IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 29 OF 2020

(Originating from Economic Crimes Case No. 2 of 2016 in the Court of a Resident Magistrate of Mtwara at Mtwara)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

MATESO S/O ALBANO KASIAN @ CHUPI.....RESPONDENT

JUDGMENT

2 Oct. & 18 Nov., 2020

DYANSOBERA, J.:

The instant appeal has been filed assailing the sentence and order passed by the Court of a Resident Magistrate of Mtwara at Mtwara dated 4th December, 2019 where the trial court sentenced the respondent to pay a fine of Tshs. 500,000/= (say Five Hundred Thousand Tanzanian shillings) or in default of payment of the fine to twenty (20) years term of imprisonment. In addition, the trial court ordered the respondent's house in Dar es Salaam and in Liwale be confiscated and forfeited to the United Republic of Tanzania.

Initially, the respondent Mateso Albano Kasiani @ Chupi was one of the four accused persons who were charged before the trial court with three counts in Economic Crimes Case No. 2 of 2016.

While the first three accused persons were, after a full trial, found not guilty and acquitted, the respondent who featured at the trial as the 4th accused was convicted on his own plea and sentenced accordingly.

Aggrieved, the appellant, the Director of Public Prosecutions, has filed this appeal against the respondent on ground that:

1. The Honourable trial Magistrate erred grossly in law and facts for sentencing the respondent contrary to law

As the record of the trial court depicts, on 25th day of November, 2019 when the charge was read over and explained to the respondent and his fellows, the respondent stated, "it is true, I dealt in government trophies". On 2nd day of December, 2019, the brief material facts of the case were read over and explained to the respondent and a cautioned statement recorded by E 8951 D/SSGT Nico was admitted as exhibit P. 1. In a ruling dated 4th December, 2019, the learned Resident Magistrate was satisfied that the respondent's plea was unequivocal and consequently, invoking the provisions of section 228 (2) of the Criminal Procedure Act, found the respondent guilty of unlawful dealing in trophies c/ss 80 (1) and 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E.2002] as amended and convicted him.

Before hearing of this appeal, the court had to determine the preliminary objection raised on part of the respondent on the competence of the appellant's appeal. The said preliminary objection was overruled. This court also rejected the request by Mr. Rainery Songea, learned counsel for the

respondent, for adjournment of the case and stay the hearing of the present appeal.

On 2nd October, 2020 when this appeal was called on for hearing, Mr. Paul Kimweri, learned Senior State Attorney stood for the appellant whereas Mr. Rainery Songea of the Phoenix Advocates firm, represented the respondent.

Arguing in support of the appeal, the learned Senior State Attorney submitted that the respondent was facing a charge of unlawful dealing in government trophies c/ss 80 (1) and 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E.2002] as amended by Act No. 3 of 2016 and was convicted on his own plea. He was consequently sentenced to a fine of Tshs. 500, 000/= or in default, to twenty (20) years term of imprisonment. The appellant, the Director of Public Prosecutions, is aggrieved by the said fine imposed under section 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 which imposes a fine of not less than twice the value of the trophy or imprisonment for a term of not less than two years but not exceeding five years or to both. Elaborating on the appellant's complaint, the learned Senior State Attorney contended that according to the charge sheet the value of the government trophy was Tshs. 388,800,000/= which means that the proper fine which the trial court should have imposed was supposed to be Tshs. 388,800,000 x 2 which equals Tshs. 777,600,000/=. To support this argument, Mr; Paul Kimweri relied on the case of **Issa Hassan Uki v. R**, Criminal Appeal No. 129 of 2017 where at p. 22, the Court of Appeal commended the Judge in increasing the amount of fine that had been imposed on the appellant. With respect to the

option of custodial sentence of twenty years prison term in default of payment of the fine, learned Senior State Attorney was of the view that it was legal as it was sanctioned by the amendment brought by section 60 (2). This court was referred to the case of **Anania Clavery Mbetela v. R**, Criminal Appeal No. 355 of 2017.

Mr Kimweri prayed this court to interfere with the trial court's sentencing so that the sentencing conforms to the law.

An attack by the appellant was also levelled against the trial court's order of confiscation and forfeiture order of the respondent's two houses; one situated at Dar es Salaam and the other at Liwale. According to learned Senior State Attorney, the confiscation and forfeiture order of the said two houses could not be executed without difficult because the said houses were not specified and particularised for a proper execution. The appellant prays that this court makes interference in the interest of justice.

Responding to the appeal, Mr. Rainery Songea argued that the respondent was convicted on his own plea and not on a full trial. He invited the court to find the cases cited by learned State Attorney to be distinguishable. He submitted that when a person pleads guilty he is entitled to a lesser punishment. Learned counsel for the respondent was of the view that the trial court properly exercised its discretion in sentencing the respondent as it did. A reference was made to the cases of **Bernadetha Paul v. R** [1992] TLR 97 and **R. v Mohamed Ally Jamal** [1948] cited in the case of **Bernadetha Paul** where it was observed that an appellate court should not interfere with the discretion by the trial judge in respect of the sentence imposed. Counsel also argued that an accused who pleads guilty to an offence with which he is charged qualifies for the exercise of mercy. He

supported his argument by citing the case of **Francis Chilema v. R**, [1968] HCD n. 510. He insisted that the penalty proposed by learned State Attorney would only be appropriate if the respondent had not pleaded guilty to the charge and the case had gone to a full trial. Reliance was made on the case of **Matengo and Kefa One v. R**: [1985] TLR 100. Counsel for the respondent argued that leniency where an accused pleads guilty was emphasised in the case of **Senga v. R** [1992] TLR 357. Counsel further submitted that in arriving at the proper sentence, the trial court considered the respondent's means and ability to pay. It was his argument that there are two laws which guided the trial court on the offence the respondent committed. These laws are the Economic and Organised Crime Control Act and the Wildlife Conservation Act. Counsel for the respondent further emphasised that the fine to be paid had to be proportional to the respondent's means to pay. To buttress this argument, learned advocate cited two persuasive cases one of Kenya- **Mutua Mutunga and Cosmsa Musyoki Musila v. R**, Criminal Appeal No. 99 of 2018 and **Oscar Ezekia Mussa @ Kidugo v. R**, DC Criminal Appeal No. 48 of the High Court of Tanzanai at Sumbawanga. He prayed this appeal to be dismissed.

In his rejoinder, Mr. Kimweri maintained that the case of **Issa Hassan Uki** (supra) is applicable to the circumstances of this case. He elaborated that in that case, the issue which was discussed was on sentencing under section 84 (1) of the Wildlife Conservation Act and further that, the discretion of the court in sentencing is subject to the prescription of the statute given by the Parliament-that is whether or not the sentence is the minimum. He pressed that the sentence of a fine stipulated under section 84 (1) of the Wildlife Conservation Act falls under the Minimum Sentencing according to the wording of the section and therefore does not give discretion to the court to

impose the sentence it wishes. Mr. Kimweri referred this court under section 74 (4) of the Interpretation of Laws Act for emphasis and re-iterated that the case of **Issa Hassan Uki** (supra) insisted that the sentence prescribed under section 84 (1) of the Act is the minimum hence the sentence of a fine of Tshs. 500,000/= was illegal.

I have considered the submissions in support and in opposition of the appeal. I have also perused the record of the trial court with respect to the impugned sentence and the order on confiscation and forfeiture on the respondent's houses at Dar es Salaam and Liwale. I have also taken into account the case laws relied on by the learned Senior State Attorney and learned Counsel for the respondent.

Generally, Parliament makes the law that defines what an offence is and the penalty to be imposed on an accused convicted of such an offence.
Courts, on the other hand, are independent of Parliament but they must interpret and apply the laws within the framework the Parliament has set. In that respect, the courts, in discharging the sentencing obligation, have to take into account the relevant law as well as the sentencing principles established by case laws.

Turning to the appeal under consideration, I will start with the complaint in respect of the sentence. As the trial court record shows, the respondent was charged in the first count along with his fellows with unlawful dealing with government trophy c/ss 80 (1) 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 of the First Schedule to and sections 57 (10 and 60 (2) of the Economic and Organised Crime Control Act [Cap.200 R.E.2002] as amended. This is according to the substituted charge dated 14th June, 2019. In that count, the four accused

persons, the respondent inclusive, were alleged to have dealt in trophies by selling and transporting elephant tusks valued at Tanzania Shillings Three Hundred Eighty Eight Hundred Thousands (sic) (Tshs. 388,800, 000/=) only, the property of the Government of the United Republic of Tanzania without a trophy dealers' licence from the Director of the Wildlife Division. After the respondent pleaded guilty and convicted on his plea, he was sentenced accordingly.

The dispute by the appellant is the sentence of a fine of Tshs. 500, 000/= (five hundred thousand only). The appellant's argument through Mr. Paul Kimweri, learned Senior State Attorney, is that the said sentence was illegal. He explained that the proper sentence according to the said provisions would have been twice the sum of Tshs. 388,800,000/= which makes a total of Tshs.777, 600,000/=. He supported his argument by referring this court to the penal provision of 84 (1) of the Wildlife Conservation Act and the decisions in the cases of **Issa Hassan Uki v. R**, Criminal Appeal No. 129 of 2017 and **Anania Clavery Betela v. R**, Criminal Appeal No. 355 of 2017 (both unreported). Opposing this contention, Mr. Rainery Songea supported the sentence imposed by the trial court arguing that the sentence was legally proper in the circumstances of the case. He supported his stance by the reasoning and citation of various case laws as indicated above.

The issue for determination in the present appeal now is whether the sentence imposed by the learned Resident Magistrate was, in the circumstances of the case, illegal. I think the answer must be in the negative.

In the first place, in sentencing the respondent, the learned trial Resident Magistrate took into account the following factors:

i. *Previous criminal records of the respondent who was a first offender,*
ii. *The mitigating factors of the respondent,*

iii. *Lengthy of the period spent in remand,*

iv. *The nature of the offence committed and the manner it was committed,*

v. *The impact of the offence committed and to what extent it has been rampant,*

vi. *The fact that the respondent pleaded guilty and thus has not wasted time of the court and the resources of the government,*

vii. *The statutory requirements of the offence charged.*

The appellant is not disputing this fact. As correctly submitted by Mr. Songea, this indicates that in sentencing the respondent, the trial court looked into and assessed not only to the sentencing principles but also the mitigating factors by the respondent.

Second, settled principle is that punishment falls within the discretion of the sentencing court. As long as that discretion is properly exercised, an appellate court ought not to interfere with the sentence imposed.

In the case of **Fortunatus Frugence v. R**, Criminal Appeal No. 120 of 2007, the Court of Appeal had this to say:

> *"We are mindful of the position this court took in ROBERT ARON V. THE REPUBLIC, Criminal Appeal No. 66 of 2007, amongst other authorities, that an appellate court should not alter a sentence imposed by a trial court on the mere ground that if it were sitting as a trial Court it would have imposed different sentence. This position emanates from the well settled principle of law that sentencing is a function best left in the discretion of the trial Court".*

The same Court in the case of **Kisukari Mmemo v.R**, Criminal Appeal No. 192 of 2013 (unreported), citing with approval the case of **R. v. Mohamed Ali Jamal** 1948 15 EACA 126 of the then Court of Appeal for Eastern Africa observed:

"An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive". As will be demonstrated in my judgment, I do not find anything material upon which I can fault the manner the trial Resident Magistrate assessed the sentence he imposed on the respondent.

Third, the respondent pleaded guilty to the charge; the trial court took into account that aspect. In the case of **Bernadetha Paulo v. R** [1992] TLR at p. 97 the Court of Appeal interfered with the sentence of the trial court by reducing a sentence of four years to that of immediate release from prison because the Judge failed to take into account the fact that the appellant had readily pleaded guilty to the charge of infanticide.

As rightly pointed out by Mr. Songea, since the respondent pleaded guilty to the offence, he qualified for the exercise of mercy. A case in point is that of **Francis Chilema v.R** [1968] HCD no. 510. This, as stated above, the learned Resident Magistrate was alive to it.

Fourth, there is no dispute that the punishment section under which the respondent was sentenced that is section 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 states, in part, as follows:-

> *"84- (1) a person who sells, buys, transfers, transports, or imports any trophy in contravention....., commits an offence and* ***shall be liable on conviction to a fine of not less than twice the value of the trophy****...."*
>
> (Emphasis supplied)

It is on record that the respondent was a first offender. This is clear from the then Public Prosecutor, Mr. Kimweri, learned Senior State Attorney when informing the trial court on the respondent's previous records at page 4 of the trial court's ruling that:-

> *"According to our records we have no previous records of 4th accused, this is his first criminal records..."*

It is trite that a maximum sentence should be rarely imposed for a first offence as that will leave no margin for a subsequent or serious offence, the legal position adopted in the case of **Gaidon Nelson Mapunda v. R**, [1982] TLR 318.

In the instant case, the penal section purposely used the phrase "shall be liable". Does the phrase mean a mandatory sentence? I think not. In **Apoya v. Uganda** [197] EA 752, the defunct Court of Appeal for Eastern Africa had this to say on maximum sentence:

> *"It seems to us beyond argument the words, "shall be liable" do not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it"*

In the instant case, the respondent pleaded guilty to the offence and was a first offender. The penal section, in the words of the defunct Court of Appeal for Eastern Africa in the case cited above, expressed the stated penalty which may be imposed at the discretion of the court". The trial court,

therefore, in my view, properly exercised its sentencing discretion in imposing the stated fine.

Fifth, I have considered the cases of **Issa Hassan Uki v. R**, Criminal Appeal No. 129 of 2017 and **Anania Clavery Betela v. R**, Criminal Appeal No. 355 of 2017 relied on by Mr. Paul Kimweri, learned Senior State Attorney. With due respect, the said cases are distinguishable from the instant one. The reasons are not far-fetched. One, in both cited cases, the appellants pleaded not guilty to the charge and the matters went to full trial. In the instant case, the respondent pleaded guilty and the matter did not go to the full trial. Two, in those two cases, the appellants were charged with and convicted of unlawful possession of government trophy contrary to section 86 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 while in the instant case, the respondent was charged with and convicted of unlawful dealing with government trophy c/ss 80 (1) and 84 (1) of the Wildlife Conservation Act, No. 5 of 2009. These are different sections covered under different Parts of the law that is Par XI and Part X, in that order. The circumstances obtaining in this instant case are, for that reason, different from those in the two cited cases.

The appellant's complaint against the sentence imposed by the lower court has no legal basis.

With regard to the complaint against the forfeiture and confiscation order, I have no doubt that it has substance. At p. 5 of the trial court's ruling, the learned trial Resident Magistrate made the following order:

> *"Additionally let the house of 4th accused in Dar es Salaam and Liwale be confiscated and forfeited to the URT".*

Apart from the fact that it is not clear under which section was the confiscation and forfeiture order made, the said properties were not identifiable with specificity. There is no dispute that an illegally obtained or held property is subject to either confiscation or forfeiture but that has to be done in accordance with the law lest it contravene the clear provisions of Article 24 (1) of the Constitution of the United Republic of Tanzania 1977 as amended from time to time. The said Article 24 (1) gives every citizen the right to own property and the protection of their property held in accordance with the law. .

As far as this case is concerned, section 111 (1) of the Wildlife Conservation Act empowers the court, where a person is convicted under the Act, to order forfeiture to the Government the items specified under paragraphs (a) to (d). However, the exercise of such power has to be subject to the procedures explained under sub-sections (3) and (4) of section 111 of the said Act. As the record of the trial court depicts, the confiscation and forfeiture order, apart from being vague, did not comply with the legal requirements. As correctly stated by Mr. Kimweri, such an order is difficult to implement in execution.

Since it is one of the roles of this court to make sure that correct procedure is followed and the law is adhered to by the courts subordinate thereto, I am duty bound, as invited by learned Senior State Attorney to interfere with the confiscation and forfeiture order of the trial court which went off tangent the law and laid down procedures. In that respect, the confiscation and forfeiture order made by the trial court was illegal ab initio. The same is quashed and set aside.

Consequently and for the reasons I have endeavoured to state above, the appeal against sentence is dismissed but the order of confiscation and forfeiture is nullified.

For the interest of justice, the record to be dispatched to the trial court for re-consideration of the **forfeiture order only** in accordance with the law of the land.

The appeal is dismissed to that extent.

W. P. Dyansobera

Judge

18. 11.2020

This judgment is delivered under my hand and the seal of this Court on this 16th day of November, 2020 in the presence of Mr. Meshack Lyabonga, learned State Attorney for the appellant and in the presence of Ms Tekla Kimati, learned Advocate for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge