IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 21 OF 2019

(C/O Criminal Case No. 10 of 2019 Kalambo District Court, Munga I. Sabuni, RM)

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

KENEDY S/O GEORGE @ KILATU ..... 1st RESPONDENT

GERALD S/O PILI ..... 2nd RESPONDENT

ROBERT S/O MULENGA ..... 3rd RESPONDENT

SINKALA S/O GILBERT ..... 4th RESPONDENT

KAPEMBWA S/O SIKASOTE ..... 5th RESPONDENT

RICHARD S/O KIFUNDA ..... 6th RESPONDENT

SAMWEL S/O KIFUNDA ..... 7th RESPONDENT

ERICK S/O MSONDA ..... 8th RESPONDENT

FRIDAY S/O SILONDWA ..... 9th RESPONDENT

KEDRICK S/O SIMWINGA ..... 10th RESPONDENT

DERICK S/O SAMA ..... 11th RESPONDENT

LUCKSON S/O CHANDA ..... 12th RESPONDENT

ISACK S/O MWIMANZI ..... 13th RESPONDENT

GOODLUCK S/O SICHILIMA ..... 14th RESPONDENT

FRANK S/O SIAME ..... 15th RESPONDENT

LINUS S/O MWAMBA ..... 16th RESPONDENT

CRIS S/O PEPO ..... 17th RESPONDENT

EDSON S/O SIAME ..... 18th RESPONDENT

JOHN S/O SINZUMWA ..... 19th RESPONDENT
JOSEPH S/O CHIFUNDA ..... 20th RESPONDENT
PETER S/O SICHILIMA ..... 21st RESPONDENT

02 & 29/09/2021

EX-PARTE JUDGMENT

Nkwabi, J.:

The respondents were charged in the District Court with an offence of engaging in fishing activities without valid licence contrary to section 13(1)(a)(c)(2)(4) and (5) of the Fisheries Act, 2003. The offence was alleged to have been committed by the respondents, in this appeal, on 9th February, 2019 at about 05:00 hrs. at Kilewani village along Lake Tanganyika within Kalambo district in Rukwa region since they unlawfully engaged in fishing activities without valid licence that allows them to engage in such activities.

The respondents pleaded guilty on being called upon to plea to the charge that was laid at their doors. Thereupon the facts of the case were read over and explained to the respondents. Two documents were tendered without objection and were admitted as exhibit P1. The implements, however, were not tendered in court for undisclosed reasons.

The respondents appear to have admitted the facts of the case. The respondents were convicted as charged and upon hearing the antecedents and mitigation, the court took into consideration that the respondents were first offenders, they pleaded to guilty hence serving court's time and their ages. The trial magistrate too considered the relationship between Tanzania and Zambia which is good one. After considering all those factors, the trial magistrate proceeded as follows:

> *With reasons stated above, this court therefore, acquits accused persons without any conditions (absolute discharge) as per* ***section 38(1) of the Penal Code Cap 16 RE 2002.*** *But with cautions that they should observe all laws and regulations while they are conducting their normal activities in the lake. They should make sure that they comply with all rules and regulations for good use of the lake. The authorities also should make sure they educate all stake holders within the lake, and provide them with all necessaries to enable these people to conduct their activities in smooth way.*

Then, the trial court ordered the implements seized and other belongings of the convicts to be restored to the respondents without any conditions.

The appellant was irritated by the "acquittal" and sentence/orders of the trial court. The appellant lodged this appeal in this court. The petition of appeal has 4 grounds of appeal:

1. *That the trial District court erred in law and in facts to acquit accused persons while they pleaded guilty to the offence.*
2. *That the trial magistrate erred in law and facts to acquit accused persons while they were already convicted from their own plea of guilty.*
3. *That the trial magistrate erred in law and facts by not sentencing the respondents after pleaded guilty.*
4. *That the trial magistrate erred in law and facts by issuing an order to the effect that the seized properties which were used in the commission of the offence be restored back to the respondents.*

Then he prayed this court to allow the appeal and set aside the trial court's "judgment" and order. In addition, in the submissions, the learned Senior

State Attorney prayed for a proper sentence and restoration of the instrumentalities of the offence in that such be handed over to the appellant.

In his submissions, Mr. John Kabengula, learned Senior State Attorney vibrantly argued that the learned magistrate erred in acquitting the respondents while they entered a plea of guilty. He argued according to section 228(1) and (2) of the Criminal Procedure Act Cap. 20 R.E. 2019 the magistrate ought to have convicted the respondents and pass sentence on them. He ought to make an order against them as well. The words acquit and absolute discharge has different meaning and implication in law. They were aggrieved as the trial court magistrate did not sentence the respondents, he added. He admits however that conditional discharge is a form of sentence.

Likewise, he argued that they were aggrieved with the order for the restoration of the seized implements without conditions. He argued the reasons provided by the trial court for the restoration order are baseless. He was of a view, that the offence is grave one and ought to be properly punished. The instrumentalities seized were subject to an order of forfeiture there being no cogent justification for not forfeiting the instruments.

I begin scrutinizing the 4th ground of appeal which was argued separately. The 4th justification of appeal was couched that *the trial magistrate erred in law and facts by issuing an order to the effect that the seized properties which were used in the commission of the offence be restored back to the respondents*. I have carefully gone through the proceedings of the trial court and found an anomaly which makes me expunge exhibit P1 in the trial court's record. The anomaly is that when the exhibit was tendered, during the reading of the facts, it was not objected by the respondents, it was admitted as exhibit. However, the contents of exhibit P1 were not read over and explained to the respondents contrary to the procedure laid down in **Robert Andondile Komba v. D.P.P., Criminal Appeal No. 465 of 2017** CAT at Mbeya (unreported):

> *Ms. Kombe invited us to infer the age of the victim from the PF3 where her age is cited as 14 years. With respect we are not persuaded that the age of the victim cited in the PF3 is proof of her age. Not only was the PF3 not read after admission therefore liable to be expunged, but the case of* ***Chrizant John v. Republic*** *(supra) cannot be brought into play in this case. This*

is because in his testimony PW6 who tendered the PF3 did not testify on the victim's age let alone details of that age.

In the present case, exhibit P1 was received but the same was not read over and explained to the accused persons. Looking at the facts of the case, one will find that the respondents were unaware of the contents of the exhibit P1 as nowhere in the facts of the case is indicated that what was contained in exhibit P1 was lists of the implements of crime which had been seized. On the strengths of the authority, I have quoted above, exhibit P1 ought to be expunged from the record, I proceed to expunge exhibit P1 from the record of the trial court. Now, the implements Mr. Kabengula seeks this court to make an order of confiscation/forfeiture, were not tendered in court as exhibit, with the expunging of exhibit P1 from the record, then such implements are unknown to the court as have not been proved. Therefore, with great respect, this court cannot issue the order that is prayed by Mr. Kabengula. In the premises, the 4th ground of appeal fails.

I now regress to deliberate on the 1st 2nd and 3rd grounds of appeal which Mr. Kabengula submitted collectively on them. On these grounds of appeal,

Mr. Kabengula's arguments seem to be premised on the view that the plea was not unequivocal one and cannot be challenged against **Laurence Mpinga v. Republic [1983] TLR 166,** Samatta, J., as he then was, held:

> *An accused person who has been convicted of an offence "on his own plea of guilty" may appeal against the conviction to a higher court on any of the following grounds:*
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> 1. *That, even taking into consideration the so called admitted facts, his plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilt.*
> 2. *That he pleaded guilty as a result of mistake or misapprehension.*
> 3. *That the charge laid at his door disclosed no offence known to law.*
> 4. *That upon the admitted facts he could not in law have been convicted of the offence charged.*

I have aptly looked at the facts relied upon to convict the respondents, with the greatest respect to Mr. Kabengula, I am not persuaded with his view. In the first place, there is no fact put forward to establish the jurisdiction of the District Court of Kalambo as the facts do not show, in which particular area the respondents were arrested. I am of the view that the district court of

Kalambo is not vested with jurisdiction to hear and determine cases in the whole region of Rukwa leave alone the whole stretch of Lake Tanganyika in Tanzania territorial water. The allegations, in the charge sheet, that the respondents were arrested at Kilewani village within Kalambo district, are not proof of jurisdiction as such are not evidence. Since this is a criminal matter, I cannot act on mere speculation. I am fortified in my view by the decision in **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.T.):

> *"We think that a lot of what is stated as above by the learned trial Principal Resident Magistrate with Extended Jurisdiction was speculation. ... Conviction in a criminal matter must be based on good ground and speculation has no room.*

Another anomaly in the facts of the case, is that the facts of the case do not show that there would be exhibit of the alleged implements of the crime, or that the list of such implements was in the exhibit P1. Too, the facts of the case that were narrated do not as well show that the instrumentalities were being used by respondents for the unlawful fishing. I say so because the respondents were not charged with unlawful possession of illegal fishing

implements. In that context, therefore, I find it difficult to go along with the prayers of the learned Senior State Attorney. I am of the view that the trial was a nullity since the plea of guilty of the respondents was imperfect, to use the words of Samatta, J., as he then was. By way of analogy see also **MIC Tanzania Ltd v Minister for Labour and Youth Development and Attorney General Civil Appeal No. 103/2004** Rutakangwa, JA. December 2006 (CAT At SDM):

> *The nothingness of incompetent proceedings was underscored by this Court in the case LEONSI SILAYO NGALAI V HON. JUSTINE ALFRED SALAKAMA AND THE ATTORNEY GENERAL, CIVIL APPEAL NO 38 OF 1996 (unreported) This court said:*
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> > *... The second aspect is whether this Court may adjourn an appeal which is incompetent, in order to allow the appellant to take necessary steps to cure the incompetency. This court has said it before that* ***an incompetent appeal amounts to no*** *appeal. It follows therefore that the court cannot adjourn what it does not have. Under such circumstances, what the court does is to strike the purported appeal off the register (emphasis is ours).*

So as there was no application before the High Court, according to the ruling of the learned judge, it was an exercise in futility to purport to determine it on the merits. No valid and enforceable orders could be made in application which was not before the High Court.

My conviction, therefore, in this case is that the proceedings, findings and orders of the trial court are liable to being quashed. I proceed to quash the proceedings and the findings of the trial court since they are based on proceedings which are a nullity. Consequently, I set aside the orders issued by the trial court. I order for a trial de novo. The appellant may prosecute the respondents if he is still interested to do so.

In the circumstances, the appeal crashes. Thus, the prayers made by the appellant to this court are rejected.

It is so ordered.

DATED and **SIGNED** at **MPANDA** this 29th day of September 2021.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

J. F. Nkwabi

Judge