

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CRIMINAL APPEAL NO. 88 OF 2021

(Originating from the District Court of Kiteto at Kibaya, Economic Case No 8 of 2017)

MAZENGO SELENJE LECHIPYA APPELLANT

VERSUS

THE DPP RESPONDENT

JUDGMENT

18/05/2022 & 20/7/2022

KAMUZORA, J.

Mazengo Selenje Lechipya, the Appellant herein, is challenging the conviction and sentence of 20 years imprisonment or payment of fine of Tshs 412,365,000/= imposed on him by the District Court of Kiteto at Kibaya (the trial court). The Appellant stood charged with the offence of unlawful possession of government trophy contrary to paragraph 14 of the 1st Schedule to and section 57 (1) and 60 of the Economic and Organised Crime Control Act [Cap 200 R.E 2002] as amended by section 16(a) and 13(b) (2) respectively of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 read together with section 86 (1) and 2(c)

of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 (a) (b) of the Written Laws (Miscellaneous Amendment) No. 2 Act, 2016.

It was alleged that on 4/7/2017 at Pori kwa pori Number One Tanga Road area in Kimana Village within Kitete District in Manyara Region, a trap was sent by wildlife officer after receiving information from the informer that the Appellant was in possession of government trophies. That, he was later arrested while in unlawfully possession of one Leopard Skin Valued at Tshs 7,801,500/= and one Girrafe tail valued at Tshs 33,435,000/= a total valued at Tshs 41,236,500/= the properties of Tanzanian Government which he was trying to sell it to the informer. In his defence the Appellant denied to have been found in possession of the government trophy. The trial court found the Appellant guilty, convicted and sentences him as above stated. Aggrieved, the Appellant is now challenging the conviction and sentence and he raised 5 grounds of appeal which are reproduced hereunder: -

- 1) That, the trial court wrongly admitted exhibit P2 and P3.*
- 2) That, the trial court erred both in law and fact to enter a court conviction of the Appellant while the offence was not proved beyond reasonable doubt.*

- 3) *That, the trial court erred both in law and fact when he failed to see the glaring contradictions in the testimonies of the prosecution witness.*
- 4) *That, the trial court erred both in law and fact to convict the Appellant basing on the defective charge sheet.*
- 5) *That, the trial court erred both in law in not analysing the evidence of PW1 ISACK RANGU who was mentioned as a valuer of the trophy.*
- 6) *That, the trial court erred both in law and fact for failing to consider the Appellant's defence.*

The Appellant also with the leave of the court raised additional grounds of appeal as follows: -

- 1) *That, the valuation report (exhibit P1) procedurally found its way in evidence as it was not read out in the court after admission. It should have been read out first before being explained. Thus exhibit P1 should be expunged, this is fatal to the case as there would be no peg for the sentence to stand on.*
- 2) *That, exhibit P4 (the Leopard skin and giraffe tail) unlawfully found its way and should be expunged as they were wrongly tendered by the public prosecutor who was not a witness and could not tender the exhibit. This is fatal to the case.*
- 3) *That, the learned Magistrate erred to convict the Appellant despite unverifiable and suspect chain of custody.*

During hearing of the appeal which proceeded orally the Appellant appeared in person with no any legal representation, while Ms. Amina

Kiango, learned State Attorney appeared for the Respondent, the Director of Public Prosecution (the DPP).

Submitting in support of the appeal. The Appellant argued for the first ground of appeal that the valuation report which is exhibit P1 does not show if the procedure were adhered to as required by the law. The Appellant thus prays that exhibits P2 and P3 the certificate of search and seizure be disregarded. The Appellant argued for ground two that, exhibit P4 which is the Leopard skin and Giraffe tail were handled wrongly as the prosecutor is the one who tendered it as while he is not a witness.

On ground three the Appellant submitted that the trial magistrate wrongly convicted him without regarding the chain of custody of the exhibits. That, PW7 who is the exhibit keeper did not state if the exhibits were numbered or marked. That the witness claimed to have received the exhibits on 7/7/2017 but no where it is indicated as to whether the exhibits were kept after they were received at the police station until when they were handled to WP7 Athuman. That, PW4 testified in court that after seizing the exhibits he handled the same to PW2 while PW2 claimed to have received the exhibits from PW7. With that contradiction he stated that, it is clear that the chain of custody of exhibits cannot be

believed. The Appellant prays for this court to find him not guilty and release him from prison.

Ms. Amina Kiango when responding to the appeal she instantly conceded to the appeal based on the fourth ground of appeal that, the Appellant's conviction was based on a defective charge sheet. She agreed that, much as the charge sheet was defective, no offence was proved against the Appellant.

Elaborating her point, Ms. Kiango submitted that, the charge sheet laid against the Appellant contravened the provision of section 132 and 135 of the Criminal Procedure Act, Cap 20 R.E 2002. That, the section requires that the charge must show the specific offence to which the accused is charged and the particulars of the offence explaining the offence in question. That, section 135 requires that the charge must start with the statement of the offence which shows the offence itself and the provision of the law to which the offence is found and the law contravened. That, going through the charge which was laid to the Appellant, the statement of the offence was wrongly set in contravention of the Wildlife Conservation Act. That, what was required was for the charge to start with the provision creating the offence and not the provision specifying the sentence. That, instead of starting with section

86(1) of the Act which is the provision creating the offence, it started with paragraph 14 of the 1st Schedule which is the schedule creating the sentence.

Ms. Kiango further submitted that, even the particulars of the offence also have defect by indicating that the Appellant was found with Leopard skin valued 7,801,500 and one Giraffe tail valued Tshs 33, 435,000 both with the value of 41, 235,500. That, as per the provision of section 135(a) (v) the charge sheet which indicated more than one offence must be numbered and charged in different counts. That, since in this matter the Appellant was found in possession of remains of two different animals which are leopard skin and giraffe tail then, the charge sheet must have contained two separate counts of possession of those parts of trophies. In support of her argument, she referred section 133(1) and (2) of the CPA Cap 20 R.E 2002 and added that, the joining of the offence in to one count denied the Appellant the right to raise reasonable defence to the offence against him and understand the gravity of the offence and the sentence against him.

Ms. Kiango insisted that, there was contravention of the law in drafting the charge sheet which is incurable at this stage and makes the republic to have failed to prove the case against the Appellant. She

referred this court to the case of **Festo Domician Vs Republic**, Criminal Appeal No 447 of 2016 CAT at Mwanza (Unreported). She then supported the Appellant's prayer for the appeal to be allowed on that ground and the conviction and sentence by the lower court be quashed and set aside.

I have considered the submission by the Appellant and Learned State Attorney appearing for the DPP. Without more ado I will direct myself to the ground of appeal argued by learned State Attorney to see if it real dispose of the whole appeal as suggested by her. It was contended that the charge sheet to which the Appellant was charged was incurably defective hence could not be relied upon to convict the Appellant.

It is trite law that, the burden of proof against the offence always lies on the prosecution to prove the case beyond reasonable doubt. For one to conclude that an offence was proved beyond reasonable, the accused must be properly aligned before the court of law. A charge is therefore an important aspect of the trial as it tells the accused precisely and concisely the offence and the matters in which he stands charged. What should be contained in the charge sheet and the mode of charging the offence are well stipulated under sections 132, 133 and 135 of the Criminal Procedure Act Cap 20 R.E 2002. I would like to first to refer sections 132 and 133 (1) and (2) which read: -

"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

"133.- (1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

From the above provision, more than one offence can be charged in one charge sheet if they are founded in the same facts but they have to be charged in separate counts. The purpose is to assist the accused understand the allegations made against him by the prosecution and prepared for the defence. This goes with the principle of fair hearing as the accused person must know a specific offence he is facing so that he can prepare his defence. This cannot be accomplished where the accused person faces an omnibus charge. For this see the case of **Deogratus Vicent Vs. The Republic**, Criminal Appeal No 376 of 2016 CAT at Arusha (Unreported).

It is also important that, the law and the section of the law against which the offence is said to have been committed to be mentioned and stated clearly in a charge. This is the requirement under section 135 (a) (ii) of the Criminal Procedural Act Cap 20 R.E 2019 which states: -

"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence."

From the law above provision, it is clear that the law and section creating the offence to be stated in the statement of the offence. The above position of the law was reiterated in the case of **Juma Mohamed vs. Republic**, Criminal Appeal No. 272 of 2011 (unreported) cited with approval in the case of **Hamisi Maliki Ngoda vs. The Republic**, Criminal Appeal No. 7 of 2017 CAT at Tanga (Unreported) in which the Court, after having made reference to the above quoted provision stated as follows: -

"It is clear from the above provisions that a statement of offence should describe the offence and should contain a reference to the section of the enactment creating the offence. After the statement of the offence then the particulars of the offence should be set out."

In the present matter, the charge sheet that was laid against the Appellant at the trial court reads that,

"OFFENCE SECTION AND LAW: *Unlawful possession of Government Trophy contrary to paragraph 14 of the 1st schedule to and section 57 (1) and 60(2) of the Economic and Organised Crime Control Act [Cap 20 R.E 2002] as amended by section 16(a) and 13(b) (2) respectively of the written laws (Miscellaneous Amendment) Act No 3 of 2016, read together with section 86 (1) and 2(c) of the Wildlife Conservation Act No 5 of 2009 as amended by section 599 (a) (b) of the Written laws (Miscellaneous Amendment) Act NO 2 Act 2016.*

PARTICULARS OF THE OFFENCE: MAZENGO S/O SELENJE LECHIPYA *charged on 4th day of July, 2017 at about 18:30 hrs at PORI KWA PORI NUMBER ONE – TANGA ROAD area in KIMANA village within Kiteto District in Manyara Region was found in unlawfully possession of one Leopard Skin valued at Tshs 7,801,500/= and one Giraffe tail valued at Tshs 33,435,000/= all total valued at Tshs 41,236,500/= the property of Tanzania Government."*

The above reproduced charge sheet reflects what was submitted by the learned State Attorney. Indeed, the charge sheet laid against the Appellant joined two separate offences in one count as the Appellant was alleged to have been found with leopard skin and giraffe tail. These are

two different trophies with different values but they were joined in one count. In my view, although the two offences are founded on the same facts, they are different offences and ought to be charged under different counts.

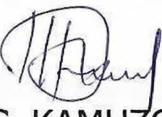
I also agree that, in the charge sheet laid down to the Appellant, the section creating the sentence for the offence was stated prior to the section to which the offence was created. I however, do not see if this is much fatal as the section creating the offence was still included. To me the same could have been fatal if the section creating the offence was not mentioned.

I therefore join hands with the Appellant and the learned State Attorney to conclude that, the defect of joining two offences in one count renders the charge to be defective and no proper conviction can be reached in a defective charge. As well submitted by the learned State Attorney, this ground determines the merit of the appeal. I therefore find no need to discuss the rest of the grounds of appeal. I hereby quash and set aside the whole proceedings, judgment, conviction and sentence imposed against the Appellant by the trial court. The Appellant should be set free from prison unless lawfully held under a lawful cause.

It is ordered accordingly.

DATED at **ARUSHA** this 20th day of June, 2022.




D.C. KAMUZORA
JUDGE