IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 236 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. DANFORD ROMAN @ KANANI.....1st RESPONDENT
2. MASHAKA JUMA WAZIRI.....2nd RESPONDENT
3. JAMILA SALUM MTALY.....3rd RESPONDENT
4. SAUMU HUSSEIN MTALY.....4th RESPONDENT

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

(Mlacha, J.)

dated 09th day of July, 2018
in
Criminal Appeal No. 37 of 2018

.....

JUDGMENT OF THE COURT

04th June & 9th September, 2019

SEHEL, J.A

The Director of Public Prosecutions (the appellant) lost his first appeal in the High Court. The Resident Magistrates' Court at Mtwara (the trial court) acquitted the respondents on a charge of unlawful possession of forest produce contrary to section 88 of the Forest Act, No. 14 of 2002 (the Act) read together with Regulations 10 and 57 of the Forest Regulations of 2004 (G.N. No. 153 of 2004), and **read together with the Forest (the Importation of Forest Produce) Regulations of 2007 (G.N. No. 181 of 2007).**

We have highlighted part of the charge sheet because the initial charging provisions were section 88 of the Act and Regulations 10 and 57 of the G.N. No. 153 of 2004. The G.N. No. 181 of 2007 was not part of the charging provision in the initial charge sheet. It was added after the prosecution requested for amendment of the charge sheet. We will revert back to the issue of amendment of the charge. It suffice to state here that the charge sheet alleged that on 31st May, 2013 at Tuleane village in Mtambaswala area within Nanyumbu District in Mtwara Region, the respondents were found in possession of 5,200 pieces of timber valued at Tanzania shillings One Sixty Six Million Four Hundred Thousands (TZS 166,400,000.00) only without a licence issued by the Director of Forestry.

The background facts are such that: E. 8705 C/PL Ng'alila (PW1) together with F. 3789 D/Ssgt Mwakabinga (PW3) were assigned to investigate a timber theft complaint filed at Mangaka Police station. The complaint was lodged by Jamila Salum Mtaly @ Jamila Hussein Mtaly (the 3rd respondent).

D/Cpl. Msafiri (PW8) recalled that on 31st May, 2013 he received the 3rd respondent who reported to him that her 5,200 pieces of timber were stolen from Ngonji village, Mozambique and ferried to Tanzania through

Tuleane border by three people namely; Danford Roman @ Kanani (the 1st respondent), Mashaka Juma Waziri (the 2nd respondent), and Salum Gobo (not a party to this appeal). Upon receipt of the complaint, PW8 recorded the 3rd respondent's statement and on 19th June, 2013 he recorded her additional statement wherein she reported that the dispute over the ownership was amicably settled by concluding a deed of settlement which was recorded at the District Court of Nanyumbu at Nanyumbu (exhibit P2).

ASP. Joackim Baltazari Mteme (PW4) Officer Commanding Station (OCS) of Mtambaswala, in Nanyumbu Disrtict, said he received a call from OCD- Nanyumbu District who informed him that there was a complaint from the 3rd respondent about stolen timber. Thus he was requested to visit the place. PW4 visited the area together with PW1, PW3 and they were led by the 3rd respondent. Upon reaching Tuleane, they called the hamlet chairman, Rashid Rashi Jumbe (PW7) who escorted them up to Ruvuma river where they found a canoe and 5,200 pieces of timber piled in three groups guarded by two watchmen. The watchmen informed them that the timber belongs to the 1st, 2nd respondents, and one Gabo. They inspected the pieces of timber and found that they had a court stop order. The police placed the timber under the custody of PW7 and returned to

Mangaka Police station where they summoned the 1st and 2nd respondents for questioning.

According to PW1 who interrogated the 1st and 2nd respondents, the 1st and 2nd respondents admitted in their cautioned statements to possess the timber which they said they bought them from Salum Gobo.

Hamis Rari (PW5), a resident of Masasi and a lorry driver recalled that in the year 2013 he was hired by the 1st respondent whom he referred him as his frequent client, to ferry more than 2,300 pieces of timber from Nakalala, Mozambique to Liwaya village, Mozambique located along Ruvuma river but unfortunately his motor vehicle broke down hence he only managed to ferry 2,300 pieces.

Boaz Nasson Sanga (PW2), Assistant Forest Manager of the TFS Southern Zone, stationed at Masasi recalled that sometime in 2013 the 3rd and 4th respondents reported at their office complaining over their timber to have been stolen from Mozambique by Salum Gobo and transported to Tanzania. He was assigned to go and inspect the stolen timber. He went in accompany with Rashidi Sembe, his fellow forest officer. At the scene, they met two watchmen who told them that the timber belongs to the 1st and 2nd respondents. They found that 5,200 pieces of timber were piled into

three groups and they had a stop order from the court. In his evidence, he said once the timber is imported into the country, they do grading then issue Transit Pass (TP). Thereafter the importer pays all necessary fees by channelling the documents to the Tanzania Revenue Authority (TRA). PW2 further said that since the timber had a stop order they could not do anything apart from putting a hammer mark indicating that the timber was illegally imported and returned back to the office.

Bashiru Hamis Mdawa (PW6) Preventive Assistant Officer working at TRA in the Department of Revenue Offices at Mtambaswala said he received the information about unlawful importation of timber. Thus, he went to visit the scene together with PW4 and they agreed that the timber should be stored at Mangaka police station until the criminal case is finalized. Following that agreement, PW4 transported 5,200 pieces of timber from Tuleane to Mangaka but on the way about 199 pieces got lost leaving 4,209 pieces.

The 1st and 2nd respondents herein testified before the trial court as DW4 and DW3 respectively. In their defences, they both acknowledged that the 3rd respondent filed a civil suit against them over the seized timber and that the dispute was amicably settled by recording a settlement deed

and a settlement order was issued 10th April, 2015 for each party to share 2,600 but they could not finalize the agreement due to the criminal charges levelled against them. They both asserted that they were duly registered businessmen. They had certificate of registration, tax identification number (TIN) and business licence which they said they have tendered them in another criminal cases. The 1st respondent tendered his documents in the Criminal Case No. 108 of 2014 while the 2nd respondent tendered his in the Criminal Case No. 105 of 2014 (exhibits D4 & D5). They admitted to have imported the timber but they said immediately after importation the 3rd and 4th respondents levelled an allegation against them that they have stolen the timber thus a dispute arose between them.

The 3rd respondent (DW2) denied to be involved in the timber business but agreed to have helped her sister (the 4th respondent) in making follow up of the stolen timber.

The 4th respondent (DW1) admitted to possess the timber. She said she is a registered business woman dealing with timber business. The business is registered in two names of J.S. Timber and Jamila Salum Mtaly with TIN number. She said the business licences and TIN number were tendered in another criminal case, Criminal Case No. 109 of 2014 (exhibit

D1 & D2). She said her 5,200 pieces of timber were stolen from Mozambique by the 1st and 2nd respondents thus he had to report about the theft.

At the end of the trial, the trial court found only the 2nd respondent to be in possession of the timber and exonerated the 1st, 3rd and 4th respondents from being either in actual or constructive possession. On whether the 2nd respondent lawfully possessed the timber, the trial court was satisfied that he has accounted for the possession. He was therefore acquitted.

Aggrieved with the findings of the trial court, the appellant unsuccessfully appealed to the High Court of Tanzania at Mtwara (first appellate court) on two main grounds of appeal. The first ground centred on the failure to properly evaluate and apply the law regarding the offence of unlawful possession of forest produce. The second ground was in respect of failure to consider the prosecution evidence. In determining the grounds of appeal, the first appellate court examined the charge sheet and made two observations. First, it said regulation 2 (a) and (b) of G.N. No. 181 of 2007 was not part of the charge sheet and secondly, it said that the

Act and G.N. No. 153 of 2004 do not have provisions that deal with importation of timber.

In trying to reason that the Act and G.N. No. 153 of 2004 do not deal with importation of timber, the 1st appellate court travelled through the entire Act. It started its journey by trying to see the definition of the word "forest"; then it turned to the objective and management part of the Act, Part II of the Act. From there, it went to the permits and licences that falls under Part VI. Thereafter, it proceeded to Part VII and most specifically to Section 58 that deals with prohibition on trade in forest produce and Section 64 of the Act that deals with the Minister's power to make prohibition/restriction orders on importation of timber/forest produce. The 1st appellate court then analyzed Part XI which carries the offences and penalties, sections 84 to 88. And finally, it landed on G.N. No. 181 of 2007 that was made under Section 106 (1) of the Act and declared that G.N. as illegal. Having found that the Act does not deal with importation of forest produce, the first appellate court concluded:

> *"That said, it is obvious that, the charge had serious illegalities and no conviction could arise out of it. That alone can dispose the appeal but I will proceed to*

discuss other issues for the interest of justice and guidance in respect of the timber."

On whether the respondents were in possession of the timber, the first appellate court found that the 1st, 2nd, and 4th respondents were in possession of timber but the 3rd respondent was exonerated with a reason that she "was merely sent to by the third respondent and thus cannot be said to be in possession".

As to whether the respondents managed to account for lawful possession, the first appellate court found that the explanation given by the respondents that they had to ferry the timber through Tuleane because of break of a bridge was "an open lie" but because the charge was bad in law it concluded that "the whole appeal was hopeless". It therefore dismissed the appeal with the following directive:

"The Regional Police Commander to hand over the timber to the Commissioner General of Tanzania Revenue Authority who will deal with them according to the laws governing the situation."

Undaunted with the dismissal of appeal, the appellant preferred this second appeal on three grounds, namely:

1. That, the first appellate court erred grossly in law and fact by holding that the charge sheet preferred does not cover the facts of the case on the grounds that the Forest Act is designated only for local forest produce and that it does not cover the imported forest produce;

2. That the first appellate court erred grossly in law and fact by holding that the Forest (Importation of Forest Produce) Regulations of 2007, GN No. 181/2007 is ultra vires and therefore illegal; and

3. That the first appellate court erred grossly both in law and fact by acquitting the respondents herein while ignoring his own finding that the respondents illegally imported the timbers through illegal entry point.

At the hearing of appeal, Mr. Ladislaus Komanya, Paul Kimweri and Theophil Mutakyalwa, learned Senior State Attorneys appeared to represent the appellant whereas Mr. Wilson Ogunde appeared to represent the respondents.

Mr. Kimweri, learned Senior State Attorney on behalf of the team representing the appellant addressed us on the three grounds of appeal in seriatim. Elaborating the first ground, Mr. Kimweri submitted that the respondents failed to account for lawful possession of 5,200 pieces of timber found in their possession as required by section 88 of the Forest Act, No. 14 of 2002 read together with Regulations 10 and 57 of G.N No. 153 of 2004; and G.N. No. 181 of 2007. He argued that the respondents were required to produce evidence in order to account for lawful importation of the timber which was said to have been imported from Mozambique. He pointed out that according to the testimony of PW3, the 1st, 2nd respondents and Mr. Gabo failed to show importation permit though they said that the said timber was imported from Mozambique and that there is enough evidence from PW4, PW5 and PW8 that the respondents ferried the timber from Makaka to Tuleane. On account that Tuleane was not an official entry point, Mr. Kimweri concluded that that alone is enough evidence to prove that the timber was imported unlawfully.

Further, Mr. Kimweri faulted the observation made by the first appellate court at page 526 of the record of appeal when the trial judge observed the following:

"....the respondents were charged of unlawful possession of forest produce contrary to section 88 of the Forest Act No. 14/2012 read with regulation 10 and 57 of the Forest Regulations GN 153/2004, nothing more"

He wondered why the first appellate court found that there is nothing more in the charge while the charge had cited G.N. No. 181 of 2007 and it reproduced it in its judgment. In any event, Mr. Kimweri argued although the charge sheet did not mention specific section, it did not prejudice the respondents since the citation of G.N. No. 181 of 2007 suffices to cover the issue of importation and there is ample evidence that the timber was imported from Mozambique. Therefore, to him, the crucial issue was for the respondents to account for the possession be it by way of producing certificate or licence.

On whether importation is covered in the Act, Mr. Kimweri submitted that G.N. No. 181 of 2007 deals with importation of forest produce and it is made under section 106 (1) of the Act. Thus, he said, the first appellate court was wrong in holding that the Act had nothing to do with importation. He explained that section 106 (1) of the Act empowers the Minister to make regulations for, amongst other things, better carrying out

of the provisions and purpose of the Act and it is couched in wider terms. It does not restrict the Minister's powers in making regulations on the items listed under it. He submitted that the purpose of the Act according to section 3 (i) is to legislate measures in protecting and enhancing global bio-diversity.

On the second ground, Mr. Kimweri submitted that the first appellate court used a wrong avenue in invalidating G.N. No. 181 of 2007 since none of the parties complained about the unlawfulness of it. He said the first appellate court raised the issue of legality of G.N. No. 181 of 2007 in the course of composing its judgment as such parties were denied their fundamental right, a right to be heard. He pointed out that had there been an application filed seeking for prerogative against the Minister's power in accordance with the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E 2002, the first appellate court could have lawfully invalidated it but there was none from the parties.

In respect of the third ground, Mr. Kimweri simply submitted that the first appellate court after holding that the explanation given by the 1st and 2nd respondents in their defence being an open lie then it ought to have found that the prosecution proved its case since an accused's lie is taken to

corroborate a prosecution's case as it was discussed and held in the case of **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002 (unreported).

On those grounds, Mr. Kimweri urged us to set aside the acquittal and enter a conviction to the respondents and also to vacate the order that nullified the G.N. No. 181 of 2007.

Mr. Ogunde began his reply by addressing us on the issue of charge sheet. He said the charge sheet read over and explained to the accused person did not contain the words **"read together with the Forest (the Importation of Forest Produce) Regulations of 2007"**. He pointed out that the words were added on 2nd June, 2017 as reflected at page 77 of the record of appeal. They were added after the prosecution prayed to effect amendment on the charge sheet. He said after that amendment was effected, the prosecution closed its case and the first appellate court proceeded to hear the defence case without reading the amended charge sheet to the accused persons as required by section 234 of the Criminal Procedure Act, Cap. 20 R.E 2002 (CPA). On that account and with the reason that there was no specific provision of G.N. No. 181 of 2007

stipulated in the charge, Mr. Ogunde was of the view that the respondents were prejudiced.

On the complaint regarding invalidation of G.N No. 181 of 2007, Mr. Ogunde conceded that the first appellate court exceeded its powers by revoking the Regulations without there being any invitation from the parties.

On the third ground, Mr. Ogunde replied that the respondents were not charged with an offence of entering through unofficial entry rather they were charged with unlawful possession of forest produce whereby they had to provide explanation for the possession. He pointed out that DW1, DW3, and DW4 explained that they are business people dealing with timber business and that they had valid licences that were tendered in other criminal cases filed against them therefore the respondents had given a lawful excuse for possession of timber. He therefore prayed for the appeal to be dismissed.

In brief rejoinder, Mr. Kimweri argued that the amendment of the charge sheet was not objected by the respondent's counsel and it was not raised at the first appellate court thus it was an afterthought. Regarding unofficial entry, Mr. Kimweri conceded that the respondents were not

charged with an offence using unofficial entry point but he reiterated what he had earlier on submitted in his submission in chief. All in all, he insisted for the appeal to be allowed.

Due to the importance of what transpired in the trial court we propose to first consider the question of compliance of section 234 (2) of the CPA as, in our view, it goes to the root of the fair trial. That provision reads as follows:-

> *"(2) Subject to subsection (1), where a charge is altered under that subsection–*
>
> *(a) the court shall thereupon call upon the accused person to plead to the altered charge;*
>
> *(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*
>
> *(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any*

witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."

In the appeal before us, as rightly pointed out by Mr. Ogunde, on 2nd day of June, 2017 the prosecution prayed under Section 234 (1) of the Criminal Procedure Act to make amendment to the charge sheet by adding in the statement of offence the following words: **"read together with the Forest (The Importation of Forest Produce) Regulation of 2007 G.N 181/2007."** The record bears that there was no objection to the prayer. Consequently the trial court granted it and an addition was made to the charge sheet. After the amendment, the prosecution closed its case. For brevity the record reads as follows:

*"**P/A (Paulo Kimweri)**: I finally pray to close our prosecution case.*

***Mr. Ogunde-Adv**: I have no objection, I do not intend to make/file submission of no case to answer let the court give its ruling.*

Court: *The 1st accused is not present in court on that basis the case is therefore adjoined (Sic.) for ruling and defence hearing on 16/06/2017.*

ABE

Sgd: G.V Dudu SRM

02/06/2017."

On 16th day of June, 2017 the trial court delivered its ruling by finding the respondents to have a case to answer thus required them to make their defence on the offence charged.

What is clear from the above sequence is that the charge sheet was amended by adding a charging provision of the law. At the time the amendment was effected, eight witnesses for the prosecution had already testified. After the alteration was made to the charge, the charge was not read over to the respondents. Section 234 (2) of the CPA which is couched in imperative requires the trial court after altering the charge to take a new plea from the accused person to a new or altered charge. In **Thuway Akonnay v. Republic** [1987] T.L.R 92 this Court held:-

"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so renders a trial a nullity."

It follows then that once a charge is amended or altered, the new or altered charge must be read to the accused person, who must in turn be asked to plead thereto.

In the present appeal, the trial court did not read the altered charge to the respondents. It ought to have read it to the respondents and require them to enter their plea. It also ought to have given an opportunity to the respondents to express whether or not they wished to have any of the witnesses who had testified recalled for either giving their evidence afresh or for further cross-examination. It was an irregularity which is an incurable and renders the trial a nullity. (See also **HSU Chin Tai and Another v. Republic,** Criminal Appeal No. 250 of 2012 (unreported)).

In that regard, the non-compliance with section 234 (2) of the CPA, rendered the proceedings of the trial court appearing after the amendment null and void. The proceedings before the trial court being a nullity it follows that even the proceedings in the first appellate court were also a nullity. Acting under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 we hereby quash and set aside all proceedings in the trial court subsequent to the amendment of the charge including the proceedings in the High Court.

Our consideration above suffices to dispose of this appeal. However, we wish to comment, albeit very briefly, on the complaint raised with regard to the invalidation of G.N. No. 181 of 2007. In our recent decision in the case of the **Director of Public Prosecution v. Selemani Azizi Ally**, Criminal Appeal No. 235 of 2018 (unreported) we dealt with similar complaint. In the first place we found that parties were denied their fundamental right of being heard on an issue raised by the court. Secondly, we held that the first appellate court usurped the powers of judicial review even though neither of the parties moved the court by way of judicial review. We said:

> *"Secondly, as rightly argued by Mr. Komanya, the appeal was not a legally and legitimately permissible occasion for the learned first appellate Judge to examine and determine the legality or validity of the impugned regulations. It is trite that the said regulations, having been made by the Minister responsible for forests under section 106 (1) of the Act, could only be assailed before the High Court by way of judicial review pursuant to section 17 of Cap. 310 (supra). Had appropriate proceedings been instituted for judicial review of the Minister's promulgation of the regulations, the Attorney General would have been summoned as a necessary*

party in terms of section 18 of Cap. 310 (supra) so that he could be heard on the matter. We, thus, find merit in the complaint at hand and proceed to quash and set aside the learned High Court Judge's invalidation of the regulations."

By nullifying the regulations, the first appellate court exceeded its powers. Since we have already nullified all the proceedings above, the question that follows is what to do next. Considering the facts and the circumstances of this appeal, we are of the opinion that it will not be for the interest of justice to order a retrial. This is because there is no evidence to warrant the conviction of the respondents. We hold so for two main reasons. First, the respondents accounted for possession. They all explained on how they came into possession of timber and that they could not finalize the clearance process due to the ensued dispute amongst them. Secondly, the evidence of PW2 that permits are obtained after importation augurs well with our finding in the case of **Seleman Azizi Ally** (supra) where we held that the law allows the importer to secure import permit after the timber had been imported into the country. Since the 5,200 pieces of timber were intercepted at the border while the

respondents were yet to start the process of clearance there was no justification for doubting their legality.

As to the way forward on the seized timber, we direct that whoever asserts that he/she has a right over the seized timber, should establish the same to the relevant authorities and clear them according to law.

DATED at **DAR ES SALAAM** this 4th day of September, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 9th day of September, 2019 in the presence of Mr. Theophil Mutakyalwa, learned Senior State Attorney for the Appellant/Republic and Mr. Wilson Ogunde, learned Counsel for the Respondents is hereby certified as a true copy of the Original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL