IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY]

AT MOROGORO

CRIMINAL APPEAL NO. 7614 OF 2024

(*Arising from the Judgement of the District Court of Kilombero at Ifakara in Economic Case No. 18 of 2023 dated 28th December, 2023 by Hon. R. Futakamba, SRM*)

JOHN NYONI KAITANI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

15/04/2024 & 06/05/2024

KINYAKA, J.:

The appellant, John Nyoni Kaitani was charged before the District Court of Kilombero at Ifakara, hereinafter "the trial court" of an offence of unlawful possession of government trophy contrary to section 86(1), (2) (b) and (3) of the Wildlife Conservation Act, Cap. 283 R.E. 2022, hereinafter "the WCA" read together with paragraph 14 of the First Schedule to the WCA, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2022, hereinafter "the EOCCA".

It was alleged before the trial court that on 23rd April 2023 at Namwawala village, Namwawala Ward within Kilombero District in Morogoro Region, the appellant was found unlawfully possessing seven pieces of buffalo meat valued at US$ 1,900 equivalent to TZS 4,460,250, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

Upon hearing the evidence of both the prosecution and defence, the trial court was satisfied that the prosecution established the offence against the appellant beyond reasonable doubt. As a result, it convicted and sentenced the appellant to pay a fine of four times the value of the trophy totaling TZS 44,602,500, and in default of such payment, the appellant was to serve 20 years imprisonment in jail.

Dissatisfied, the appellant knocked the doors of this Court preferring seven grounds of appeal as reproduced herein below:-

1. That the trial magistrate erred both in law and facts when admitting the cautioned statement as prosecution exhibit P2 knowingly that the same were not taken in accordance with the law. The appellant was arrested on 23rd April 2023 at 2100 hrs as stated by PW2 one Mapande Ganzali and escorted to Ifakara Police and PW3 one WP 4629 D/SGT Rehema testified that she recorded caution statement on 24th April

2023 at 1100 hrs. It is not in record that extension of time was sought and obtained meaning that the interrogation (cautioned statement) made by PW3 was illegally obtained and for the administration of justice, I pray for it to be expunged from records;

2. That the prosecution witnesses never clarified the distinct features of the exhibit tendered to be admitted by court, the omission that affect the root of the case from the charge sheet. The trial court erred in law convicting the appellant basing on imaginary story. It was the duty of an expert to clarify the distinct features of the trophy rather than saying the smell was of buffalo instead of clarifying that smell. Refer to the cases of Republic v. Kerstin Cameron (2003) TLR 85 and Abadallah Thabiti Issa v. R. Criminal Appeal No. 79 of 2019 HCT Mtwara (unreported) where (Ngwembe J) by then had the same view;
3. That search was not properly conducted to the appellant. As pointed out by the prosecution witnesses that search was conducted during night, they did not express distance and intensity of light that helped in visibility. PW1 the Police Officer, PW2 the Conservation Ranger at TANAPA and the whole team of arrest refused to be searched by the appellant before they forcibly entered the house. The Honourable

Magistrate had to warn herself of the likelihood chances of fabrication of the case against the appellant before entering conviction. The Hamlet Chairman, the Village Executive Officer and other members of the Village Council are just nearby my house. Failure to invite any of them during search in a serious matter like this had affected the root of the case. I PRAY FOR Seizure Form to be expunged from records as I was not free during signing and my life was in danger considering that PW6 is not independent to me as we are not in good terms and the rest of arresting team were soldiers being armed;

4. That the trial magistrate erred in law and facts when admitting the evidence of PW5 one Garitha Bitaliho the Honourable Magistrate and applied as part of conviction evidence against appellant knowingly that PW5 is not aware of what was buried and that the admission of the inventory Form prosecution exhibit 4 left doubts as is not clear what kind of meat was that and it was not read over to me to know its contents before signing. I pray the Inventory Form to be expunged from records;
5. That the trial magistrate erred in law and facts relying on repudiated/retracted confession imposing conviction to the appellant

without full consideration of the circumstances that it was true given by the appellant. My strong evidence that I bought a flesh meat of cow and dried it for future use was not shaken by any prosecution witness or prosecutor and was not considered by the trial magistrate. In a village we don't have butchers as we buy cow meat in pieces. Is it a criminal offence to buy a flesh of cow? This was not clarified during judgement;

6. That the trial process was not fair as the appellant was not accorded with enough time for defence and calling my key witness. I informed the trial magistrate that I had two witnesses but prosecution told me that the witnesses are family members hence they cannot testify for me. The trial magistrate again erred in Rules governing competency and comparability of witnesses; and
7. That the case against the appellant was not proved beyond reasonable doubt as required by law, the fact which had affected both the root of the case and the end process of litigation by convicting innocent appellant.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented. The respondent was duly represented by Mr. Josberth Kitale, learned State Attorney.

Being a lay person, the appellant prayed to adopt the contents of his grounds of appeal and explanations made therein as part of his submissions in the appeal. He added that the Valuation Officer who testified before the trial court that he recognized the trophy by smell, did not state the kind of instrument he used to recognize such smell.

Mr. Kitale begun by conceding to the first and fifth grounds that Exhibit P2, the appellant's caution statement was taken out of the prescribed time contrary to section 50(1) (a) of the Criminal Procedure Act Cap. 20 R.E. 2022, hereinafter "the CPA". He pointed out the evidence of PW3 that the appellant was arrested at 11:00 pm on 23rd April 2023, handed to Ifakara Police Station on 24/04/2023 at 1:00 am and interrogated at 11:00 am on 24/04/2023 beyond the four hours prescribed by the law.

Opposing the second ground, he stated that the Wildlife Officer/Valuer (PW4) on page 16 of the proceedings managed to describe the differences between the trophy meat and cow meat that the dried pieces of meat had a buffalo smell and thick tissues different from animal like cow.

Against the third ground, Mr. Kitale explained that search is conducted in accordance with sections 38(3) of the CPA, 22(3) (b) of the EOCCA and 106(1) (b) of the WCA. He argued that the three laws require the presence of an independent witness but has not provided for mandatory requirement of the presence of the VEO or members during the search exercise. To him, an independent witness whose presence is required when search is conducted under section 106(1)(b) of the WCA means a person who has no interest in the incident or what is being conducted. He argued that PW6 was an independent witness as confirmed by the appellant's testimony on page 29 of the proceedings that his witness is PW6 as what he said was what had actually happened during the search. He added that the appellant neither objected to the admission of the Exhibit P1, the seizure certificate nor testified before the trial court that he signed the seizure certificate against his will.

Rebutting the fourth ground, Mr. Kitale stated that the trophy was valued and found to be the buffalo's, and that the appellant was sent before PW5, the Primary Court Magistrate of Mlabani, Ifakara. He submitted that the order of destruction of the trophy was issued in front of the appellant and SGT Rehema, the same was destructed in front of the appellant, and that

the appellant did not cross examine PW5 on that aspect. He added that section 101(1) (a) (i) and (ii) of the WCA and PGO No. 229 paragraph 25, provide for guidance on disposal of the perishable exhibits but does not require the magistrate who orders destruction of the exhibit to witness or participate in the burying exercise, though PW5 was present when the exhibit was buried.

He contended that the appellant's complaint that Exhibit P4 was not read over to him, was an afterthought as the appellant never cross examined PW5 on the aspect which prove that he duly signed Exhibit P4 while knowing the contents of the same. He referred to the decision in the case of **Christopher Marwa Mturu v. R., Criminal Appeal No. 561 of 2019**.

He opposed the sixth ground for being an afterthought elaborating that the appellant was given the right to call witnesses but he chose not to call any witness. Relying on the decision of the Court of Appeal in the case of **Oscar John Bosco @ Jacob & Another v. R., Criminal Appeal No. 140 of 2018**, he submitted that the record of the court carries the true record of the proceedings and cannot be impeached. He added that the claim that the trial magistrate erred in the rules of competency and comparability of witnesses is out of context.

In response to the seventh ground, the state counsel submitted that the prosecution proved that the appellant was arrested with buffalo meat as evidenced by Exhibit P1, and seizure certificate which was signed by the appellant proving that he was found in possession of buffalo meat as it was held by the Court of Appeal in the case of **Shaban Waziri Mizogi v. R., Criminal Appeal No. 476 of 2019** in which the case of **Song Lei v. DPP, Criminal Appeal No. 16 of 2017** was cited with approval. He added that the prosecution proved that the appellant was arrested with buffalo meat through the evidence of PW4 who identified the meat basing on its smell and tissues.

In rejoinder, the appellant submitted that he did not buy buffalo meat but cow meat for his son's baptism at TZS 3,000. He denied the meat to be either buffalo meat or government trophy and that he does not know how to read and write. He prayed for his appeal to be allowed.

My determination of the present appeal begins with the first and fifth grounds of appeal relating to the appellant's complaint that the caution statement was taken outside the four hours prescribed under section 50(1)(a) of the CPA. Section 50(1)(a) and (b) reads:-

"For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence..."

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

In emphasizing on the compliance to the above cited provision, the Court of Appeal in the case of **Anold Loishie @ Leshai v. Republic, Criminal Appeal No 249 of 2017** (unreported) observed as follows:-

*"The above provisions without doubt, call for strict compliance. This fact has been restated in various decisions of this Court. In the case of **Emmanuel Malahya vs Republic,** Criminal Appeal No. 212 of 2004 (unreported), the Court held:*

> *"Violation of s. 50 is fatal and we are of the opinion that ss. 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as mere technicalities."*

The Court went further referring its holding in the case of **Ramadhani Mashaka v. Republic, Criminal Appeal No. 311 of 2015**, where it was held:-

> *"it is now settled that a cautioned statement recorded outside the prescribed time under section 50(1) (a) and (b) renders it to be incompetent and liable to be expunged...."*

In the present appeal, as conceded by Mr. Kitale, I have also noted from the evidence of PW3 on pages 14 and 15 of the proceedings that the appellant's caution statement admitted by the trial court as Exhibit P2 was taken at 11:00 am on 24th April 2023. The appellant was arrested on 23rd April 2023 at 11:00 pm and handed at the Ifakara Police Station afterwards at 1:00 am, the difference of twelve hours and ten hours from when the appellant was arrested and conveyed to the police station, respectively. The prosecution did not offer any reason for its delay in interrogating the appellant. As the appellant's caution statement was admitted in contravention of the law, I expunge Exhibit P2 from the record of the trial court. The first and fifth grounds of appeal are allowed.

I will now turn to determine the remaining grounds of appeal. I will firstly determine the second ground of appeal, followed by the third, sixth, fourth and seventh grounds of appeal.

On the second ground, the appellant attacked the decision of the trial court by basing on imaginary story of the prosecution witnesses who failed to clarify distinctive features of the trophy and its failure to clarify the smell. The evidence as to the nature of the meat that was found in possession of the appellant was testified by PW4, the Wildlife Officer on pages 17 and 18 of the proceedings.

Both during her evidence in chief and when she was cross examined, PW4, a holder of the Bachelor Degree in Wildlife Conservation Science from the University of Dar es Salaam, consistently informed the trial court that the buffalo meat had a different smell compared to other domestic animals. She identified the buffalo meat as having thick tissues compared to animal like cow which he compared due to their resemblance. When cross examined on how she was able to identify the trophy, she stated that it was through her knowledge in anatomy and physical animal behavior.

From the above piece of evidence where PW4 was able to explain the distinctive features of the dried buffalo meat, I find the trial court's reliance on the evidence of identification of the trophy proper. The cases cited by the appellant are distinguishable from the present case. In **Republic v. Kerstin Cameron** (supra), the prosecution witnesses failed to sufficiently

describe the distinctive feature of the trophies. In **Abdallah Thabiti Issa** (supra), the Court found that the investigation failed to properly investigate the case to find out the killer of the trophy (the Great Kudu), and that the trial court had failed to consider the accused's allegation that the police ate all the meat that were cooked and left only one piece for exhibit purpose. The circumstances are different from this case. The second ground of appeal lacks merit.

The third ground faults the trial court's reliance on the prosecution evidence which did not establish the intensity of light that assisted visibility during the search exercise as well as failure by the police officer to call the hamlet chairman, VEO and members of the village council to witness the search exercise. Admittedly, I have noted from the record of the trial court that the prosecution witnesses did not establish the intensity of light that assisted them in the search exercise, despite the fact that the search was conducted at night.

However, I find the lack of such piece of evidence not material in proving the offence of unlawful possession of government trophy that the appellant was charged with. The evidence of PW1, PW2, PW6 and DW1 prove that the search was conducted in the presence of PW6 who was the appellant's

neighbour, and a sulphate with the dried meat was found at the room of the appellant's daughter in his house.

Again, the fact that the search was not witnessed by the hamlet chairman, VEO or members of the village council, is baseless. For the purpose of sections 38(3) of the CPA, 22(3) (b) of the EOCCA and 106(1) (b) of the WCA, PW6's presence and witnessing of the search as the appellant's neighbour, was sufficient to comply with the requirement of the law.

I find the appellant's complaint that he did not freely sign the search and seizure certificate as he was in danger, an afterthought. Though before this Court, the appellant indicated that the arresting team were soldiers who were armed which would have posed a sense of fear in him, but the same should have been raised at the trial, not at the stage of an appeal after being convicted. If the appellant had raised an issue at the trial, the trial court would have heard both parties on the circumstances of procurement of Exhibit P1, and whether or not there was fear imposed on the appellant in the process. This being a new raised matter at the level of the appeal, this Court does not have an opportunity to hear and determine the allegation which was not raised and deliberated before, and finally determined by the trial court. In holding as above, I am fortified by the

decision in the case of **Hassan Bundala Swaga v. R., Criminal Appeal No. 416 of 2014** where the Court of Appeal held:-

> *'It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal.'*

I also find the appellant's argument that PW6 was not an independent witness as they were not in good terms an afterthought, for the same was not raised at the trial. Contrary to his averments before this Court, when the appellant was examined by the trial court on page 29 of the proceedings, he informed the trial court that '*my witness is PW6 what she said is what happened*. It means that he believed PW6 as an independent witness and confirmed that what PW6 testified was correct. The third issue lacks merit and is dismissed.

The appellant's complaint in the sixth ground is that he was not accorded with an opportunity to call his key witnesses who were his family members, and thus, the trial magistrate erred in complying with rules governing competency and comparability. The complaint should not detain me much. Whether or not the prosecution denied such right to appellant is redundant.

It would have made sense if the trial court denied the appellant such right. However, contrary to the appellant's averments in the ground of appeal, the appellant informed the trial court as reflected on page 29 of the proceedings that he had no other witness and prayed to close his case after he finalized his evidence. Not only the allegation is an afterthought but also fallacious. The sixth ground is dismissed for lack of merit.

I now turn to the fourth ground where the appellant faults the trial court for its reliance on the evidence of PW5 who was not aware of what was buried. He complained further that the inventory form, Exhibit P4 was not read to him to know its contents before he signed and it was not clear what kind of meat it was.

I have scanned the trial court proceedings. The argument that PW5, the Primary Court Magistrate was not aware of what was buried is not supported by the evidence on record. Not only that it is not a requirement under section 101(1) (a) (i) and (ii) of the WCA and paragraph 25 of PGO No. 229 (Investigation Exhibits) that a person ordering destruction of a trophy must witness it's destruction, but also PW5 testified to have witnessed the burying of the meat as reflected on page 22 of the proceedings.

As for the second limb of the appellant's complaint that Exhibit P4 was not read over to him, I find it to be a serious one. The same was not rebutted by the state counsel. In his submissions opposing the ground, the state counsel never responded on this allegation. Not only that but also, the evidence of PW3 who took the trophy to PW5 for inventory, and PW5 who prepared inventory and ordered destruction of the dried meat, did not inform the Court whether the inventory was read over to the accused person and if the accused was given the right to be heard on the same before its destruction. The fact that the accused person was present during the exercise and signed the inventory form, does not guarantee the fairness of the process if the inventory form was not read over to the accused for him to understand what was written therein and to be heard of any matter or concern thereof.

I find that it was irregular for PW5 to order destruction of the trophies without reading the same to the accused and hearing him. I find that the inventory was not properly and procedurally procured. In arriving at the decision, I am have been guided by paragraph 25 of PGO No. 229, and the Court of Appeal decision in the case of **Mohamed Juma Mpakama v. R. Criminal Appeal No. 385 of 2017** where it was held:-

".....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.....In the instant appeal, the appellant was not taken before the primary court magistrate ***and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (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.*** *In addition, no photographs of the perishable Government trophies were taken as directed by the PGO".* [Emphasis added]

On the basis of my observation and the above authority, I expunge the Inventory (Exhibit P4) from the record for being improperly procured. The fourth ground is partly allowed to the extent explained above.

On the seventh ground, the appellant's complaint is on the prosecution's failure to prove the offence against him beyond reasonable doubt. I agree with the state counsel that Exhibit P1, the search and seizure certificate, established that the appellant was found with a dried buffalo meat. However,

the existence of the trophy cannot be held to be proven upon expunction Exhibit P4, the inventory form.

Again, apart from lack of evidence of the existence of the trophy, the prosecution evidence was manned with contradictions which I find them material. There are clear contradictions in the evidence of PW1 and PW2 on the time of arrest, search and seizure. On page 7 of the proceedings, PW1 testified that:

> *"On 23/04/2023 at 22hrs while at Mbingu police station came TANAPA officers Mr. Kipande and Emmanuel, they informed me that at Namwawala village they were informed that there was a person in possession of Government trophies thus they were asking for assistance to conduct search and arrest. I and D/SGT Joseph joined the two and we went to the directed area at Namwawala "A" there they showed me the house they suspected.....We knocked the house and it was opened by the accused person; I arrested him.....I there filled the search/seizure form..... "*

However, PW2 testified on page 12 of the proceedings that:

> *".....It was at 21hrs, so we resided, Insp. knocked the door where the accused responded; insp. identified himself where the accused John opened the door."*

What can be gathered from the above extract is that, the TANAPA officers went to PW2 at 22hrs and they together started a journey to Namwawala "A" village from Mbingu Police Station. In my view, it was impossible for them to reach at Namwawala "A" village one hour before, at 21hrs. This impact the value and weight of the arrest, search and seizure process which are key in the criminal investigation and prosecution, especially the offence that the appellant was charged with.

Again, the contradiction as to the number of buffalo meat found at the house of the appellant between PW1, PW2 and PW5 in one hand, and PW6 on the other is material. On page 8, 12 and 21 of the proceedings, PW1, PW2 and PW5 testified that they found seven pieces of pieces of meat, respectively. However, PW6, a neighbour who witnessed the search, testified on page 24 of the proceedings that they found six pieces of meat.

The contradictions impaired the weight and credibility of the prosecution witnesses and the search and seizure exercise. The offence that the appellant was charged with required proof of the quantity of the trophy that he possessed which affects the aggregate value of the trophy as well as the sentence likely to be imposed on the appellant, be it fine and or imprisonment as provided for under section 86(3) of the WCA. The

contradictions create doubts that, in criminal proceedings justify to be resolved in favour of the accused person, the appellant herein. In view of the above findings, the seventh ground of appeal has merit and is allowed.

Based on the absence of the trophy upon expunction of Exhibit P4 and the material contradictions in the prosecution evidence, I hold that the prosecution failed to prove the offence against the appellant beyond reasonable doubt. I find the appellant's appeal merited and the same is allowed to the extent demonstrated above.

Consequently, I quash the trial court's conviction against the appellant, set aside the sentence and order the appellant's immediate release from prison, unless he is held therein for any other lawful cause.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 6th day of May 2024.

H. A. KINYAKA

JUDGE

06/05/2024