IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 65 OF 2015

MAGOIGA MAGUTU @ WANSIMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

Dated the 27th day of October, 2014
in
Criminal Appeal No. 37 of 2014

JUDGMENT OF THE COURT

18th, 20th & 25th May, 2016

JUMA, J.A.:

The incident over which the appellant was arrested for, took place at around 1 p.m. on 13/5/2010. Park Rangers, who included Renatus Izack Aron (PW1), Steven Mutalemwa (PW2) and Thadeus Manongwa were travelling in a vehicle (Reg. No. SU 37215 TDI) belonging to their employer— the Serengeti National Park (SENAPA). From their base in the national park, the rangers

were heading towards the township of Mugumu. When they reached an area of Kisangura village of Serengeti District known as "Tabora B" Ranch, they saw a person walking ahead and he was carrying a parcel. They decided to follow him from behind. When this person saw the approaching vehicle, he threw down the parcel he was carrying, and took to his heels. This conduct, heightened the Rangers' suspicions.

PW2 who was on the driving seat, stopped the vehicle, and the escapee was chased on foot. PW1 picked the parcel from the ground, as the remaining rangers chased and apprehended the runaway stranger. When they opened up the parcel, the rangers found two dried leopard skins. The person who was trying to escape mentioned his name— Magoiga Magutu Wansima (the appellant herein). When asked whether he had permit to possess the leopard skins, he replied that he did not have. The appellant was escorted to Mugumu Police Station where a police case file was opened against him.

The appellant appeared before the District Court of Serengeti at Mugumu where he was charged with unlawful possession of Government Trophies contrary to section 86 (1) and (2) (c) of the Wildlife Conservation Act No. 5 of 2009 (hereinafter referred to as **"the WCA, 2009"**) read together with para 14 (d) of the First Schedule to, and sections 57 (1), 60 (2) both of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 (hereinafter referred to as **"the ECCA"**). The particulars of the offence alleged that the two leopard skins he was found in possession of, were the property of the Government of Tanzania, and had the value of Tshs. 5,000,000/=.

The offence of being found in unlawful possession of Government trophy for which the appellant was charged with was, and still is, an economic offence triable by the High Court, sitting as an Economic Crimes Court. Before commencement of the trial of economic offences, prior Consent of the Director of Public Prosecutions (DPP) under section 26 (1) of the ECCA is needed. For purposes of the instant appeal that Consent was

obtained on 6/9/2010. Again, although, under section 12 (3) of the ECCA, economic offences are ordinarily triable in the High Court, these offences can also be tried in subordinate courts upon a Certificate issued for that purpose by either the DPP himself, or by any State Attorney duly authorized by the DPP. On 8/9/2010 Ayub Mwenda, learned Senior State Attorney ordered the charge of the economic offence facing the appellant to be tried by the District Court of Serengeti at Mugumu.

The trial proceeded uneventfully until after the appellant completed his cross examination of PW2. Later on 28/1/2011 the public prosecutor informed the trial court that the appellant had jumped and escaped from a lorry that was transporting him and other remand prisoners from the district court to remand prison. The trial court issued an arrest warrant against the appellant and allowed Athuman Kitenana (PW3), a Game Warden, to testify. PW3 explained how he visited the police station where he formally identified and carried the valuation of the two leopard

skins. The Certificate of value which PW3 filled on 14/05/2010 was tendered as exhibit P2.

The learned trial magistrate (F.S. Kiswaga-RM) found the appellant guilty and convicted him on the basis of the evidence of the three prosecution witnesses. In sentencing, the learned trial magistrate ordered the appellant pay a fine of Tshs. 50,000,000/= cash (which is ten times the value of the government trophy charged) or serve twenty years imprisonment in default. The sentence was ordered to run from the moment of the appellant's arrest.

On 8/10/2013 which was almost four months after his conviction and sentence in absentia, the appellant was brought before the trial court. The learned trial magistrate read out the sentence which required the appellant to either pay a fine of Tshs. 50,000,000/=, or to serve 20 years imprisonment in default, was read out. The appellant's first appeal (High Court Criminal Appeal No. 37 of 2014) was dismissed on 27/10/2014 by Bukuku, J. Still aggrieved, he preferred this second appeal to this

Court which he predicated on the following three grounds of appeal:

1. *THAT, the alleged search and seizure of the government trophies has violated the Criminal Procedure Act.*
2. *THAT, the sentence imposed by the trial and first appellate court to the appellant was excessive.*
3. *THAT, the prosecution's case was not proved to the standard required in criminal justice.*

On 18th May, 2016 which was the day of hearing, the appellant appeared in person, unrepresented. Mr. Hemedi Hamidi Halfani, learned State Attorney represented the respondent/Republic. After hearing the parties' submissions on the grounds of appeal, we adjourned the hearing for deliberations before arriving at our decision. It was during the deliberations when it occurred to us that there were four additional issues of law which had jurisdictional implications, but were not addressed

by the learned State Attorney. We found it appropriate to re-summon the parties so that they may be heard on those issues of law.

When the parties re-appeared before us on 20th May, 2016, the appellant once again appeared in person fending for himself; whereas Mr. Halfani continued to represent the respondent/Republic.

We **firstly** asked the learned State Attorney to address us on the question whether the appellant could be convicted for an offence (i.e. unlawful possession of Government trophy) created under a law (i.e. WCA, 2009), which had not come into operation. The appellant was arrested and was found in unlawful possession of two leopard skins on 13/5/2010. We pressed the learned State Attorney on this issue after realizing that the appellant was arrested almost two months before the Government Notice Number 231 of 2010 finally brought the WCA, 2009 into operation on 1st July, 2010.

The **second** jurisdictional question centres on the consent to prosecute an economic offence appearing on page 4 of the record by which Ayub Mwenda, learned Senior State Attorney consented the appellant to be prosecuted. This consent was very specific to an offence of unlawful possession of Government trophy contrary to section 70 (1) and (2) (iii) of the Wildlife Conservation Act, 1974 (hereinafter referred to as **the WCA, 1974**) but not section 86 (1), (2) (c) of the WCA, 2009 under which the appellant was charged and convicted.

The **third** jurisdictional issue relates to the Certificate of the DPP to transfer the prosecution of the economic offence facing the appellant, from the High Court, to the District Court of Serengeti District at Mugumu. Like the Consent, the Certificate appearing on page 5 of the record of this appeal was issued in respect of the offence of unlawful possession of Government Trophy c/s section 70 (1) and (2) (iii) of the WCA, 1974 but not section 86 (1), (2) (c) of the WCA, 2009 under which the appellant was charged and convicted.

In the **fourth** issue we wanted to satisfy ourselves whether the appellant upon his re-arrest after absconding from his trial; was accorded his right to explain why he had absented himself as provided for under section 226 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (**the CPA**), which states:

> ***226.-****(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court thinks fit.*
>
> *(2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.*

(3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension and the person effecting such apprehension, shall endorse the date thereof on the back of the warrant of commitment.

(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.

In his response, the learned State Attorney combined the first three issues we raised and argued them together. Initially, Mr. Halfani stood on a position that the provisions of the WCA, 2009 should be presumed to have been in operation on 13/5/2010 when the appellant was arrested. He supported this stance by arguing that since the President had already given his Assent, offences committed after that assent should be punished under the WCA, 2009. For support, he referred us to section 16 of Interpretation of Laws Act, Cap 1 (R.E. 2002) to contend that the

Assent of the President on 12/3/2009 operationalized the WCA, 2009 from that date of the Assent. Section 16 of Cap 1 states:

> ***16.*** *Notwithstanding section 14, where an Act provides that the Act, or portion of the Act, is to come into operation on a day to be fixed by notice, that provision and the provision providing for the short title of the Act, unless it is otherwise expressly provided, shall come into operation on the day on which the Act receives the Presidential Assent.*

Mr. Halfani only relented and changed his line of submission when we pressed him to revisit two points. Firstly, the Interpretation of Laws Act which is a Statute of general application cannot prescribe the operational date of an Act of Parliament if the specific Act of Parliament, i.e. the WCA, 2009 has in section 1 (2) already prescribed that it shall come into operation on such date as the Minister appoints by notice in the *Gazette*. Secondly, we pointed out that since vide the GN No. 231 of 2010 the Minister responsible for wildlife has already appointed

1/7/2010 as date of operation; there cannot be any legal reasons to fall back to the Interpretation of Laws Act.

The learned State Attorney came round to agree with us that the appellant should have been charged with an offence under the WCA, 1974 which, the learned State Attorney added, is consistent with the provisions of the law cited in the Consent Order and in the Certificate to transfer the trial to the District Court of Serengeti at Mugumu.

Despite conceding that the appellant should have been charged with an offence under the WCA, 1974 but not under the WCA, 2009, the learned State Attorney gave his reasons why he thinks being found in possession of two leopard skins was already an offence when the appellant was arrested on 13/5/2010 and the appellant cannot escape criminal responsibility under the constitutional provisions prohibiting charging of persons with an offence that was not an offence under the law at the time the act was committed. He pointed out that the act of unlawful possession of Government trophy was an economic offence under

the WCA, 1974 and continued to be so even after the WCA, 2009 came into operation on 1/7/2010. Secondly, he pointed out that except for the sentence, all the ingredients of the offence of unlawful possession of Government Trophy under section 70 of the WCA, 1974 were re-enacted under section 86 of the WCA, 2009. This commonality of ingredients of the offence meant that the appellant was not prejudiced at all by the details of the provisions of section 86 (1), (2) (c) under which he was charged and convicted. Thirdly, he submitted that because the WCA, 2009 enacted an enhanced sentence which was not in existence when the appellant committed the act, he should not be made to suffer from that higher sentence than the one existing on 13/5/2010 when he committed an economic offence under the repealed WCA, 1974.

On the final issue, the learned State Attorney submitted that the trial magistrate complied with his duty under section 226 of the CPA because he allowed the appellant to explain why he did not turn up for his trial. In so far as the learned State

Attorney is concerned, the appellant was not prejudiced in any way when the sentence was read out to him.

When he was asked to give his own remarks, the appellant pointed out that he is but a layman. He left it to the Court to take care of his interests over matters of law which he did not understand.

For purposes of the instant appeal before us, we had time to look at the saving provisions of section 122 of the WCA, 2009. We determined that the WCA, 2009 was not designed to apply retrospectively to cover offences like unlawful possession of Government trophy, which was committed on 13/5/2010 before the WCA, 2009 came into operation on 1/7/2010. The relevant section 122 of the WCA, 2009 states:

> *122-(1) The Wildlife Conservation Act is hereby repealed.*
>
> *(2) Upon the commencement of this Act, a person who is convicted of an offence under the Wildlife Conservation Act shall, notwithstanding*

the provisions of other written law, be liable to be deemed as having been convicted under the corresponding offence under this Act.

Much as the provisions of the WCA, 2009 were not enacted to apply retrospectively, we respectfully agree with the line of the submission made by the learned State Attorney to the effect that the act of being found in unlawful possession of leopard skins was an offence under the WCA, 1974 on 13/5/2010 when the appellant was arrested and it continued to be an offence even after the WCA, 2009 came into operation. We further agree with him that the wording of the offence of unlawful possession of Government trophy under section 70 of WCA, 1974 are identical with section 86 (2) (c) of WCA, 2009 under which the appellant was supposedly charged and convicted in absentia. Since the act of unlawful possession of Government trophy was an offence on 13/5/2010 under section 70 of the WCA, 1974, the appellant cannot claim that he was charged for committing an act that was not a punishable offence on 13/5/2010 and therefore, he cannot

seek the protection provided by Article 13 (6) (c) of the Constitution which states:

> *"13 (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
>
> *(a)...*
>
> *(b)...*
>
> *(c)* ***no person shall be punished for any act which at the time of its commission was not an offence under the law****, and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed;"* [Emphasis added].

We would like to observe that upon a closer scrutiny, we found that the WCA, 1974 and the WCA, 2009 share common ingredients of the offence but only differ on the extent of the sentence. The WCA, 2009 enacted a greater sentence when it prescribed a mandatory term in prison for ***"not less than***

twenty years but not exceeding thirty years" and additional fine at the court's discretion—***"...not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount."*** The relevant sentencing section 86 (2) (ii) states:

> *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.*
>
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *...*
>
> *(c) in any other case –*
>
> *(i) where the value of the trophy which is the subject matter of the charge does not exceed one hundred thousand shillings, to a fine of not less than the amount equal to twice the value of the trophy or to imprisonment for a term of*

not less than three years but not exceeding ten years;

(ii) where the value of the trophy which is the subject matter of the charge exceeds one million shillings, ***to imprisonment for a term of not less than twenty years but not exceeding thirty years*** *and the court* ***may, in addition*** *thereto,* ***impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount.*** [Emphasis added].

We should point out here that as it is prohibited by the provisions of Article 13 (6) (c) of the Constitution, it was not proper for the two courts below, to impose on the appellant a greater sentence than the one that was existing on 13/5/2010 when he committed an act amounting to an economic offence. The relevant paragraph (c) of Article 13 (6) states the following with regard to punishments:

(c) no person shall be punished for any act which at the time of its commission

was not an offence under the law, and also ***no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed;***"[Emphasis added].

The sentencing section 70 (2) (c) (iii) of the WCA, 1974 which is applicable to the appellant provided for a lesser sentence than the sentence of imprisonment for a term of not less than twenty years but not exceeding thirty years which section 86 (2) (c) of the WCA, 2009 prescribes. Section 70 (2) (c) (iii) of WCA, 1974 prescribes a lesser sentence of "a term of not less than ten years but not exceeding twenty years" in the following way:

(c) in any other case–

.....

(iii) where the value of the trophy which is the subject matter of the charge exceeds twenty thousand shillings, ***to imprisonment for a term of not less than ten years but not exceeding***

twenty years *and the court* ***may in addition to that impose a fine not less than one hundred thousand shillings nor more than ten times the value of the trophy, whichever is the larger amount****.* [Emphasis added].

Finally, we turn to the issue regarding the duty the law imposes on trial magistrates under section 226 (2) of the CPA to ask the appellant who had absented from his trial, whether he had any explanation for his absence. It is clear to us that the above sub-section (2) provides a statutory opportunity to a person who fails to appear after an adjournment but he is all the same convicted in absentia; to explain why he did not turn up for his trial. Section 226 (2) provides:

"(2) If the court convicts the accused person in his absence, ***it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control*** *and that* ***he had a probable defence on the merit****.*

The Court has on several occasions restated the law on how the trial court should exercise its judicial discretion under section 226 (2) of the CPA in order to afford the accused person the opportunity to be heard on why he was absent and on whether he had probable defence on the merit. In **Marwa s/o Mahende v. R** [1998] TLR 249 the Court re-affirmed the principle of law it had restated earlier in the **Lemonyo Lenuna and Lekitoni Lenuna v. R** (1994) TLR 54:

> *In our view the subsection **[i.e. section 226-(2) of CPA]** is to be construed to mean that an accused person who is arrested following his conviction and sentence in absentia, should be brought before the trial court ... The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are not often represented by counsel. They are not aware of the right to be heard which they have under the sub-section, it is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring*

that the accused, upon his arrest, is brought before the court, which convicted and sentenced him, to be dealt with under the sub-section.

The excerpt of the record on page 26 showing when the appellant was presented on 8/10/2013 following his arrest after his two-year absconding from his trial shows the following:

*"**PP:** - ... Your hon. the accused in the dock before your honourable court is called Magoiga Magutu Wansima. .... He jumped from the lorry while he was coming from the court being taken in remand custody with his colleagues under supervision of Cpl Daniel- Prison Officer on 11/01/2011. The Police chased him but he successfully disappeared. Your hon. this court continued with hearing this case in his absentia u/s 226 of the CPA and was found guilty, convicted and sentenced to serve 20 years imprisonment in default of paying fine Tshs. 50,000,000/=.....*

....

F.S. Kiswaga—RM

8/10/2013

Court: *- Accused is then asked if what stated by the prosecutor are correct.*

F.S. Kiswaga—RM

8/10/2013

Accused: *- Your hon. facts narrated by the prosecutor are correct. Truly I didn't know what I was doing. I Pray for court's mercy and forgiveness. I won't repeat again. I still have a pending economic case No. 62/2013.*

F.S. Kiswaga—RM

8/10/2013

Court: *- Accused does not give reason why he decided to jump from the car and disappeared. He only prays for forgiveness and court's mercy. Since no reason has been given to convince the court on the execution of the sentence or otherwise, I therefore commit the accused Magoiga Magutu Wansima in the judgment and sentence delivered on 13/6/2013 to pay a fine of Tshs. 50,000,000/= or serve 20 years imprisonment. Sentence shall commence immediately today.*

F.S. Kiswaga—RM

8/10/2013"

The appellant was, and still is a layman. The above excerpt does not show the learned trial magistrate taking the first initiative to address the appellant to account for his absence, and determine whether he had a probable defence on merit. He instead allowed the public prosecutor to address the court first. We think the trial magistrate should have first addressed the appellant about his right to be heard under sub-section (2) of section 226 of the CPA.

It seems to us the phrase "*he had a probable defence on the merit*" in section 226 (2) of the CPA bear a special duty which trial magistrates have towards the lay accused persons who missed out the chance to testify in their own defence. Here, the law impliedly expected the learned trial magistrate to specifically make a finding whether even from the perspectives of the evidence of PW1, PW2 and PW3; the trial court can glean out some semblance of probable defence for the benefit of the lay accused person. The lay appellant should have been informed that the trial court had discretion to set aside the appellant's

conviction in absentia if the appellant showed that his absence from the hearing was from causes over which he had no control and that he had a probable defence on the merit. It was intimidating to the appellant for the learned trial magistrate to allow the public prosecutor to first furnish in detail how the appellant had jumped from the prison van whilst on transit to prison.

The failure of the trial magistrate, to properly address the lay accused person (the appellant) on his right to be heard under section 226 (2) of the CPA, coupled with the confusion arising from the charging the appellant with unlawful possession of Government trophy under section 86 (2) (c) of the WCA, 2009 instead of preferring the charge under section 70 (2) (c) (iii) of the WCA, 1974; we find merit in this appeal.

We are inclined to invoke our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 to quash and set aside all the proceedings, conviction and sentence in both the trial District Court of Serengeti at Mugumu in Economic Case

No. 01/2010, and all the proceedings in the High Court Criminal Appeal No. 37 of 2014.

We order that the matter be remitted to the trial District Court for a trial *de novo* by another magistrate in accordance with the consent to prosecute the appellant for having contravened the provisions of Section 70 (1) and (2) (c) (iii) of the WCA, 1974. We so order.

DATED at **MWANZA** this 23rd day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL