

TANZANIA / JUDGMENT

shigela mazudi lindui mazuri 5 others vs the republic 2023 tzhc 18041 12 may 2023

COURT
TZHCDECIDED
12 May 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY) AT MTWARA CRIMINAL APPEAL NO. 16 OF 2023 (Originating
from Criminal Case No. 07 of 2023 at Lindi Resident Magistrate Court)

1. SHIGELA MAZUDI LINDUI MAZURI
2. SANDU PAUL MALANDO
3. LANDU TARIGULA SHIJA
4. MANGAIKA KISINZA APPELLANTS
5. MAHERA LUBABANGA Luchagula
6. NYANGA HASSANI MASANJA VERSUS THE
REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 24.04.2023 Date of Judgment: 12.05.2023 Ebrahim, J: The six Appellants herein namely Shigela Mazudi Lindui Mazuri, Sandu Paul Malando, Landu Tarigula Shija, Mangaika Kisinza, Mahera Lubabanga Page 1 of 10 Luchagula and Nyanga Hassani Masanja were charged and convicted on their own plea of guilty for the offence of unlawfully introducing domestic animals in the National Park contrary to sections 25(1)(d) and 29(2) of the National Park Act, Cap 282 RE 2002; read together with Regulation 7(i) and 20 of the National Park Regulation GN 50 of 2002 as amended by GN No. 4 of 2003. It was alleged that the above named Appellants on 22nd day of February 2023 at Njenje Maporomoko Area in Nyerere National Park within Liwale District in Lindi Region introduced into the National Park domestic animals to wit 205 cows and 1 donkey without permit. The said animals were admitted into evidence as exhibit P3. After hearing and considering the antecedents presented by the learned State Attorney and mitigations of the Appellants, the trial Magistrate sentenced each Appellants to pay fine of Tshs. 200,000/- or serve twelve months' imprisonment in default. The trial magistrate ordered further the forfeiture of 205 herds of cattle and one donkey under section 29(2) of the National Park Act, Cap 282 RE 2002. Aggrieved, the Appellants have preferred the instant appeal raising two grounds of appeal as

follows: Page 2 of 10

1. That, the trial court erred in law and facts to order the forfeiture of 205 cows and 1 donkey to the government while disregarding and ignoring the Appellant's mitigation and relying on the provision which is not mandatory to impose the forfeiture order.
2. That, the trial court erred in law and facts to sentence the 4th, 5th and 6th Appellants illegally totally ignoring their mitigation and imposing fines to the tunes of Tshs. 200,000/- or twelve months' imprisonment in default without regarding them to be children of the tender age or below the age of sixteen years. When the case was called for hearing, the Appellants were represented by advocate Alex Nyoni and the Republic had representation of Ms. Kono Komba learned State Attorney. In his submission challenging the decision of the trial court, advocate Nyoni faulted the trial court for imposing a forfeiture order under section 29(2) of the National Park Act which does not mandatorily impose forfeiture but rather gives mandate to the court to forfeit the goods/vehicle used in the commission of the offence. He argued that the trial magistrate did not consider the mitigation factor that apart from being the 1st offenders, the claimed that there no marks to show Page 3 of 10 that they were within the National Park. He advised the court to implore the conditions of granting an order for injunction be employed in issuing an order for forfeiture. Arguing the second ground of appeal, advocate Nyoni stated that the trial magistrate did not consider the fact that the 4th, 5th and 6th Appellants are under the age of 16 years i.e., they are aged 15, 15 and 13 years respectively when she imposed the sentence c/s 326(1) and 337 of the Criminal Procedure Act, Cap 20 RE 2022. He added that the 4th, 5th and 6th Appellants are Children under the provisions of section 118 and 119 of the Law of Child Act which requires the court to impose an alternative punishment and that the fine be directed to the parents. Basing on the shortcomings that he pointed out, advocate Nyoni prayed for the appeal to be allowed. Responding to the submission by the counsel for the Appellants, Ms. Kono counsel for the Republic partly agreed with advocate Nyoni's submission that the 4th, 5th and 6th Appellants were minors hence the court ought to have warned itself and impose an alternative punishment. She added that the fine imposed did not state that the same should be directed to the guardian or next friend. She however, urged this court to invoke its inherent powers and Page 4 of 10 issue an appropriate order as to who should be pay for the children as per section 118 of the Law of the Child Act. She commented however that the error is inly on the execution of the order because the court imposed alternative sentence and the fine has already been paid. Responding on the 1st ground of appeal, Ms. Kono reverted to page 16 of the proceedings where she said the court before imposing a sentence took aboard the mitigation factors as well as the prayer for forfeiture which was made under section 29(2) of Cap 282 by prosecution side. He argued further that the term "may" means the court has discretionary powers and in this case the court found in its wisdom to order for forfeiture and assigned reasons for its decision. She thus urged the court to see that the ground of appeal is irrelevant and prayed for the order to be upheld. In rejoinder, Mr. Nyoni simply reiterated his submission in chief and insisted that the Appellants did not know the boarder. Before I proceed to determine this appeal, I find it apt to state at the outset that the

argument by Mr. Nyoni that the Appellants did not know the borders is irrelevant and cannot be termed as a mitigation as it is a defence which would have required evidence to determine it. Since they pleaded guilty to the offence, they have no room to bring such a defence at a mitigation stage. Page 5 of 10 I therefore ignore his line of argument in so far as the issue of borders is concerned. I shall begin by addressing the second ground of appeal on the punishment imposed to the 4th, 5th and 6th Appellants. Firstly, at page 8 of the typed proceedings of the admitted facts show that the 4th accused person was 18 years of age. Therefore, the 4th Appellant was he was not a child (minor) during the conviction and sentencing in terms of section 4(1) of the Law of the Child Act, Cap 13 RE 2019 which define a child a person below the age of 18 years. It is only the 5th and the 6th Appellants who were recorded to be 15 and 13 years respectively. Verily, the law i.e., section 118(1) of the Law of the Child Act, Cap 13 RE 2019 clearly provides that where a child is convicted of an offence and fine is imposed, the court may order that fine to be paid by the parent, guardian or relative of a child unless otherwise. Further, section 119(1) CAP 13 specifically prohibits a custodial sentence of a child. Coming to our instant case, the trial magistrate imposed a fine of Tshs. 200,000/- or 12 months' imprisonment to all the Appellants without recognition of the 5th and 6th Appellants being minors hence the issuance of Page 6 of 10 an alternative punishment only. As observed by the learned State Attorney, the trial magistrate rightly imposed a fine only that she did not order for the said fine in respect of the 5th and 6th Appellants to be paid by their parents or guardians or relative. In a view of setting the records straight much as the same has been paid hence overtaken by event, I accordingly revise the order and state clearly that the fine of Tshs. 200,000/- in respect of the 5th and 6th Appellants should be paid by their parents, guardian or relative in line with section 118 (2) of Cap 13. Now coming to the forfeiture order. Counsel for the Appellants argued that the trial magistrate ignored the mitigations of the Appellants and ordered for forfeiture of the cattle while the law i.e., section 29(2) of the National Park Act does not mandatorily order for forfeiture. He advised the court to consider the elements for issuance of injunction. Out-rightly, the argument of consideration of elements of injunction in ordering a forfeiture order are misguided considering the fact that he is comparing two different laws with different circumstances. In fact, it is a stretch of his imagination. In essence, he is comparing a criminal liability which calls for a criminal conviction and punishment to a civil liability where one is called to redress the wrong doing. Therefore, this line of argument is farfetched. Page 7 of 10 Indeed, section 29(2) of the National Parks Act allows the court to order the forfeiture of the domestic animals entered into the National Park to the government. The powers are discretionary. I agree that discretionary powers should be exercised judiciously which means by applying common sense, wisdom and asserting reasons. I do not however agree with the counsel for the Appellant that since the Appellants stated their mitigation then the trial magistrate has to decide in their favour. I must state out-rightly here that as a general principle, an appellate court cannot interfere with the exercise of the discretion of the lower court unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account. At this instant I subscribe to the holding of the Court of Appeal in the case of TCCIA Investment Co.

Ltd Vs DR. Gideon H. Kaunda, Civil Appeal No. 310 of 2019 which quoted with approval a decision of the erstwhile Court of Appeal for East Africa in the case of Mbogo and Another v. Shah [1968] 1 EA 93, that: "The relevant passage is as per Sir. Clement de Lestang VP at page 94 thus: I think it is well settled that this Court will not interfere with the exercise Page 8 of 10 of its discretion by an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion,"[Emphasis added]. In this case, the trial magistrate rightly considered all the mitigations factors as stated by Appellants including the facts that they are first offenders and that they depend on them for their livelihood. On the other hand, the trial magistrate also considered the prayer by prosecution side to confiscate the animals and reasoned that the Appellants were charged for contravening the law and regulations and destroying the prospects of the nation's economy as whole. She thus ordered the forfeiture among other punishment so that it can deter the act of introducing domestic animals to the National Park and equally serve as a lesson to the society as a whole. As such she reasoned by looking at a bigger picture in serving the nation's economy for a greater. In that I cannot fault her. From the above therefore, save for the revision of an order concerning an alternative punishment to minors and ordering the payment of fine by the parents in respect of the 5th and 6th Appellant so as to set the records Page 9 of 10 straight; I find the appeal to be un meritorious and I accordingly upheld the forfeiture order of the trial court. This appeal is therefore dismissed. Accordingly ordered. R.A Ebrahim JUDGE Mtwara 12.05.2023 Page 10 of 10

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