

TANZANIA / JUDGMENT

nestory nambamoja vs director of public prosecutions 2024 tzca 182 15 march 2024

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IN THE COURT OF APPEAL OF TANZANIA AT SUMBAWANGA (CORAM: KOROSSO, 3.A., MWAMPASHI, J.A.. And MASOUD. J.A.) CRIMINAL APPEAL NO. 505 OF 2019 NESTORY NAMBAMOJA.....APPELLANT VERSUS DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Sumbawanga) (Mashauri. J.~ > dated the 25th day of June, 2019 in Criminal Appeal No. 04 of 2019 JUDGMENT OF THE COURT 11th & 19 h March, 2024 KOROSSO. J.A.: The appellant Nestory Nambamoja was arraigned before the Resident Magistrate's Court of Katavi, tried and convicted for the offence of Unlawful Possession of Government Trophy contrary to section 86(1) and

- (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (WCA) read together with paragraph 14 of the First Schedule to, section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 (EOCCA). The particulars of the offence alleged that on 17/7/2018, on or about 17.00 hours at the Ilumbi area within Rukwa/Luafi Game Reserve, in the District of Mlele, Katavi Region, the appellant was found in unlawful possession of Government trophy, to wit, ninety kilograms of porcupine meat, valued at Tshs. 2,970,000/= (USD 1350.0), the property of the United Republic of Tanzania without a trophy certificate or a CITES permit from the Director of Wildlife Division. The appellant is recorded to have pleaded guilty to the charge. His plea of guilty to the charge moved the trial court to call upon the prosecuting State Attorney to read the facts substantiating the charge. The facts were read out and four exhibits were tendered to support the commission of the offence by the appellant. These included; the certificate of seizure dated 17/7/ 2018, the cautioned statement of the appellant, the Trophy Valuation Certificate, and 90 Kgs of porcupine meat which were admitted as exhibits PI, P2, P3 and P4 respectively, without any objection from the appellant. Subsequently, the appellant admitted that the narrated facts were correct and true and that after being read aloud, he well understood the contents and substance of the admitted exhibits PI, P2 and P3. In addition, having been shown exhibit P4, the appellant admitted that the same was found in his possession and he had no permit. On the strength of what transpired, the trial court found his guilty plea for the offence charged to be unequivocal. Consequently, he was convicted as charged and sentenced to serve twenty (20) years imprisonment. The appellant was aggrieved with the findings and sentence of the trial court

and preferred an appeal before the High Court in Criminal Appeal No. 4 of 2019. The appeal was 2 dismissed, the High Court Judge holding that the appellant's plea was unequivocal rendering the appeal unmeritorious. Aggrieved by the outcome of his appeal, the appellant has come to this Court with an appeal premised on four grounds of appeal which paraphrased give rise to the following complaints that fault the High Court for:

1. Dismissing the appeal even though the prosecution failed to prove the charge beyond reasonable doubt.
2. Failure to consider that the language used by the court in recording the appellant's plea of guilty was not understood by the appellant.
3. Not taking into account the prosecution's failure to tender a seizure certificate to prove the charge.
4. In recording a plea of guilty while the memorandum of facts where not written in compliance with section 192 of the Criminal Procedure Code, Cap 20 (the CPA). When the appeal was called for hearing, the appellant appeared in person, unrepresented while Mr. Deusdedit Rwegira, learned Senior State Attorney represented the respondent/Director of Public Prosecution (DPP). The appellant adopted the grounds of appeal filed and preferred to first hear the respondent's response to his grounds of appeal and be accorded leave to rejoin afterward. 3 On his part, adverting to the appellant's grounds of appeal, Mr. Rwegira, commenced by asserting his opposition to the appeal and support for the appellant's conviction and sentence meted out by the trial court and confirmed by the first appellate court. He submitted that he would respond to all the grounds of appeal conjointly having drawn one issue from them that is, whether the plea of guilty by the appellant was unequivocal within the confines of the law. Amid, his submission and having been engaged by the Court on this issue, he changed gears to support the appeal, contending that he had discerned some anomalies in the plea-taking proceedings. He contended that the plea-taking infractions included; one, the fact that the cautioned statement (exhibit P2) which was one of the exhibits admitted to substantiate the charge against the appellant was improperly admitted, having been recorded out of time contrary to section 50(1) of the CPA; and two, that the prosecution claims that the 90 kilograms of meat that the appellant was found in possession of, was porcupine meat, as alleged in the charge sheet, was not proved by any scheduled officer according to the law, which rendered the charge which the appellant pleaded against, defective. He thus contended that under those circumstances, the prosecution side failed to expound all the relevant ingredients of the offence charged when presenting the memorandum of facts and the appellant pleaded to a defective charge. In the circumstance, he argued what was admitted by the appellant did not amount to an 4 unequivocal plea of guilty. On the remedy, Mr. Rwegira urged the Court to find that a retrial will not be what justice demands taking account of the circumstances of the case, and left it to the Court to decide the way forward. In rejoinder, apart from extending his appreciation for the submission of the learned Senior State Attorney, the appellant reiterated his earlier prayers for his grounds of appeal to be considered, his appeal be allowed and he be set at

liberty to join his family. A careful scrutiny of the grounds of appeal before us for determination and the submissions from the contending parties has convinced us that the central issue for our determination arising from grounds 1, 2 and 3 of appeal is whether the plea which was entered by the appellant to the charge which he faced was unequivocal. We shall refer to the remaining ground 4 if that need arises. As we begin our deliberations, we find it fitting to emphasize the fact that generally, the doors to appeal against the conviction of a person convicted of an offence on his own plea of guilty are blocked. In such circumstances, such a person can only appeal against the extent or legality of the sentence imposed as provided by section 360 (1) of the CPA as held in *Luhinda Njemu v. Republic*, Criminal Appeal No. 300 of 2012 (unreported). However, under certain circumstances, an appeal may be entertained even though a person was convicted of the offence charged following a plea of guilty as set out in the decision of the High Court in the case of *Laurence Mpinga v. Republic* [1983] T.L.R. 166 which was subsequently approved by several decisions of the Court, including in cases of *Josephat James v. Republic*, Criminal Appeal No. 316 of 2010, *Ramadhani Haima v. Republic*, Criminal Appeal No. 213 of 2009, *Karlos Punda v. Republic*, Criminal Appeal No. 153 of 2005 and *Michael Adrian Chaki v. Republic*, Criminal Appeal No. 399 of 2019 (all unreported). According to these cases, those grounds are as follows: "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". Another relevant provision of the law in respect of pleas of guilty, is section 228(1) and (2) of the CPA which states: "228(1)- The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
- (2) If 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 contrary. Certainly, sections 360(1) and 228 of the CPA emphasizes that; one, there can be no appeal from a conviction emanating from own plea of guilty unless it is against the sentence or the plea emanating from the conditions expounded above. Two, the conviction of an accused on a plea of guilty, requires the trial court to be satisfied that the plea amounts to an admission of every constituent of the charge and it is unequivocal. [See, *Msafiri Mganga v. Republic*, Criminal Appeal No. 57 of 2012 (unreported)]. In the present case, we find it pertinent to reproduce the charge and what transpired in the trial court which has led to the instant appeal. "CHARGE STATEMENT OF OFFENCE UNDER LAW FULFILLMENT OF GOVERNMENT TROPHY: Contrary to section 86(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 of the First Schedule to,

sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] both as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016. PARTICULARS OFFENCE NESTORY S/O NAMBAMOJA is charged on the 17th day of July 2018 on or about 17:00 HRS at Humbi area within Rukwa/Luafi game reserve the District of Mlele in Katavi Region was found in unlawful possession of government trophy, to wit, ninety

- (90) kilograms of porcupine meat with the value of ONE THOUSAND, THREE HUNDRED AND FIFTY USD dollars (1,350) equivalent to Tanzanian Shillings, two million, nine hundred and seventy thousand (Tshs. 2,970,000/=) only, the property of the Government of United Republic of Tanzania without a trophy import certificate or a CITES permit from the Director of Wildlife Division". The proceedings of 20/7/2018 on plea taking went thus: 'S/A : This is a fresh charge. It is an economic case, and the DPP has filed the consent and certificate conferring jurisdiction upon this court That's all. 8 Court: Charge read over and well explained to the accused person in Swahili language which the accused is familiar with, and required to plea thereto. Accused plea : It is true. Court: Plea of guilty entered. RM's Name, Signature and date S/A : The accused has pleaded guilty to the charge. Therefore, pray to proceed with the facts U/S 228 of the CPA Cap 20 R. E 2002. Court: Prayer granted. (RM's Name, Signature and date)". Thereafter, the State Attorney presented the facts which in essence alluded to one, that the particulars of the accused were as per the charge sheet. Two, that on 17/7/2018 around 17:00 hours, the appellant was in a temporary camp built within Luafi Game Reserve within Mlele District and was found and apprehended by Park Rangers Thomas Edward and Amos Sweka. Three, the appellant admitted not having a permit to enter or build a temporary camp in the Game Reserve. Four, the search in the appellant's camp conducted by the Park Rangers led to the seizure of 90 kilograms of porcupine meat, which the appellant had in his possession. Five, the certificate of seizure prepared thereafter, was signed by the appellant and the park rangers. Six, a certificate of seizure dated 17/7/2018; appellant's cautioned statement of 18/7/2018; and Trophy Valuation certificate revealing that the seized meat was that of porcupine valued at Tshs. 2,970,000/= (USD 1350.0) were admitted into evidence without objection from the appellant as exhibits PI, P2 and P3 respectively. Seven, exhibits PI, P2 and P3 upon being admitted, were read aloud in court and the appellant stated after each one: "I have well heard and understood the contents of the exhibit" Eight, the 90 kilograms of porcupine meat of which the appellant was found in possession, was tendered and without objection from him, admitted as exhibit P4. Moreover, upon the State Attorney reading the facts, the record of appeal on pages 12 and 13 shows the appellant to have stated: 'I have well heard and understood all the facts read and explained to me and saw the exhibits. I do admit all the facts to be true and correct 'Nime sikia mae/ezo yote ya/iyosomwa kwangu na kuona vielelezo vyo te vilivyotolewa. Nakirikuwa mae/ezo hayo nikweli nani sahihi. 'I admit to have entered Luafi Game Reserve without permit, and I was found in possession of government trophy without permit to wit, 90 kilograms of porcupine meat. 'Nakuba hnilingia porila kiba la Ruafi bika kiba/i, na huko nilikuwa na ny

ra za s e rik a li am bayo n i k ilo 9 0 za nyam a ya N ungunungu'. I adm it to have com m itted the offence o f being found in possession o f trophy unlaw fully. N a k iri ku te n d a k o sa la ku ku tw a n a n ya ra b i/a k ib a li'. That is a ir . Having examined the facts arising from the proceedings of the trial court as shown above, and taking into account the fact that; na plea o f g u ilt y is an unequivocal acceptance by an accused person o f a ll the inculpatory facts that constitute an offence..." as held in *Selemani Juma Mkwanda v. Republic*, Criminal Appeal No. 10 of 2004 (unreported), the question that persists in our minds is whether, in the instant case, the plea of guilty entered by the appellant is imperfect, ambiguous, unfinished or a result of mistake or misapprehension. In our scrutiny of the plea entered by the appellant to the charge read over to him, as well as his response to the facts of the case narrated to him, we do not doubt that the appellant clearly understood the nature of the charge against him. Indeed, this is reflected in the detailed response he gave to each set of facts or exhibit tendered and admitted. The proceedings as found in the record of appeal show the trial court to have recorded Swahili version of his responses which further negates any possibility of imperfection, ambiguity, or misapprehension in his plea of guilty. For the foregoing, we are constrained to differ with the learned Senior State Attorney's position that the plea was equivocal for reasons 11 already provided earlier on. We wish to state that his argument that exhibit P2 affected the plea of guilty since it was admitted in evidence while its recording did not comply with the law having recorded out of time does not hold water. This Court held in *Matia Barua v. Republic*, Criminal Appeal No. 105 of 2015 (unreported), that tendering an exhibit be it an object or a document after an accused person has pleaded guilty to the charged offence, is not a legal requirement though it is desirable to do so. Similarly, in *Onesmo Alex Ngimba v. Republic*, Criminal Appeal No. 157 of 2019 (unreported), the Court held that tendering an exhibit after an unequivocal plea has been recorded does not have any effect on the said plea as it was not based on the admitted exhibit. What we can gather from the cited decisions is that tendering of exhibits is not a legal requirement upon a plea of guilty having been entered, though desirable. An unequivocal plea of guilty as the one by the appellant in the instant case, cannot be vitiated by an improperly admitted exhibit, where the plea did not rely on such an exhibit. In the present case, the record of proceedings at the trial court shows that the conviction of the appellant was the consequence of the appellant's unequivocal plea and not based on the admitted exhibits. We also find his argument that the charge was defective to be misconceived since it is not substantiated by the record. The appellant's plea of guilty and admission of the narrated facts substantiating the 12 offence charged as correct referred to the 90 kgs porcupine meat, an important ingredient of the offence in the charge. Therefore, throughout the process, the appellant understood that he was found in unlawful possession of 90 kilograms of porcupine meat and admitted the fact to be correct and true. The argument by the learned Senior State Attorney of absence of an expert to prove it was porcupine meat does not hold water. Regardless, the valuation report tendered as exhibit P3, stated that what the appellant was found in possession of was porcupine meat. To be noted is the fact that the Wildlife Conservation (Valuation of Trophies) Regulations, 2012, GN No. 207 of 2012, spells out the valuation of trophies and information to be filled in any Trophy

Valuation Certificate like exhibit P3. It states that apart from bearing the name and designation of certifying officer, it is divided into seven columns to be filled with such important facts as - (i)- type of trophy; (ii)- number of pieces of the trophy concerned; (iii) number of specified unlawfully killed; (iv) weight in kilograms; (iv) value per kg/pieces in USD; and (vi) total amount in USD. Therefore, clearly, the one who fills the form is mandated to fill the type of trophy, and in this case, it was porcupine meat. It should be noted that in terms of section 86(4) of the WCA, a trophy evaluation certificate can be issued by the Director or a Wildlife Officer from the rank of Wildlife Officer. In the case of Jamali Msombe v. Nicholas Bilali @Myovela, Criminal Appeal No. 28 of 2020, we held that a Game Ranger, Game 13 Warden, Wildlife Officer, Wildlife Ranger and Game Ranger are same persons whose main task is to protect wildlife and in essence, either can fill the Trophy Valuation Certificate. In those circumstances, we find that the Game Warden who filled out the certificate is authorized to do. Nevertheless, as discussed above, the appellant pleaded to the facts narrated and not to exhibit P3 contents. Regarding ground 3 that the first appellate court did not take into account the failure of the prosecution to tender the seizure certificate, we find it to be misconceived, since the record shows it was tendered and admitted as exhibit PI. Suffice it to say, that even if it would not have been tendered, as argued above, it would not have devalued the unequivocal plea of guilty as already expounded above when addressing queries on the admitted exhibit P2 and P3. For the foregoing, we agree with the findings of the first appellate court that the plea of guilty by the appellant was unequivocal. Regarding the appellant's complaints found in the 2nd and 4th grounds of appeal, we are constrained to note that they need not take much of our time. As reproduced hereinabove, we find the complaint to be grounded by misconception since the record of proceedings shows that the charge was read in Swahili, a language known to the appellant. Therefore, his complaint in the 2nd ground that the language used in the plea taking is unknown to him is not justified. The other complaint by the appellant 14 found in the 4th ground, is that the memorandum of facts was not written in compliance with section 192 of the CPA, which we also find to be misconceived. We think it is opportune to adopt the finding of this Court in Hyasint Nchimbi v. Republic, Criminal Appeal No. 109 of 2017 when we held: "Section 228 of the CPA ... applies when an accused admits the charge and facts. The facts that are adduced under Section 228 are not by any means in the form of a Memorandum, but they are facts supporting the charge. (Section 192 of the CPA) applies during preliminary hearing when the accused has pleaded guilty and the prosecution adduces facts with the view of ascertaining which of them are not disputed so as to speed up 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 facts, if there be any, is prepared. At the end of the procedure under Section 228 of the CPA a conviction is probably entered'. Certainly, from the above excerpt it should be clear that upon a plea of guilty by the accused person, a trial court proceeds under section 228

(2) of the CPA, that is, if satisfied the plea is unequivocal, it "sh a ll convict him and pass sentence..." Section 192 of the CPA applies when there is a plea of not guilty and thus is not applicable in the instant case. 15 All in all, we are constrained to agree with the decision of the High Court because in essence given the appellant's unequivocal plea to the charge, the appeal before it was incompetent under section 360(1) of the CPA. In the end, the appeal being unmeritorious, is dismissed in its entirety. DATED at SUMBAWANGA this 14th day of March, 2024. W. B. KOROSSO JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgement delivered this 15th day of March, 2024 in the presence of the appellant in person/unrepresented and Kizito John Kitandala, Ms. Hongera Mafilimbo, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original. A. L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL 16

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