THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

[MUSOMA SUB REGISTRY AT MUSOMA]

CRIMINAL APPEAL No. 117 OF 2022

(Arising the District Court of Serengeti at Mugumu in Economic Case No. 49 of 2021)

JUMA SIMBA @ MACHOKE ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

06.11.2023 & 13.11.2023

Mtulya, J.:

Mr. Juma Simba @ Machoke (the appellant) and **Fikirini Samson @ Mturi** were arrested and arraigned before the **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 49 of 2021** (the case) for allegations of three (3) offences.

The offences against which the dual were prosecuted are displayed in the Charge Sheet, as: first, unlawful entry into the National Park contrary to sections 21 (1) (a) & 29 (1) of the **National Park Act [Cap. 282 R.E. 2002]**, as amended by the Written Laws (Misc. Amendment) Act, No. 11 of 2003 (the National Park Act); second, unlawful possession of weapons in the National Park contrary to section 24 (1) (b) & (2) of the National Park Act; and finally, unlawful possession of Government trophies contrary to section 86 (1) & (2) (c) (iii) of the **Wildlife Conservation Act, No. 5**

of 2009 (the Wildlife Act) read together with sections 57 (1), 60(2) and paragraph 14 of the First Schedule to the **Economic and Organised Crime Act [Cap. 200 R.E. 2019]** as amended by the Written Laws (Misc. Amendment) Act, No. 3 of 2016 (the Economic Crime Act).

According to the allegations prepared by the Republic (the respondent) on 28th June 2021, the dual accused persons were found and arrested on 25th June 2021 at Mlima Msabi area within Serengeti National Park in Serengeti District of Mara Region possessing weapon *panga*, two hind limb of wildebeest and one dried skin of hyena, without permission of the Director of Wildlife, being sought and obtained.

The dual accused persons were brought before the district court on 29th June 2021 and when the charge was read over before them and asked to plead thereto, **Fikirini Samson @ Mturi** (the first accused), pleaded not guilty to all the indicated allegations, whereas on 5th October 2021, the appellant pleaded guilty to the charges. Following his plea of guilty and admission of the facts of the case constituting the elements of the indicated offences, to be true and correct, the district court moved on to convict him.

However, before the sentence was pronounced, the district court had invited the appellant to enjoy the right to mitigate. In his

mitigations, the appellant prayed for lenient sentences as reflected at page 5 of the district court's proceedings conducted on 5th October 2021. On the other hand, **Mr. Matatala, J.**, who had appeared for the Republic, in his antecedents stated that the Republic had no any previous criminal records of the appellant.

In its sentence, the district court sought that the Government is preventing poaching activities and the habit has to be deterred and finally resolved that the appellant to serve jail term of six (6) months for the first and second offences, and thirty (30) years imprisonment for the third crime of unlawful possession of Government trophies, to wit two hind limbs of wildebeest and one dried skin of hyena.

The appellant was dissatisfied with both the conviction and sentence and approached this court in **Criminal Appeal No. 117 of 2022** complaining on ten (10) issues, namely, in brief that: first, he was not found in possession of Government trophies and weapons; second, exhibit IR and police form No. 45 breached directive 31 of the Police General Orders; third, contradiction of evidence between investigator and wildlife officer; fourth, thirty (30) years sentence is excessive; fifth, exhibit two (2) forelimbs of wildebeest was not brought to court; sixth, no proof of photographs was produced in court; seventh, it is the first time for

the appellant to stand charged in court; eighth, appellant's confession was not tested at justice of peace; ninth, investigation officer did not appear in the court; and finally, the thirty (30) years imprisonment did match with the charge sheet.

The reasons of appeal were scheduled for hearing on 6th November 2023. However, before the appellant had registered relevant materials in favor of the appeal, **Mr. Tawabu Yahya Issa**, learned State Attorney for the respondent, raised up and stated that the law in section 360 (1) of the **Criminal Procedure Act [Cap. 20 R.E 2022]** (the Act) bars appeals hearing of this species as the appellant had pleaded guilty in the district court. According to Mr. Tawabu, all necessary procedures were followed in convicting the appellant in all three (3) counts, and finally he was sentenced to thirty (30) years imprisonment for the offence of unlawful possession of Government trophies.

In the opinion of Mr. Tawabu, this court is restricted to move into determining the substance of the appeal, save for reason number four (4) of the appeal which protest the sentence of thirty (30) years imprisonment. According to him, even the sentence meted to the appellant was proper as the Economic Crime Act provides for maximum sentence of thirty (30) years imprisonment as indicated in section 60 (2) of the Act. Mr. Tawabu thinks that the

appellant had cited section 86 (1) & (2) of the Wildlife Act in his fourth complaints, but the section cannot be invited in presence of specific section 60 (2) of the Economic Crime Act. Finally, Mr. Tawabu submitted that the sentence is not higher as is displayed at page 5 of the judgment of the district court where mitigations and antecedents were invited and considered before the judgment.

Replying the materials registered by Mr. Tawabu, the appellant disputed the submission and record on the district court. According to him, Mr. Tawabu did not submit the truth of the matter and the record is wrong as he did not admit the offence at the district court. In the opinion of the appellant, the first magistrate did not record anything in the case file and had expired before the hearing of the case, whereas the second magistrate had recorded what she so wish and convicted him. In a brief rejoinder, Mr. Tawabu submitted that the appellant cannot fault court record as a sanctity document, and in any case, there are no any other record to digest complaint of the appellant at the district court.

I have scanned typed proceedings of the district court in the case and found that on 5th October 2021, when the charges were read over and explained to the appellant, he pleaded guilty to all the indicated three (3) offences levelled against him. Subsequent to his plea of guilty and admission of the facts of the case constituting

all necessary elements of the indicated offences, to be true and correct, the district court had convicted and sentenced him to serve the maximum sentence of thirty (30) years imprisonment in the third count.

However, before the sentence was pronounced, both parties were invited to cherish the right to be heard as indicated in the precedent of **Olonyo Lemuna & Another v. Republic** [1994] TLR 54, at page 60 of the judgment, that: *in our understanding, various provisions of the Criminal Procedure Act were aimed at speeding up trials. [However], the cardinal principle of affording opportunity to the parties to be heard is not to be overlooked.* ***The right to be heard is a cornerstone principle of justice***.

In enjoying the right, at page 4 of the proceeding conducted on 5th October 2021, the prosecutor stated that*: I have no records of previous convictions*, whereas the appellant at page 5 of the proceedings was recorded to have mitigated that: *I pray for leniency of this court*. The mitigation of the appellant was declined by the learned magistrate at page 5 of the proceedings for reason that: *the mitigation cannot be taken into consideration due to the fact that our Government is preventing anti-poaching*.

The appellant, during hearing of this appeal has declined to say a word on the display of the record. He only complained on his

plea of guilty that it was fabricated by the second magistrate and Mr. Tawabu submitted his points on the record which was twisted by the second magistrate. On the other hand, Mr. Tawabu thinks that the sentence was proper as the learned magistrate had considered both antecedents and mitigations. While I am very much aware of the fact that the Government discourages anti-poaching activities, but the sentence enacted under section 60 (2) of the Economic Crimes Act invites a bundle of circumstances before deciding on appropriate sentence.

The Judiciary of Tanzania in 2019 had published the **Tanzania Sentencing Manual for Judicial Officers** (the Manual), currently named the **Tanzania Sentencing Guidelines, 2023** (the Guidelines), to assist judges and magistrates in arriving at suitable sentences against accused persons who are found guilty. Item (f) and (l) in **General Principles of Sentencing** as reflected at page 2 and step 1 in **Sentencing Process** as reflected at page 16 of the Guidelines shows that maximum sentence should only be imposed when the offence comes close to the worst of its type and should rarely be imposed on first offender.

The practice in support of the move is found in the precedent of the Court of Appeal in **Hassan Charles v. Republic**, Criminal Appeal No. 329 of 2019. The practice is cherished in common law

legal tradition, where our courts normally borrow practices (see: **Smith v. R [2007]** New South Wales Court of Criminal Appeal 138).

In the present case, the appellant is the first offender, pleaded guilty of the alleged offence, and prayed for a lenient sentence, but had received a maximum sentence enacted in section 60 (2) of the Economic Crimes Act. In any case, unlawful possession of Government trophies two (2) hind limbs of wildebeest and one (1) dried skin of hyena types of offences cannot be said they are closer to the worst species of economic or wildlife offences. This is obvious contrary to the directives of our superior court, the Court of Appeal and the indicated Guidelines. In my opinion, the complaints of the appellant in the fourth, seventh and tenth reasons of appeal have merit.

However, before I conclude on an appropriate sentence to the appellant in the third crime of unlawful possession of Government trophies, there are two (2) important complaints that have to be resolved in the instant appeal, *viz*: first, the complained fault of the record of the district court; and second, application of section 86 (1) & (2) of the Wildlife Act. Regarding to the authenticity of the record, the established practice is that: *a court record is always presumed to accurately represent what actually transpired in court* (see: **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018;

Halfani Sudi v. Abieza Chichili [1998] TLR 527; **Shabir F. A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994; and **Paulo Osinya v. R** [1959] EA 353). In the precedent of **Alex Ndendya v. Republic** (supra), at page 12, the Court of Appeal observed that:

> *The appellant also complained before us that the trial magistrate did not record his complaint...We are positive that the appellant is trying to impeach the court record. It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record.*

On the other hand, the appellant was prosecuted for wildlife and economic offences, and complained on sentence of thirty (30) years imposed to him based on section 60 (2) of the Economic Crimes Act instead of section 86 (1) & (2) of the Wildlife Act. Mr. Tawabu contended that there is special enactment in section 60 (2) of the Economic Crimes Act hence section 86 (1) & (2) of the Wildlife Act cannot be invited and applied.

The question was resolved on 23rd February 2023 by the Court of Appeal in the precedent of **George Lazaro Ogur v. Republic**, Criminal Appeal No. 69 of 2020, at page 22 of the judgment, that:

> *The learned counsels for both sides acknowledged that the trial court should have sentenced the*

*appellant under section 60 (2) of the EOCCA as section 86 (2) of the WLA was inapplicable. We are agreeing with them. The said section 60 (2) provides [that] a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years, but not exceeding thirty years...as we recently stated in [**The Director of Public Prosecutions v. Papaa Olesikadai @ Lendemu & Another**, Criminal Appeal No. 48 of 2020] and [**Hamis Juma @ Selemani @ Isaya v. Republic,** Criminal Appeal No. 63 of 2020], the section is overriding penalty provision for any corruption or economic offence...we set aside the illegal sentence of fifteen years imprisonment imposed on him and substitute for it the sentence of twenty years imprisonment.*

Having the precedent of our superior court on record, this court is not positioned to interpolate other issues. The only question this court is supposed to reply in the present appeal is what is the appropriate sentence to the appellant, after considering all relevant factors. I have already indicated in this judgment that there is in place the Guidelines which find support of the Court of Appeal precedent and common law practices which show that first offenders receive less sentence than habitual criminals, unless the crime is closer to the worst of its type. Even if that is the case, a maximum sentence must rarely be imposed on the first offender.

The law regulating sentence is also flexible to those who admit commission of offences saving time and costs of courts. However, the district court in its sentence sought that the Government is preventing poaching activities and resolved the appellant to serve jail term of six (6) months for the first and second offences, and thirty (30) years imprisonment for the third crime of unlawful possession of Government trophies, to wit two hind limbs of wildebeest and one dried skin of hyena.

As I specified in this judgment, this is vivid breach of the directives of the Court Appeal and the indicated Guidelines. This court cannot support the move taken by the district court. In that case, I adjust the sentence imposed by the district court from thirty (30) to twenty (20) years imprisonment to run from when the appellant was sentenced, that is 5th October 2021.

It is so ordered.

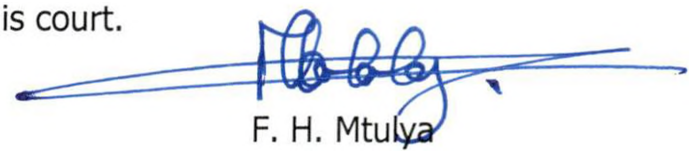
Right of appeal explained.

F. H. Mtulya

Judge

13.11.2023

This judgment was delivered in Chambers under the Seal of this court in the presence of **Mr. Tawabu Yahya Issa**, learned State Attorney for the Republic and in the presence of the appellant, **Mr. Juma Simba @ Machoke** through teleconference attached in this court.



F. H. Mtulya

Judge

13.11.2023