

TANZANIA / JUDGMENT

20190607 TZHC Mwanza

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I I IN THE HIGH COURT OF TANZANIA I j ,, IN THE DISTRICT REGISTRY ~(- , --- I \::":. . ., AT
MW ANZA 1~ I ~;--: . :~> He. CRIMINAL hrPEAL NO. 92 OF 2018 / . (Original Ecanom ic Case No.
\37of2017 .the District Court of Bunda . \ DANIEL S/O DAUDI@
KITERF. APPELLANT \vERSUS THE
REPUBLIC J..... RESPONDENT I . I . I

JUDGMENT

I 29/4/2019 & 7/6/2019. G. J. Mdemu, J; \ In the District Court of Bunda, tll Appellant was charged with economic case I No. 37 of 2017 for three counts, to wit; 'unlawful entry into a Gaqle Reserve contrary . I to section 15(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 and unlawful possessions of weapons in a Game R~Jrve contrary to section 17(1) and (2) of the I I Wildlife Conservation Act. No. S of 2009 and unlawful possession of government trophies contrary to section 86(1)(2)(~) of the Wildlife Conservation Act, No. 5 of 2009 read together with section 59 of the Written Laws (Miscellaneous ! Amendments) Act, No. 2 of 2016 and ~aragraph 14 of the First Schedule to and I sections 57(1) and 60(2) and (3) of the Economic and Organized Crime Control Act, I Cap. 200 as amended by section 13 arid , 16 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. \ I According to the facts, on the 27tlf of March, 2017 at Kemabere area within lkoronge Game Reserve, in Serengeti N:ational Park, the Appellant was found by I game wardens in possession of one Knife, one full carcass of impala, two sides of ribs, two forelimbs, and neck connected\~ith head of impala and one ostrich claw .

- .,~ I II . On that fateful day, Jurna Ginet, Boniphace Kisihi, PW1 and PW3 respectively, John I Joram and Anthony Marnboleo, while on patrol, found I the Appellant inside. the Game I Reserve possessing one knife and the named government trophies. He had no permit. I I m1 28 of March, 2017 the said trophies/got valued. According to exhibit P3, j certificate of valuation, impala trophy was valued at Tshs. 1,7,26,140/= whereas I ostrich claw was valued to Tshs. 2,655,600 if=. The Appellant was then charged, prosecuted and convicted on all the three coubts as follows; In the first and second I counts, the Court convicted and sentenced the i\ppellant I to a fine of 100,000 /= or 12 months imprisonment each. The Appellant wJs convicted and sentenced to twenty

(20) years imprisonment in the third count . df unlawful possession of government j . trophies. This was on 15th of august, 2017. I Aggrieved, the following grounds of I appeal got preferred:- I

1. That, the trial Magistrate erred on point of law and facts by believing I ' and relying on evidence produced by prosecution witnesses and I ignored completely my sole defence presented in Court anyhow. · I I
2. That, apart from PW1 and PW3 who I were game scout and PW2 is a park warden, there is no other independent I witness who came . before the Court to testify the evidence off' prosecution side. PW1, PW3 and I PW2 were the same people from th~ same offke and working. I I
3. That, exhibit P2 was wrongly tende red and admitted before the Court I I since was not tendered by an expert from the Government chemist as required by the law. I ..
4. That, consent from Director of PLblic I Prosecutions was not proved I whatsoever over by the prose ution side. {The Economic and 7 Orqanised ... Crime Control Act, 200 IIR.E 2002) 2/ ~c:::..... ==...J:::;•;,,,~<--- - - - -
5. That, the trial Magistrate misdirect~d himself when he wrapped the Criminal Procedure Aa in blanket a:nd threw away when he shifted the burden of proof to the de/enc\$ {Appellant). It is known and I accurate that always the burden of proof lies on prosecution side. . I H_ence in the case of Emmanuel Ka~wma Vs Rep (HCM} M~aikasu). Cr. App. No. 6 of 1983 TLR at pag 81. 1
6. That, in view of above grounds of ~ppeal, it is clear that the trial Magistrate erred in law and facts ti fail properly examine, consider and evaluate the evidence on recordland reached on wrong decision. The Appellant appeared in person alld the Respondent Republic had the I service of Ms. Maryasinta Lazaro, learned State-Attorney on the 29 th of April, 2019 . I . when the appeal. was called for hearing. TheI Appellant had nothing useful to add save for the grounds of appeal which he praYted to be adopted as his submission. He therefore prayed the appeal, for reasons c~ntained in the grounds of appeal, be allowed. . j Ms. Maryasinta Lazaro, learned State Attorney submitted on ground four only on want of the consent of the Director of PuJlic Prosecutions. She submitted briefly I that, the consent made reference to paragraph 14- of the First Schedule to the Economic and Organized Crime Control Act, Cap. 200. As the said paragraph has I several items, Ms. Maryasinta stated that, it :is not known which item the Appellant got charged subject to consent and certificJte. She therefore observed that, under 1 the circumstances, the District Court of Bun da had no jurisdiction over the trial of I the Appellant. She urged me, on those circumstances to order for a retrial. The I Appellant in rejoinder was not happy withI the suggestion of the learned State Attorney on retrial as what happened was nqt his fault. I should begin with observation madel by the learned State Attorney. I agree with her that, certificate of transfer an~! consent of the Director of Public Prosecutions should precisely state lwhich provision of the law the j 3 I-....c:. I accused/ Appellant has violated. jI'his should comprise sections in the

Act of Parliament creating an offence. It is not healthy, as is always done by the (prosecutions to issue consent and certificate comprising the provisions of the Economic and Organized Crime Control Act alone. This law, just make certain offences created by other laws to be economic. It cannot stand alone in the consent: . . . and certificate without mentioning other laws. Certificate and consent of those category, as in the instant appeal, are defective. Ms. Maryasinta having observed that defects, requested a retrial. It is trite law that, a retrial can only be ordered where there are chances of conviction by a Court properly directing its mind (see also *Dorminic Simon Vs R.* (1972) HCD 152 and *I Republic Vs S. Salehe* (1977) HCD 15. The learned State Attorney did not guide the Court on this important legal requirement. She abdicated her professional carrier. I will do it myself and in the final analysis, I will determine whether, a trial be ordered or not as guided by the learned State Attorney basing on want of consent of the Director of Public Prosecutions, but on substantive principles guided by the above case laws. My perusal to the record has revealed the following; In the first place, I thought the learned State Attorney could also comment, there was substitution of the charge after consent of the Director of Public Prosecutions and certificate have been filed in Court. According to the record, on 28th of March, 2017 consent and certificate got filed. A day later, that is on 29th of March, 2017, a charge was substituted. I am aware that the prosecutions are at liberty to substitute or amend their charge at any time provided the accused is given his/her legal rights guaranteed by the law. Notwithstanding, in my considered opinion, I am of the view that, for charges with prerequisites, trials should be sanctioned by the Director of Public Prosecutions, their amendment or substitution thereof should be with assurance recorded in the proceedings that, they had no any effect to the consent, short of which, another consent be issued after the amendment or substitution thereof. This is so especially where the amendment was so fundamental in the statement of offence, which may introduce either a section or omit a section. In either of the two scenarios, it has to be made clear that they tally with what was consented for. Reverting to the evidence on record, PW1 and PW3 all got involved in patrol that led to the apprehension of the Appellant. I have noted the following in their testimony; One, PW1 in his examination in chief among others, testified to have found the Appellant in possession of one piece of ostrich meat. When cross examined, he said it was claw of ostrich as PW3 also did testify. Two, PW3 testified in chief that, together with other trophies, the Appellant was found with impala. In fact, the evidence which is lacking to PW1. The latter on this stated as hereunder as at per page 4 of the proceedings:- "We searched him, we found one piece of meat of ostrich, he had one full carcass of impala also another carcass was half it had two side ribs, two fore limbs connected to a neck and head of impala" However, PW3 at page 8 of the proceedings stated as follows:- "We found him with a full carcass of impala, 2 fore limbs, 2 side ribs and a neck of impala---" Three, exhibit P3 tendered by PW2 do not account of what PW1 and PW3 testified. The said exhibit (certificate of valuation) contain the following government trophies:- "One full carcass of impala, two fore limbs, head, neck, ribs" There are the following mischief in the certificate of valuation. First, it has comprised the contents of a trophy neither testified by PW1 nor PW3. This is a head. It does not however state of

1, high wild animal. Second, it has not specified if the two fore limbs neck and ribs are of which government trophy. PW1 and PW3 said to be of impala. We cannot however impute that: the said unidentified trophies in the certificate of valuation are the same trophies handed over to PW2 by PW1 and PW3 who arrested the Appellant. The above analysis sums up to one thing that, the prosecution evidence comprises of contradictions and inconsistencies. The learned trial Magistrate did not rehear and resolve such contradictions as required by law. As complained by the Appellant in his grounds of appeal, the evidence is weak and the Magistrate did not properly evaluate this evidence. Ordering a retrial as guided by the learned State Attorney will be a miscarriage of justice. Accordingly, the appeal is allowed, conviction is hereby quashed and the sentence in all the three counts is hereby set aside. Unless lawful held, the Appellant should be released from prison forthwith. It is so ordered.

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