

TANZANIA / JUDGMENT

abdul salehe bahati saidi v the republic

2023 tzhc 23784 4 december 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (TABORA DISTRICT REGISTRY)
AT TABORA CRIMINAL APPEAL NO. 07 OF 2023 (From the decision of the District Court of Kailua
in Original Criminal Case No. 06 of 2023, before Hon. A.E. Chiiongoiaf SRM) ABDUL
SALEHE 1st APPELLANT BAHATI
SAIDI..... 2nd APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 30/10/2023 Date of Judgment: 04/12/2023 KADI LU, J. In the District Court of Kailua, the appellants were charged with two counts namely, the unlawful introduction of domestic animals into the National Park contrary to Regulation 7 (1) and 20 of the National Parks Regulation, G.N. No. 50 of 2002 made under Section 25 of the National Parks Act, [Cap. 282 R.E. 2002] read together with Section 29 (2) of the same Act. The second count was unlawful disturbing the habitat of the component of biological diversity contrary to Sections 188 (c), 66, 67, 68, and 193 (1) (a),

- (b) (2) (4), and (5), all of the Environmental Management Act, 2004. It is alleged by the prosecution that on 04/01/2023, at Migungani area in Kigosi National Park within Kailua District in Tabora Region, the appellants did graze 319 herds of cattle without a permit and disturbed the habitat of the component of the biological diversity to wit; flora and fauna. At the hearing of the case before Kailua district court, on 11/01/2023 when the charge was read over to the appellants, each pleaded not guilty to the first count, but they both pleaded guilty to the second count. The trial Magistrate ordered the case to proceed to the preliminary hearing on 13/01/2023. On that date, when the appellants were reminded about the charge, both entered a plea of guilty to both counts. The prosecution narrated the facts constituting the appellants' case. According to the district court, the appellants admitted all the facts. Based on that finding, and without any further ado, the court convicted the appellants of the offence, and sentenced them to pay a fine of Tshs. 54,000/= each or serve a jail term of nine (9) months in default. Moreover, the court ordered the forfeiture of the 321 cows to the Government to be sold in public auction by the court broker and the proceeds to be deposited to the Government's bank account. Dissatisfied with the decision, the

appellants filed this appeal praying for the court to allow the appeal, nullify the proceedings of the trial court, quash the conviction, and set aside the sentence and the forfeiture order due to the following:

- 1) That, the appellants' plea was imperfect, ambiguous, unfinished and forthat reason, the trial court erred in law by treating it as a plea of guilty.
- 2) That, the appellants'plea ofguilty was a result of misapprehension or mistake as they did not understand the nature of the plea or offence.
- 3) That, the trial court erred in law and fact for improper admission of exhibits P1 and P2 and failure to consider that the substances of these exhibits were not read over to the appellants after the admission. 2
- 4) That, the trial court erred in law for failure to allow the appellants to dispute or explain the facts or to add to them, the trial court recorded not the appellants' own words, but its own.
- 5) That, how the proceedings were conducted at the trial court was irregular and/or improper. When the appeal was called for hearing, the appellants were represented by Mr. Saikon Justin, Advocate whereas the respondent was represented by Mr. Steven Mnzava, the learned State Attorney. I will consider the submissions by Counsel for both parties in the course of determining the grounds for appeal. I will consolidate the first, second, and fourth grounds of appeal, which upon a thorough examination, they all focus on one specific complaint that the plea upon which the appellants were convicted, was equivocal. From the outset, Mr. Saikon stated that the appellants did not plead guilty to any of the counts because according to him, the appellants had no sufficient understanding of the accusations against them so, the purported plea was not real. The learned Advocate argued that Section 360 (1) of the Criminal Procedure Act (CPA) prevents appeals against conviction of the accused person who pleaded guilty, but where the plea was equivocal, the appeal may be allowed. He referred to the case of Josephat James vR., Criminal Appeal No. 316 of 2010, Court of Appeal of Tanzania at Arusha where it was held that under certain circumstances, an appeal may be entertained by an appellate court notwithstanding that a conviction resulted from a plea of guilty. He mentioned the said circumstances to include where the plea was imperfect, ambiguous, or unfinished, or the appellant pleaded guilty as a 3 result of a mistake or misapprehension, where the charge levied against the appellant disclosed no offence known to the law, and whereupon the admitted facts, the appellant could not in law have been convicted of the charged offence. Mr. Saikon explained that in the case at hand, the appellants replied, "It is true. We grazed in the National Park without a permit" and that they destroyed natural vegetation. According to Mr. Saikon, it is not clear as to which National Park the appellants graze in. He also argued that it is alleged that the appellants admitted all the facts, but it is unclear as to which facts were admitted by each appellant. He invited me to read the case of Joseph Mahona @ Joseph Mboje @ Magembe Mboje v R., Criminal Appeal No. 541 of 2015 in which the Court of Appeal discussed the steps to be followed where the accused pleads guilty to the charge. Responding to Mr. Saikon's submissions, Mr. Steven

stated that the conviction and sentences meted upon the appellants were proper because Section 360 (1) of the CPA is clear that where the accused pleads guilty, he cannot afterward challenge the proceedings or conviction rather, he may challenge the sentence only. He cited the case of Laurence Mpinga v Republic, [1983] TLR 24, to support his argument. He refuted the assertion that the appellants' plea was imperfect, ambiguous, and unfinished because the trial court's proceedings show the appellants' clear plea. He added that there is no ambiguity regarding the National Park in which the appellants' 4 cattle were found as long as they had no permit, there was no justification for them to graze in any National Park. The learned State Attorney cited the case of Paulo Kaparage v R.f Criminal Appeal No. 73 of 2021, Court of Appeal of Tanzania at Tabora in which it was stated that where the plea is unequivocal, the appellate court cannot fault the finding of the trial court. In rejoinder, Mr. Saikon reiterated that since the learned State Attorney had not submitted anything concerning the facts admitted by the appellants, the trial court was not supposed to record a plea of guilty as the appellants' plea was improper, unfinished and ambiguous. I have hinted earlier that the gist of the appellants' complaint is that they were unlawfully convicted based on an equivocal plea of guilty, thereby rendering the subsequent sentence and orders illegal. To appreciate the appellant's complaint in the 1st, 2nd and 4th grounds of appeal, it is appropriate to quote the relevant proceedings of the trial court on 13/01/2023: "The accused persons reminded the charge and they replied: 1st count: 1st accused: "It is true, We did graze cows in the said area without a permit." 2nd accused: "It is true, we did graze in the National Park without a permit" Signed: A.E CHILONGOLA - SRM 13/1/2023. 2nd count: 5 1st accused: "It is true, we destructed natural vegetation in National Park by grazing 319 cows therein." Signed: A.E CHILONGOLA - SRM 13/1/2023. 2nd accused: "It is true, we destructed natural vegetation in National Park by grazing 319 cows." Signed: A.E CHILONGOLA - SRM 13/1/2023. Court: Entered plea of guilty to the charge. Signed: A.E CHILONGOLA - SRM 13/1/2023. PP: We are ready to adduce the facts of the case. Court: The facts containing the substance of the offences charged read over and explained to the accused persons who admitted to being true and correctly recorded in paragraphs 1,2,3,4,5,6,7,8 and 9 also undertake to sign- Signatures: 1st accused: 13/1/2023. 2nd accused: 13/1/2023. PP.-13/1/2023. Signed: A.E CHILONGOLA - SRM 13/1/2023. Court: Section 193 (3) of the CPA, Cap. 20 R.E. 2022 complied with." Thereafter, the court admitted as exhibits, a seizure certificate and map of the scene, Kigosi National Park. It visited the National Park where the Public Prosecutor prayed to tender the alleged 321 herds of cattle. As there was no objection from the appellants, the court proceeded as follows; Court: "321 herds of cattle admitted as exhibit P3/" 6 Signed: A.E CHILONGOLA - SRM 13/1/2023. It then heard a previous criminal record of the accused as well as the mitigating factors before it sentenced the appellants as shown earlier. The procedure to deal with a plea of guilty is stipulated under Section 228 (2) of the CPA which provides: "Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary." The provision quoted above was interpreted in the case of Khalid Athuman v R., Criminal Appeal No. 103 of 2005 thus: "When a person is

charged, the charge and the particulars should be read out to him so far as possible in his language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should allow the accused to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of the facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to the sentence. The statement of facts and the accused's reply must, of course, be recorded." From the excerpt, the trial Magistrate, in this case, was supposed to follow the steps enumerated above to satisfy herself that the appellants' plea of guilty was unequivocal. In *Michael Adnan Chaki v. Rt Criminal Appeal No. 399 of 2017*, the Court of Appeal established the circumstances in which a plea of guilty may be deemed to be unequivocal for purposes of conviction before the trial court. It held that for a plea of guilty to be unequivocal and therefore valid: First, the appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law; second, the court must satisfy itself without any doubt and must be clear in its mind that, an accused fully comprehends what he is faced with, otherwise injustice may result. Third, when the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies every particular ingredient of the offence. Fourth, the facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged. Fifth, the accused must be asked to plead and must actually plead guilty to every ingredient of the offence charged and the same must be properly recorded and must be clear. 8 In the instant case, the appellants were charged in the first count with the offence of unlawful introduction of domestic animals into the National Park contrary to Sections 25 (1) (d) and 29 (2) of the National Parks Act, read together with Regulations 7 (1) and 20 of the National Parks Regulation, G.N. No. 50 of 2002. In the second count, they were charged with unlawfully disturbing the habitat of the component of biological diversity contrary to Sections 188 (c), 66, 67, 68 and 193 (1) (a), (b) (2) (4) and (5), all of the Environmental Management Act. It appears that the trial magistrate, in conducting plea of guilty proceedings under Section 228 (2) of the CPA, adopted a procedure for conducting a preliminary hearing which is governed by Section 192 of the CPA whose purpose is to determine matters not in dispute to relieve the prosecution from the burden of summoning witnesses on matters not disputed by an accused person. In *Paulo Kaparage v. Rt Criminal Appeal No. 73 of 2021*, Court of Appeal of Tanzania at Tabora, it was observed that: "There is no doubt that the ultimate result of holding a preliminary hearing under section 192 of the CPA is to expedite the trial by not calling unnecessary witnesses to prove undisputed facts

hence shortening the trial period of the case." The procedure for conducting plea of guilty proceedings under Section 228 of the CPA is different from the procedure for conducting preliminary hearing proceedings in terms of Section 192 of the CPA. In the case of 9 Hyansint Nchimbi v R., Criminal Appeal No. 109 of 2017, it was stated that: have found it opportune to, once again draw the attention of magistrates to the difference between the procedure under section 228 of the CPA and that obtaining under section 192 of the CPA. The former provision applies when an accused admits the charge and the facts. The facts that are adduced under section 228 of the CPA are not by any means in the form of a Memorandum, but they are mere facts supporting the charge. The latter provision applies during the preliminary hearing when the accused has pleaded not guilty and the prosecution adduces facts with the view of ascertaining which of them are not disputed to speed up the trial and avoid the costs of calling witnesses to undisputed facts. At the end of the procedure under section 192 of the CPA, a Memorandum of undisputed fact, if there be any, is prepared. At the end of the procedure under section 228 of the CPA, a conviction is probably entered." By deviating from the procedure for conducting plea of guilty proceedings, the appellants lacked an opportunity to admit every element of the offence charged and to dispute or explain the facts or to add any relevant facts as required by the law. The trial Magistrate only recorded that the facts constituting the substance of the offences charged were read over and explained to the appellants who admitted them all as true and correct. Instead of disclosing the ingredients of the offence and the substance of the evidence amplifying the particulars of the offences in the charge, the prosecution narrated the facts which could enable the trial court to prepare a memorandum of undisputed facts, if the appellants had pleaded not guilty. io I agree with the argument by Mr. Saikon that the proceedings conducted by the trial court were rather unusual because after the appellants had pleaded guilty to the charge, the court conducted a preliminary hearing. In my considered view, that was improper and the plea of guilty entered cannot be held to have been unequivocal upon which to ground a valid conviction against the appellants. As to the way forward, after having established that the appellants never entered any lawful plea and were never legally tried, the next step is to consider an appropriate order to make. Mr. Saikon opined that this is not a fit case to order a retrial since it would mean allowing the prosecution to rectify the observed errors. He implored this court to nullify the proceedings and the conviction, to set aside the sentence and orders of the trial court. On my part, I think I cannot order a retrial in the circumstances of this case because the appellants were not tried at all. Likewise, I cannot order an acquittal of the appellants because their innocence or otherwise was not determined by the district court. Therefore, there are no gaps that may be filled by the prosecution as alleged because the prosecution did not present any evidence to prove their case and the appellants did not present their defence. Thus, based on the first, second, and fourth grounds of appeal, the submissions of the parties, and the law applicable, I nullify the disputed plea and the proceedings in the trial court. The conviction of the appellants based on the illegal plea is equally quashed. I further set aside not only the sentence imposed on the appellants but also the judgment and orders of the 11 district court, for they emanated from a nullity. For the foregoing reasons

and given the orders I have just made, I allow the appeal and direct that the case file in Criminal Case No. 06 of 2023 be remitted to the district court of Kaliua for hearing before another Magistrate according to the law, starting from the initial stage of reading over the charge to the appellants followed by all necessary trial procedures. The right of appeal is explained for any party aggrieved by this decision. Order accordingly. JUDGE 04/12/2023 Judgment delivered in chamber on the 4th Day of December, 2023 in the presence of Mr. Saikon Justin, Advocate for the appellants and Ms. Upendo Florian assisted by Ms. Aziza Mfinanga, State Attorneys for the JUDGE 04/12/2023. 12

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