IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A, MWARIJA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 345 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. **PIRBAKSH ASHARAF**
2. **JAMBECK SALEHE**
3. **ABDULSATAL HASSAN @ HAIDAL**
4. **ZULFIKARI MOHAMED**
5. **ABDULAZIZ ASHRAFU**
6. **NAWAZI HASSAN**
7. **FRANK COMARK**
8. **ANDREA SUMBIZI @ CHAGUA**
9. **JACOB MPINGA @ JOHN**
10. **JUDICA KIBONA**
11. **LEVINA MODEST**

..... RESPONDENTS

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Kalombola, J.)

dated the 21st day of June, 2017
in
Economic Criminal Appeal No. 3 of 2017

.....

JUDGMENT OF THE COURT

17th & 20th July, 2018

MZIRAY, J. A.:

The Respondents herein appeared in the District Court of Manyoni at Manyoni on a charge sheet containing eleven counts, the

particulars of which were shown in the charge sheet. All counts were in relation to seven offences which are **first,** Unlawful Hunting contrary to section 47(a)(b)(i)(ii)(aa) and (2)(c) and section 111(1)(d) and 113(1)(2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(a) and section 60, both of the Economic and Organized Crimes Control Act Cap 200 R.E. 2002; **second,** Unlawful Possession of Government Trophy contrary to section 86(1) and (2) (c)(ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(d) of the First Schedule to, and section 57(1) of the Economic and Organized Crimes Control Act Cap 200 R.E. 2002; **third,** Possession of Weapon in certain circumstances contrary to section 103 of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(c) of the First Schedule and section 60, both of the Economic and Organized Crimes Control Act Cap 200 R.E. 2002; **fourth,** Failure to carry Licence contrary to section 61(a)(3),111(1)(d) and 113(1)(2) of the Wildlife Conservation Act No. 5 of 2009; **fifth,** Failure to record the animal hunted in their Licence contrary to section 61(b)(3),111(1)(d) and 113(1)(2) of the Wildlife Conservation Act No. 5 of 2009; **sixth,** (only for the first appellant), To be accampanied by more than four people during hunting contrary

to Regulation 8(1)(c),18 of the Wildlife Conservation (Resident Hunting) Regulation of 2010 read together with section 113(1)(2) of the Wildlife Conservation Act No. 5 of 2009 and **lastly,** Failure to carry Hunting Identity Card during hunting Contrary to Regulation 13 and 18 of the Wildlife Conservation (Resident Hunting) Regulation of 2010 read together with section 113(1)(2) of the Wildlife Conservation Act No. 5 of 2009.

After a full trial, they were all acquitted.

Being dissatisfied with the decision of the trial court, the Director of Public Prosecutions (DPP) preferred a first appeal to the High Court at Dodoma. The High Court dismissed the appeal, hence this second appeal.

Briefly, the facts of the case are as follows. On 16/12/2015, PW1 Godfrey Bais and PW4 Musa Mbaga, who are Game Officers, while in their normal patrol in Mnadani Game Reserve area within Chunya District, arrested the eleven respondents in three motor vehicles. The respondents were from a hunting expedition. In the presence of PW2 Richard Kalimbi who is a Ward Executive Officer of Rwangwa area, the respondents were searched. In the three motor

vehicles, PW1 and PW2 seized game meat, firearms and some ammunitions. The seized items were documented in a certificate of seizure. On 19/12/2015 the seized trophies were taken to PW3 Athumani Bahati, a Valuer, for analysis and in his valuation report, (exhibit P6) he stated that the trophies seized valued in total USD 7550. It is also in the prosecution evidence that the respondents failed to produce hunting licence and hunting identity card at the time of their arrest. However, PW1 and PW4 confirmed from Chunya Wildlife District Office that the first respondent was issued with a hunting permit but he was only allowed to hunt one worthdog, one bohoreedbock, one buffalo, one cookchart beast and three francolins. The eleven respondents were charged because they killed more animals than what the licence issued allowed and that at the time of their arrest they did not carry the hunting licence and the hunting identity card.

The defence given by each of the eleven respondents is similar in content in all material aspects. They denied to have committed the offences charged. They maintained that they had a valid licence and that they hunted animals which were listed in the licence issued to the

first respondent. They went on to state that the fire arms used in their hunting expedition on that day had all the required permits from the responsible authority. They maintained that they were four people in the expedition and the other people were not in the hunting errand but on their official duties and vacation.

At the hearing of the appeal, Mr. Morice Cyprian Sarara, learned State Attorney appeared in Court representing the appellant whereas, the respondents had the services of Mr. Nduruma Majembe assisted by Mr. George Stephen Njooka and Shadrack Mofulu, learned counsel.

The learned State Attorney canvassed only one ground in his memorandum of appeal which read: -

> ***That the Hon. Judged erred in law and in facts in not holding that the appellant prove [sic] its case beyond reasonable doubt against all counts.***

The learned State Attorney gave his reasons why he was of the view that the prosecution had proved the guilt of the appellants beyond a shadow of doubt. Before proceeding on this point the Court

asked him to comment on the propriety of some of the counts in the charge sheet and the issue as to whether or not the trial court had jurisdiction to entertain them. His response was that, the same were defective because the provision of section 113(2) of the Wildlife Conservation Act No. 5 of 2009 were not cited in the statement of offence in respect of 2nd, 3rd, 4th, 5th, 6th and 7th count. Under the circumstances, he submitted that the District Court of Manyoni had no jurisdiction to try those counts. He emphasized that failure to cite the provision of section 113(2) of the Wildlife Conservation Act No. 5 of 2009 ousted the trial court jurisdiction to adjudicate on the said counts of the charge. In view of the above, he invited us to find that the trial in respect of the 2nd, 3rd, 4th, 5th, 6th and 7th count was a nullity.

Regarding the 1st count, the learned State Attorney referring to the provision of section 60 of Economic and Organized Crimes Control Act, submitted that the sub-sections for punishment were not specified in the statement of the offence thus rendering the charge in respect of those offences defective. He pointed out that section 60 of the Economic and Organised Crimes Control Act; referred in the 1st

count is too general. He stressed that the charge sheet should have specified, in the statement of the offence, the sub-section in which the offence was created which should have been sub-section (1)(a) and (b). Addressing on the 10th and 11th counts, the learned State Attorney was of the view that since Regulations do not create offences, then the counts were also problematic.

Expounding on the remaining counts, that is, count No. 1,8 and 9, the learned State Attorney forcibly submitted that there is enough evidence to sustain the respondents conviction. He relied on the testimony of PW1, who stated that the appellants were arrested without having the Hunting Licence as per section 61(a) of the Wildlife Conservation Act, which compelled them to carry their licences all the time when they were in a hunting expedition. He also submitted that the appellants committed offence when they ommited to record the number of animals hunted.

In response, the learned counsel for the respondents joined hands with the learned State Attorney that failure to cite the provision of section 113(2)of the Wildlife Conservation Act, in 2nd, 3rd, 4th, 5th, 6th and 7th count rendered the trial a nullity for want of jurisdiction.

They further submitted that charging the respondents under section 47(a)(b)(i)(ii)(aa)of the Wildlife Conservation Act, made the charge duplex as the offences under sub-section (a) and (b) are distinct. They went further by stating that section 61 of the Wildlife Conservation Act under which the respondents were also arraigned in count 8 and 9 is actually non-existent. For that reason, they submitted that no offence was created by citing the said provisions. They also pointed out that even assuming that count 8 and 9 in the charge sheet were in order, the fact which they vehemently deny, the only person who was supposed to be charged on those counts was the first respondent who was issued with the licence and not all the respondent.

On the basis of defective charge and on account of insufficient evidence to prove the charge, they urged us to dismiss the appeal for want of merit and refrain from making an order for retrial.

In determining the matter, we shall begin with the issues that we had raised; the propriety of the counts in the charge sheet and whether or not the trial court had jurisdiction to try the respondents on these counts.

Having considered the submissions made by the respective learned counsel for both parties, we unhesitatingly agree with them that the charge sheet, undoubtedly suffers from serious defects. For instance, defect found in the 1st count was to combine section 47(a)(b)(i)(ii)(a) of the Wildlife Conservation Act, while it is clearly seen that the offences under sub-section (a) and (b) are two distinct offences. While sub-section (a) is referring to a person not being a holder of licence, on the other hand, sub-section (b) makes reference to a person being a holder of licence. A charge is said to be duplex if, for instance, two distinct offences are contained in the same count, or where an actual offence is charged along with an attempt to convict the same offence. (See **Director of Public Prosecutions vs. Morgan Mariki and Another**, Criminal Appeal No.133 of 2013). It was also stated in the case of **Kauto Ally vs. The Republic,** [1985] T.L.R.183 that;

"Lumping of separate and distinct offences in a single count may render a charge bad for duplicity."

Again, on the 1st and 7th count, we entirely agree that section 60 of the Organised Crimes Control Act is too general. The charge sheet

ought to have specified, in the statement of the offence, the sub-section in which the offence was created. Sub-section(1), (2) and (3) was supposed to feature in the two counts.

On counts No. 8 and 9, the respondents were charged under section 61(a) and (b) which does not exist. The prosecution failed to include sub-section (1) of the said section. This omission obviously rendered the charge to be incurably defective. In addition to that it is uncontroverted that the Hunting Licence was only issued to the first respondent but the prosecution included the other respondents in count 8 and 9. We find that it was totally unfair to have included all the respondents in the two counts.

With regard to the 10th and 11th counts, the respondents were charged under Regulations which in law does not create an offence.

In the premises, we hasten to agree with both counsel for the parties that the charge sheet was fatally defective for the anomaly explained herein above. It is now settled that a person accused of an offence must know the nature of the charge facing him as per the principle of a fair trial. The prosecution and the trial court are duty bound to exercise care that the charge against the appellant is correct

before the commencement of the hearing. To emphasize the duty of the prosecution to file a charge correctly, this Court in the case of **Mohamed Kaningo vs. Republic**, [1980] TLR 279 observed as follows:-

> *"**It is the duty of the prosecution to file the charges correctly**, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly". (Emphasis added.)*

In conclusion we find that one, the trial court did not have jurisdiction to try the charges preferred against the respondents in count 2, 3, 4, 5, 6 and 7. Two, the charge in respect of count 1 was bad for duplicity. Three, the charges in count 8 and 9 were defective for covering all the respondents while the licence was issued to the first respondent only and lastly the charges in count 10 and 11 were based on the provisions of the Regulations which do not create

offences under the Act. In the event, for different reasons, we hereby dismiss the appeal.

DATED at **DODOMA** this 20th day of July,2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL