

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAM

CRIMINAL APEAL NO. 326 OF 2017

(Originating from Criminal Case No. 250 of 2017 Morogoro District Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

ATHUMANI TANGAWIZI RESPONDENT

JUDGMENT

Mkasimongwa, J.

Before the District Court of Morogoro one **ATHUMANI TANGAWIZI** stood charged with two counts as follows:

1st Count: Unlawful Entry into the Game Reserve Contrary Section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 (Cap. 283).

It was alleged by the prosecution that;

"Athumani Tangawizi, on the 08th October, 2017 did enter at Kimelo area which is within Selous Game Reserve in the District and Region of Morogoro without a permit or authority".

2nd Count: Unlawful Grazing Animals in the Game Reserve: Contrary to Section 18 (2), (3) and (4) and 111 (1) (a) of the Wildlife Conservation Act No. 5 of 2009 (Cap 283 R. E. 2009).

Again, it was alleged by the Prosecution that:

"Athumani Tangawizi on the 08th October, 2017 at Kimelo area which is within Selous Game Reserve in the District and Region of Morogoro did graze 72 herds of cattle without a permit or authority".

The accused was convicted of the two offences on his own plea of guilty. According to the Prosecution the Accused was a first offender. That aside the prosecutor prayed the court that it imposes a severe sentence in accordance with the law. The prosecution also prayed the court that it makes an order in terms of Section 111 (1) (a) of the Wildlife Conservation Act No. 5 of 2009 forfeiting the herd of cattle found in the Game Reserve. In mitigation the accused prayed for leniency. He also stated that the cattle were not his property. He has been just employed as a cowboy and the cattle belong to one MAJURA KABEHO. The later was summoned by the court to address the court and upon hearing him the court sentenced the accused person to pay Tshs. 120,000/= fine or serve twelve (12) imprisonment in default of the fine for the first count and Tshs. 300,000/= fine or serve twenty four (24) months imprisonment in default of payment of the fine for the second count. The court denied the prayer for forfeiture of the cattle save for four cows which were forfeited to take care of the costs for keeping the cattle.

The Prosecution is aggrieved by the order of the court. As such the Director of Public Prosecutions preferred this appeal. In the Petition of Appeal, he has raised three grounds of Appeal and the complaint revolves around the following:

1. That the trial Resident Magistrate did misinterpret the mandatory provisions of Section 111 (1) (a) of the Wildlife Conservations Act, No. 5 of 2009.
2. That the trial Resident Magistrate erred when he gave audience to Majura Kabeho who was not a party to the criminal case after convicting the accused person.
3. That the Appellant/Prosecutor was not accorded with an opportunity to be heard after Majura Kabeho had submitted to the court.

Hearing of the Appeal proceeded by way of written submissions. In his submission the Appellant stated, in respect of the first ground of appeal, that Section 111 (1) (a) of the Wildlife Conversation Act, No. 5 of 2009 appears to direct the court to issue an order to forfeit the property of the subject matter of the charge upon the accused person being found guilty. The section uses the words "... the court shall order forfeiture" and under Section 53 (2) of the Interpretation of Laws Act (Cap. 1) the word "shall" has been given the meaning that an act conferred must be performed. The section also uses the words "in respect of which the offence was committed". These words were judicially interpreted in the case of **Republic vs. Omary s/o Kindamba and others (1960) E. A. 407** which interpretation was referred to and affirmed by the court in the case of **Samson Kalala (Administrator of the Estate of the Late Emmanuel Luzindana) vs. Republic and the Manager Burigi Game Reserve, Criminal Appeal No. 67 of 2013 (HC) at Bukoba**. The interpretation makes it clear that the property listed under Paragraph (a) of Section 111 (1) of the Wildlife Conservation Act include all the 72 herds of cattle at issue as

it was also held in the case of **Saleh and Another vs. Republic (1971) 1 EA 381**, that where forfeiture is proper all the property comprised in the charge must be forfeited. It is submitted that in the circumstances of this case forfeiture was improperly ordered.

As regards to the second ground of appeal, it is submitted by the Appellant that acting under Section 111 (2) of the Wildlife Conservation Act, the court summoned a third party (Majura Kabeho). The later appeared and addressed the court and the court acted on his submissions. The Appellant submitted that Section 111 (2) of the Act does not apply in this matter. The Section deals with properties or things connected with the commission of the offence that is instrumentalities of the crime. These are not the subject matters of the offence. As such the section does not apply to the case and the trial court misdirected itself in applying the provisions of Section 111 (2) of the Act. The law protects no one from forfeiture of the subject matter of the offence especially under Section 111 (1) (a) of the Act.

As for the third ground of appeal it is submitted by the Appellant that the Republic was not availed an opportunity to make an answer to what Kabeho had submitted. In our jurisdiction the right to be heard is a Constitutional one. An infringement of such a right vitiates the proceedings as it was held in the case of the **DPP vs. Sabina J. Tesha and Others**.

Based on the above submissions, the Appellant prays the court that is sets aside the order of the trial court forfeiting 4 herds of cattle and restituting the rest (68 herds of cattle) to the Respondent.

On the other hand, the Respondent submitted that the Principle of Mitigation is to the effect of making less consequence of an order or action and in criminal law, specifically it is not intended to excuse or justify a criminal conduct but is considered out of mercy or fairness. This is what the trial magistrate considered when determining on the prosecution's prayer for forfeiture of all the 72 cattle.

As for the second ground of appeal, the Respondent contended that in summoning **Majura Kabeho**, the trial court had exercised powers conferred upon it under Section 195 (1) of the Criminal Procedure Act (Cap 20 R. E. 2002) which provides that any court may, at any stage of a trial or proceedings under the Act, summon any person as a witness if his evidence appears to be essential to the just decision of the case. As the court had acted on the powers conferred upon to it by the law, the second ground of appeal remains of no any merit.

As for the third ground of appeal, it is submitted by the Respondent that as **Majura Kabeho** was summoned as a witness in terms of Section 195 (1) of the Criminal Procedure Act and as such he gave the evidence required on oath, it was the Appellant's duty to cross examine the witness as it is provided for under Section 195 (2) of the Criminal Procedure Act, which duty they did not take. The Respondent again added that forfeiting 72 herds of cattle without according the owner an opportunity to be heard would have contravened Article 24 of the Constitution of the United Republic of Tanzania. The Respondent prays the court that it upholds the order of the court and that the appeal be dismissed.

That is all from the parties. Before going into the merits of the case, let me comment on the charges. Section 15 of the Wildlife Conservation Act No. 5 of 2009 Criminalizes entry into a game reserve by any person other than a person travelling through the reserve along a highway or designated waterway, without the written authority of the Director previously sought and obtained. The Act also under Section 18 (2) and (4) criminalizes the act of grazing any livestock in a game reserve or wetlands. It was alleged by the prosecution that on 8th of October, 2017 the Respondent did commit two offences. The Respondent did in the first place enter into Selous Game Reserve and in the second place he did graze 72 herds of cattle in the Selous game reserve. It is unfortunate that the charge sheet is silent as to the time the alleged offences were committed. This leads the court in finding that the two offences were simultaneously committed by the Accused person. That is the Accused did enter and graze herds of cattle into the game reserve. Evidently where the Respondent grazed herds of cattle into the game reserve he must have entered into it. This is evidenced by the facts adduced in court by the prosecutor that:

"... the game officers Edward Mzali and Sospeter Paskali were patrolling at different area in the Selous Game Reserve, when they reached at Kamelo area they found the accused grazing they arrested him ..."

It is my opinion that the accused in one Act had constituted two different offences that is one accused's act had constituted a crucial element in two different offences. In such a situation where the prosecution wishes to charge the accused with those two different offences, it cannot do so independently. The two counts must be

charged in the alternative. Where a person is charged in the alternative counts and is found guilty of both counts, he shall only be punished in one count. This goes to the Constitutional principle that no one should be punished twice for one act. In this case it was not proper to charge the Accused person with the two counts unless they were charged in the alternative. Since the two counts, which emanate from one act, were not charged in the alternative that amounted to duplicity. In my view the first count was not necessary.

Again going by the record it is clear that the prosecution did ask the court to forfeit the 72 herds of cattle the prayer was made under Section 111 (1) (a) of the Wildlife Conservation Act which reads as follows:

"S. 111 (1) where a person is convicted of an offence under the Act, the court shall order forfeiture for government of

(a) An animal, livestock or trophy in respect of which the offence was committed."

Indeed, this section is couched in mandatory words. Although the section is in such words, the implementation of the Section is not automatic. One against whom the order for forfeiture should be imposed must be invited to show cause as to why the order should not be given. In this case that opportunity was accorded to the accused who pleaded that the cows are owned by another person that is **Majura Kabeho**. The court heard the later and released the 68 cattle to him in terms of Section 111 (2) of the Act. In his submissions the Appellant stated that:-

"... the provisions of Section 111(2) of the Act deals with property or things connected with the commission of the offence. Instrumentalities of the Crime. Such things are enumerated in paragraphs (a), (b), and (c) of Section 111 (2) of the Act. The same kind of things are shown in paragraphs (b), (c), (d) and (e) of Section 111 (2) of the Act. Neither of the things or their alike are seen in paragraph (a) of Section 111 (1). Thus Section 111 (2) of the Act is in applicable to subject matter of the offence specifically those appearing in paragraph (a) of Section 111 (1) ..."

I have quoted Section 111 (1) (a) of the Wildlife Conservation Act herein above. For easy reference let me again reproduce hereunder Section 111 (2) of the Act:-

"S. 111 (2) The court shall order forfeiture in accordance with the provisions of subsection (1) notwithstanding that the vehicles, vessel, aircraft, weapon, article or thing to be forfeited was owned by a person other than accused".

Going by the provisions of Section 111 (1) (a) and (2) of the Act it is evident that Section 111 (1) (a) of the Act empowers the court to order forfeiture for the Government of an animal, livestock or trophy in respect of which the offence was committed. Going by Section 111(2) of the Act the court is empowered to order forfeiture in accordance with the provisions of subsection (1), notwithstanding that the vehicle, vessel, aircraft, weapon, article or thing to be forfeited was owned by a person other than the accused person. The right of the owner under such


circumstances is provided for under Section 111 (2) proviso that is to make an application that the court should not make the order for the forfeiture. It is important to note here that against what is submitted by the Appellant, Section 111 (1) and 111 (2) of the Act must be read together. Going by Section 111 (2) there is no mention of animal, livestock or trophy in respect of which the offence was committed. As the Appellant has rightly put it, Section 111 (2) of the Act lists only the instrumentalities of the crime. As such under such 111 (2) of the Act, the court cannot order for the forfeiture for the Government of the items listed under Section 111 (1) (a) of the Act which are owned by a person other than the accused without necessarily summoning the owner. This is no wonder that the owner of the properties/things listed under Section 111 (1) (a) has no right to make application under Section 111 (2) Proviso of the Act. Majura Kabeho in my view was rightly summoned to appear in court and show cause why forfeiture order should not be issued in respect of his cows. The owner could not be summoned as a witness under Section 195(1) of the Criminal Procedure Act as it is submitted by the Respondent. Upon showing cause why the order for forfeiture should not be issued the Prosecutor should have been given an opportunity to respond if there was any response. This was not done and it stands that the prosecutor was not heard in that regard. Since it was their right, denial of the right vitiates the proceedings in that aspect.

All in, all as said, the 1st count was unnecessary to be charged. Under the revisionary powers of this court, the same is declared null and it is nullified. The conviction in that respect is quashed and the sentence passed is set aside. As the Prosecution was not heard in response to the submission by **MAJURA KABEHO** showing cause why the cattle should

not be forfeited all proceedings in that regard is declared null and void and are hereby nullified and the subsequent orders are set aside. It is hereby ordered that the parties to the case should be summoned along with **MAJURA KABEHO** so that the later should be herd why his cows should not be forfeited and the prosecutor be accorded with an opportunity to be herd in response. The lower record be remitted for that purpose and the matter should land into the hands of another magistrate.

Dated at Dar es Salaam the 9th of January, 2018




E. J. Mkasimongwa

JUDGE

09/01/2018