IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., MWAMPAŞHI, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 478 OF 2021

NOAH SAJILO ..... 1ST APPELLANT

SHUKURANI NYANG'AA @ PATRICK ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania at Dodoma)

(Siyani, J.)

dated the 23rd day of August, 2021

in

Dc. Criminal Appeal No. 162 of 2020

JUDGMENT OF THE COURT

08th December, 2023 & 2nd January,2024

LILA, JA:

This appeal presents very peculiar circumstances such that it is not even proper to say that it is an appeal against 'convictions' and 'sentences'. It arises from the judgment of the High Court of Tanzania at Dodoma in consolidated DC Criminal Appeals No.149 and 162 of 2020 which dismissed the appellants' appeal for want of merit.

It is vivid from the record of appeal that before Manyoni District Court, in Economic Case No. 95 of 2017, the appellants were jointly arraigned to answer a charge which comprised six counts. In counts

number 1, 3 and 6 they were charged with the offence of unlawful possession of Government Trophies contrary to sections 86 (1) (2)(c)(iii), 3(b), 111(1)(a) and 113(2) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) and (b) of the Written Laws Miscellaneous Amendment Act No. 2 of 2016 (the WCA) read together with paragraph 14 of the First Schedule to the Economic and Organized Crimes Control Act as amended by sections 16 (a) and 13 (b) and 16(a) of the Written Laws Miscellaneous Amendment Act No.3 of 2016 (the (the EOCCA). The remaining counts, that is counts number 2, 4 and 6, the accusations were about unlawful dealing in Government Trophies contrary to sections 80 (1), 84 (1) and 113(2) of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA, as amended by sections 13(b) and 16(a) of the Written Laws (Miscellaneous amendment) Act No. 3 of 2016.

The appellants pleaded not guilty on all the offences. Six witnesses and 11 exhibits were produced in a bid by the prosecution to establish the charge, namely, a piece of elephant tusk (exhibit P2), a black buffalo horn (exhibit P3), two bags (exhibit P4), a register (exhibit P5), trophies valuation certificates (exhibits P6 and P7), certificate of seizure (exhibit P9), 1st appellant's caution statement (exhibit P9) and 2nd appellant's

caution statement (exhibit P11). At the conclusion of the trial, the trial magistrate composed a 'judgment' which culminated in the appellants' incarceration in prison, each serving twenty (20) years jail term. As to why and how that came about, are issues to be discussed later in this judgment. In the meantime, it suffices to say that the appellants were aggrieved hence the present appeal.

In challenging their 'convictions' and 'sentences', a set of memoranda of appeal is in the record of appeal; one lodged jointly by the appellants and the other lodged by the 2nd appellant alone, each comprising seven (7) grounds of appeal. But the said memoranda were lodged on the same date, 10/12/2022. As the appeal turns on a ground that both courts did not evaluate, analyze the evidence and consider the defence evidence together with another ground not contained in any of memoranda but raised *suo motu* by the Court in the course of hearing the appeal, we find it insignificant to recite the grounds of complaint in the memoranda of appeal and their respective parties' counsel's arguments in their respect save for arguments in respect of failure by the trial magistrate and first appellate judge to consider the defence evidences which shall be discussed in line with the issue raised by the Court.

In the course of perusing the record and, in particular the 'judgment', it came to our notice that the manner the appellants were 'convicted' and 'sentenced' raised issues and the Court wanted to satisfy itself on the propriety and validity of the 'judgment'. The record bears out that after summarizing the evidence by both sides, the trial magistrate gave a verdict. We let the relevant part of the 'judgment' as reflected at pages 90 to 92 of the record tell it all: -

> *"Having gone through the evidence of both sides, this court is on the view that, both accused persons charged with the offence of unlawful possession of Government Trophy contrary to section 86 (1) the Wildlife Conservation Act No. 5 of 2009. The law provides as follows: -*
>
> ***Section 86 (1) Subject to the provisions of this Act, a person shall not be in possession of, or buy, sell or otherwise deal in any government trophy.***
>
> *The provision of the law prohibits a person to possess Government trophy unless he or she acquired the same legally. In consideration of the evidence adduces before this court by PW3 who is the arresting officer is to the effect that, PW3 with the 1st accused person, DW1 informed PW3 that he is having the Government trophy, PW3*

pretend to buy one alive pangoline, DW1 informed PW3 that the same worth Tshs 10,000,000/=, DW2 appear at the area of crime scene carrying bucket, in the bucket there was one alive pangoline, when PW3 searched DW1 in his coat he found one elephant tusk and one black buffalo horn, the accused persons had no licence to possess Government trophy, the fact the accused persons found with the Government trophy illegal, this court is on the view that, the prosecution prove the case against the accused person for the 1st, 3rd and 5th count.

In consideration of the evidence adduced before this court by the prosecution side, that the accused intend to sell one alive pangoline, one elephant tusk and one black horn to PW3, the accused found red with the mention government tophy. As per section 80(1) of the Wildlife Conservation Act No. 5. The law provides as follows: -

Section 80 (1) A person shall not deal in trophy or manufacture an article from a trophy for sale or carry on the business of a trophy dealer except under and in accordance with the conditions of a trophy dealer's licence.

The above provision of law required a person who deals with the Government trophy shall acquire the dealer's licence. The evidence of prosecution side revealed that, the accused when arrested they do not have the dealer's licence, being the case, this court are hereby convicted the accused person for the 2nd, 4th and 6th count. It Is so decided accordingly.

Sgd S. T KIAMA, RM

30/07/2020

PREVIOUS CRIMINAL RECORDS:

Your honour, I do not have the records against the accuse person, it is our prayer the accused persons be punished forthwith to render the lesson to the accused persons and other who commit such offence. Your honour, I pray before the court one elephant tusk and one black buffalo horn be forfeiture for Government use as per s. 111(1) (a) of the Act No. 5/2009.

MITIGATION:

1st Accused: *Your honour, I have the family that depends on me, mother is old and my childrens are schooling, I do not any person who will take care of my family, I pray for court leniency.*

2nd Accused: *Your honour, I have three children's they all depends on me, I have no one to take care of them, I pray for court leniency.*

SENTENCE:

The court records reveal that, the convicts are the first offender, the convicts also pray for court leniency, this court order as follow: -

1st Count: *As per section 13 (b) (2) (3) (4) and 16 (a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016, this court are hereby sentence the convicts to serve 20 years imprisonment.*

2nd Count: *As per section 13 (b) (2) (3) (4) and (16 (a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016, this court are hereby sentence the convicts to serve 20 years imprisonment. Sentence shall run consecutive.*

Sgd S.T. KIAMA, RM

30/7/2020"

We first invited counsel of the parties to address the Court on the concern expressed by the Court.

First to address the Court was Mr. Leonard Mwanamonga Haule, learned advocate, who appeared to represent both appellants before us.

Upon his serious examination of what transpired, without mincing words, was of the view that there was no finding of guilty and conviction in respect of counts number 1, 3 and 5 although the trial magistrate found the case was proved against the appellants. In respect of counts number 2, 4 and 6, he argued, the appellants were convicted without first being found guilty. Arguing further, he said that it is surprising that the appellants were sentenced for offences in counts number 1 and 2 only. To him, the state of affairs coupled with the warrant of commitment to prison found at pages 93 to 94 which shows that the appellants were sentenced in all six counts they were charged with, brought about a confusion and uncertainty as regards in which counts the appellants were found guilty, convicted and sentenced. He was, however, hesitant to propose the way forward leaving it for the respondent Republic to propose. On further prompting by the Court, he said the appellants should benefit from the infractions committed and be released from prison.

Ms. Neema Taji, learned State Attorney who appeared together with Ms. Rachel Tulli, also learned State Attorney, to represent the respondent Republic, concurred with Mr. Haule on the existence of the mishaps but parted ways with him on the way forward. It was her view

that the infractions can be cured by the Court invoking its powers of revision under section 4(2) of the Appellate Jurisdiction Act, (the AJA) to step into the shoes of the High Court (first appellate court) and correct the infraction as the Court did in the case of **Salehe Ramadhani Othumani @ Saleh vs The Republic**, Criminal Appeal No. 532 of 2019 (unreported).

The learned counsel of the parties had earlier on expressed concurrent views in respect of both courts below not analyzing the evidence and considering the appellants' defence evidences. While Mr. Haule considered the anomaly to be fatal vitiating the conviction and citing the Court's unreported decision in the case of **Abel Masikiti vs The Republic**, Criminal Appeal No. 24 of 2015 to augment his assertion, Ms. Taji, while acknowledging prevalence of the anomaly in the judgment of both courts below, was completely opposed to the view taken by Mr. Haule that the error was fatal and vitiates conviction supporting her stance with the Court's decision in **Siaba Mswaki vs The Republic**, Criminal Appeal No. 401 of 2019 (unreported) that the ailment is cured as the Court may do what the High Court ought to have done by revisiting the appellants' defence evidences the consequences of which will be to find that they could not shake the prosecution case.

It is, indeed, plain that the 'judgment' of the trial court lacked essential ingredients of a proper judgment contemplated under section 312(1) of the Criminal Procedure Act, (the CPA). That section provides: -

> *"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."* (Emphasis added)

A glance on the above quoted portion of the trial court's judgment reveals that after reproducing the evidence by both sides, the trial magistrate did not proceed to assess the evidence by showing the points or issues which were to be determined, the decision thereon and the reasons for the decisions as imperatively required in the above quoted provisions of the law. That error is fatal and vitiates the judgment. The error renders it not to be a judgment at all (see **Shabani Amiri vs The Republic**, Criminal Appeal No. 18 of 2007 (unreported).

There was another anomaly rightly complained by Mr. Haule, that there was completely no consideration of the appellants' defence evidences. Such a patent deficiency, we entirely agree with Ms. Taji, could be made good by the first appellate court by subjecting the entire evidence to its fresh and exhaustive scrutiny as a first appeal is in the form of a re-hearing and, where that is not done, it is an error which should be remedied on a second appeal. It is trite legal principle that it being a misdirection and misapprehension of the evidence on record, the Court has the requisite mandate to step into the shoes of the High Court and do what the High Court ought to have done, a position spelt out in **D. R. Pandya vs R** [1957] E. A. 336 and in the case of **Karim Jamary @ Kesi vs Republic**, Criminal Appeal No. 412 of 2018 (unreported) cited in **Siaba Mswaki vs Republic** (supra). We acknowledge the existence of the Court's decision in **Abel Masikiti vs Republic** (supra) cited to us by Mr. Haule and, with all due respect, we still find the stance set in **D. R. Pandya vs R** (supra) most suited in the circumstances of this case. We shall, however, not undertake the High Court's duty in this case for a reason soon to come to light.

We now turn to the issue raised *suo motu* by the Court. On the face of the excerpt from the 'judgment' above quoted, it is evident, **first**;

that after making a finding that the prosecution had proved the case against the accused persons for counts number 1, 3 and 5, the learned trial magistrate did not proceed to convict the appellants (then accused persons). **Second**; that the learned trial magistrate convicted the appellants in counts number 2, 4 and 6 without first having made a finding that they were guilt of the offences. **Third**; that the appellants were sentenced in counts 1 and 2 only quite against his reasoning in the judgment and, **fourth**, that, according to the warrant of committal, the appellants were incarcerated for committing all the six offences. The crucial question is whether or not, in the circumstances, it can, with certainty, be said that there were proper convictions and sentences from which a valid appeal could arise to the High Court and later to the Court.

Trite stance is that the procedure for conviction and sentence is governed by the provisions of section 235(1) of the CPA which provides:

> *"(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."*

The provision makes it plain that after the court is satisfied that the prosecution has led sufficient evidence proving the offence charged, he shall find him guilt and convict him before passing a sentence. Conviction is, therefore, one of the essential ingredients of a judgment. The law, goes further to tell how conviction should be done under section 235(2) of the CPA 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."*

In this appeal no convictions were entered against the appellants in counts number 1, 3 and 5 and they were convicted in counts number 2, 4 and 6 without being found guilty. It is obvious that the trial magistrate flouted the procedure laid down in section 235(1)(2) of the CPA. Such anomalies could, as rightly argued by Ms. Taji, as well be remedied by the High Court on first appeal. It is now trite law that omission to enter conviction before sentence, is not a fatal ailment as the same is curable under section 388 of the CPA. The Court in a number of the cases has insisted on the same, for instance in the case of **Amitabachan s/o**

Machaga @ Gorong'ondo vs Republic, Criminal Appeal No. 271 of 2017 (unreported) it was held that: -

> *"Ordinarily we would have remitted the record to the High Court for it to enter the conviction so as to make the matter be properly before us for determination on the merit. However, both attorneys, for the appellant and for the respondent urged us to proceed with the hearing and determination of the appeal to its logical conclusion because on the merit, the justice of the case militates against remitting it to the High Court. We readily agreed. Although we are aware that an appeal is not properly before us where no conviction has been entered by the trial court, we think* ***it is not always that such omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where the justice of the case demands otherwise. In other cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered.*** *See the case of* ***Imani Charles Chimango v. Republic*** *Criminal Appeal No. 382 of 2016 (unreported). We shall therefore ignore the omission and*

proceed with the determination of the appeal on the merit." [Emphasis added]

(See also the case of **Mabula Makoye & Another vs Republic** Criminal Appeal 227 of 2017 (unreported).

The above notwithstanding, that could not however save the day as the record presents irreconcilable and unexplained contradictions in respect of which counts were the appellants convicted, sentenced and incarcerated in prison. We say so because in our perusal, the record reveals that the appellants were sentenced on two counts only, that is count 1 and count 2. This does not tally with the warrants of commitment which show that each appellant was sentenced in all counts. It is obvious that the sentences meted out in court and for which the appellants are serving in prison are not consistent with the convictions entered in court and sentences meted out which were on two counts only. Worse still, it is not clear on the 'judgment' the counts on which the appellants were convicted and why they were sentenced on only two counts. In sum, the 'judgment' lacked clarity which is an essential component in fair trial as guaranteed in Article 13(6)(a) of the constitution of the United Republic of Tanzania of 1977 which underscores and safeguards the fundamental rights of individuals when

their rights and duties are being determined by the courts or other agencies. Under that headline, an accused is entitled to receive a clear and reasoned judgment which not only justifies the court's decision by providing a detailed explanation of the court's findings of facts but also the application of the law in the decision-making process that will enable a higher court (appellate court) to assess whether the law has been correctly applied and whether any error has been made so as to correct it. The demonstrated patent procedural irregularities during deliberations, contradictions in its substantive conclusions (convictions) and in sentencing have cumulatively created a total confusion in establishing, in clear terms, the appellants' liabilities and the appropriate sentences to be meted out. They are, in our firm view, not misdirections or non-directions on the evidence or a misapprehension of the evidence for which the Court normally interferes so as to make a correction. We think the Court exercises such mandate where the Court is certain with the omission, misdirection, non-direction or misapprehension of the evidence. It is not the duty of the Court, in our strong view, to compose a proper and clear judgment but to correct a correctly composed judgment but flawed. For the Court to exercise such power, the lower court must, therefore, make a decision which is clear but suffering from

some infractions for which the Court interferes so as to correct them. Simply stated, the findings and orders made, though flawed, must be clear and certain for appellate courts to interfere in a bid to correct the infractions. Such is not the case in the present case. The findings of the trial court and the sentences meted out for the offences, as aptly explained above, leave a lot to be desired. The trial court 'judgment' is full of uncertainties as on which counts the appellants were found guilty, convicted and sentenced. Cumulatively, the infractions render it a confused 'judgment' the remedy of which is to let a fresh judgment be composed setting out concisely and clearly the counts, if any, the appellants are convicted and sentenced and the same should be reflected in warrants of committal. In view of this, we hold that there was no valid judgment upon which the High Court could interfere and correct, uphold or dismiss on first appeal. Unfortunately, such serious and patent infractions, went unnoticed by the High Court.

For the fore going reasons, invoking our powers of revision under section 4(2) of the AJA, we nullify the judgments by both courts below, quash the appellants' purported 'convictions' and set aside the 'sentences' meted out by the trial court and sustained by the High Court. For the interest of justice, we remit the record to the District Court of

Manyoni with a direction to compose a fresh judgment according to law. In the meantime, the appellants shall remain in remand prison to await the verdict of the case. In the event of convictions being entered, the periods already served by the appellants, be considered in imposing proper sentences.

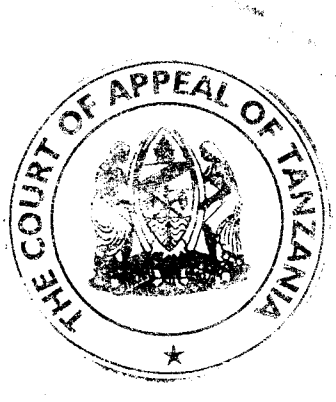
DATED at **DAR ES SALAAM** this 21st day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of January, 2024 in the presence of the Appellants in person, unrepresented and Ms. Faudhiat Mashina, learned State Attorney for the Respondent/Republic via video link from High Court Dodoma is hereby certified as a true copy of the original.



R.W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL