iii) (3) (b), 113 (2) as amended by section 59 (a) and (b) 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 Economic and Organized Control Act, Cap 200 RE 2002 as amended by section 13 (b)

and 16 (a) of the Written Laws (Miscellaneous Amendments) Act (No. 3) of 2016 and 18 (1) (3) of the Wildlife Conservation Act No. 5 of 2009 respectively.

The record shows the appellant denied the charges. He did so even when the matter came for preliminary hearing on 9th July, 2018 where despite admitting some of the facts to be correct and true, he kept on pleading not guilty to the charges. Among others, the appellant admitted having been found in a game reserve with a weapon and unlawful destructing vegetation. Basing on such admission of facts, the trial court went on to convict and sentence the appellant for unlawful entry into a game reserve, unlawful possession of weapons and destructing vegetation in a game reserve which were the first, second and fourth counts in the charge sheet. Whereas in each of the first and fourth counts, he was sentence to pay a fine of Tshs 100,000/= or serve a term of one year imprisonment in default, for the second count he was awarded another term of one year imprisonment in case he fails to pay a fine of Tshs 100,000/=. The court then proceeded to hear the case in respect of the third count and upon full trial, the appellant was convicted for that count as well and sentenced to 20 years imprisonment. Dissatisfied, the appellant lodged the present

appeal advancing three grounds of complaint which reasons that will be known shortly, I will not reproduce its contents.

At the hearing of the appeal, Ms. Bertha the learned State Attorney who appeared for the respondent/Republic, raised it to the attention of the court, a point of law that there was a procedural irregularity which occasioned failure of justice on the party of the appellant. She contended that it was wrong for the court to convict the appellant on the purported plea of guilty despite denying the charges. Relying on the position of the Court of Appeal of Tanzania in **Khalid Athuman Vs Republic** (2006) TLR 79 and **DPP Vs Chibago Mazengo and 2 others,** Criminal Appeal No. 109 of 2019, the learned State Attorney argued that a person charged of an offense could only be convicted on his own plea of guilty if he admits both the charge and facts and therefore since the appellant pleaded not guilty to the charge, the court not withstanding his admission to the facts, ought to have entered a plea of not guilty.

As to the third count which proceeded to full trial, the learned State Attorney argued that the court admitted as evidence, a certificate of seizure (exhibit P1) Inventory (exhibit P2) and Valuation Report (exhibit P4). These exhibits were however not read over in court and according to

her, there was no oral account from the prosecution's witnesses that attempted to explain its contents. Ms Bertha submitted further that failure to read the contents of a documentary exhibit after it has been admitted as evidence, was a fatal procedure irregularity and consequently subject of being expunged from the record.

In conclusion and while leaving it for the court to decide the fate of the appellant regarding his conviction on the third count, the learned State Attorney urged the court to nullify proceedings in respect of the appellant's conviction on the first, second and fourth counts, set aside the conviction and sentence thereof. On the other hand, the appellant being a lay person, had nothing substantial to offer, presumably owing the technicality nature of the issue raised.

Having revisited the record and what was submitted to me by the learned State Attorney, I will hasten to agree with Ms Bertha that indeed, the trial court's proceedings reveals failure by the learned trial magistrate to comply with the law when convicting the appellant on the purported admission of the charges. As correctly submitted by Ms Bertha, the law is settled that a conviction on plea of guilty can only be entered, if a person charged of a criminal offense, admits both the charge and the facts which

constitutes ingredients of the charged offense. In this case, the appellant did not admit the charge. He even disputed even some of the facts read over to him during the preliminary hearing. That alone warranted the court to enter a plea of not guilty and require the prosecution side to prove the case. In my considered opinion, even where an accused person admits all the facts, a prudent court should not proceed to enter a conviction if he denies the charge.

As prior noted, since the case came for preliminary hearing when the appellant was convicted and he, having denied the charge, then the facts ought to have been read to him before the court prepares a memorandum of undisputed facts and direct the prosecution to call witnesses on the disputed ones. If at all the court believed that the facts admitted by the appellant constituted an offense, it ought to have caused the charges to be read again and if the same were denied then enter a plea of not guilty. By proceeding to convict the appellant while the charges remained disputed, the court flawed the procedure and that irregularity jeopardized the appellant's right to defend himself on the charges leveled against him.

Regarding the third count which went into full trial, the prosecution side tendered a seizure certificate, an inventory and valuation report which were admitted as exhibits P1, P2 and P4 respectively among other pieces of evidence. Admittedly these documents were however not read in court to enable the appellant understand its contents and cross examine on the same. Ms Bertha had once again a correct observation on the consequence of failure to read the contents of a documentary exhibits after its admission in court that is the same becomes subject of being expunged from the records. There are plenty of authorities which supports the learned counsel's stance and the Court of Appeal of Tanzania decisions in **Rashid Kazimoto and Masoud Hamis Vs Republic,** Criminal Appeal No. 558 of 2016 and **Mbagga Julius Vs Republic,** Criminal Appeal No. 131 of 2015 suffices to conclude this issue. That being the position, exhibits P1, P2 and P4 in the instant matter, are hereby expunged from the record for the same reasons that they were not read over and explained to the accused person.

Having expunged the exhibits as stated, I had to revisit the record in order to satisfy myself whether there was an oral account from the prosecution's witnesses which can support the third count. To prove that the appellant

was found with unlawful possession of government trophy, the prosecution led evidence that one Enos Kitomari (PW1) was with Joel Moleli (PW2) when they found the appellant with warthog dried meat inside Kizigo game reserve. The seizure certificate itself indicates that among the seized items, there was warthog meat. However, the valuation report (exhibit P2) shows there were four pieces of fresh and dried warthog meat. The contents of valuation report therefore contradicts oral testimonies from PW1 and PW2 as to the presence of fresh meat.

In the fine and with what that I have endeavoured to say, I agree with Ms Bertha that after discarding the documentary evidence, the remaining oral testimony is insufficient to warrant a justifiable conviction in respect of the third count. I therefore quash the appellant's conviction on that count and set aside the sentence meted therein. With regard to the appellant's conviction on the first, second and fourth counts, I hold that the trial court adopted a wrong procedure when reaching that decision and in terms of section 373 (1) (a) of the Criminal Procedure Act Cap 20 RE 2019, the respective proceedings dated 09th July, 2018 are hereby nullified. It follows therefore that both the conviction and sentenced imposed basing on the purported plea of guilty cannot be left to stand and the same are quashed and set aside accordingly. It is further ordered

that an expedited fresh trial in respect of those three counts before another magistrate of competent jurisdiction be conducted and should such trial lead to a conviction, the time the appellant has spent in prison serving the current sentence, should be taken into account when passing the sentence. It is so ordered.

DATED at **DODOMA** this 2nd Day of August, 2021

M.M. SIYANI

JUDGE