IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 555 OF 2017

EMMANUEL AMBROUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 12th day of October, 2017
in
Criminal Appeal No. 105 of 2017

.....

JUDGMENT OF THE COURT

15th December, 2020 & 11th February, 2021

NDIKA, J.A.:

The appellant, Emmanuel Ambrous, was convicted by the District Court of Babati, on his own plea of guilty, of unlawful possession of government trophy. He was sentenced to a custodial term of twenty years. His first appeal to the High Court of Tanzania at Arusha against the conviction and sentence bore no fruit, hence this second and final appeal.

Since the substantial legal issues in the appeal revolve around the validity of the charge, the unequivocality of the appellant's plea and the

regularity of the proceedings, we find it crucial, at the very inception, to extract the operative part of the charge upon which the appellant was arraigned and convicted:

"**CHARGE**

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHY contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 read together with Paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

PARTICULARS OF OFFENCE

EMMANUEL S/O AMBROUS on the 4th day of May, 2017 at Lake Burunge area, within Babati District in Manyara Region, was found in possession of ten carcasses of flamingos valued at Tanzanian Shillings Four Million Seven Hundred Ninety-Six Thousand (TShs. 4,796,000.00) the property of Tanzania Government without a permit from the Director of Wildlife.

Signed at Babati this 18th day of May, 2017.

E.G. Masaki,

STATE ATTORNEY"

It is on record that after the above charge was read over and explained to the appellant, he readily expressed himself as follows:

"It is true."

The presiding Senior Resident Magistrate, then, recorded the above reply as a plea of guilty, after which the Public Prosecutor gave an account of what the prosecution conceived to be the facts of the case.

Briefly, the prosecutor stated that on 4th May, 2017 around 04:00 evening hours, a certain Said Hawasi, a Wildlife Officer, while on patrol with three other officers in the area around Lake Burunge, found the appellant in possession of ten carcasses of flamingos valued at TZS. 4,796,000.00, the property of the Government of Tanzania. The appellant was arrested promptly. On being interrogated at Magugu Police Station, the appellant confessed to the offence as he admitted being found in possession of the trophy without any requisite permit. Accordingly, one Corporal Khatibu, a police officer, filled out a certificate of seizure, which, then, was signed by the appellant and other witnesses.

The appellant's response to the narrated facts is reflected at pages 5 and 6 of the record of appeal:

"I agree that the names and addresses are mine.

I agree that on 4/5/2017 at 04:00 evening hours I was at Lake Burunge area and I was in possession of ten (10) carcasses of flamingos worth [TZS] 4,796,000.00, the property of the Tanzania Government.

I agree that I had no permit allowing me to possess flamingos.

I agree that park rangers called Said Hawasi, Japhari Rajabu, Maiko Mbilinyi and Daniel Pascal with Corporal Rajabu who were on patrol found me in possession of ten carcasses of flamingos.

I agree that certificate of seizure was prepared and we all signed on it.

I agree that I was interrogated at Magugu Police Station and I confessed to have been found in possession of ten carcasses of flamingos ...."

There and then, the Public Prosecutor tendered a cautioned statement attributed to the appellant along with a certificate of seizure, an inventory form, a trophy valuation report, a sketch map and a chain of custody. The appellant having had no objection to their admissibility, the presiding Senior

Resident Magistrate collectively admitted the cautioned statement and the certificate of seizure as Exhibit P.1. The inventory form and the trophy valuation report were also admitted and marked together as Exhibit P.2 whereas the sketch map and the chain of custody form were marked jointly as Exhibit P.3.

Finally, the presiding Senior Resident Magistrate convicted the appellant on his own plea of guilty thus:

> *"**Court**: The accused admitted all facts read and explained to him including the exhibits read and shown to him. In that regard, the accused person is hereby convicted on his own plea of guilt."*

As alluded to earlier, the above conviction earned the appellant twenty years imprisonment, a statutory minimum. On first appeal, the High Court upheld the conviction and sentence.

The appellant has filed in this Court two memoranda of appeal in succession, each of which raises three grounds of appeal. The thrust of the memoranda is: **one**, that the charge was defective. **Two**, that the appellant's conviction did not comply with section 312 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA"). **Three**, that

Exhibits P.2 and P.3 were irregularly admitted, hence unreliable. **Finally**, that the plea of guilty was not unequivocal.

At the hearing before us, the appellant appeared in person to prosecute his appeal while the Republic had the joint services of Mses. Mary Lucas, Alice Mtenga and Tusaje Samwel, learned State Attorneys.

In his written brief and short oral argument, the appellant addressed the first three grounds of appeal as reformulated above. On the first ground, he bemoaned that he was convicted on a defective charge in that it was wrongly laid under section 86 (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 ("the Act") instead of section 86 (2) (b) of the Act. He argued that the defect was fatal and that the Republic should have sought an amendment of the charge. As regards the second ground, he criticized the learned appellate Judge for not finding that his conviction was vitiated by the presiding Senior Resident Magistrate's failure to state the offence of which he was convicted, contending that it was a clear violation of the mandatory provisions of section 312 (2) of the CPA. Coming to the third ground of complaint, the appellant argued that Exhibits P.2 and P.3 were not read out after they were admitted, which was an abrogation of his right to

know the contents thereof. The appellant did not address us on the fourth ground of complaint but he finally urged that his appeal be allowed.

Replying for the Republic, Ms. Lucas valiantly opposed the appeal. On the first ground, she submitted that the offence was rightly laid under section 86 (2) (c) (iii) of the Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 covering a category of animals under which flamingos fall. She elaborated that section 86 (2) (b) of the Act suggested by the appellant as the proper provision was inapplicable because it concerned trophies from "Part I animals" prescribed in the First Schedule to the Act. She added that even if wrong charging provision had been cited, such an error would be remediable by the curative provisions of section 388 of the CPA.

Coming to the alleged non-compliance with section 312 (2) of the CPA, which is the issue in the second ground, Ms. Lucas argued that the said provisions were inapplicable; for, the appellant was convicted upon his own plea of guilty in terms of section 228 (2) of the CPA as elaborated by the first appellate Judge. She added that the presiding Senior Resident Magistrate did not have to restate the charging provisions under which the appellant was convicted. On the two exhibits allegedly admitted and relied

amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016, thus:

> *"(c) in **any other case** –*
>
> *(i) [Omitted]*
> *(ii) [Omitted]*
> *(iii) 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]

Thus, it is our firm view that the charge was unblemished not just in its statement of the charged offence but also in the particulars of the offence. We are satisfied that the impugned charge, in its form and content, sufficiently notified the appellant the substance of the offence he faced of possessing government trophy, to wit, flamingo carcasses valued at TZS. 4,796,000.00, the property of the Government of Tanzania, without a requisite permit. The first ground of appeal fails ultimately.

provision. It should be noted that while subsection (1) of section 86 prohibits possession or buying or selling of or otherwise dealing in any government trophy, subsection (2) creates the offence of unlawful possession of government trophy for any contravention of the aforesaid prohibition and then prescribes in Paragraphs (a), (b) and (c) the penalty to be imposed upon conviction depending on the type and value of the trophy involved. It is clear that section 86 (2) (b) of the Act, suggested by the appellant as the proper provision, deals with the offence of possession of a government trophy which is a part of an animal specified in Part I of the First Schedule to the Act. For ease of reference, we extract the said provisions thus:

> *"where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both."*

A flamingo, whose carcasses were the subject of the charge against the appellant, is not specified as a Part I animal. To be sure, such a bird falls under the category of "other cases" governed by section 86 (2) (c), as

articulated the criteria for interfering with a conviction based upon a plea of guilty thus:

> *"Such an accused person may challenge the conviction on any of the following grounds:*
>
> *1. that, even taking into consideration the 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 guilty;*
>
> *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; and,*
>
> *4. that upon the admitted facts he could not in law have been convicted of the offence charged."*

It is noteworthy that the four grounds of complaint raised in this appeal are plainly within the bounds of the principle stated in the above case.

We now deal with the first grievance alleging that the charge was defective on the ground that it was laid under a wrong charging provision. This criticism, we hasten to say, is evidently misconceived and we agree with Ms. Lucas that section 86 (2) (c) (iii) of the Act was the proper charging

charged offence. In the premises, Ms. Lucas advocated that the appeal be dismissed.

The appellant declined an opportunity to rejoin, saying that he had nothing useful to add.

Ahead of our determination of the appeal in the light of the submissions from both sides, we wish to express our agreement with Ms. Lucas that section 360 (1) of the CPA, as a general rule, bars entertainment of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence imposed. That provision states that:

> *"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."*

We are aware that notwithstanding the above provision, an appeal against conviction on a plea of guilty may be entertained under certain circumstances as an exception to the general rule. In **Kalos Punda v. Republic,** Criminal Appeal No. 153 of 2005 (unreported), the Court cited with approval a decision of the High Court (Samatta, J., as he then was) in **Laurence Mpinga v. Republic** [1983] TLR 166 which, at page 168,

upon without having been read out after admission, the learned State Attorney conceded that the presiding Senior Resident Magistrate erred in relying upon the documents whose contents were not read out after admission. While she urged that the said impugned documents be expunged, she relied upon the decision of the Court in **Joel Mwangambako v. Republic**, Criminal Appeal No. 516 of 2017 (unreported) for the proposition that the absence of the said documents would not necessarily be fatal to the conviction as tendering and admission of such documents is not a legal requirement where an accused person pleads guilty to an offence though it is desirable to do so.

Finally on the fourth grievance, Ms. Lucas submitted that, in the first place, the appellant, having been convicted on his own plea of guilty, was barred by section 360 (1) of the CPA to appeal against the conviction but only against excessiveness of the sentence imposed. However, she acknowledged that the conviction could be challenged if it was based on a plea that was not unequivocal. It was her firm contention that the impugned conviction was based on an unequivocal plea because the facts of the case admitted by the appellant unreservedly disclosed all the ingredients of the

The complaint in the second ground of appeal that section 312 (2) of the CPA was flouted when the conviction was entered is equally unmerited. Ms. Lucas rightly supported the position taken by the first appellate Judge that the said provision only applied when a conviction was entered in a judgment after a full trial consequent to the accused having pleaded not guilty to the charged offence. To demonstrate her position, the learned appellate Judge fittingly excerpted the provisions of section 235 (1) and 312 (2) of the CPA, which, in effect, enjoined the trial court to deliver its judgment after hearing the respective cases of the prosecution and the defence and that in the case of conviction the judgment must specify the offence of which the accused is convicted as well as the law under which the offence was laid. She postulated, rightly so in our view, that since the appellant was convicted on his own plea of guilty, the resulting conviction was fittingly based upon section 228 (2) of the CPA, which states thus:

> *"If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."*

It is evident that in convicting the appellant, the presiding Senior Resident Magistrate did not specifically state the offence the subject of the conviction nor did she mention the law under which the offence was created. At any rate, that approach does not amount to a violation of 312 (2) of the CPA, because the conviction was not entered in the course of a judgment after a full trial. Nonetheless, taking a hard look at the record and the circumstances of this case, we think the phrase used by the learned Magistrate that "the accused person is hereby convicted on his own plea of guilty" certainly meant contextually that the appellant was convicted of unlawful possession of government trophy, the offence he stood charged with and to which he pleaded guilty unambiguously. We thus find the second ground of appeal without substance and dismiss it.

On the grievance in the third ground of appeal, there is no doubt that the inventory form and the trophy valuation report that constituted Exhibit P.2 as well as the sketch map and the chain of custody form (collectively admitted as Exhibit P.3) were not read out after they were tendered by the prosecution and admitted by the presiding Senior Resident Magistrate. Ms. Lucas conceded that much. We are also cognizant that the learned Magistrate remarked in the course of convicting the appellant that all the

exhibits were "read out and shown to him" but this claim flies in the face of the record. As a matter of fact, the procedural mishap complained of did not affect Exhibits P.2 and P.3 only; it also befell the admission of the cautioned statement and the certificate of seizure, purportedly admitted collectively as Exhibit P.1. This sorry state of affairs is further compounded by another processual indiscretion, which the appellant did not raise for our attention. It is that he was not asked if he had any objection to the admissibility of any of the documents before they were formally admitted.

In **Lack s/o Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 (unreported), citing **Robinson Mwanjisi and Three Others v. Republic** [2003] TLR 218, the Court re-emphasised the imperative for clearing the ground for admission of a document and stated that:

> *"Even after the admission, the contents of the cautioned statement and the PF.3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful."*

Given that the admitted documents were not cleared before admission and that their contents were not read out after admission, the appellant was not appraised of the substance thereof. Consequently, this anomaly renders the documents liable to be expunged as the impugned conviction could not be anchored on documents whose contents the appellant was not aware of. We accordingly expunge them from the record.

It is germane to determine the effect of the expungement of the exhibits on the appellant's conviction. On this issue, we express our agreement with Ms. Lucas that the absence of purged documents would not be fatal to the unequivocality of the appellant's plea in view of the circumstances of this case. For, as we held in **Matia Barua v. Republic**, Criminal Appeal No. 105 of 2015 (unreported), the tendering and admission of an object or a document as an exhibit after an accused person has pleaded guilty to the charged offence is not a legal requirement even though it is desirable to do so – see also **Frank s/o Mlyuka v. Republic**, Criminal Appeal No. 404 of 2018 (unreported) in which **Matia Barua** (*supra*) was referred to. Once the appellant has pleaded guilty and then admitted the facts of the case that disclosed all the elements of the charged offence, his plea would be considered unequivocal. Indeed, the applicable procedure

when an accused person pleads guilty to a charged offence, as stated in numerous decisions of the Court, involves no production of proof of the charge but a procedure for ascertaining if the appellant's plea is unequivocal – see the leading case of **Adan v. Republic** [1973] EA 445 decided by the Court of Appeal for East Africa in a case originating from Kenya, to which we fully subscribe. See also this Court's decisions in **John Faya v. Republic**, Criminal Appeal No. 198 of 2007; and **Constantine Deus @ Ndinjai v. Republic**, Criminal Appeal No. 54 of 2010 (both unreported). In the premises, while we find some merit in the third ground of appeal, we nevertheless hold it inconsequential to the outcome of the appeal.

Finally, we deal with the claim that the appellant's conviction was founded upon an equivocal plea of guilty.

To begin with, it bears restating that an accused can only be convicted on his own plea of guilty if the court is satisfied that his plea is unequivocal. That is, where it is ascertained that he has accepted as correct facts which constitute all ingredients of the charged offence – see, for example, **Ndaiyai Petro v. Republic**, Criminal Appeal No. 277 of 2012 (unreported).

In the instant case, we stated earlier that the appellant pleaded guilty to the charge after it was read over and explained to him by stating that "*It is true.*" This was entered by the presiding Senior Resident Magistrate as a plea of guilty. Furthermore, after the facts of the case were narrated by the Public Prosecutor, as we have shown earlier, he admitted each set of facts unreservedly as nothing but the truth. Having examined the facts of the case put to him, we entertain no doubt that they sufficiently disclosed the core of the charged offence, that he was found at Lake Burunge area on 4th May, 2017 unlawfully possessing government trophy, that is, ten carcasses of flamingo valued at TZS. 4,796,000.00, the property of the Government of Tanzania, without a requisite permit. Bearing that in mind and taking into account that the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said account, we share the view taken by the first appellate Judge that he was rightly convicted on his own plea of guilty as it was unequivocal and unblemished. We, consequently, dismiss the fourth ground of appeal.

As regards the sentence, we are satisfied that the twenty years' imprisonment imposed on the appellant by the trial court and upheld by the first appellate court is the prescribed statutory minimum for the offence he

was convicted of in terms of section 86 (2) (c) of the Act, which we reproduced earlier. We, therefore, find no cause to disturb it.

In conclusion, we find the appeal unmerited. We, accordingly, dismiss it.

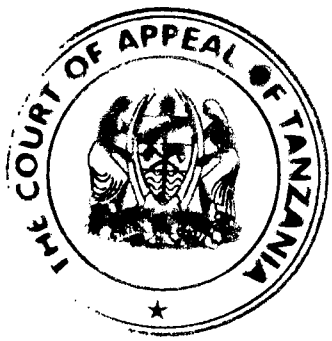
DATED at **DAR ES SALAAM** this 4th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered on this 11th day February, 2021, in the presence of appellant in person–linked via video conference at Arusha Central Prison and Ms. Mary Lucas, State Attorney for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL