**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: KWARIKO, J.A, LEVIRA, J.A. And KENTE, J.A.)**

**CRIMINAL APPEAL NO. 321 OF 2021**

**SALIMU MOHAMED @ MNDIA .....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the Judgment of the Court of Resident Magistrate of Dodoma at Dodoma)**

**(Dudu, PRM Ext. Jur.)**

**dated the 28th day of April, 2021**
**in**

**Extended Jurisdiction Criminal Appeal No. 41 of 2020**

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## JUDGMENT OF THE COURT

*5th May & 11th September, 2023*

## LEVIRA. J.A:

The appellant, Salimu Mohamed @ Mndia and another who is not a party to this appeal were charged before the District Court of Kondoa with three counts to wit, Unlawful Possession of Government Trophies, contrary to section 86 (l) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) read together with paragraph 14 (d) of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 (the EOCCA); Unlawful Hunting in Game Reserve contrary

to section 19 (1) (2) (a) of the WCA; and Unlawful Entry in the Game Reserve contrary to section 15 (1) and (2) of the WCA.

They both denied all the charges. However, after a full trial, the appellant alone was convicted on all counts while the second accused was acquitted. Subsequently, the trial court sentenced the appellant to twenty years imprisonment on the first count, five years imprisonment for the second count and in respect of the third count, he was sentenced to serve one year in jail. The sentences were ordered to run concurrently. Aggrieved, the appellant lodged an appeal to the High Court of Tanzania at Dodoma. In terms of section 45(2) of the Magistrates' Courts Act, [CAP 11 R.E. 2019] his appeal was transferred to the Resident Magistrates' Court of Dodoma at Dodoma to be heard and determined by G.V. Dudu, Principal Resident Magistrate with Extended Jurisdiction. The appeal was not successful as it was dismissed for want of merit. Still aggrieved, the appellant has preferred this second appeal.

Before going far, we find it apposite to provide a brief background on the appellant's conviction and sentence. On 29th November, 2018, Benson Ochieng, David Temu and Bethseba, the Wildlife Officer and Game Warden Officers, respectively (PW1, PW2 and PW3) were tipped by an informer that

there were people hunting wild animals in Mkungunero Game Reserve. Working on the information, all the three made a follow-up and at around 5:00 hours they saw three people, chased them and succeeded to arrest the appellant with a bag while others escaped. They searched the appellant's bag only to find a fresh meat of Zebra weighing fifty kilograms. After that, PW1 prepared a seizure certificate in the presence of the appellant who at the end appended his signature. The appellant and the alleged meat were taken to Kondoa Police Station.

The record reveals further that, on 30th November, 2018 one Donasian Beda Makoi, a Wildlife Officer at Mkungunero Game Reserve (PW4) evaluated and confirmed that the meat seized from the appellant was of the Zebra worth USD 1200 equivalent to TZS 2,759,880.00. PW4 filled such details in a trophy valuation certificate and signed it. Later, on the same day, No. WP. 2308 D/DSGT Magreth (PW6) who was assigned to investigate the case, accompanied by the Wildlife Officers took the appellant and the meat to Kondoa District Court. After securing the Magistrate's disposal order, the said meat was disposed of and the inventory form (exhibit P2) was prepared.

Based on those facts the appellant and his accomplice who was arrested later were arraigned and tried before Kondoa District Court as

indicated above. In defence, the appellant disassociated himself from all charges claiming that, he was arrested at his home place on the allegation that he was found in unlawful possession of Government trophy.

Having heard the evidence from both sides, the trial court believed the prosecution evidence and proceeded to find the appellant guilty as charged, convicted and sentenced him to serve twenty (20) years imprisonment for the first count, five (5) imprisonment for the second count and one (1) year imprisonment for the third count. The sentences were ordered to run concurrently. The appellant appealed unsuccessfully as introduced above. Being dissatisfied with the decision on appeal by the Principal Resident Magistrate with extended jurisdiction, the appellant has preferred the present appeal against the conviction and sentence. The following are his complaints: **one**, that the prosecution case was not proved to the required standard in criminal cases. **Two**, that the conviction was based on procedural irregularities. **Three**, that the first appellate court erred when acted on the evidence of visual identification which was not water tight. **Four**, that the first appellate court erred in failing to consider the defence evidence when analyzing and evaluating the evidence from both sides.

At the outset, we have noted from the notice of appeal that the present appeal is against the conviction and sentence in respect of the first count of unlawful possession of Government trophies.

When the appeal came for hearing before us, the appellant appeared in person, unrepresented, whereas the respondent, Republic was represented by Mr. Leonard Reuben Chalo, learned Senior State Attorney assisted by Ms. Sabina Silayo, also learned Senior State Attorney and Ms. Mwajuma Mkonyi, learned State Attorney. The appellant adopted his grounds of appeal as they appear in the memorandum of appeal. Thereafter, he preferred to hear from the respondent's side first as he reserved his right of rejoining.

Upon taking the floor, Mr. Chalo supported the appellant's conviction and sentence right away. He commenced his submission with ground two in which the appellant is complaining on procedural irregularities in the proceedings. Regarding seizure certificate, the learned State Attorney argued that the document was properly made, for, it was signed by the appellant. He added that the delay or failure to procure an independent witness at the scene of crime to witness the seizure was justified by the prosecution witnesses. Regarding the legality of inventory, Mr. Chalo invited

us to page 49 of the record of appeal which shows that the appellant was involved in the whole process of disposal of the meat.

Submitting on the chain of custody, the learned State Attorney urged us to find that it was not broken as the prosecution evidence shows that after seizure, PW1, PW2 and PW3 sent the exhibit to the police post where it was handed over to PW5 who also gave it to PW6 for disposal.

Concerning the third and fourth grounds, Mr. Chalo was brief in his submission that since the appellant was found red-handed at the scene of crime, the issue of identification could not arise. He added that the complaint on failure to consider defence evidence has no merit. Mr. Chalo referred us to pages 167 and 168 of the record of appeal where the trial court had considerable time of considering defence evidence.

Finally, Ms. Sabina ended the respondent's reply submission on proof of the charge. She submitted that PW1, PW2 and PW3 proved beyond reasonable doubt that the appellant was found at the scene of crime carrying a bag with Zebra meat. According to her, that evidence was corroborated by PW4 who examined the meat and confirmed that it was of Zebra. Regarding chain of custody, the learned State Attorney added that after seizure, the meat was handed to the exhibit keeper (PW5) who on the next day gave it

to PW6 for identification. She submitted further that eventually the exhibit was sent to the court for an order of destruction. Bolstering her arguments, the learned State Attorney invited us to consider our decision in **Goodluck Kyando v. Republic** [2006] T.L.R 363 on credibility of PW1, PW2 and PW3.

When invited to rejoin, the appellant had no much to say being a lay person. Simply, he complained against the prosecution that they failed to summon the magistrate who issued the disposal order to testify. He also called upon us to consider the fact that the ten-cell leader did not arrive at the scene of crime to witness seizure.

Having carefully considered the submissions, the record and grounds of appeal, we observe that the issues raised by the appellant will be disposed of the way they have been submitted by Mr. Chalo and Ms. Sabina for the respondent. The first issue to be determined is whether the investigation and proceedings before the trial court were marred with procedural irregularities. Despite the fact that the appellant failed to mention the purported procedural irregularities in the conduct of the case, we still intend to go along with the respondent's submission that the complaint is predicated on the legality of the seizure certificate (exhibit P. 1) and inventory form of disposal (exhibit

P. 2). We take that view because the same complaint was raised and attended before the first appellate court.

Starting with the certificate of seizure, we appreciate the requirement under section 38 of the Criminal Procedure Act, Cap 20 R. E. 2022 (the CPA) that search should be conducted in the presence of an independent witness. Similarly, we are aware that in terms of section 106 (1) of the WCA, the presence of an independent witness depends on the circumstances of each case; such as, the time and place where the appellant was arrested. We once had a similar matter in the case of **Jason Pascal and another v. Republic**, Criminal Appeal No. 615 of 2020 (unreported), where we stressed that:

> *"According to the evidence of PW1 and PW2 on the record, the appellants were arrested in the forest at Kibanga along the road. The incident happened during night. It was not in residential area. Given the remoteness of the area the appellants were arrested in and the time in which search and arrest was done, it was, as a matter of common sense, very difficult to get an independent witness. We therefore, agree with Mr. Mahona that, in a situation like this, the requirement of an independent witness is dispensed with under section 106 (1) of the WCA."*

See also: **Papaa Olesikaladai @ Lendemu and Another v. Republic**, Criminal Appeal No. 47 of 2020 (unreported).

Applying that legal position and taking into account the circumstances of the present appeal that, the arrest and search were conducted in the game reserve at 5:00 hours, undoubtedly, it is our opinion that this case fits the threshold of an exceptional circumstances as it was in the above decision. Therefore, we find that the absence and /or delay to procure the independent witness did not render the search and seizure certificate invalid.

As for the inventory form, we go along with the submission by the learned State Attorney that the complaint is belatedly raised. The exhibit was admitted without objection and its contents were not substantially controverted by either the appellant's counsel when cross examining or the appellant at the time of giving his defence. We are mindful of the obvious rule that failure to object an admission of exhibit is tantamount to an admitted fact. See: **Maige Nkuba v. Republic**, Criminal Appeal No. 551 of 2016 and **Ayubu Andimile @ Mwakipesile v. Republic**, Criminal Appeal No. 503 of 2017 (both unreported).

In the present case, even if we would have found that the admission of exhibit P2 was improper and therefore disregard it, there is still strong

oral account from prosecution witnesses; as per the record of appeal, showing that all along the appellant participated in the process of disposing the Zebra meat. Under the circumstances, the grievance against the inventory form at this stage has no merit as it is an afterthought.

We proceed with the complaint that the evidence of visual identification was not water tight. This will not detain much of our time. Since there is cogent evidence from PW1, PW2 and PW3 that the appellant was arrested red-handed, the legal position in this case is clear that the issue of visual identification cannot arise. The same position was reiterated in the case of **Daffa Mbwana Kedi v. Republic**, Criminal Appeal No. 65 of 2017 (unreported), that where an accused is arrested at the scene of crime his assertion that he was not sufficiently identified should be rejected. The complaint raised is therefore baseless.

In the fourth ground, the first appellate court is criticized for sustaining the conviction despite failure of the trial court to consider defence evidence. Upon examination of the record of appeal, we agree with Mr. Chalo's submission that the complaint has no bearing from the record, for, the evidence of both sides was analyzed and considered before convicting the appellant. This is clearly reflected at pages 159, 160, 163 and 167 of the

record where the trial court summarized and considered the defence evidence thoroughly. However, it found such evidence incapable of raising reasonable doubt against the prosecution case. In that regard we dismiss the complaint.

Reverting to the first ground of appeal, the appellant is faulting the lower courts for not finding that the charges against him were not proved beyond reasonable doubt. This being a second appeal, it is instructive and we need not cite any authority that the Court has no powers to interfere with the concurrent factual findings of lower courts unless it is shown that they were arrived at based on misapprehension of the evidence or there has been a miscarriage of justice or violation of a principle of law. It is also not insignificant to embrace the established principle that, every witness is entitled to credence and his testimony must be received and accepted unless there is cogent reason to hold otherwise. See: **Goodluck Kyando** (supra). We shall be guided by those principles.

It is gathered from the record of appeal that whilst upholding the decision of the trial court, the first appellate court made the following observation at page 210 of the record of appeal:

*"Going through the evidence of three prosecution witnesses, one will find their evidence not contradicted, probable and plausible one, since there is no any allegation of ill motive or prior grudges between the prosecution witnesses (PW1, PW2 and PW3) and the appellant to suggest that these prosecution witnesses could have cooked up such story against the appellant. I am of the firm view as rightly found by the trial magistrate that what PW1, PW2 and PW3 told the trial court was a true account based on what they real witnessed. Indeed, the credibility of these prosecution witnesses was sufficiently assessed by the trial court and rightly found be reliable. Based on their testimony I find no doubt that the appellant was red handed caught by them after entering the Mkungunero Game reserve and killing a Zebra. As long as the appellant was caught on the spot then the issue of possibilities of mistaken identity holds no water, that therefore it goes without saying that the principles underlying the proper identification by the Court of Appeal ... cannot be called upon to apply, regards must be had to the facts that there was no point in time that during the arresting process the arresting wardens lost sight to the appellant. The evidence that the appellant was red handed caught after being found*

*in unlawful possession of government trophy to wit fresh meat of zebra is well corroborated by the evidence of PW4, PW5 and that of PW6..."*

Based on the quoted excerpt, it seems clear to us that the findings of the first appellate court that the prosecution witnesses were credible and reliable need not be faulted. Through PW1, PW2, PW3 and PW4, the prosecution managed to prove all the essential ingredients of the offence of unlawful possession of Government trophy specified under section 86 of the WCA. We are compelled to observe so because the witnesses were consistent in their testimonies that, they caught the appellant in the game reserve carrying a bag and after search they found him with the alleged meat of Zebra. The evidence was also corroborated by exhibit P1 and P2 (the seizure certificate and inventory form) in which the appellant signed as an undertaking that he was found with Government trophy.

Regarding the chain of custody of the alleged meat, in our opinion, Ms. Sabina submitted correctly that the prosecution witnesses' oral account established the unbroken movement of the exhibit from the time of seizure until its disposal. The link was clearly demonstrated by PW5 (from page 62) that on the material date whilst at Kondoa Police Station, she received the appellant and exhibit P1 from PW1. She opened, inspected and registered it

in the exhibit register. PW5 kept the exhibit in a special room which on 30th November, 2018 was handed over to PW6. On the same date, PW6 gave the exhibit to PW4 for identification and valuation. Then, the exhibit was returned to PW6. After that, PW6 accompanied by the appellant and wildlife officers went to Kondoa District Court and successfully obtained the court disposal order which was admitted as exhibit P2.

Furthermore, the evidence from seizure certificate (exhibit P1), the inventory form (exhibit P2) and the chain of custody form (exhibit P4) strengthened the prosecution oral account that the integrity of chain of custody in respect of exhibit P1 from the time of seizure until its disposal was not compromised.

In the upshot of what we have said above, we find no merit in this appeal. However, we take note that the appellant ought to have benefited from sentence remission in terms of section 172 (2) (c) of the CPA. Therefore, we order the appellant's sentences of twenty (20) years imprisonment for the first count, five (5) imprisonment for the second count and one (1) year imprisonment for the third count which were ordered to run concurrently, to run from 3rd December, 2018 when he was first remanded in custody instead of 26th June, 2020 when he was convicted and

sentenced. Save for the sentence which we have adjusted, we dismiss the appeal.

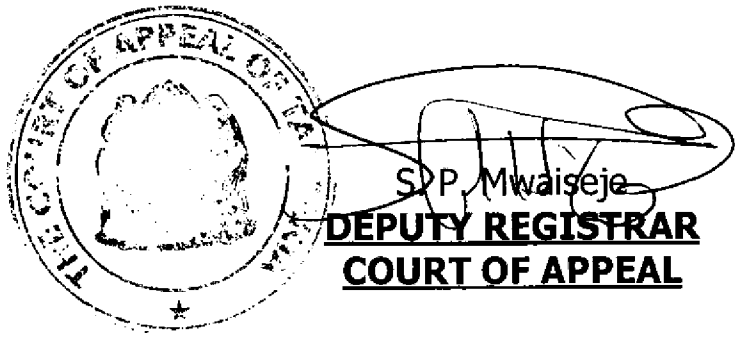
**DATED** at **DAR ES SALAAM** this 7th day of September, 2023.

M. A. KWARIKO
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 11th day of September, 2023 in the presence of Appellant in person - linked via Video conference from High Court Dodoma and Ms. Magreth Bilali, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. P. Mwaiseje
**DEPUTY REGISTRAR**
**COURT OF APPEAL**