IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A.:)

CRIMINAL APPEAL NO. 391 OF 2020

JONATHAN JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Court of Resident Magistrate of Bukoba at Bukoba)

(Ndale, SRM - Ext, Jur.)

dated 30th day of April, 2020

in

Criminal Appeal No. 64 of 2020

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JUDGMENT OF THE COURT

11th & 18th July, 2022

MWARIJA, J.A:

In the Court of Resident Magistrate at Bukoba, the appellant, Jonathan Joseph was charged in RM Economic Crime Case No. 1 of 2018, with three counts of unlawful possession of Government trophies contrary to s. 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by s. 59 of the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 4 of 2016 (Act No. 4 of 2016) (the WCA) read together with paragraph 14 of the First Schedule to and s. 57 (1) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002, now R.E. 2022].

It was alleged in the 1st and 2nd counts that on 11/5/2017 in the evening at Kyaka Tanzania Revenue Authority (TRA) barrier within the District of Missenyi in Kagera Region, the appellant was found in possession of pieces of skin and a horn of sitatunga valued at TZS. 9,786,800.00 and TZS. 4,493,400.00 respectively without a written permit of the Director of Wildlife Conservation Authority. It was alleged further in the 3rd count, that on the same date, time and place, the appellant was found in possession of one otter skin valued at TZS. 763,878.00 without a written permit of the Director of Wildlife Conservation Authority.

The appellant denied all counts. After a full trial, the learned trial Resident Magistrate found that the prosecution had failed to prove the 1st and 3rd counts and therefore, acquitted the appellant of those counts. He was however, satisfied that the 2nd count had been proved beyond reasonable doubt. As a consequence, the appellant was convicted and sentenced to pay a fine of TZS 13,480,200.00 or ten years imprisonment in default.

Dissatisfied with the decision of the trial court, the appellant appealed to the High Court vide Criminal Appeal No. 62 of 2019. The appeal was however, transferred to the Court of Resident Magistrate, Bukoba to be heard before Ndale, SRM-Ext. Jur. The learned appellate

Magistrate upheld the appellant's conviction. As to sentence, she was of the view that the same was illegal because, following amendment of s. 86 (2) of the WCA by s. 59 of Act No. 4 of 2016, the amount of fine imposed on the appellant ought to have been thrice the value of the trophy or an imprisonment term of twenty years. She therefore, increased the sentence to a fine of TZS. 44,934,000.00 or imprisonment term of twenty years. Aggrieved further by the decision of the appellate Magistrate, the appellant has preferred this appeal.

The facts leading to the appellant's arrest, trial and consequently his imprisonment, may be briefly stated as follows; According to the prosecution evidence, on 11/5/2018 at about 15:00 hrs while on duty at TRA barrier, Kyaka area, Ally Shabani who was at the material time a member of people's militia, stopped a motorcycle on which the appellant was a passenger. The said Ally Shabani testified in the trial court as PW2. It was his evidence that, the appellant had a bag and when he (PW2) wanted to search it, the appellant attempted to run away. PW2 said further that, he sought police assistance and following a report to the police, Insp. Makongoro went to the scene, re-arrested the appellant and together with PW2 took him to police station, Kyaka.

In his evidence, Insp. Makongoro who testified as PW1, said that when the appellant's bag was searched, it was found to contain various

items including two animal horns and pieces of skin suspected to be Government trophies. The other items were the appellant's voter's registration card, a bed sheet and traditional medicines. The witness tendered the certificate of seizure and the same was admitted in evidence as exhibit P1.

It was the prosecution's further evidence that the horns and pieces of animal skins which were suspected to be Government trophies were sent to Missenyi District Game Officer for verification. The same were sent by No. F 3038 D/Cpl. Rashid (PW3). They were received at the District Game Office by a Game Officer, Aloyce Mchonde (PW4). According to the report which he tendered in court as exhibit P2, it is shown that while the horn was of sitatunga, the skins were of otter.

As to his defence, the appellant testified that, on the material date of his arrest, he was with his pregnant girlfriend with whom he had gone to attend a clinic. They later on went to have breakfast in a restaurant at Bunazi area when police officers arrested him and his girlfriend, Agnetha Salvatory. He said that, the police told him that he was suspected to be a bandit. It was his evidence further that, they were taken to Kyaka police station where he was locked up while his girlfriend was released.

On 14/5/2017, he said, he was removed from lock up and tortured. Three days later, on 17/5/2017, after the police had realized that he was in bad health as a result of the torture, he was issued with a PF3 and sent to hospital where he was admitted for two days. After his discharge from hospital, the police released him and went to his home at Kayanga but without the PF3. He went on to state that, while at home, his condition changed and thus went to police station, Kayanga to get a PF3 so that he could go to hospital. It was his further evidence that when he told them the purpose of seeking a PF3; that his sickness resulted from pains sustained from being beaten by police at Kyaka, in response, a police officer from Kyaka was sent to take him back to Kyaka Police Station and from there, he was charged in court as stated above.

In his decision, the learned trial Resident Magistrate found that, since the skin of sitatunga and that of otter, the subject matters of the 1st and 3rd counts, were not tendered in evidence, it is doubtful that the same were found in the appellant's possession. As to the sitatunga horn, the subject matter of the 2nd count, he was of the view that the evidence of PW2, PW3 and PW4 had sufficiently proved that it was found in the appellant's possession. While therefore, as stated above,

the appellant was acquitted of the 1st and 3rd counts, he was convicted of the 2nd count.

On appeal, the learned appellate Magistrate upheld the trial court's decision. He agreed with the learned trial Resident Magistrate that, the 2nd count was proved beyond reasonable doubt. He found that the prosecution witnesses, particularly PW1 and PW2, were creditworthy. As shown above, he consequently upheld the conviction and increased the sentence.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Veronica Moshi assisted by Mr. Joseph Mwakasege, both learned State Attorneys.

In his memorandum of appeal, the appellant has raised a total of 15 grounds of appeal. For reasons which shall be apparent herein, we need not reproduce those grounds of appeal. Before we could proceed to hear the appellant's submission in support of his grounds of appeal, Ms. Moshi informed us that the respondent was supporting the appeal. Her stance to that effect was based on the fact that the trophy, which is the subject matter of the 2nd count, was not tendered in the trial court and did not therefore, form part of the prosecution evidence. According to the learned State Attorney, the omission by the prosecution to tender

that crucial evidence weakened its case. She cited the case of **Emmanuel Saguda @ Sulukuka & Another v. Republic**, Criminal Appeal No. 422 "B" of 2013 to bolster her argument.

In response to the submission made by the learned State Attorney, the appellant did not have much to state other than supporting her. He prayed the Court to allow the appeal and release him from prison.

Having considered the submission of the learned State Attorney, we agree that, from the record, although the appellant was convicted of the offence of being found in unlawful possession of a sitatunga horn, that trophy was not tendered in evidence. When testifying in the trial court, PW1 said that the appellant was arrested with a bag within which were pieces of wildlife skins and horns. Apart from tendering the certificate of seizure, the horn, which according to the record, was identified by PW4 to be of sitatunga, was not tendered.

In the particular circumstances of this case, the effect of the omission to tender in court the item which is the subject matter of the charge, is to render the charge unproved. The position was aptly stated in the case of **Emmanuel Sagunda** (supra) cited by Ms. Moshi. In that case, like in the case at hand, the prosecution tendered a certificate of seizure of a trophy but did not tender the trophy itself so as to prove

one of the counts which the appellant in that case was charged with. Having considered the effect of the omission, the Court held as follows:

> *"It is evident from the provisions of section 101 of the Wildlife Conservation Act, the Government trophies found in possession of the appellants were required to be tendered in court as exhibits. This was not done. Instead a certificate of valuation and an inventory form were tendered and admitted in court. The appellants did not have any opportunity to see the actual trophies and did not have an opportunity to raise an objection. It is a well established practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit. The court treated the reports produced by PW1 as conclusive. Given the position, the requirements under the law have not been met."*

Guided by the position which we took in that case, we agree with the learned State Attorney that the appellant's conviction in the 2nd count was based on insufficient evidence hence invalid. Had the learned appellate Magistrate properly analyzed the evidence, he would not have upheld the appellant's conviction.

On the basis of the foregoing reasons, we allow the appeal. The appellant's conviction is hereby quashed and the sentence is set aside. He should be released from prison forthwith unless he is held for other lawful cause.

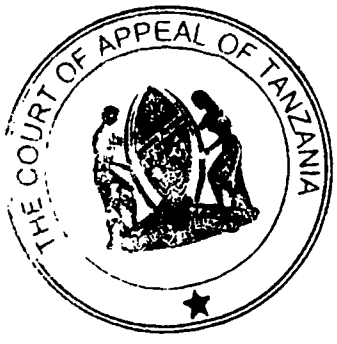
DATED at **BUKOBA** this 16th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2022 in the presence of the appellant in person and Mr. Amani Kiluwa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. A. AMWORO
DEPUTY REGISTRAR
COURT OF APPEAL