

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: MUGASHA, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CONSOLIDATED CRIMINAL APPEAL NO. 16 'A' OF 2016 & NO. 16 OF 2017

SONG LEI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

**1. XIAO SHAODAN
2. CHEN JIANLIN
3. HU LIANG } RESPONDENTS**

(Appeal from the Decisions of the High Court of Tanzania, at Mbeya)

(Levira, J.)

**Dated the 8th day of November, 2016
in
Economic Crimes Appeal No. 16 of 2016**

RULING OF THE COURT

6th & 14th December, 2018

MWAMBEGELE, J.A.:

This is a consolidated appeal. It combines two appeals. The first appeal is by Song Lei against the Republic. It was christened Criminal Appeal No. 16'A' of 2016. The second one is by the Director of Public

Prosecutions against Xiao Shaodan, Chen Jianlin and Hu Liang. The second one was christened Criminal Appeal No. 16 of 2017. The two appeals were consolidated because they originate from the same trial and there is an order of the Court made on 12.02.2018 to the effect that the two appeals be consolidated. Both appeals emanate from the decision of the Court of the Resident Magistrates of Mbeya in Economic Crimes Case No. 6 of 2015 in which Song Lei, Xiao Shaodan, Chen Jianlin and Hu Liang were charged with three counts of leading organized crime, unlawful dealing in trophy and unlawful possession of Government trophy. After a full trial all accused persons were convicted as charged and sentenced to fifteen years in jail in respect of the first count, fine of USD 836,000.00 or three years in default in respect of the second count and twenty years in jail and fine of USD 4,180,000.00 in respect of the third count. They appealed to the High Court where Levira, J. allowed the appeal in respect of Xiao Shaodan, Chen Jianlin and Hu Liang. Song Lei's appeal was allowed on the first count but failed in respect of the second and third counts.

Song Lei appealed against the decision of the High Court hence Criminal Appeal No. 16'A' of 2016. Likewise, the Director of Public

Prosecutions was not happy with the acquittal of Xiao Shaodan, Chen Jianlin and Hu Liang hence criminal Appeal No. 16 of 2017.

Thus when the appeal were called on for hearing on 06.12.2018, the first thing the Court did was to consolidate them. The consolidation was done in the presence of the parties; that is, Song Lei who is an appellant in what we shall be referring to it as the first appeal and Xiao Shaodan, Chen Jianlin and Hu Liang who are respondents in what we shall be referring to as the second appeal. Song Lei was represented by Mr. Victor Mkumbe, learned counsel. The respondents in the second appeal appeared in person, unrepresented. The respondent in the first appeal and appellant in second appeal appeared through Mr. Joseph Pande, Principal State Attorney and Basilius Namkambe, State Attorney. To avoid confusion, we shall be referring to the parties in their names.

At the very outset, the Court wanted to satisfy itself on the propriety or otherwise of the record of appeal as the exhibits put in evidence at the trial were neither in the record of appeal nor in the original case file. Since this is a point of law, we invited the learned counsel appearing to address us on it.

Mr. Pande began by submitting that, as the record of appeal misses the exhibits put in evidence at the trial, it offended rule 71 (2) (e) and (f) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules). Given the circumstance, it was his prayer that hearing of the consolidated appeal be adjourned to another convenient date to give room to the Registrar to reconstitute the record of appeal.

When probed by the Court that, the trial court record at p. 180 shows that the documentary exhibits were given to the prosecution and if that was in compliance with section 353 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA), Mr. Pande revealed that, though the prosecution had requested the trial court to be given the passports of the appellant Song Lei and respondents Xiao Shaodan, Chen Jianlin and Hu Liang as they were needed for some criminal investigation in Dar es salaam, to their surprise, they were given all the documentary exhibits after the delivery of the decision of the High Court on first appeal. He added that they availed the same to the Mbeya Regional Crimes Officer (hereinafter referred to as the RCO) who later transmitted some of them to the Director of Criminal Investigation in Dar es Salaam (hereinafter referred to as the DCI). He added that, they could not procure the exhibits in readiness for the hearing of the appeal because

the exhibits which were not transmitted to the DCI were under the custody of a certain Sgt. William who was at the time outside Mbeya. As for those under the custody of the DCI, could not be easily procured as the Directorate of Criminal Investigation in Dar-es-salaam was in the process of relocating to Dodoma; the Capital City. Regarding the way forward, Mr. Pande undertook to follow the matter up so that the documentary exhibits availed to the prosecution by the trial court are returned to the Registrar in good time. Probed to specify the exhibits which are in their possession, Mr. Pande listed them as follows:-

- (i) Temporary importation/exportation permit (of road vehicles).
- (ii) The file and letter/documents (the blue card, photocopy of Song Lei's passport, introduction email by Song Lei (introducing Zhang Peng as his agent) and photocopy of Song Lei's driving licence)
- (iii) A letter of handing over
- (iv) Certificate of search and seizure
- (v) The valuation report of the horns.
- (vi) Handing over of the Car;
- (vii) Mr. Song Lei's TIN
- (viii) Entry arrival declaration
- (ix) Motor vehicle file
- (x) Cyber examination report.
- (xi) The mobile phone examination report

- (xii) The letter to request mobile phone examination
- (xiii) Declaration of importation of Song lei's motor vehicle
- (xiv) The Driving licence of Song Lei
- (xv) Passports of the accused persons
- (xvi) Vaccination Certificates
- (xvii) International Certificates of Song Lei.

We also, for clarity, wish to reproduce hereunder the exhibits tendered at the trial:

1. Exhibit P1 – Temporary importation/exportation permit (of road vehicles).
2. Exhibit P2 – The file and letter/documents (the blue card, photocopy of Song Lei's passport, introducing letter by Song Lei (introducing Zhang Peng as his agent) and photocopy of Song Lei's driving licence.
3. Exhibit P3 – Blue Cards of 4 accused persons.
4. Exhibit P4 – Motor Vehicle.
5. Exhibit P5 – Eleven Rhino horns/trophies.
6. Exhibit P6 – 4 bags of accused persons.
7. Exhibit P7 – 4 passports of accused persons.
8. Exhibit P8 – 12 Cell phones of the accused persons.
9. Exhibit P9 – iPad.
10. Exhibit P10 – 4 Vaccination Cards of the accused persons.
11. Exhibit P11 – A certificate of TIN of Song Lei with Serial No. 171156 and TIN – No. 127 – 538-476.

12. Exhibit P12 – Driving Licence of Song Lei.
13. Exhibit P13 – Certificate of search and seizure.
14. Exhibit P14 – Trophies evaluation form.
15. Exhibit P15 – A letter of handing over.
16. Exhibit P16 – Message point out from accused person's phones.
17. Exhibit P16 – Print out (from cyber crime unit).

Mr. Pande reiterated his earlier prayer to have the hearing of the consolidated appeal adjourned to enable the reconstruction of the record after the Registrar of the High Court is availed with the documentary exhibits which are under the custody of the prosecution.

On his part, Mr. Mkumbe had no opposition to the prayer made by Mr. Pande. However, he was of the view that the horns must be made available. After a brief dialogue, Mr. Mkumbe shifted the goalpost; he was of the view that the valuation report of the horns would suit the purpose as the horns, as per the order of the trial court, should be in the hands of the Director of Wildlife.

Having heard the learned counsel appearing, we wish to state that the documentary exhibits now in the hands of the prosecution are very crucial for the determination of this second appeal. We say so because, this being a second appeal, the Court would probably be required to re-evaluate the evidence, which process will entail having a glance at the

exhibits put in evidence at the trial. That will entail scrutinizing the documentary exhibits as well. Perhaps to have a better understanding as to the whereabouts of the exhibits put in evidence, we find it appropriate to reproduce the order of the trial court made on 17.12.2015 in the judgment. The order runs from pp 179 and 180. It reads:

"ORDER

1. *Under Section 85 (1) (c) (d) (h) of Wildlife conservation Act Cap. 283, the trophies Exhibit P. 5., be the property of the government of Tanzania and its disposal should be regulated by the Director of Wildlife.*
2. *The motor vehicle Toyota Hilux surf with Reg. No. T. 103 DER Exhibit P. 4 be under the assets for feature and Recovery Section under DPP.*
3. *Exhibit P6 bags of the convicts, should be returned to them. (because they are their own properties. Even Exhibit p. 7 (their pass ports)*
Exhibit P. 10 (vaccination cards)
Exhibit P 11 (1st Accused TIN certificate)
Exhibit P. 12 (1st Accused driving licence)

4. *Exhibit P. 1 C. 32 carnet de passage, Exhibit P. 2 (letters/documents Exhibit P. 13 search and seizure note, Exhibit P. 15 letters of handing over, Exhibit P. 16 message print out, be taken by prosecution.*
5. *Exhibit P. 8 cell phones because were used in assisting commission on offence, they will be sold by this court.*
6. *Exhibit P. 9 iPad cell phones because were used in assisting commission offence, they will be sold this court.*
7. *Because the offences/counts were committed in the same series of transactions, the sentence of*

1. *Fine to run consecutively*
2. *Imprisonment to run consecutively (sic) i.e. Each accused will serve a term of twenty years imprisonment.*

Sgd: M. C. M. Mteite – RM

17. 12. 2015".

As per the order of the court reproduced above, the above exhibits were disposed as under:

1. Director of Wildlife:

- Exhibit P5 – (the trophies).

2. Director of Public Prosecutions:

- Exhibit P4 – (Motor Vehicle).
- Exhibit P1 – (Temporary permit).
- Exhibit P2 – (letters and documents).
- Exhibit P13 – (Search warrant/Certificate of seizure).
- Exhibit P15 – (Letter of handing over).
- Exhibit P16 – (Message print out).
- Exhibit P14 – (trophies evaluation report).

3. Court:

- Exhibit P8 – Cell phones.
- Exhibit P9 – iPad.

4. Appellants:

- Exhibit P6 – (bags of the convicts).
- Exhibit P7 – (Passports of the convicts).
- Exhibit P10 – (Vaccination Cards).
- Exhibit P11 – (1st accused TIN certificate).
- Exhibit P12 – (1st accused driving licence).

It is worth noting that Exhibit P3 (Blue cards of the 4 accused persons) and Exhibit 17 (print out from Cybercrime Unit) do not feature in the order and it is not known how they were disposed of.

We must confess that the order made by the trial court really taxed our minds. They certainly were made prematurely. The disposal of

exhibits were made before the appeal was determined and exhausted.

This offended section 353 (1) of the CPA. This sub-section reads:

"Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of the proceedings or if any appeal is entered in respect thereof, the thing may be sold, destroyed or otherwise disposed of in such manner as the court may by order direct and the proceeds of its sale shall be paid into the general revenues of the Republic."

It need not be overemphasized that once tendered and admitted in evidence exhibits must be in the custody of the trial court. They can only be disposed of in terms of section 353 of the CPA. What happened in the case at hand is, to say the least, strange.

We find ourselves pressed to interject at this juncture the prosecution is contributor to this strange state of affairs. We say so because despite

knowing full well that the passports of the accused persons were ordered to be returned to accused persons, yet, through an administrative letter, the prosecution applied to be availed with them for investigation purposes in another case in Dar es Salaam. That was a blatant disregard of the court order which required that the same be returned to the accused persons; the incorrectness of the order notwithstanding.

We insist that adherence of the letter of the law is of paramount importance not only in disposal of exhibits but also on other aspects. The orders made by the trial court are, to say the least, strange. Disposal or otherwise of exhibits should be done with observance of the law. The way the exhibits were disposed in the case at hand left justice crying. We hope this blatant disregard of the law will not recur.

Be that as it may, we, as were the learned counsel appearing, are satisfied that the Court cannot proceed with the hearing of this second appeal without a properly constituted record of appeal. We thus, hereby order as follows:

1. The prosecution return all the original documentary exhibits to the Registrar of the High Court at Mbeya not later than 30.01.2019.

These exhibits are, but not limited to:

- (i) Temporary importation/exportation permit (of road vehicles
- (ii) The file and letter/documents (the blue card, photocopy of Song Lei's passport, introduction email by Song Lei (introducing Zhang Peng as his agent) and photocopy of Song Lei's driving licence).
- (iii) A letter of handing over
- (iv) The valuation report of the horns;
- (v) A certificate of search and seizure
- (vi) Trophy Evaluation Report
- (vii) Handing over of the Car;
- (viii) Mr. Song Lei's TIN
- (ix) Entry arrival declaration
- (x) Motor vehicle file
- (xi) Cyber examination report.
- (xii) The mobile phone examination report
- (xiii) The letter to request mobile phone examination
- (xiv) Declaration of importation of Song lei's motor vehicle
- (xv) The Driving licence of Song Lei
- (xvi) Passports of the accused persons
- (xvii) Vaccination Certificates
- (xviii) International Certificates of Song Lei.

2. The cellphones and iPad or, if the order of the court has been executed, the Exchequer Receipt Vouchers (ERVs) thereof be made available in the record or original case file.
3. After the Registrar is availed with the original documentary exhibits by the prosecution in (i) above, reconstruct the record of appeal and notify the Registrar of the Court of Appeal.
4. The Registrar of the Court to fix for hearing this consolidated appeal in the next convenient sessions of the Court.

The above said and done hearing of this consolidated appeal is adjourned to another date to be fixed by the Registrar of the Court.

Order accordingly.

DATED at MBEYA this 14th day of December, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL