IN HE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO 110 OF 2022

(Originating from the District Court of Monduli at Monduli,

Economic Crime Case No. 9 of 2018)

EMMANUEL BERNARD .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26th July & 29th September, 2023

KAMUZORA, J.

The Appellant was aligned before the District Court of Monduli at Monduli (the trial court) in Economic Crime Case No. 9 of 2018 and charged with two counts; one, the offence of unlawful possession of government trophy contrary to section 86(1) and (2) (b) of the Wild life Conservation Act, No 5 of 2009 read together with paragraph 14 of the 1st Schedule to and section 57 (1) and 60(2) of the Economic and Organised Crime Control Act, [Cap 200 R.E 2002] as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 and two, the offence of unlawful

possession of weapon contrary to sections 103 of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the 1st Schedule to and section 57 (1) and 60(2) of the Economic and Organised Crime Control Act, [Cap 200 R.E 2002] as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. He was convicted and sentenced to serve 20 years imprisonment for the first offence and two years imprisonment for the second offence.

It was alleged that, on 23rd day of September 2018 at Nadosoito village Selela area within Monduli District in Arusha Region, the Appellant was found in unlawfully possession of zebra meat equal to one killed zebra valued at USD 1200 equivalent to Tshs. 2,725,200/= the property of the Government of the United republic of Tanzania without the permit from the Director of Wildlife. On the material date, he was also found in possession of weapon to wit one Machete/bush knife in circumstance which raised reasonable presumption that he has used it in commission of offence under the Wild life Conservation Act, No. 5 of 2009.

The Appellant was arrested by game wardens who were in normal patrol. They saw the Appellant beside the road carrying a

sulphate bag and searched him and discovered that he was carrying zebra meat and machete. He was then arrested and arraigned before the trial court in respect of the offences named above.

Before the trial court could commence, the Appellant absented himself therefore hearing proceeded in his absence under section 226 (1) of the Criminal Procedure Act. The trial court after hearing the prosecution evidence was satisfied that the prosecution case was water tight against the Appellant hence, convicted and sentenced him in absentia. The Appellant was later apprehended and sent before the trial court where he was ordered to serve sentence that was imposed by the trial court.

The Appellant was aggrieved thus, preferred an appeal to this court on nine grounds. During hearing of appeal, he opted to abandon four grounds and the remaining grounds are rephrased and reproduced hereunder;

1) *That, the Honourable Magistrate erred in convicting the Appellant for the offences which were not proved beyond reasonable doubt.*
2) *That, the trial magistrate erred to believe that the Appellant was found with government trophy and exhibits basing on illegal and unlawful certificate of seizure (Exhibit P1).*

3) *That, the trial magistrate erred to believe that the Appellant was found with government trophy basing on illegal inventory form (Exhibit P4)*
4) *That, the trial magistrate erred to convict the Appellant basing on illegal and unlawful Cautioned statement (Exhibit P5)*
5) *That, the prosecution miserably failed to prove the charge beyond reasonable doubt.*

On the date of hearing of appeal, the Appellant appeared in person with no legal representation and Mr. Alawi Hassan, learned State Attorney appeared for the Respondent, Republic.

I will start with the 1st ground to which the Appellant argument that the offences were not proved beyond reasonable doubt is basically based on failure to comply to the requirement of section 234 (1). He challenged the jurisdiction of the trial court on account that, an order for substitution of the charge was made while no certificate and consent from the DPP was issued to the court to try the said economic case. The Appellant cited section 12(3)(4) of the EOCCA and the case of **Jumanne Leonard Nagali Vs. Republic,** Criminal Appeal No. 515 of 2019 CAT to support his argument that the trial court lacked jurisdiction to try the case.

The Appellant also claimed that it was wrong for the trial court to proceed with hearing of evidence before conducting preliminary

hearing. He explained that after the substitution of the charge sheet, the trial court proceeded with hearing the case instead of conducting preliminary hearing. To him, that was contrary to the legal requirement.

Responding to this ground, Mr. Alawi stated that DPP consent was issued and admitted in court on 12/09/2019. Regarding the claim that the preliminary hearing was not conducted, Mr. Alawi Replied that, the trial court was correct to proceed with hearing under section 226(1) of the CPA as the Appellant jumped bail and could not know what transpired before the trial court.

Starting with the claim that preliminary hearing was not conducted, the record reveals that on 12/09/2019 the trial court scheduled for preliminary hearing to be conducted on 25/09/2019. However, on that date, the Appellant was not in attendance as he has absconded. The trial court proceeded to set date for hearing of the prosecution evidence under section 226(1) of the CPA. I agree with the learned state attorney that since the Appellant was not in attendance, it was impracticable for the trial court to conduct preliminary hearing. The purpose of preliminary hearing to briefly inform the accused person on the facts of the case and intended

evidence to be relied upon by the prosecution side. In the absence of the accused, preliminary hearing becomes irrelevant. In that regard therefore, the argument that preliminary hearing was not conducted is meritless.

On the argument that the trial court lacked jurisdiction to try the case, I have considered the arguments by the parties and perused the trial court record. The Appellant was charged for economic case and when the charge was first read to him, he was asked not to plead to the charge as the trial court had no jurisdiction to try the case. In other words, there was no DPP consent to prosecute economic case and certificate conferring jurisdiction to the trial court to try economic case. The case was adjourned several times before the Appellant absconded. There were also two substitutions of charge sheet; first, on 19/10/2018 when the Appellant was still attending and the second, on 12/09/2019 after he had absconded. The subsequent amendment was accompanied by the DPP consent and certificate conferring jurisdiction to the subordinate court to try the case as opposed to the first substitution which shows that the consent and certificate were yet to be issued and the Appellant was asked not to plead to the charge. However, at the time of the subsequent amendment which was

accompanied by the consent and certificate, the accused had already absconded. In that regard, the Appellant never pleaded to the new charge to which his trial stems. The issue therefore is whether the Appellant was properly tried before the trial court.

I understand that under section 226 (1) of the CPA, hearing of the case can proceed in the absence of the accused person where it is proved that the accused absconded without reasonable cause. The said section read: -

> ***226**.-(1) Where at the time or place to which **the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present**; and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court thinks fit.*

The wording of the above provision presupposes that the charge was already read to the accused who has pleaded to the charge and matter was scheduled for hearing. Thus, hearing will proceed in the absence of the accused if he did not appear on the date scheduled for hearing or further hearing.

It must be noted that, the charge sheet is the foundation of trial hence, one must plead to the charge before being tried. In the present matter, the Appellant absconded before the matter was set for hearing as investigation was reported incomplete. Therefore, it cannot be said that the accused was tried under section 226 (1) where he had not pleaded to the charge. In fact, there cannot be trial before pleading to the charge as the charge is the foundation of trial. Thus, the trial under the provision of section 226 (1) of the CPA in this case was vitiated by non-compliance to section 228 (1). Section 288 (1) of the CPA is very clear and it read: -

> *"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

That was also the holding of the Court of Appeal in **Geophrey Isidory Nyasio Vs Republic,** [2020] TLR, 334. In that case, the charge was substituted twice but the second substituted charge was not read over to the accused persons. It was held that failure to comply to section 228 (1) was fatal and the defect renders the subsequent proceedings a nullity.

Again, section 234 (2) of the CPA is more specific to where there is alteration or amendment of charge. It also requires the accused to

be called upon to plead to amended or altered charge. In the matter at hand, the substance of the amended charge was not read to the accused. It was therefore unprocedural to try the accused who had not pleaded to the charge. That was also the holding of the Court of Appeal in **DPP Vs. Danford Roman @ Kanani & three others**, [2019] TLR, 218. It was held: -

1. *"It is settled law that, once a charge is amended or altered, the new or altered charge must be read to the accused person, who must in turn be asked to plead thereto.*
2. *Failure by the trial court to read the altered charge to the accused person amounts to an irregularity which is incurable and renders the trial a nullity.*
3. *The non-compliance with section 234 (2) of the CPA, renders the proceedings of the trial court appearing after the amendment null and void....."*

With the above holding, it was not proper to invoke the provision of section 226 (2) before complying to section 228 (1) and 234 (2) of the CPA. Since the accused absconded before he entered the plea, the remedy would be to withdraw the charge and wait for the accused's apprehension so that he could be tried for the offence.

Assuming that section 226 (1) was properly invoked, still there was non-compliance to the requirement of section 226 (2). The said provision reads: -

> *(2) Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.*

The above provision requires the court to the trial court to explain to the accused who was tried in absentia his right to raise defence for his absence. In Criminal Appeal No. 65 of 2015**, Magoiga Magutu @ Wansima Vs. The Republic,** the Court of Appeal while interpreting section 226 (2) of the CPA clearly insisted on the requirement to afford the accused person the opportunity to be heard on why he was absent and on whether he had probable defence on the merit. It referred its decision in **Marwa s/o Mahende Vs. R [1998] TLR 249** where the Court re-affirmed the principle of law it had restated in the case of **Lemonyo Lenuna and Lekitoni Lenuna Vs. R [1994] TLR 54:** where it was held: -

> *"In our view the subsection [i.e., section 226-(2) of CPA] is to be construed to mean that an accused person who is arrested following his conviction and sentence in absentia, should be brought before the trial court ... The need to observe this*

procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are not often represented by counsel. They are not aware of the right to be heard which they have under the subsection, it is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring 21 that the accused, upon his arrest, is brought before the court, which convicted and sentenced him, to be dealt with under the sub-section."

The court referred the excerpt of the record of the trial court which indicated that, following his arrest after his two-year absconding from his trial the Appellant was not addressed to account for his absence for the trial court to determine whether he had a probable defence on merit. The Court of Appeal held that: -

".... We think the trial magistrate should have first addressed the Appellant about his right to be heard under sub-section (2) of section 226 of the CPA. It seems to us the phrase "he had a probable defence on the merit in section 226 (2) of the CPA bear a special duty which trial magistrates have towards the lay accused persons who missed out the chance to testify in their own defence. Here, the law impliedly expected the learned trial magistrate to specifically make a finding whether even from the perspectives of the evidence of PW1, PW2 and PW3; the trial court can glean out some semblance of probable defence for the benefit of the lay accused person. The lay Appellant should have

been informed that the trial court had discretion to set aside the Appellant's 24 conviction in absentia if the Appellant showed that his absence from the hearing was from causes over which he had no control and that he had a probable defence on the merit. It was intimidating to the Appellant for the learned trial magistrate to allow the public prosecutor to first furnish in detail how the Appellant had jumped from the prison van whilst on transit to prison."

The Court of Appeal concluded that failure of the trial magistrate, to properly address the lay accused person (the Appellant) on his right to be heard under section 226 (2) of the CPA, was fatal.

The circumstance in the above is most similar to the case at hand. The typed proceedings of the trial court at page 25 shows that, following apprehension of the Appellant after his conviction and sentence in absentia, he was presented before the trial court. The excerpt in the proceedings reads: -

"Ms. Janeth:- the accused person who disappeared is in custody today.

Accused:- I forgot that I had a case in court after I was bailed out

Janeth:- The accused defence has no weight. He just opted to leave the case.

Order:- The accused defence is not watertight. This court follows to convict and sentence the accused person as it previously did. The sentence shall run from today."

The above excerpt is similar to what transpired in the Magoiga Magutu @ Wansima (supra). The Appellant in this matter was not addressed to account for his absence for the trial court to determine whether he had a probable defence on merit. The trial court did not address the Appellant about his right to be heard under sub-section (2) of section 226 of the CPA therefore, an order for the Appellant to serve sentence before excising his right under section 226 (2) was fatal.

The determination of this ground surface to determine the whole appeal. Since there was procedural irregularity in the trial court proceedings which renders the trial a nullity for the Appellant was not properly tried, this court quash and set aside the trial court proceedings, conviction and sentence passed against the Appellant. I however order for trial *de novo* before another magistrate with competent jurisdiction. The appeal is therefore allowed to the extent above explained.

DATED at **ARUSHA** this 29th day of September 2023.

D.C. KAMUZORA

JUDGE