IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 459 OF 2020

BULUKA LEKEN OLE NDIDAI.....1ST APPELLANT
LEKITONYI KAIKA LENDIARE.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Arusha)

(Luvanda J.)

dated the 18th day of February, 2020

in

Economic Case No. 20 of 2019

.....

JUDGMENT OF THE COURT

7th & 21st February, 2024

GALEBA, J.A.:

The two appellants in this appeal, Buluka Leken Ole Ndidai (the first appellant or DW1) and Lekitonyi Kaika Lendiare (the second appellant or DW2), were charged before the Corruption and Economic Division of the High Court at Arusha, in Economic Case No. 20 of 2019. They were charged on a single count of unlawful possession of a Government trophy contrary to the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act, 2009 (the WCA) read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act. According to the

particulars of offence in the information which was presented to the trial court, on 22nd October, 2018 at Makati Village Lake Natron Area within Longido District, in Arusha Region, the appellants were found in unlawful possession of Government trophies, to wit giraffe's meat and a head.

The appellants denied to have committed the offence, but nonetheless, the trial court found them guilty and upon conviction, each was sentenced to pay a fine of Tanzania Shillings 340,179,000.00 and if they would fail to raise the money, then each was to serve a custodial sentence of twenty (20) years imprisonment. It appears that they did not pay the fine, because at the hearing of this appeal, they were under custody and escort of prison officers.

The brief facts giving rise to the present appeal may be summarized as follows in the context of the prosecution; that on 22nd July, 2018, while on patrol in Lake Natron Game Controlled Area, one Anthony Ntoros Peria (PW1) a game warden stationed at the Northern Zone Anti-Poaching Unit (KDU), received information from a confidential informer that there were poachers at Makati Area on the edge of Lake Natron. Together with Emmanuel Alexander Mponji (PW4), George Mangu and Hamis Mandau, PW1 proceeded to the scene of crime and found the two appellants skinning a giraffe with two double edged knives and one bush knife. They were arrested immediately and

admitted to have no official permit to be in possession of the Government Trophy. A seizure certificate, exhibit P1 was filled in and signed as appropriate. PW1 and other arresting officers conveyed the accused to the Police in Arusha. The exhibits, that is the meat, a head and a piece of skin of the giraffe were taken to KDU Arusha and PW1 handed over the exhibits to one James Kugusa (PW2) who is an exhibits keeper. A handing over document, exhibit P3 in that respect was filled in. Further, on 24th October, 2018, Emmanuel Daniel Pius, (PW3) a wildlife officer, was instructed by his incharge to go to the store and identify and value the Government Trophy. He went to PW2 who handed to him the trophy which he identified and concluded the same to be a head, meat and skin of the wild animal, giraffe. He prepared a Trophy Valuation Certificate, exhibit P4. Thereafter, this witness, PW3 on the same date, filled in the Inventory Form, exhibit P5, which he presented before a resident magistrate at the Resident Magistrate's Court in Arusha, in order to procure a disposal order of the said government trophy, for the same was susceptible to speedy decomposition. After its procurement and in compliance to the obtained court order to dispose of the exhibit, PW3 made a pit in the ground and buried the trophy. In place of the buried trophy, exhibit P5 was then relied upon in court to

prove that the appellants were found in unlawful possession of the trophy. Briefly, the above constituted the prosecution case.

As for the defence, the first appellant aged 60 at the time, testified that he lives at Makati Village and was arrested at his home in the evening around 19:00 hours on a date he did not recall, while taking care of his cattle. He was then severely beaten and taken to Ngaresero. Later on, he was taken to Ngaruka where he was forced to enter into a small room wherein, he was forced to sign a document whose content he did not know. He was later taken to the Police where there was no interpreter. He testified that he came to know anything relating to the giraffe meat in court. He denied to have been found in possession of the alleged government trophy.

On his part, the second appellant testified that he was a resident of Makati Village and denied to be linked in any manner with the alleged government trophy. According to him, he was arrested along with the first appellant at his home for reasons he was not told. After their arrest, they were taken to Ngaresero, where he was beaten by the police. They were then taken to Ngaruka where they were beaten and forced to sign papers. Then they were conveyed to Arusha. He denied to have been in possession of giraffe meat, head or piece of skin, which he only heard of, in court.

Having considered both the prosecution and the defence cases, the trial court made the finding that the appellants were both guilty having been found in unlawful possession of government trophy as charged and sentenced them as indicated earlier on. This appeal is challenging that finding of the High Court. The appeal was initially based on 7 grounds, but at the hearing grounds 3, 4 and 5 were abandoned leaving only grounds of appeal No. 1, 2, 6 and 7 for determination of this appeal, which may be rearranged as follows:-

> *"1. That, the learned trial Judge erred in law and in fact when he failed to evaluate the evidence of PW1, PW2, PW3, PW4, Exhibit P1, P3, P4 and P5 and thus arrived at the wrong conclusion.*
> *2. That, the learned trial Judge erred in law and in fact when he failed to realize that the evidence on record was too short and contradictory and hence casting doubts to the allegations.*
> *3. That, the learned trial Judge erred in law and in fact by failure to evaluate the evidence tendered by the defence side which raised reasonable doubts.*
> *4. That, the learned trial Judge erred in law and fact in his judgment when he held that the prosecution had proved its case beyond reasonable doubts."*

At the hearing of this appeal, the appellants were represented by Mr. John Melchiory Shirima, learned advocate, whereas the respondent Republic had the services of Ms. Riziki Mahanyu, learned Senior State Attorney, assisted by Ms. Neema Mbwana, Ms. Eunice Makala and Ms. Tusaje Samwel, all learned State Attorneys. Present too, was Mr. Latang'amwaki Ndwati, a person fluent in Maasai who was sworn and assisted the Court as a translator of the proceedings because the appellants were only fluent in Maasai but not Kiswahili or English.

To start with, and as indicated above, out of the 7 grounds of appeal that were lodged, Mr. Shirima abandoned grounds 3, 4 and 5 and maintained the above listed grounds and in arguing them he started with ground 1.

Although learned counsel spent quite a considerable amount of time trying to get across to us the appellants' basic grievance in that ground of appeal, what we eventually gathered from him to be the complaint of the appellants, was that the Inventory Form (exhibit P5) which was tendered by PW3 and included in the record of appeal at page 76, was procured illegally, so much so, that it ought not to have been relied upon in convicting the appellants. In supporting that point, Mr. Shirima argued that the record does not show that the appellants were present before the magistrate who made an order to dispose of

the alleged Government trophy. He contended that the appellants not being fluent in either Kiswahili or English, even if they were to be present before the magistrate, there is no evidence on record that there was an interpreter who translated to them all that was transpiring before the magistrate. According to him, the omission to effectively and actively involve the appellants in the process of procuring the order to destroy the trophy allegedly found in their possession, violated section 101 of the WCA. The learned advocate relied on the case of **Emmanuel Saguda @ Suluka and Another v. R,** Criminal Appeal No. 422 "B" of 2013 (unreported), impressing upon us that, at the time of procurement of the order to dispose of the perishable exhibit, suspects ought to have been present and be made to actively participate at the session by affording them a right to comment on the exhibit for which the disposal order was being sought. He finally prayed that exhibit P5 be expunged from the record and allow the 1st ground of appeal in that respect.

In response, Ms. Mbwana was not at all at one with the learned advocate. She referred the Court to page 53 of the record of appeal and submitted that when PW3 took the perishable exhibit before the magistrate for procurement of the disposal order, the appellants were present. In any event, she submitted, according to law, it is not compulsory that the suspects must be present at the time of

procurement of the disposal order. According to the learned State Attorney, section 101 of the WCA was not breached. She moved the Court to hold that the disposal order was procured according to law and exhibit P5 is a valid exhibit. She moved the court to dismiss the appellants' 1st ground of appeal.

In resolving the contested above 1st ground of appeal, the appropriate starting point, we think, should be the law, which is section 101 (1) (a) (i) and (2) of the WCA as amended. That section provides as follows: -

> *"101. (1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-*
>
> *(a) prior to commencement of proceedings, order that-*
>
> *(i) any animal or trophy which is subject to speedy decay;*
>
> *and is intended to be used as evidence, be disposed of by the Director;*
>
> *(2) The order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial."*

So, under the above provision, prior to commencement of formal proceedings which may be mounted for purposes of trial, on its own

motion or upon being moved by the prosecution, the court has mandate to order disposal of an animal or trophy whose nature is perishable and susceptible to speedy decay. As indicated above, the statute provides for the time to make that order, that is any time during investigation of the case but before commencement of formal proceedings, but the statute does not provide the procedure of going about it. It also does not provide as to who should be present at the session.

This Court however has had on multiple occasions pronounced its position on the issue of involvement of the suspect or suspects at the time of ordering a disposal of perishable exhibits, and the effect of failure to procure participation of the suspect at the session seeking to secure a disposal order. In the case of **Mohamed Juma Mpakama v. R** [2019] 1 T.L.R. 514 we observed that the issue of presence of the suspect at the session seeking a disposal order is a requirement traceable from the Police General Orders (the PGO). This Court referred to PGO No. 229 paragraph 25 relating to Investigation and Exhibits and held that the presence of a suspect at that time is mandatory. That paragraph of PGO 229 provides:-

> *"25. Perishable* ***exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together***

with the prisoner (if any) *so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."*

[Emphasis added]

In the case of **Mohamed Juma Mpakama,** (supra) it was held at page 516 thus:-

"vii. Paragraph 25 of PGO envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. ***This paragraph, 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard."***

[Emphasis added]

As a consequence, the Court at page 527 observed:-

"...While the police investigator, Detective Corporal Simon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, ***the resulting Inventory Form (exhibit PE3) cannot be proved against the Appellant because he was not given the opportunity to be heard by the primary court magistrate."***

[Emphasis added]

Before **Mohamed Juma @ Mpakama** (supra) was decided in 2019, the position had been held and maintained in the case of **Emmanuel Saguda @ Suluka** (supra) in 2014, where it was observed that at the time of seeking to obtain the order, the suspect or suspects are entitled to see the alleged exhibits and raise an objection if any. Subsequently, in **Nyakwama Ondare @ Okware v. R,** Criminal Appeal No. 507 of 2019 (unreported), the Inventory, exhibit PE1 was expunged from the record for reasons, among others being that, there was no evidence that the disposal order of the exhibit was procured in the presence of the suspect. Similarly, in **Mosi Chacha @ Iranga v. R**, Criminal Appeal No. 508 of 2019 (unreported), faced with the same problem of absence of the suspect at the session at which a disposal order was sought, this Court observed that the mandatory requirement is not only the presence of the suspect but also affording him a right to be heard before the disposal order is to be given.

See also the case of **Michael Gabriel v. R,** Criminal Appeal No. 240 of 2019 and; **Ngasa Tambu v. R**, Criminal Appeal No. 168 of 2019 (both unreported).

That is to say, the powers to issue disposal orders of a perishable exhibit under section 101 (1) (a) (i) and (2) of the WCA, must be exercised in observance of the requirements to have the presence of the

suspect in respect of whom the exhibit relates under paragraph 25 of PGO No. 229 providing for several aspects of Investigation and Exhibits.

With the above understanding on the law, we will now turn our full attention to what happened in the case before us, in order to find out whether the appellants were present before the magistrate who issued the disposal order or not. In doing that, we have thoroughly scrutinized the record of appeal particularly the evidence of PW3 who presented the perishable exhibit before the magistrate to seek a disposal order at page 57 of the record of appeal. At that page, the witness when responding to a question posed by the defence counsel during cross examination, had this to say:-

> *"In exhibit P5 on item seized, I recorded giraffe meat with skin and head. At disposal I was in company of investigator and an interpreter of Masai one Anthon Peria who is working at KDU North Zone. An interpreter was not sworn, only was summoned to assist the suspects in case of misunderstanding. At burying I was alone."*

In the judgment of the trial court, particularly at pages 137 to 140 of the record of appeal, in trying to trace the origin of the Inventory Form, the court observed that the same is not a requirement under section 101 of the WCA and reasoned that, may be the game warden

who prepared it borrowed the practice from section 47 (1) and (5) of the Police Force and Auxiliary Services Act, relating to disposal of unclaimed property subject to natural decay, and PGO No. 304 in respect of Unclaimed property whose details are filled in Police Form No. 12 (PF12) also called an Inventory. After observing that the inventory form does not have a column for a suspect or suspects to sign, and without investigating and making a finding of fact on whether the appellants were present at the time PW3 was seeking for a disposal order before a magistrate, the trial court at page 140 of the record of appeal, concluded that the Inventory Form, exhibit P5 before him was a valid and perfect document.

As seen above, we indicated that PW3 testified that at the time of seeking a disposal order, the suspects were present. In our view, that simple linear statement is insufficient. Because it leaves many more questions unanswered, in view of this Court's authorities we referred to above. Such queries are like; **one**, if the suspects were present before the magistrate, where is it indicated in the inventory, that the suspects were present? **two**, were they asked for any comment, remark or objection as regards the exhibit which was being sought to be disposed of? If yes, where is the record of their comment, remark or observation in that respect?

In our view, the void and emptiness left by the above questions lead to only one conclusion, namely, that the appellants were not heard and their comments or objections (if any) were not taken, at the time the disposal order was being procured. If that is the case, which we are confident, it is, the inventory cannot be relied upon to prove any case against the appellants, for as against them, it is ineffectual. The respondent's position on that matter is not made any better by PW3, testifying at page 57 of the record of appeal, that there was an interpreter one Anthony Peria (PW1), to assist the appellants in case there was a misunderstanding before the magistrate. That piece of evidence cannot be trusted either. In this case the appellants are not fluent in both Kiswahili and English, that is why at the trial, one Mr. Kiremu Maireju was sworn and assisted in translating the proceedings at the trial court. Likewise, before us Mr. Latang'amwaki Ndwati, acted as a translator. In any event, throughout the evidence of one Anthony Peria (PW1), from pages 37 to 44 of the record of appeal, he never stated that he appeared before the magistrate who made a disposal order and translated anything for the appellants. It is an unfair trial, to conduct any legal proceedings, including the proceedings to seek an order to dispose of exhibits, where the suspect, even if present, he is not fluent or conversant with the language of the proceedings in question. See this

Court's decision in **Juma Ndodi v. R,** Criminal Appeal No. 588 of 2020 (unreported). In short, the appellants were not heard at the time the magistrate was making an order to destroy the trophy.

Nonetheless, it is worthwhile to note that indeed, there is a *lacunae* in the law. Presently, there is no statutory procedure providing for the proceedings to put into effect the requirements of section 101 (1) and (2) of the WCA and paragraph 25 of PGO No. 229, which provisions are necessary for procuring a disposal order for a perishable exhibit. In our view, as an interim measure pending promulgation of any rules of procedure for that purpose, it will be sufficient for a magistrate before whom an order to dispose a perishable Government trophy or trophies, to make such order, provided that; **one**, the prayer to issue the order to dispose of perishable exhibits may be made by the investigator or the prosecution informally before a magistrate in chambers; **two,** if the order is likely to be relied upon in any future court proceedings against any suspect, that suspect must be present at the time of making the prayer and; **three,** the suspect must be asked as to his comments, remarks or objections as regards the perishable exhibits sought to be destroyed. **Four,** if that suspect does not make any comments, remarks or objections, the magistrate shall record the fact that, the suspect was invited to make any comments, remarks or

objections, but he opted to make none. **Five,** if the suspect makes any comments, remarks or objections, they shall be recorded as appropriate either on the reverse side of the Inventory Form or on any separate piece of paper or papers and shall be signed by the magistrate.

Finally, in view of this Court's consistent position as regards affording the suspects the right to be heard at the time of issuing a disposal order, exhibit P5 in this case was illegally procured. In **Juma Mohamed @ Mpakama** (supra), we said *"the resulting Inventory Form (exhibit PE3) cannot be proved against the Appellant because he was not given the opportunity to be heard by the primary court magistrate."* Based on that authority, we expunge exhibit P5 from the record. In the absence of the Inventory Form, which stands in the place of the destroyed trophies, there is no way legally conceivable, that the appellants can still legally remain blameworthy of the offence charged, in the aftermath of discarding exhibit P5.

In fine, the first ground of appeal succeeds to the above extent. In the same vein because, discarding exhibit P5 is sufficient to dispose of the appeal, which we allow, we find no need to engage in discussing any other grounds of appeal.

Lastly, the appellants' finding of guilty is quashed, the respective orders of their convictions are nullified and the sentences meted upon them are both set aside. In the final analysis, it is hereby ordered that both appellants be released forthwith from prison, unless they be held there for other lawful cause.

It is so ordered.

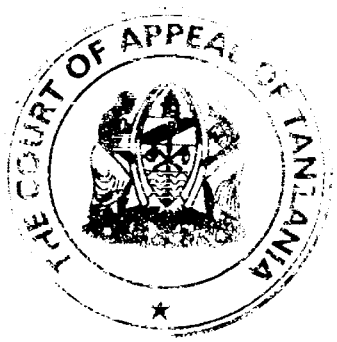
DATED at **ARUSHA** this 20th day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

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



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL