IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRIC REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 137 OF 2020

1. SAYI S/O MSINGI @ KIRANGA ..... 1ST APPELLANT
2. REGI S/O EMMANUEL @ KABESHI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 135 of 2019)

JUDGMENT

24th March and 28th April, 2021

KISANYA, J.:

This appeal traces its origin from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 135 of 2019. In that case, the appellants, Sayi s/o Msingi @ Kiranga and Regi s/o Emmanuel @ Kabeshi together with Masanja s/o Kanunda @ Kitiri (who is not subject to this appeal) were charged with offences of Unlawful Entry in the National Park, Unlawful Possession of Weapon in the National Park and three counts of Unlawful Possession of the Government Trophy.

The brief facts of the case leading to the arraignment of the appellants went thus: On 11th October 2019 around 02:00pm, Wilson Adam (PW1) together with his fellow park rangers, Stephen Mpondo (PW2), Deusi Kisaku

and Stephen John arrested the appellants and Masanja Kanunda @ *Kitiri* (hereinafter referred to as the third accused) at Mbarageti area into Serengeti National Park. The arrested persons were found with one knife, one panga, one head of zebra, one head of warthog and fifteen tails of wildebeest. When interrogated the appellants and third accused had no relevant permits. They were therefore taken to the police station and arraigned before the trial court for the foresaid offences.

In its endeavour to prove the charges, the prosecution marshalled four witnesses. These were, PW1 and PW2 who arrested the appellant and third accused in the National Park; Wilbroad Vicent (PW3), a wildlife warden who identified and valued the Government trophies; and WP 5665 DC Sijali (PW4), a police officer who investigated this case including, applying for an order to dispose the Government trophies. The prosecution also tendered to wit, certificate of seizure (Exhibit PE1), one machete and one panga (Exhibit PE2), Trophy Valuation Certificate (Exhibit PE3) and Inventory Order dated 15/10/2019 (Exhibit PE4).

The appellants and third accused were found with a case to answer. When called upon to enter their defence, they denied to have been found in possession of weapons and government trophies. They also testified to have been arrested on 11th October 2019 around 01:00 pm when they were grazing cattle.

After a full trial, the appellants and third accused were found guilty and convicted of all counts of offence. The trial court sentenced the appellants to one (1) year imprisonment for the first and second counts and twenty (20) years imprisonment for the third, fourth and fifth counts. The third accused person was sentenced to a conditional discharge of one (1) year in respect of all counts on the account that he was a child.

Aggrieved by the conviction and sentence, the appellants knocked at the door of this Court by way of appeal. They raised the following grounds:

1. *That, the trial Magistrate erred in law and fact to conviction-and sentence the appellant when proved the case beyond reasonable doubt on the side of prosecution without considering an objective evaluation of entire evidence with that of defense balanced against the prosecution side. (sic)*
2. *That, the trial magistrate erred in law and fact to convict and sentence the appellant without certificate of suizer from Director of Prosecution during the trial at the court. (sic)*
3. *That, the trial magistrate erred in laws and fact to convict and sentence wrong exhibits which was tendered at the court during trial. (sic)*
4. *That, the trial Magistrate erred in laws and fact to convict and sentence the appellant because during the trophies destroyed I was not there*

and I did not sign the inventory form which submitted at the court during this trial and the court admitted that form as exhibit. (sic)

At the hearing of this appeal, both parties appeared through virtual court services. While the appellants appeared in person, the respondent was represented by Nimrod Byamungu, learned State Attorney.

The appellants had nothing to submit in support of the appeal. They prayed to adopt the grounds asserted in their petition of appeal and urged the Court to discharge them.

Therefore, I invited Mr. Byamungu to respond on the appeal. The learned State Attorney did not address the said grounds. As an officer of the Court, he submitted on irregularity in the proceedings of the trial court. Mr. Byamungu pointed out that the appellants were not called upon to close the defence case. He was of the view that, the said irregularity vitiated the proceedings of the trial court because it is not clear as to whether the appellants needed to call witnesses or not. Therefore, Mr. Byamungu moved the Court to nullify the judgment of the trial Court and remit the case file to the trial court for purposes of complying with the law. He found it not necessary to address other grounds of appeal.

The appellants had nothing to add in rejoinder.

In the light of the above, I will consider whether the proceedings of the trial court were tainted with irregularity before determining the grounds raised in the petition of appeal.

I have dutifully gone through the record. As rightly observed by Mr. Byamungu, the appellants did not close the defence case. It is on record that; the trial court went on to fix the date judgement immediately after recording evidence of DW3 (the third accused). In terms of section 235 of the Criminal Procedure Act [Cap. 20, R.E. 2019), judgment leading to conviction and sentence or acquittal or discharge follows after hearing the prosecution, the accused and their respective witnesses. The section reads:

> *"235.-(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 according to law or shall acquit or discharge him under section 38 of the Penal Code."*

It is apparent that the above quoted provision was not complied with in this case. Since the appellants did not close the defence case, it is not known as to whether they intended to call witnesses after giving their evidence. Although it was not specifically ordered, I find that the defence case was closed by the trial court. The law is settled that the trial court has no mandate of closing the prosecution or defence case. See for instance, the case of **The Director of Public Prosecutions Versus Joseph s/o Mseti**

@ Super Dingi and 3 Others, Criminal Appeal No. 548 of 2019 (unreported) where the Court of Appeal held:

> *"Admittedly, the court is vested with the power of controlling its proceedings and therefore is, in appropriate situations enjoined to avoid unnecessary adjournments. However, in doing so, the move is not to close a party's case but to refuse adjournment..."*

The Court of Appeal cited its decisions in **Director of Public Prosecutions (DPP) v. Iddi Ramadhani Feruzi,** Criminal Appeal No. 154 of 2011, **Abdallah Kondo v. Republic, Criminal Appeal No. 322 of 2015, Matimo Sagila and another v. Republic**, Criminal Appeal No. 07 of 2015, **Frenk Benson Msongole v. Republic**, Criminal Appeal No. 72 'A' of 2016 and **Emmanuel Idd Faraja v. Republic**, Criminal Appeal No. 563 of 2016 (all unreported). It went on to hold that:

> *"Having found that the closure of the prosecution case by the trial court was prejudicial to the prosecution side, we hasten to remark that the impugned order was erroneous."*

In my considered view, the above position applies also to the defence case. Thus, the court has no mandate to close the defence case as that would prejudice the accused who was planning to call witness / witnesses.

The right to call a witness is one of the aspects of fair hearing guaranteed under article 13(3) of the Constitution of United Republic of

Tanzania. Its violation amounts to breach of the rule of natural justice. Therefore, in the exercise its duty of controlling the proceedings, the trial court is required to ensure that the accused is accorded with the right to call witnesses.

I have noted that the appellants had indicated that they would not call witnesses. However, that was not a warrant of setting the date of judgment without hearing from the appellants themselves. Since the defence case remained unclosed, it is uncertain whether the appellants were not indenting to exercise their right of calling witnesses. Therefore, they were not accorded the right to fair hearing.

The law is settled that, the proceedings and or decision arrived at in violation of the rule of natural justice including the right to fair hearing is a nullity. In **EX-D 8656 CPL Senga s/o Idd Nyembo and Others vs R,** Criminal Appeal No. 16 of 2018 (unreported), the Court of Appel cited with approval its decision in **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (unreported) that:-

> "*The right of a party to be heard before an adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been*

reached had the party been heard, because the violation is considered to be a beach of the principles of natural justice"

See also the case of **Mbeya - Rukwa Auto parts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 251 where the Court of Appeal held that:

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of the equality before the law.

Given the above position, I am of the view that, the judgment which led to the conviction and sentence at hand is a nullity due to the foresaid reasons. In the premises, there is no need of considering the grounds of appeal because they based on the nullity judgment and sentence.

In the exercise of revisional powers vested in this Court, I hereby nullify the trial court's proceedings from the stage where the trial court erroneously closed the defence case by fixing the date of judgement. Consequently, the following orders are issued:

1. The judgment and sentence is quashed and set aside.
2. The original case file is remitted to the District Court of Serengeti for continuation of trial from the stage where the trial court fixed the date of judgment after hearing DW3.

3. The case shall proceed in absence of the third accused who was not required to have been charged with the appellant due to his age.
4. In the event the appellants are convicted of the charged offences, the time they spent to serve the sentence at hand be taken into account.

It is so ordered

DATED at MUSOMA this 28th day of April, 2021.

E.S. Kisanya
JUDGE

Court: Judgment delivered through video link on the 28th day of April, 2021 in appearance of the appellants and Mr. Nimrod Byamungu, learned State Attorney.

Right of appeal is well explained.

E. S. Kisanya
JUDGE
28/04/2021