S.A. M Lema

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MZIRAY,J.A.)

CRIMINAL APPEAL NO 351 OF 2017

JONAS NGOLIDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. L. Mansoor, J.)

dated the 17th day of July, 2017
in
Criminal Appeal No. 76 of 2016

JUDGMENT OF THE COURT

2nd & 5th July, 2018

JUMA, C.J.:

JONASI NGOLIDA, the appellant, was charged before the Senior Resident Magistrate, Ms. J.M. Minde sitting at Manyoni in the District Court of Manyoni (Economic Case No. 8 of 2016) for two counts. The **first count**

related to the offence of Unlawful Possession of Government Trophy contrary to section 86 (1) and (2) and 113 (2) of the Wildlife Conservation Act No. 5 of 2009 (hereinafter referred to as **"the WCA")** read together with paragraph 14 (d) of the First Schedule and Section 57 (1) and 60 both of the Economic and Organized Crime Control Act Cap 200 RE 2002. The **second count** related to the offence of dealing in Government Trophy contrary to sections 80 (1), 84 (1) and 113 (2) of the WCA read together with paragraph 14 (d) of the First Schedule and Section 57 (1) and 60 both of the Economic and Organized Crime Control Act Cap 200 RE 2002.

The particulars of the first count are that on the 10th day of February 2016 at about 04:00 hrs at Ikolo Village, Mkalama District within the Singida Region the appellant was found in possession of Government Trophy, that is, three elephants' tusks weighing 9.8 kg, all valued USD 5,300 which is equivalent to TZS. 10,780,000 obtained from three elephants all valued at USD 30,000 (TZS. 60,000,000/=) being the property of the United Republic of Tanzania.

The particulars of the second count alleged that the appellant was found in Unlawful Dealing in Government Trophy, that is, three elephant

tusks weighing 9.8 kg valued at USD 5,300 which is equivalent to TZS 10,780,000 obtained from two elephants all valued at USD 30,000 (TZS. 60,000,000) being the property of the United Republic of Tanzania.

When called upon to plead after the substance of the charge had been read over and explained to him with respect to the first count, the appellant replied:-

> *"It is true that on 12/2/2016 at about 04:00 at Ikolo Village at Mkalama District, Singida Region, I was arrested with three elephant tusks without permit to possess them."*

With regard to the second count, the appellant responded likewise by replying:-

> *"It is true that on 12/2/2016 at about 04:00 hrs at Ikolo village at Mkalama District Singida Region I was found unlawful dealing with the government trophy to wit three elephant tusks."*

The learned Senior Resident Magistrate entered a plea of guilty against the appellant, expounding that the appellant had offered an unequivocal plea of guilty to the charges.

Mr. Baltazary, who was the Public Prosecutor, presented the supporting facts to the plea, by expounding the particulars relating to how the appellant was arrested by several Game Wardens who included Paulo Mwizarubi and Athumani Bahati. Upon his arrest, the appellant was transferred to Manyoni Police Station. It was also outlined how the appellant was interrogated by D/Cpl Chiganga, and he admitted possession and dealing with the elephant tusks illegally. It was narrated also that the appellant also recorded a caution statement wherein he admitted the two counts he was charged with.

Finally Mr. Baltazary tendered as exhibits: (1) three elephant tusks weighing 9.8 kilograms; (2) Accused person's caution statement which was recorded on 19/2/2016; (3) seizure warrant filled on 12/2/2016; and (4) Trophy valuation report filled on 14/2/2016.

After presentation of the facts, the appellant reacted by saying:-

"I have no objection and all what is stated is true."

After admitting the exhibits as part of the factual background, the learned Senior Resident Magistrate found the appellant guilty on two counts of Unlawful Possession of Government Trophy and Unlawful Dealing in Government Trophy. With respect to the first count, the appellant was sentenced to a fine of TZS 600,000,000/= or to serve a term of twenty (20) years in prison. On the second count, the appellant was sentenced to serve fifteen years (15) imprisonment. The two sentences were ordered to run concurrently.

Despite pleading guilty, the appellant was apparently aggrieved and dissatisfied with the decision of the trial District Court of Manyoni. He lodged his first appeal in the High Court at Dodoma. In dismissing the appellant's first appeal, Mansour, J. relied on section 360(1) of the Criminal Procedure Act, Cap. 20 (**the CPA**) and pointed out that the appellant was rightly convicted on his own unequivocal plea of guilty.

Still aggrieved, the appellant has come to this Court on second appeal.

At the hearing of this appeal the appellant was represented by Mr. Godfrey Wasonga, learned counsel, while Mr. Harry Mbogoro, learned State Attorney, appeared for the respondent Republic. The memorandum of

appeal, which Mr. Wasonga relied on to argue the appeal contained five grounds of appeal upon which he invited the Court to nullify the proceedings of the two courts below, set aside the judgment, and sentence. Alternatively, Mr. Wasonga invites us to order a fresh trial at the District Court. The grounds of appeal are:

> *1.-That both trial magistrate and Hon. Judge erred in law by convicting the Appellant basing on statement plea of guilty without first following the mandatory requirement before entering plea of guilty.*
>
> *2.-That, the purported plea of guilty is marred by procedural irregularities which make the whole plea a nullity.*
>
> *3.-That, the conviction not proper as facts are at variance with the charge sheet.*
>
> *4.-That, the Hon. Judge erred in law by not addressing the Appellant as per requirement of section 214 of the Criminal Procedure Act Cap. 20 R.E. 2002.*
>
> *5.-That, both trial Magistrate and Hon. Judge imposed excessive punishment contrary to section 86(2) of the Wildlife Conservation Act No. 5 of 2009.*

On the first ground of appeal, the learned counsel for the appellant urged us to overturn the appellant's plea of guilty because the learned trial Magistrate overlooked the mandatory conditions underlined under section 194 (1) of the CPA which prescribes the procedure to be followed where the accused desires to plead guilty to a non-warrant offence, like the offences the appellant was charged with. The relevant section 194 (1) of the CPA provides:

> *"194.-(1) Where an accused person charged with a non-warrant offence, other than an offence punishable with death or life imprisonment, intends to plead guilty to the charge and desires to have his case disposed of at once he may give a written notice to that effect to the magistrate before whom the case is to be heard, and it shall be lawful for the magistrate to serve the person with a formal charge and a notice to appear, not less than four clear days, before the magistrate for the purpose of pleading to the charge and final disposition of the case."*

The first condition, according to Mr. Wasonga, which the learned trial Magistrate should have sought guidance from, is for prior written notice the appellant must have given to the trial magistrate indicating the

intention to plead guilty to the charge and the desire to have the appellant's case disposed of at once. In so far as Mr. Wasonga is concerned, in the absence of that written notice of the appellant, the trial magistrate erred when she recorded the appellant's plea of guilty. The next important condition which Mr. Wasonga contended was not followed was, the failure of the learned trial magistrate, upon receiving the accused person's written notice, to serve the accused person with a formal charge and a notice to appear not less than four clear days before the taking of the plea and pleading guilty. Because these conditions were not followed, Mr. Wasonga submitted that the plea of guilty which the appellant entered should be discarded.

It is appropriate to pause here and remark that Mr. Mbogoro did not address the novel submissions which Mr. Wasonga made on the scope of section 194 (1) of the CPA. Suffice to say, this ground of appeal should not detain us for it is devoid of merit. We think, the wording of section 194 (1) of the CPA relates to what we may describe as pretrial initiative taken by an accused person to express his readiness to enter a plea of guilty. He initiates the move by sending a written notice to the trial magistrate that

he intends to plead guilty. We think, once the hearing begins and the accused person is in the presence of the learned trial magistrate, the provisions of section 194 (1) of the CPA will no longer be applicable. The accused person will have the freedom to plead guilty when the charge is read over and will have an additional opportunity to confirm his plea of guilty once the prosecution narrates the salient facts disclosing the ingredients of the offence concerned.

Next in his submissions, after abandoning ground number 4, the learned counsel for the appellant combined grounds number 2, 3, and 5 by complaining that plea of guilty is marred by procedural irregularities. He elaborated by submitting that the particulars of the offence and the memorandum of facts which were read out to the appellant are at variance with the two counts in the charge sheet. He highlighted the confusion to the appellant arising from the statement of offence of the first count citing section 86 (2) of the WCA without specifying which between paragraphs (a), (b) and (c) of subsection (2) of section 86 created the punishment for which the appellant was sentenced by the trial court.

The learned counsel for the appellant similarly took exception to the way exhibits were tendered as part of the memorandum of facts. He complains that these exhibits were neither accorded respective exhibit numbers, nor were their contents read out to the appellant. Because the appellant was not aware of the facts contained in the exhibits, Mr. Wasonga submitted, the appellant's plea was not unequivocal.

Mr. Wasonga next referred to us what he considers as irregularity in the second count where the particulars of the offence did not specify the nature of the "unlawful dealing" which the appellant did to fall under the ambit of the statement of the offence specified as "UNLAWFUL DEALING IN GOVERNMENT TROPHY". The learned counsel for the appellant submitted that failure of the particulars of the second count to specify the nature of unlawful dealing which the appellant was involved in makes his plea of guilty equivocal. The particulars of the offence for the second count provide:

"PARTICULARS OF OFFENCE

JONAS S/O NG'OLIDA *on 12th day of February 2016 at about 04:00 hrs at Ikolo village in Mkalama District, Singida Region was found in unlawful dealing in Government Trophy*

to wit: THREE ELEPHANT TUSKS weighing 9.8 kg valued at USD 5,300 which is equivalent to Tshs 10,780,000/= obtained from TWO ELEPHANTS all valued at USD 30,000 which is equivalent to Tshs 60,000,000/= the property of the United Republic of Tanzania.

Mr. Wasonga wound up his submissions by referring us to an irregularity appearing on page 14 of the record of appeal, where, upon finding the appellant guilty on two counts, the learned trial magistrate proceeded to impose sentences without entering convictions on two counts. This anomaly, he submitted, violates the compulsive provisions of section 235 (1) of the CPA making the entire decision of the two courts below fatally defective.

In his oral submissions in reply Mr. Mbogoro initially opposed this appeal. He referred us to section 360 (1) of the CPA contending that since the appellant was convicted on the basis of his own plea of guilty, he can only appeal against the sentence but not against his conviction. Section 360 (1) states:

"360(1).-No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been committed on such plea by a subordinate court except as to the extent or legality of the sentence."

For support of his position that the appellant's plea was unequivocal, Mr. Mbogoro cited the decision of this Court in **KALOS PUNDA V. R.**, Criminal Appeal No. 153 of 2005 (unreported) and argued that this appeal has not satisfied the criteria for interfering with a plea of guilty. These criteria are:

1.-that even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;

2.-that the appellant pleaded guilty as a result of mistake or misapprehension;

3.-that the charge laid at the appellant's door disclosed no offence known to law; and

4.-that upon the admitted facts the appellant could not in law have been convicted of the offence charged."

When pressed about the irregularities which Mr. Wasonga had outlined in his submissions, the learned State Attorney came around to concede that by citing section 86(2) of WCA which provides for punishment for the offence of unlawful possession of Government Trophy without specifying which of its paragraphs (a), (b) and (c) creates the punishment that was imposed on the appellant, he submitted that the plea of guilty on first count cannot be regarded to have been unequivocal.

Mr. Mbogoro further conceded that had the appellant known the nature of the sentence which would follow his conviction under any of the paragraphs (a), (b) and (c), he probably would not have pleaded guilty.

With both Mr. Wasonga and Mr. Mbogoro coming down to a common ground that the appellant's plea of guilty was not unequivocal on account of irregularities they have outlined, their main point of departure what the way forward should be in the circumstances of this appeal. Mr. Mbogoro urged us to order a retrial. On his part, Mr. Wasonga urged us to allow the appeal, arguing that we should not allow the Director of Public Prosecutions any room to take advantage of the situation by improvising what has otherwise been a defective charge sheet.

From submissions of the two learned counsel, the next issue for our consideration is whether the appellant's plea was unequivocal.

Beginning with the exhibits which formed part of memorandum of facts presented to the appellant, we think exhibits constitute evidence in a case. We think, Mr. Wasonga was right to fault the failure in the trial court, to show the appellant exhibits before these were admitted as part of facts which were the basis of the appellant's plea of guilty. It is an irregularity that makes the appellant's plea of guilty not unequivocal. The importance of showing exhibits to an accused person and reading out the same was underscored in **RAMADHANI s/o HAMISI MWENDA V. R.,** Criminal Appeal No. 116 of 2008 (unreported) where the Court stated:

> *"We entirely agree with the learned Senior State Attorney that there was a shortfall by the trial Court in the admission of the two exhibits. First, for both exhibits they were not shown to the appellant before admission, and therefore the appellant had no opportunity to cross-examine on them. The appellant was denied his basic right of knowing what was contained in those exhibits and then give his defence on them."*

It undisputed that the Statement of the Offence in the first count which was read out to the appellant, section 86 (1) of the WCA which creates the offence of Unlawful Possession of Government Trophy was cited together with section 86 (2) which provides for punishments. Unfortunately, the charge sheet is defective in so far as it failed to specify which, amongst paragraphs (a), (b), and (c) of sub-section (2) of section 86, creates the punishment for the offence of possession of Government Trophy for which the appellant was charged under section 86(1) of the WCA. This is an irregularity that makes the plea of guilty not to be unequivocal.

Further, for an unequivocal plea of guilty to be sustained in an appeal, statement of the offence shown in a charge sheet must disclose the ingredients of the offence and punishment that an accused person should expect should he plead guilty to the charge. We think, charge sheets must make correct reference to the provisions creating not only the offences, but also the punishment that is to follow should the accused person be convicted. In other words, an offence is unlawful act or omission that is punishable. An offence is not complete without attendant punishment.

Citing its earlier decision in **OMARI SETUMBI V. R.**, Criminal Appeal No. 277 of 2015 this Court in **SHEDRACK LOSHOC @ LOTA V. R.**, Criminal Appeal No. 28 of 2016 (unreported) stated:

> *"It has been the position of the Court that, where the charge sheet does not make proper reference to the enactment creating the offence, such irregularity is fatal."*

In the second count regarding the offence of Unlawful Dealing, we think Mr. Wasonga is right to fault the way the particulars of offence of UNLAWFUL DEALING was mere reproduction of "unlawful Dealing" contained in the Statement of the Offence. Unlike where an accused person pleads NOT GUILTY and witnesses are later called to clarify the nature of "UNLAWFUL DEALING;" the appellant before us, who pleaded guilty must rely on the clarity of the Statement of the Offence which unfortunately did not disclose to the appellant the nature of Unlawful Dealing in Government Trophy for which he was charged and pleaded guilty for. We think, looked at closely, section 80(1) and 84(1) of the WCA have the specifics of the offence of Unlawful Dealing with Government

Trophy which should have guided the drafting of the particulars of the offence in the second count.

Sections 80(1) and 84 (1) of the WCA for which the appellant was charged in the second count provides examples of "unlawful dealings" which should have featured in the particulars of the offence in the second count. Section 80 states:

> *"80 (1).-A person shall not deal in trophy or* ***manufacture from a trophy for sale*** *or* ***carry on the business of a trophy dealer*** *except under and in accordance with the conditions of a trophy dealer's licence."* [Emphasis provided].

In our reckoning, particulars of the offence of "Unlawful Dealing" under section 80(1) specify the nature of dealing in the form of "***manufacture from a trophy for sale***" or "***carry on the business of a trophy dealer***." By citing section 80 of the WCA in the Statement of the Offence in the second count, one would have expected the particulars of this count to show whether the appellant was manufacturing for sale any Government Trophy, or what type of business involving Government Trophy the appellant was engaged in.

Section 84(1) which features in the Statement of Offence in the second count states:

> *"84(1).- A person who **sells**, **transfers**, **transports**, **accepts**, **exports** or **imports** any trophy in contravention of any of the provisions of this Part....."* [Emphasis provided].

One would have expected the particulars of Unlawful Dealing under section 84(1) to specify the nature of "*selling*", or "*transferring*", or "*transporting*" or "*accepting*", or "*exporting*" or "*importing*" the appellant was engaged in.

Neither the particulars of the offence in the second count, nor the Memorandum of Facts, drew the appellant's attention to any of the categories of unlawful dealings under sections 80(1) and 84(1) of the WCA.

For failing in the second count, to specify the nature of "unlawful dealing" the appellant was involved in, the appellant's plea of guilty cannot be said to have been unequivocal.

In view of all the foregoing irregularities which make the appellant's plea of guilty equivocal, the appeal is allowed, the verdict and sentence of the trial District Court of Manyoni in Economic Case No. 08 of 2016 of 12/05/2016 are quashed and set aside. In addition, the subsequent proceedings and the judgment of the High Court at Dodoma in (DC) Criminal Appeal No. 76 of 2016 are quashed and set aside.

We order the District Court of Manyoni at Manyoni to take the plea of the accused afresh, meanwhile the appellant shall remain in custody pending the taking of his plea which shall be within 30 days of this decision. It is so ordered.

DATED at **DODOMA** this 4th day of July, 2018.

I. H. JUMA
CHIEF JUSTICE

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