IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 237 OF 2017

GEOPHREY JONATHAN @ KITOMARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)
(Moshi, J.)

dated the 25th day of January, 2016
in
Criminal Appeal No. 53 of 2015

JUDGMENT OF THE COURT

8th & 16th February, 2021

MWARIJA, J.A.:

In the Resident Magistrate's Court of Arusha, the appellant, Geophrey Jonathan @ Kitomari was charged with the offence of unlawful possession of Government trophy contrary to sections 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (the Act) read together with section 57 (1) and paragraph 14 (d) of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002]. It was alleged that on 21/1/2014 at Madukani street within Longido District in Arusha Region, the appellant was found in unlawful possession of five

pieces of giraffe meat valued at TZS 23,775,000.00 the property of Tanzania Government.

The appellant denied the charge and as a result, the case proceeded to a trial. Whereas the prosecution relied on the evidence of five witnesses, the appellant was the only witness for his defence.

The facts giving rise to the appellant's arraignment and subsequent conviction can be briefly stated as follows: On 21/1/2014 the police at Longido, through a police officer by the name of Ally Hassan Ramadhani Msambaa (PW1) received information from the Longido District Game Officer, one Laizer, that wildlife meat was being sold in a certain house at Madukani street @ Methodox street within Longido township. PW1 together with another police officer, Abdallah Selemani Mchilimba (PW4) were ordered by their superior, the Officer Commanding Station (OCS), to go to the scene with a view of arresting those who were selling the suspected meat. The two police officers were accompanied by Japhet Raphael Mollel, a Game Officer (PW3) as well as the District Game Officer, Mr. Laizer. Having arrived at the suspected house and after involving the ten-cell leader, Simon Ngila Mollel (PW5), they conducted a search in the house in question.

According to the evidence of PW1, when the team searched the house, they found in one of the rooms, many buckets, one of which had meat which PW2 identified to be of giraffe. PW2 told the trial court that he identified it because it contained a skin which had black spots. He testified further that he valued the meat and found it to be worth TZS 23,775,000.00. He tendered a valuation report and an inventory which, despite the objection by the appellant, were admitted in evidence as exhibits P2 and P3 respectively. On his part, PW1 tendered as exhibit, the certificate of seizure which he had prepared after the search was carried out. The same was admitted as exhibit P1 also despite the appellant's objection.

Evidence was also given by PW5 to the effect that at the request of PW1 and PW4, he witnessed the search of the house in which wildlife meat was allegedly being sold. It was his evidence that, five rooms of that house were searched but nothing was found in any of the rooms. He went on to testify that, later on however, the appellant, whom he knew as one of the residents at that area, appeared from the toilet room carrying a bucket which upon being inspected, was found to contain giraffe meat.

In his defence the appellant denied the charge. He testified that until the material date, he was working as a mason at NHC construction

site in Longido. It was his evidence that he used to reside at the construction site as he neither had a house nor a rented premise at Longido. On 12/1/2014 which was on a Sunday, while in the company of his girlfriend, one Mary Msuya, he met one person called Max. The said person accused him (the appellant) that Mary Msuya with whom he was having an affair was the former's lover. On 18/1/2014 when the appellant and Max met at the market area, a fight ensued between them and despite being separated by people who were at that area, Max, whom the appellant learnt later that he was working with the Wildlife Department, warned the appellant that he would fix him.

It was the appellant's further evidence that on 21/1/2014, a friend of his, with whom they were working at the construction site, asked to offer him a lift. The appellant carried that person on his bicycle to his home. When he arrived at that person's house, he saw a motorcycle. On that motorcycle, he saw Max and another person. According to the appellant, Max told him that the most awaited day of dealing with him had come. Shortly thereafter, he was severely beaten and subsequently arrested and taken to police station where the charge against him was prepared.

At the conclusion of the trial, the trial court was satisfied that the evidence tendered by the prosecution witnesses had proved the case

against the appellant beyond reasonable doubt. The learned trial Resident Magistrate was of the view that the evidence of the five prosecution witnesses had sufficiently proved that the appellant was found with five kilograms of giraffe meat. With regard to the appellant's defence, on what appeared to us to be the shifting of the burden of proof to the appellant, the learned trial Resident Magistrate found that, since the appellant did not call as a witness, Mary Msuya, his allegation that he had grudges with the Game Warden who arrested him over the said woman was not proved. He was similarly of the view that, the appellant's evidence that he was taken by his friend to the house in question was unsubstantiated because the appellant did not call that person to testify before the trial. The appellant was, as a result, convicted and sentenced to twenty (20) years imprisonment.

On appeal to the High Court, the learned first appellate Judge upheld the finding of the trial court that the evidence of the five prosecution witnesses had proved the case against the appellant beyond reasonable doubt. She was of the view that, although their evidence had some contradictions and inconsistencies, the same were minor and thus did not go to the root of the case. She found further that the meat, which according to the prosecution witnesses was found in possession of the appellant, was giraffe meat as proved by the expert who identified it. In

the end, the learned first appellate Judge dismissed the appeal in its entirety.

The appellant was further aggrieved by the decision of the High Court hence this appeal. In his memorandum of appeal lodged on 12/6/2017, he raised the following six grounds:

> "1. *That, the first Appellate court erred in law and fact in ignoring the contradictions and inconsistencies in the prosecution evidence.*
> 2. *That, the first appellate court erred in law and in fact in upholding the appellant's conviction relying on contradictory, inconsistent, and unreliable evidence of the five prosecution witnesses which did not prove the charge.*
> 3. *That, both the trial court and the first appellate court misdirected themselves when they relied on their speculative ideas which influenced their judgment.*
> 4. *That, both the trial court and the first appellate court erred in law and in fact when they failed to scrutinize the evidence of PW1 and exhibit P1 and hence they arrived on erroneous decisions.*
> 5. *That, I pray this Hon. Court to step into the shoes of the trial court and re-evaluate the evidence properly.*

6. *That, failure by the prosecution to tender a certificate of seizure created a gap in the prosecution case. Section 38 (3) of the CPA Cap. 20 R.E. 2002 requires that anything that is found as a result of search and the same is seized a certificate of seizer should be filled. This requirement was not fulfilled during the search."*

Later on 4/2/2021, the appellant filed a supplementary memorandum of appeal consisting of five grounds as follows:

"1. *That, the first appellate court did not consider and evaluate the chain of custody of Exhibit P1 as per testimony of PW1 and as a result arrived at wrong conclusion.*

2. *That, the first appellate court erred in law and in fact when it failed to scrutinize the Trophy Valuation Report (Exh P2). The Trophy Valuation Report was prepared by PW2 as a "Game Warden" thus offending the provisions of section 86 (4) of the Wildlife Act which requires that it be signed by the Director or Wildlife Officers.*

3. *That, without prejudice to the content of paragraph 1 herein above, the trial*

court and the first appellate court did not consider and evaluate the evidence on record hence the prosecution case . . . was not proved beyond reasonable doubt by respondent.

4. *That, the conviction of the appellant was based on a trial that was not procedurally conducted Exhibit P1, P2 and P3 were admitted but were not read over and explained in court as per the law.*
5. *That, the first appellate court erred in law by upholding/sustaining the appellant's conviction while there was unfair trial soon after the appellant having been objected the tendering of the search warrant by contending that he did not sign the said document, the trial magistrate was required to conduct an inquiry and assess whether the said signature belong to him or not . . ."*

At the hearing of the appeal, which was conducted through video conferencing facility linked to Arusha Central Prison, the appellant appeared in person, unrepresented. On its part, the respondent Republic

was represented by Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Tusaje Samwel, learned State Attorney.

In his submission, the appellant argued his grounds of appeal generally. He maintained the arguments he made before the High Court that the evidence of the prosecution witnesses did not prove the case against him beyond reasonable doubt. It was his submission that such evidence was tainted with contradictions and inconsistences. Making reference to the evidence of PW3, PW4 and PW5, he contended that the same was contradictory as regards the manner in which the meat was allegedly found in his possession. He argued that, whereas PW3 testified that after the house had been searched, a 20 kgs bucket containing giraffe meat was found, PW5 said that it was the appellant who came out from the toilet room with a bucket containing the meat.

It was the appellant's further argument that the learned High Court Judge erred in upholding the decision of the trial court while the same was erroneous because it was based on documentary evidence which was either invalid or unprocedurally admitted. He submitted first, that despite having objected to the admission of exh. P1 on the ground that he did not sign it, the learned trial Resident Magistrate proceeded to admit it without considering the raised objection. Secondly, that after admission of all the documents as exhibits, the same were not read out in court to enable the

appellant to understand their contents. Thirdly, he argued that exhibit P2 which was relied upon by the trial court was invalid because the same was prepared by a person who did not qualify to do so on account that he was not the person described under s. 86 (4) of the Act.

Finally, the appellant submitted that, had the learned first appellate Judge properly re-evaluated the evidence, she would have found that the case against the appellant was not proved beyond reasonable doubt.

In reply, Ms. Silayo started by expressing her stance that she was supporting the appeal. She was in agreement with the appellant that the prosecution did not prove the case beyond reasonable doubt. She conceded to grounds 1, 2 and 4 of the appellant's supplementary memorandum of appeal.

With regard to the 1st ground, she submitted that from the evidence, the way in which the meat, which was the subject matter of the charge, was handled, did not ensure that there was unbroken chain of custody. She argued that although PW3 and PW4 stated that they arrested the appellant and took him to Longido police station, they did not state the place at which the meat was taken. She argued further that, on his part, PW2 who prepared the valuation report of the meat on 23/1/2014 did not state the place and the name of the person who handed the meat to him

for valuation. Relying on the case of **Petro Kilo Kinangai v. Republic**, Criminal Appeal No. 565 of 2017 (unreported), the learned Senior State Attorney urged us to find that since the prosecution evidence does not show that the chain of custody of the meat was observed as from its seizure on 21/1/2014 to 23/1/2014 when the valuation report was prepared, it is doubtful that exhibit P2 was for the meat which was the subject matter of the charge.

On the 2nd ground, the learned Senior State Attorney agreed with the appellant that PW2 was incompetent to prepare the valuation report (exhibit P2) because in his capacity as a Game Warden did not qualify to do so because under s. 86 (4) of the Act, it is the Director of the Wildlife or a Wildlife Officer who qualify to do so. She thus submitted that the valuation report was prepared in contravention of the law.

With regard to the 4th ground, Ms. Silayo argued that, despite the error, stated above, after its admission in evidence, exhibit P2 was not read out in court. This, she said, happened also to exhibits P1 and P3, the certificate of seizure and the inventory respectively. According to the learned Senior State Attorney, the omission occasioned injustice to the appellant and therefore, urged us to expunge from the record, the three documentary exhibits. If that is done, Ms. Silayo argued, the remaining prosecution evidence will not suffice to prove the charge.

Having considered the grounds of appeal and the parties' submissions, we hasten to state that we are in agreement with the learned Senior State Attorney that the appeal can be effectively disposed of basing on the 1st, 2nd and 4th grounds of the supplementary memorandum of appeal. With regard to the 4th ground, it is common ground that the certificate of seizure (exhibit P1), the valuation report (exhibit P2) and the inventory (exhibit P3) were admitted in evidence contrary to the procedure. In the first place, when the prosecution sought to tender them, the appellant objected to their admission. However, the learned trial Resident Magistrate proceeded to admit each of the three documents without considering the appellant's objection. Secondly, after having admitted the documents in evidence, their contents were not read out in court.

It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, clearing the document for admission, actual admission and finally, to ensure that the same is read out in court. The principle was aptly stated in the case of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218. In that case, the Court held as follows:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for*

admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."

The significance of reading out a document which has been admitted in evidence has been explained in a number of decisions of this Court. In the case of **Joseph Maganga and Dotto Salum Butwa v. Republic**, Criminal Appeal No. 536 of 2015 (unreported) for example, the contents of the cautioned statement were not read out to the accused person. The Court stated as follows on the effect of the omission:

"The essence of reading out the document is to enable the accused person to understand the facts contained [therein] in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity."

Similarly, in the case of **Robert P. Mayunga and Another v. Republic,** Criminal Appeal No. 514 of 2016 (unreported), the Court had this to say.

"Failure to read out to the appellant a document admitted as exhibit denies [him] the right to know the information contained in the document and therefore puts him in the dark not only on what to

cross-examine but also how to effectively align or arrange his defence."

See also the cases of **Lista Chalo v. Republic,** Criminal Appeal No. 220 of 2017 and **Stephano Mondelo v. Republic,** Criminal Appeal No. 10 of 2018 (both unreported).

The effect of the omission as held in all the above cited cases is to expunge the documents from the record. The position is the same where the document is admitted without being cleared for admission as it happened in this case. - See the case of **Joel Mwangambako v. Republic**, Criminal Appeal No. 516 of 2017 (unreported). In the circumstances, we agree with the learned Senior State Attorney that exhibits P1 – P3 which were wrongly admitted in evidence deserve to be expunged from the record and thus we accordingly hereby do so.

Since the documents which we have obliterated from the record formed the crux of the prosecution evidence, the effect of the expungement is that the prosecution case crumbles. The finding on the 4th ground of the appellant's supplementary memorandum of appeal suffices to dispose of the appeal. We therefore do not find any pressing need to determine the 1st and 2nd grounds of the supplementary memorandum of appeal on which the learned Senior State Attorney also based her submission.

In the event, we, allow the appeal. The appellant's conviction is hereby quashed and the sentence metted out to him is set aside. He should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **ARUSHA** this 15th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 16th day of February, 2021 in the presence of the Appellant in person through video conferencing facility linked to Arusha Central Prison and Ms. Tusaje Samwel, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL