

TANZANIA / JUDGMENT

amir francis kigahhey others vs republic

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM REGISTRY (DAR ES SALAAM DISTRICT REGISTRY) CRIMINAL APPEAL NO 51 OF 2019 (Appeal from Economic Case No. 5 of 2016, Resident Magistrate Court for Dar es Salaam at Kisutu)

1. AMIR FRANCIS KIGAHHEY..... .I st APPELLANT
2. JAIRANI MOHAMED RASHID 2nd APPELLANT
3. IBRAHIM SAMWELI MKANDE..... 3 rd APPELLANT VERSUS
REPUBLIC..... . RESPONDENT

JUDGMENT

MASABO J, L.: - The appellants Amir Francis Kigahhe, Jairani Mohamed Rashid and Ibrahim Samweli Mkande were charged of two counts in Economic Crimes Case No 5 of 2016, to wit: (i) leading organized crime contrary to paragraph 4 (1) (a) of the first schedule read together with Sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap R.E 2002] and (ii) Unlawful Possession of Government trophies contrary to section 86(1), 2 (c) (ii) and

- (3) (b) of the Wildlife Conservation Act ,No 5 of 2009 read together with paragraph 14 (d) of Economic Organised Crime Control Act [Cap 200 R.E 20002]. After full trial they were found guilty and each of them was sentenced to 20 years imprisonment for the first count and 20 years for the second count. Aggrieved the appellants appealed before this court on the following grounds;

1. That the trial magistrate erred in law and fact by convicting and sentencing the appellants relied on exhibits admitted before trial court and PRM failed to consider the irregularities of its chain of custody has no chronology of documentation such as PF 145 (EXH. Label form), P F 137 (Court Exhibit Register) and Handling over letter on the alleged Exhibits contrary to Police General Order (PGO-220);
2. That the trial magistrate erred in law and fact by convicting and sentencing the appellants relying on Exh PI (Alleged Court Register) which was tendered by unmaterial witness and illegal made contrary to police general order (PGO 229) procedure law.

3. That the trial magistrate erred in law and fact by convicting and sentencing the appellants relying on Exh P3 (seizure note) which was made illegally contrary to Section 38 of Criminal Procedure Act (Cap 20 R.E 2002);
4. That the trial magistrate erred in law and fact by convicting and sentencing the appellants while failing to draw adverse inference against the prosecution side for failure to summon crucial witness (independent witnesses and passersby at the locus in quo) and and the police who stored the alleged exhibit to come to testify on what transpired;
5. That the trial magistrate erred in law and fact by convicting and sentencing the appellant while the prosecution side failed to prove the charge on how the appellants were connected with the offence since the police who arrested the appellants and detained him in Police custody failed to tender arrest order and PF- 20 (Detention and Register) contrary to both criminal procedure Act (Cap 20 RE 2002) and Police General Order;
6. That the trial PRM erred in law and fact by convicting and sentencing the appellants merely relying on incurably defective charge as the time at which the crime was committed was not disclosed contrary to the procedure of law.
7. That the learned trial PRM erred in law and fact by convincing and sentencing the appellants while failed to draw an adverse inference against the prosecution side where the investigator of the case was not summoned to adduce his/her evidence and the map measurement , photograph of the crime scene or Police Note Book was not tendered before trial court as evidences contrary to procedure of law.
8. That the trial PRM erred in law and fact by convicting and sentencing the appellants where he failed to determine that the appellants were detained over period of time prescribed by law and there was no certificate of permit from court as issued to police to enlarge that period pursuant to the requirement of the law.
9. That the trial PRM erred in law and fact by convicting and sentencing the appellants on basis of uncorroborated and unjustified prosecution evidence and failed to asses and evaluate properly the evidences tendered by both parties before the trial court contrary to the procedure of law. The appeal was heard orally the appellants appeared in person and Ms. Tully Helela, learned State Attorney represented the Republic respondent. The matter was scheduled for judgment today. In the course of preparation of judgment, I discovered that the judgment appealed against is marred by two major irregularities. First, the issues for determination are not indicated; and Second, the appellants were not properly convicted. With regard to the first irregularity, Section 312(1) of the Criminal Procedure Act, provides that: 312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court." There are numerous authorities on the

interpretation of this provision including the case of George Mingwe V.R (1989) TRL 10 (HC) where it was held that: 4 "a judgement which does not conform with the provisions of s.312 (1) of CPA 85 is not a judgement in law and will certainly run the risk of being quashed, it has been said now and again that a judgement to be a judgement "must contain the point or points for determination the decision thereon and the reasons for the decision". As regards conviction, section 312(2) of the Criminal Procedure Act, Cap 20 RE 2002 provides that: "(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced [emphasis added]. The interpretation and application of this subsection has been a common subject in our courts. Thus, there exist a plethora of authorities to the effect that the subsection of couched on mandatory terms hence, failure to enter conviction in the manner prescribed above renders the judgment a nullity (see Ramadhani Masha V Republic [1980] TLR 172; Shabani Iddi Jololo and Three Others v. R., Criminal Appeal No. 200 of 2006, Court of Appeal of Tanzania (Unreported); Amani Fungabikasi v R, Criminal Appeal No. 270 of 2008, Court of Appeal of Tanzania (unreported); and Sam Sempemba and Another vs. Republic, criminal Appeal No 169 of 2010 CAT (unreported). 5 In the instant case, as alluded to earlier, the appellants were charged of two counts: (i) leading organized crimes contrary to paragraph 4 (1) (a) of the first schedule read together with Sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap R.E 2002] and (ii) Unlawful Possession of Government trophies contrary to section 86(1), 2 (c) (ii) and (3) (b) of the Wildlife Conservation Act ,No 5 of 2009 read together with paragraph 14 (d) of Economic Organised Crime Control Act [Cap 200 R.E 20002]. If after trial they were found guilty, it was important that the magistrate enter a proper conviction on each of the counts. On the contrary, the magistrate made a following conclusion: As aforesaid, the testimony by prosecution case sufficiently leveled and I therefore find accused's guilt and convict them forthwith". The conclusion above is totally non-compliant with the requirement of the law and as held in Fungabikasi's decision (supra), since there was no conviction entered there is no valid judgment upon which this court can could uphold or dismiss. As held in George Mingwe V.R (supra), since the judgment being appealed against is tantamount to no judgment it cannot escape the risk of being quashed. This having been said, I invoke the revisional powers of this Court in Section 44(1) of the Magistrate Courts Act, Cap 11 RE 2002, quash and set aside the said judgment of the trial court, which is not in conformity with section 312(1) and (2) of the Criminal Procedure Act. The sentence inflicted on the appellants is also quashed and set aside. The learned trial magistrate is 6 directed to prepare a judgment in accordance with the dictates of section

132. If this will prove to be impossible, for whatever good cause, the appellant should be tried afresh. DATED at DAR ES SALAAM this 11th day of December 2019. J.L. MASABO JUDGE 7

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