

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

CRIMINAL APPEAL CASE No. 5 OF 2022

*(Arising from the District Court of Bunda at Bunda
in Economic Case No. 1 of 2021)*

1. KAGONDI MASUNGA KAGONDI
2. LUCAS LUSWAGA @ MKENGWA } **APPELLANTS**

Versus

REPUBLIC **RESPONDENT**

JUDGMENT

25.10.2022 & 25.10.2022

Mtulya, J.:

The **Court of Appeal of Tanzania** (the Court) on 13th May 2020, in the precedent of **Director of Public Prosecutions v. Rajabu Kibiki**, Criminal Appeal No. 367 of 2017 (the case), observed that: *the position in the instant appeal is that the trial magistrate purported to amend the charge in the course of composing judgment by combining two counts into one.*

The reason of the trial magistrate to do so is reflected at page 11 of the judgment in the case that: *all what the trial court did was to combine the counts allegedly because the offence was committed at different times on the same night which did not attract preferring two counts.* After observing the fault, the Court clarified on the status and mandate of the trial court that:

*There is no authority on a trial court to amend a charge sheet at the judgment stage and where such is done as it were, the same is fatal for violating the provision of section 234 of the CPA [**Criminal Procedure Act [Cap. 20 R.E. 2019]**].*

With the available remedies in such circumstances, the Court stated that:

*We nullify the judgment of the trial court, quash the conviction and set aside the sentence imposed against the respondent. Going forward, considering that the ailment in the proceedings before trial court is limited to the judgment, we do not think it appropriate to take the same route was took in **Sylvester Albogast v. Republic**, Criminal Appeal No. 309 of 2015, in which we nullified the entire proceedings of the courts below because the charge was defective in form and substance vitiating the entire trial. Instead we direct the trial court to compose a fresh judgment based on two counts appearing in the charge sheet. The judgment shall be composed by the same magistrate unless it is impractical to do so for compelling reasons in which case, the same shall be composed by another magistrate of competent jurisdiction.*

According to the Court that is the appropriate available remedies in the circumstances and the established practice of the Court. In order to display the standard practice, the Court cited the authorities in **Gofrey Richard v. Republic**, Criminal Appeal No. 365 of 2008 and **A.5204 WRD Viatory Paschal v. Republic**, Criminal Appeal No. 195 of 2006.

In the present case, the trial magistrate, during composition of the judgment cited section 86(1) & 2(c) (iii) of the **Wildlife Conservation Act, No. 5 of 2009** as amended by **Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016** (the Wildlife Act) read together with paragraph 14 of the First Schedule to the **Economic and Organized Crimes Control Act [Cap. 200 R.E. 2019]** (the Economic Crimes Act), from the beginning of his judgment to the end. Even the conviction and sentence was based on the cited provisions.

However, the charge sheet which was pressed against the appellants depicted section 86(1) & 2(b) of the Wildlife Act read together with sections 57 (1) & 60(2) of the Economic Crimes Act. The instant case was scheduled for appeal hearing in this court yesterday, 24th October 2022. However, after registration of materials for and against the appeal, this court *suo moto* noted the cited discrepancies in the charge sheet and judgment hence invited the second appellant, who preferred the present

appeal and Mr. Frank Chanila, learned State Attorney, who appeared for the Republic, to cherish the right to be heard on the subject. However, the appellant briefly stated that he cannot state anything as he is a lay person and opted to let it to this court to decide according to the law, whereas Mr. Chanila prayed for one (1) day leave to consult the provisions of the **Criminal Procedure Act [Cap. 20 R.E. 2019]** (the Act) and practice of courts on the subject.

Today morning hours, when the appeal was scheduled again for receiving necessary materials in terms of statutes and precedents on the subject, Mr. Chanila raised and stated that in the present case the trial magistrate amended the charge sheet and composed his own judgment *suo moto* without inviting the parties in the dispute. According to Mr. Chanila, the judgment of the **District Court of Bunda at Bunda** (the trial court) in **Economic Case No. 1 of 2021** (the economic case) is a nullity and prayed the same be quashed.

Regarding available remedies, Mr. Chanila submitted that the case file has to be remitted to the trial court for composition of a fresh and proper judgment that will abide with the cited provisions in charge sheet. In bolstering his submission, Mr. Chanila cited the authorities in statute and practice of the Court

in section 234 of the Act and cited precedent in **Director of Public Prosecutions v. Rajabu Kibiki** (supra) respectively.

This court is a court of law and justice attached with additional mandate of ensuring proper application of laws in statutes and precedents (see: **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017; **Puma Energy Tanzania Limited v. Ruby Roadways Market (T) Limited**, Civil Appeal No. 3 of 2018; **Ghati Methusela v. Matiko Marwa Mariba**, Civil Application No. 6 of 2006 and **Godfrey Joshua Isobu & Another v. Elizabeth Mwajuma Mwaka**, Land Appeal Case No. 22 of 2022 and). It cannot justifiably close its eyes in seeing the breach of the provision in section 234 of the Act and directives of the Court in the precedent of **Director of Public Prosecutions v. Rajabu Kibiki** (supra).

In the present appeal it is vivid and obvious that the trial magistrate in the district court amended the provisions narrated in the charge sheet during composition of the judgment and the Court has already provided the way forward in such circumstances. Having said so, and noting the Court has already determined the issue like the present one and being aware this court is bound by the directives of the Court, I am moved to quash the judgment of the district court in the economic case, as I hereby do so. I further direct the district court to compose a fresh judgment based on the

provisions appearing in the charge sheet. The judgment shall be composed by the same magistrate unless it is impractical to do so for compelling reasons in which case, the same shall be composed by another magistrate of competent jurisdiction. In the meantime, the appellant shall remain in custody pending composition of a fresh judgment before a competent magistrate.

Ordered accordingly.



F.H. Mtulya

Judge

25.10.2022

This judgment was delivered in chambers under the seal of this court in the presence of the first appellant Mr. Lucas Luswaga @ Mkengwa and in the presence of Mr. Frank Chanila, learned State Attorney for the Republic.

F.H. Mtulya

Judge

25.10.2022