

TANZANIA / JUDGMENT

SAMSON EMMANUEL 4 OTHERS VS REPUBLIC

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MWANZA SUB REGISTRY) AT MWANZA CRIMINAL APPEAL NO. 7048 OF 2024 (Originating from Economic case No. 5/2022 of Sengerema District court at Sengerema before Hon. Barnabas T.G. (SRM) on 04/01/2023)

1. SAMSON S/O EMMANUEL..... APPELLANT
2. SHALALI S/O JISANDU..... APPELLANT
3. HAMISI S/O NGURUMO.....APPELLANT
4. MOHAMED S/O NASIBU..... APPELLANT
5. MATHAYO S/O ROBERT..... APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGEMENT

18h July & 2ndAugust, 2024 A. MATUMA, J. The appellants herein above named stood charged in the District Court of Sengerema at Sengerema for an offence of JJnlawful Possession of Page 1 of 8 Government Trophies Contrary to Section 86(1) (2) (c) (iii) of the Wildlife Conservation Act, Cap. 283 R.E 2022 read together with paragraph 14 of the first schedule and section 57 (1) and (60) (2) of the Economic and Organized Crimes Control Act, cap. 200 R.E 2022. They were alleged to have been found in possession of government trophies on the 16th July, 2022 at Mission area within Sengerema District in Mwanza Region. The alleged trophies are 7 pieces of Elephant Tusks valued at USD 60,000 equivalent to Tshs. 138,957,000/=. The Director of Public Prosecutions consented to the prosecution of the appellants for such offence of Unlawful Possession of Government Trophies. Thereafter the case started for trial and in the course of trial the prosecution made several amendments of the charges. On 15th December, 2022 the substitution was made to do away with the charge of a single count and introducing a new charge with two counts; Unlawful possession of Government trophies and Leading Organized Crimes. The preliminary hearing was conducted on this substituted charge and then the case scheduled for trial. On this charge ten prosecution witnesses gave their respective evidences. Page 2 of 8 Then the prosecution on 26/09/2023 substituted the charge by adding two more counts to make the charge with four counts as clearly seen at page 103 of the typed proceedings; "PP: The matter is for hearing..... we pray

for amendment of the charge.... by adding counts from two to four counts" The court allowed the amendments and four counts were read to the accused persons as can be seen at page 103 to 104. But for unclear records the appellants were convicted on the charge sheet with five counts; Unlawful possession of government trophies, Leading Organised Crime, Unlawful dealing in trophies, Unlawful possession of fire arms, and Unlawful possession of ammunition. In each count a sentence of twenty years jail term was pronounced. Aggrieved with such conviction and sentence, the appellants are now before this court with several grounds but I will not reproduce all the grounds of appeal in this Judgment because only one ground suffices to determine the appropriateness of the conviction and sentence against the accused persons. Page 3 of 8 At the hearing of this appeal the appellants were present in person and the Respondent was represented by M/S Revina Tibilengwa learned Principal State Attorney. Both parties were in agreement that the proceedings and judgment of the trial court was a nullity and thus the conviction illegal. The learned Principal State Attorney submitted that the counts which were added in the subsequent substituted charges required consent of the Director of Public Prosecutions but such substituted charges were tried without the consent and certificate of the DPP being sought and obtained. She cited the case of Mwanaharusi SaHrnu Mshahara versus The Republic, Criminal Appeal no. 403 of 2022 in which the Court of Appeal held that under section 12(3) of Cap. 200 supra the consented offences by the DPP must be reflected in the Consent Deed along with the provisions contravened failure of which the proceedings become a nullity. The learned principal State Attorney further argued that in the instant case the DPP consented only to one Count and the rest counts which came through amendments were not consented for. The learned counsel further submitted that even the substitution of the charges was made without informing the appellants of their rights to have the witnesses recalled for further cross examination. Page 4 of 8 Under the circumstances she argued the proceedings of the trial court to be nullified and the impugned judgment be quashed. As to the way forward the learned Principal State Attorney argued this court to order a retrial because she believe that the evidence on record is strong enough to warrant the appellants to be recharged. She pointed out that there is direct evidence of an eye witness, there is confession leading to discovery as well as cautioned statements of the 1st and 5th appellants which were tendered in evidence without objection. On their part the appellants, each supported the arguments of the Public Attorney but differed with her on what should be the way forward. To them, the appropriate way forward is to acquit them because they have been in custody for more than two years and the prosecution might use the retrial to fill in the gapes. As rightly observed and submitted by the learned Principal State Attorney, the substitution of the charges was made contrary to the law. Although it is not the law that witnesses must always be recalled to testify afresh when the charge sheet is substituted, it is a mandatory legal requirement that once the charge is substituted while some evidence has already been taken, the trial court must inform the accused person of his right to have the witnesses who have already testified recalled^ This requirement is Page 5 of 8 under section 234 (2) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The requirement is to inform the accused of such right and not to an automatic recall of the witness or witnesses. The accused might even not wish the witnesses to be recalled and the Court may as well refuse the prayer to have the witnesses recalled. In the case of Omary Kitambo Vs the Republic, Criminal appeal No. 94/2014 the Court of Appeal determined the rights of the accused

person under the provisions of section 234 of the CPA supra upon substitution of the charge in the course of trial and held that violation of any of the rights thereof vitiates the proceedings. In the instance case, it was wrong for the trial court to stay mute without informing the appellants that they had a right to demand the witnesses who had already testified to be recalled for either; to give the evidence afresh or for further cross - examination. In the case of the Republic Vs. Jumanne Mohamed[1986] TLR 232 the court in discussing section 234 (2) (b) supra stated. " Where the accused before the court of law is a layman or a lawyer who is not likely to know Page 6 of 8 (sufficiently) the provisions of section 234 (2) (b) of the Act, the court is under duty, in the interests of justice, to inform the accused of his rights under the subsection and find out from him which right, if any, he proposes to exercise". The court went on that; "The accused's reply should be reflected on the record of the case". In this case the provisions of the law supra were completely ignored by both the Prosecutor and the trial magistrate. Failure to adhere to the requirements of Section 234 (2) (b) supra renders the trial a nullity and vitiates the decision arrived at the end of the trial. In the instant appeal, I rule out that failure of the trial court to comply fully with section 234 (2) (b) supra was fatal and rendered the proceedings at the trial a nullity. Again, as rightly submitted by the learned attorney, the substituted charges were not consented for by the DPP and thus the trial thereof a nullity. s' Page 7 of 8 With the herein above anomalies and as rightly suggested by the learned State Attorney, I nullify the proceedings of the trial court and quash the conviction and set aside the sentences of twenty years meted against each appellant. Having considered the evidence on record I am in agreement with the learned Principal State Attorney that a retrial would be a just order to make. This is because there is a prima facie case against all accused persons for they were arrested on a trap base. The period served by each of the appellant is very small compared to the years they ought to serve had everything been in its place. I therefore order the retrial of the appellants to the charge which was consented by the DPP unless further charges are consented for. In case of a new conviction to any of the appellants, I direct that the due sentence shall be entered but with clear deductions of the period already served by the appellants. Right of further appeal is explained. It is so ordered^" atuma Judge 02/08/2024 Page 8 of 8

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