IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 37 OF 2009

(C/f Arusha District Court, Economic Case No 18 of 2006)

HAMISI RAMADHANI @ HAMIS ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Arusha)

(J.M. KARAYEMAHA – RM)

In

Economic Case No. 18 of 2006

Dates: 7/09/2011 & 13/10/2011

JUDGMENT

Before: Sambo, J.

The appellant in this case, Hamisi Ramadhani @ Hamisi, stood charged with the offence of **Unlawful Possession of Government Trophy** contrary to **section 59(2) of the Economic and Organized Crimes Control Act,[Cap 200, R.E. 2002] and section 67(1) & (2)(b) of the Wildlife Conservation Act, [Cap.283, R.E. 2002]**. The District Court of Arusha, found him guilty, convicted and sentenced him to eleven (11) years of jail imprisonment. Aggrieved by the said conviction and sentence, he preferred the present appeal in which he raised four grounds as hereunder:-

1. *That, the learned trial Magistrate erred in law and in fact by relying on the uncorroborated evidence adduced by PW1 to convict the Appellant.*

2. *That, the learned trial Magistrate erred in law and in fact by accepting as an exhibits the things alleged to be found in the Appellant's house through search which was not properly conducted.*

3. *That, the learned trial Magistrate erred in law and in fact by failing to consider that the alleged search was conducted without involving the independent witness (neighbour).*

4. *That, the learned trial Magistrate erred in law and in fact directly by failing to comply with the provisions of section 214 of the Criminal Procedure Act, [Cap 20, R.E. 2002].*

Wherefore; the Appellant prays before this court, that the appeal be allowed by quashing the conviction and setting aside the sentence and let him at liberty.

On the date of hearing, the Appellant appeared in person and the Respondent was represented by Mr. Zakaria. The Appellant prayed to argue his case by way of written submissions whereby the Republic did not object and the court allowed the matter to be argued by written submissions.

Submitting to support his ground of appeal, the Appellant submitted that, the evidence adduced by PW1 is unworthy of belief because it was made without search warrant and it is uncorroborated in the essence that it was made without the presence of any independent witness.

He further asserts that, the trial Magistrate who took over the matter after the Appellant lost confidence with the previous one, just proceeded with the case without starting afresh hearing the case and calling PW2 and PW3 who could come and testify instead of relying to their statement tendered in court as evidence.

Lastly, the Appellant also submits that, he was wrongly convicted and sentenced with the offence charged without calling the Police Officer who investigated the case to testify before the trial.

In replying to the first ground, the learned State Attorney, Mr. Zakaria, submitted that, the evidence of PW1 was supported by PW4 and the statements of other witnesses whose attendance could not be procured without undue delay. The two statements of Ally Kazungu and Emmanuel Makali were tendered under **section 34 of the Tanzania Evidence Act, [Cap 6, R.E. 2002]** hence become part of prosecution evidence.

On the second ground, Mr. Zakaria, stated that, the reasons for failure to involve the independent witness during the search was stated during the trial. Also the search was conducted without search warrant as per **section 42(1)(b)(ii) of the Criminal Procedure Act [Cap 20, R.E. 2002].**

Submitting on failure of the trial Magistrate to comply with the provision of **section 214(1) of the Criminal Procedure Act (supra)**, Mr. Zakaria submitted that, the duty to resummon the witnesses and or recommence the trial under the above section is not mandatory rather it is upon the discretion of the trial Magistrate. He further adds that, the successor Magistrate to act on the evidence recorded by his predecessor did not prejudice the Appellant.

In relation to assertion that, the Appellant was convicted without the prosecution side to call the Police Officer who investigated the case to testify in court, the learned State Attorney, Mr. Zakaria, submitted that, the investigation of this case was done by the Ant Poaching Unit like other wildlife nature cases and the Anti Poaching Unit were called and testified in court. Apart from that, it is his submission that, the prosecution side are at liberty to call any witness who they think can prove their case beyond reasonable doubt and as provided by **section 143 of the Tanzania Evidence Act [Cap 6, R.E. 2002]** and the holding in the case of **Yohanis Msigwa vs. Republic [1990] T.L.R.148** there is no specific number of witnesses required to prove the case. Therefore, it is on that basis Mr. Zakaria considers this ground to lack merits.

Apart from the above submissions the learned State Attorney, Mr. Zakaria also has drawn attention to this court that, there were irregularities on the charge sheet, whereby, the Appellant was wrongly charged under **paragraph 15(d) of the 1st schedule and section 59(2) of the Economic and Organised Crime Control Act No. 13 of 1984** as amended by **Act No. 10 of 1989 and Act No. 3 of 1992,** together with **section 67(1) & (2)(b) of the Wildlife Conservation Act No 12 of 1974** instead of charging the accused as per **paragraph 14(d) of the 1st schedule and section 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap 200, R.E. 2002]** together with **section 70(1) & (2)(b) of the Wildlife Conservation Act [Cap 283, R.E. 2002]**. But according to Mr. Zakaria those irregularities are not fatal and can be cured by **section 388(1) of the Criminal Procedure Act (supra).**

Lastly, Mr. Zakaria, submitted that, in this offence the Appellant was required to be sentenced for the term not less than twenty (20) imprisonment as per **section 70(1) & (2)(b) of the Wildlife Conservation Act [Cap 283, R.E. 2002],** because he was found with Zebra which is an animal specified in **part I of the 1st schedule to the Wildlife Conservation Act (supra),** the learned State Attorney prayed this court to exercise its powers under **section 366(1)(a)(ii) of the Criminal Procedure Act (supra)** and sentence the accused as required by law.

In further reply, the Appellant still insisted that he was convicted by basing on uncorroborated evidence and the blood clothes which occasioned suspicion were not tendered as exhibit during the trial. On irregularities in the charge sheet, to the Appellant is not minor error and according to him wrong citation of provision of law is fatal.

Having read all parties submissions, the proceedings record and the judgment of the trial court, this court consider that the second and the third ground can be consolidated to be one ground. For that matter there are three grounds of appeal and this court has the following to say, and I start with the first ground;

It is quite true as the learned State Attorney, Mr. Zakaria, submitted that, the evidence of PW1 was corroborated by the evidence of PW4 and the statements of Elly Kazungu marked **C1** and that of Emmanuel Makali, marked **C2**. I consider those statements to have been made to express the matter in question, therefore; can be taken as prosecution evidences as per **section 34(a) of the Tanzania Evidence Act (supra)**. For that reasons the first ground lacks merit.

On the issue of search warrant, I concur with the learned friend Mr. Zakaria that the law allows search without warrant in some circumstances. The records show that, the accused was arrested while running, thus the Anti Poaching officer suspected him to have been committing offence. Therefore, to prove what they were suspecting without delay before things have changed, they did search without warrant as per **section 42(1)(b)(ii) of the Criminal Procedure Act (supra)**. To that effect this ground loses.

On the Appellant's last ground that, the trial Magistrate contravened with the provision of **section 214(1) of the Criminal Procedure Act (supra),** the law under the said section provides that, the Magistrate taking over, may proceed with the proceedings recorded by the previous Magistrate or resummon the witnesses and recommence the trial or the committal proceedings if he considers it necessary. The proceedings records at page 19 on the top, shows that, the trial Magistrate taking over the matter just proceeded with the case without resummoning PW1 to appear in court and testify again before him. This is not fatal and I concur with the learned State Attorney that, to resummon the witnesses, or recommence the trial as per **section 214(1) of the Criminal Procedure Act (supra)** is not mandatory rather it is the discretion of the trial Magistrate taking over. In a very recent case of **Yusuph Nchira vs The Director of Public Prosecution (D.P.P), Criminal Appeal No. 174 of 2007 (CAT) at Arusha registry (unreported)** at page 8 to 9, inter alia, it was held that;

> *"The law before this amendment was to the effect that the magistrate who took over was mandatorily required to inform an accused of his right to demand that the witnesses who testified before be summoned to testify*

before him if the appellant so desired (See: ***Liamba Sinanga v. Republic [1994] TLR.97;*** *Criminal Appeal No. 60 of 2001,* ***Ndeoya Thadayo v. The Republic*** *(unreported). The appellant was charged on the 25/3/2004 when the old section had been amended ..... The magistrate who takes over now has discretion to resummon the witnesses and recommence the trial....* ***There was no obligation on her party to inform the appellant to demand that the witnesses who testified before the first magistrate be resummoned to testify before her."*** *(emphasized)*

For this reason, the last ground of appeal also fails.

Concerning the failure of the Officers who investigated the case to come and testify in court, it is clear before the law as the learned State Attorney submitted that, **section 143 of the Tanzania Evidence Act [Cap 6, R.E. 2002]** and the holding in the case of **Yohanis Msigwa vs. Republic [1990] T.L.R.148**, that the prosecution side are at liberty to choose any witness who they think will be fit to prove their case beyond reasonable doubt.

On the irregularities pointed out by the learned State Attorney as found in the charge sheet whereby the Republic cited the law as they were before being revised in 2002, is not fatal because the content of the laws cited in the charge sheet are similar to the relevant provisions in the respective 2002 revised Acts. Under this situation I cannot say that, the Appellant was prejudiced, because he knew and understood the offence charged with. In the recent case of **Otto Kalist Shirima vs. The Republic, Criminal Appeal No. 234 of 2008 (CAT) Arusha registry (unreported)** it was held that,

"...since the Appellant not only understood the nature of the offence he was facing but also ably defended himself, therefore; those irregularities did not occasion injustice on his side".

As rightly submitted by Mr. Zakaria, the learned State Attorney, those errors can be cured by **section 388(1) of the Criminal Procedure Act (supra).**

In relation to sentence, the **Interpretation of Laws Act [Cap 1, R.E. 2002] under section 72** provides that,

"Where any act constitutes an offence under two or more Acts, the offender shall unless the contrary intention appears, be liable to be prosecuted and ***punished under either or any of such Act****, but shall not be liable to be punished more than once for the same offence."(emphasized)*

But in this matter, the accused was supposed to be sentenced to imprisonment for not less than twenty years but not more than thirty years as per **section 70(1) & (2)(b) of the Wildlife Conservation Act [Cap 283, R.E. 2002],** because it is the section which expressly and directly state the offence which the accused was charged with.

Surprisingly, upon careful perusal of the lower court records, I found that, the matter was tried by the District Court of Arusha while the **Certificate of Order for Trial of an Economic Offence** issued by the Acting learned State Attorney in charge, N.J. Ringo, on 18th May, 2007 **ordered the offence to be tried by the Resident Magistrates' Court of Arusha**. The District Court had no power to deal with the matter which it has been ordered to be tried by the Resident Magistrates' Court.

Another issue which I have encountered is the issue of territorial jurisdiction. The incident took place within Simanjiro District in Manyara Region in 2006 and the Resident Magistrates' Court of Manyara was established since 2004, but the learned State Attorney ordered the offence to be tried in the Resident Magistrates' Court of Arusha. There is no law under **the Economic and Organised Crime Control Act (supra)** empowers the Director of Public Prosecution or State Attorney to order the offence to be tried in another territorial jurisdiction while in the place the offence has committed there is a court which has power to try the offence. **Section 12(3) of the Act,** provide that;

> *"The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as* ***he may specify in the certificate.****"*

The wording of the above cited section does not give power to the Director of Public Prosecution or State Attorney to transfer the matter to another territorial jurisdiction. The phrase "...***he may specify in the certificate"*** gives discretion to the Director of Public Prosecution or State Attorney to order such offences to be tried either by the District Court or Resident Magistrates' Court in the territory where the offence committed and not otherwise.

Notwithstanding other reasons stated above and for the reason that, the matter was tried by the District Court contrary to the order of State Attorney and that, the State Attorney ordered the matter to be tried in wrong territorial jurisdiction is like the

offence was not tried at all. To that effect this court has nothing to do but to quash the conviction and set aside the sentence and to order a retrial. The Appellant was convicted and sentenced since 25th June, 2008. It will be injustice to the Appellant side to order the retrial while he served almost four years in prison. I therefore allow the appeal, quash the conviction and set aside the sentence against the Appellant and all other subsequent orders, if any. I order that the Appellant be released from the prison as soon as it is practicable, unless otherwise lawfully held.

K.M.M. SAMBO

JUDGE

13/10/2011

Delivered in chambers this 13th day of October, 2011 in the presence of the learned State Attorney, Miss Hyera..., for the Republic and the Appellant in person.

K.M.M. SAMBO

JUDGE

13/10/2011