IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL 238 OF 2020

LEONARD FELESIANO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania at Tabora]

(Bongole, J.)

Dated the 9th day of April, 2020

in

Criminal Appeal No. 112 of 2019

JUDGMENT OF THE COURT

19th & 27th September, 2023

MGEYEKWA, J.A.:

In the Resident Magistrate's Court of Tabora at Tabora, the appellant was charged with the offence of unlawful possession of Government trophies contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009 (the Act) read together with section 60 of the Economic and Organized Crime Control Act, (the EOCCA). The prosecution alleged that on 30th May, 2018 during evening hours at Nkumbi Sogange area within Kaliua District in Tabora Region, the appellant was found in unlawful possession of five (5)

pieces of smoked Buffalo meat valued at TZS. 4,332,000/= property of the Government of the United Republic of Tanzania without any permit previously sought and obtained from the Director of Wildlife.

The appellant denied the charges as a result the case proceeded to a full trial. In the effort to discharge the duty of proving its case, the prosecution relied on the evidence of four (4) witnesses and they tendered five (5) exhibits, namely; a certificate of seizure (Exh.P1), five pieces suspected to be smoked Buffalo meat (Exh.P2 collectively), the trophy valuation certificate (Exh.P3) and cautioned statement (Exh.P4). The appellant was the only witness for the defence.

The facts giving rise to the appellant's arraignment and subsequent conviction can be briefly stated as follows: On 30th May. 2018, a Game Officer at Lumbe Kaliua District by the name of Charles Gembeshi (PW2) received information from an informer that wildlife meat was being sold at Izimbili village within Kaliua District. PW2 accompanied by Jumanne Haji Loya (PW1), went to the scene with a view of arresting those who were selling the suspected meat. Having arrived at the said area, they arrested the appellant in possession of meat, PW2 identified it to be of smoked Buffalo. PW2 told the trial court that he identified it because he is an expert in

identifying wildlife meat. They interrogated the appellant and he informed them that he bought the said meat.

It was the evidence of PW1 and PW2 that on the following day, they took the appellant together with the seized five (5) pieces of smoked Buffalo meat to the office of the Ward Executive Officer (WEO) then to Tabora Game Office where they kept the said meat. PW1 prepared a certificate of seizure (Exh.P1) and PW2 tendered the five (5) pieces of smoked Buffalo meat. The said trophies were taken to Horraisi Paulo Kisalika (PW3) a Game officer for identification and valuation. He testified that he valued the meat and found it to be worth TZS 4,332,000. He recorded his findings in the trophy valuation certificate which was admitted in evidence as exhibits P3. Evidence was also given by a police officer, E 105 Detective Corporal Conrad (PW4) to the effect that he interrogated the appellant and recorded his cautioned statement (Exh.P4).

In his defence, as alluded earlier, the appellant denied the charge. He testified that he was arrested at the mosque area. According to the appellant, on the same day, they took him to Lumbu 'B' and on the following day they took him to WEO's office and later he was brought to the Tabora Game office

where he was locked in for eleven (11) days. Thereafter, he was taken to court where he was charged.

At the conclusion of the trial, the appellant was found guilty. He was consequently convicted and sentenced to a fine of TZS. 4,332,000/= or serve a jail term of 20 years.

The appellant unsuccessfully appealed to the High Court. The learned first appellate judge upheld the finding of the trial court and held that the evidence of the five prosecution witnesses had proved the case against the appellant beyond reasonable doubt. The appellant was further aggrieved by the decision of the High Court hence this appeal. In the Memorandum of Appeal, the appellant raised seven (7) grounds of appeal and on 20th September, 2023, he submitted a supplementary memorandum of appeal with one (1) ground of appeal. All eight (8) grounds raised by the appellant can be conveniently paraphrased as follows:

1. *That, the prosecution case was not proved beyond reasonable doubt.*
2. *That, the two courts below erred in law to convict and sentence the appellant without analysing, evaluating, and considering the defence evidence.*

3. *That, the learned High Court Judge erred in law to uphold the conviction of the appellant based on the strength of the cautioned statement (Exh.P4) without considering the following:*

   (i) The signature of the appellant on the caution part varies with the rest of the signatures in the statement.

   (ii) Exh.P4 was made at KDU Office, Tabora but PW4 the police officer who recorded the said statement did not mention it.

   (iii) The Exh.P4 was prepared out of the statutory period.

4. *That, it was not established by the prosecution that Exh.P2 was Buffalo meat.*

5. *That, the chain of custody of the alleged buffalo meat (Exh. P2) was broken*

6. *That, exhibit P1 (the Certificate of Seizure) was filled on 31st May, 2018 a day after the seizing of the alleged buffalo meat and signed by PW2 while the same was required to be prepared at the time of arrest of the appellant.*

7. *That, PW3 did not tell the trial Court how he was able to ascertain the value of the alleged buffalo meat without establishing its weight, which is not stated in the trophy valuation certificate.*
8. *The trial court did not comply with the mandatory provision of section 210 (3) of the Criminal Procedure Act, Cap. 20 which requires the trial Magistrate to inform the witnesses that they are entitled to have their evidence read over to them.*

At the hearing of the appeal, the appellant appeared in person and fended for himself whereas Ms. Alice Thomas, learned State Attorney appeared for the respondent/Republic. When given the chance to argue his grounds of appeal, the appellant adopted his Memorandum of Appeal and opted to hear the learned State Attorney's response reserving his right to rejoin if the need arose.

In reply, Ms. Thomas started by expressing her stance that she did not support the conviction and sentence by the trial court which apparently was confirmed by the High Court. She anchored her support on a legal point which she found to be pertinent. The learned State Attorney stated that the

consent that was filed at the trial court purportedly under section 26 (1) of EOCCA was signed by the learned State Attorney In charge instead of the Director of the Public Prosecution (the DPP) as the law requires. She implored us to find that the trial court had no jurisdiction to determine the case. The learned State Attorney invited us to stand by our decision in **Peter Kingoli Malima & 4 Others v. Republic**, Criminal Appeal No.300 of 2020 [2023] TZCA 17350 (14 June 2023) TanzLII on the same proposition.

On what should be the appropriate remedy, the learned State Attorney did not opt for a fresh trial. Her reason was founded on the ground that there were some evidential shortcomings.

The fourth, fifth and sixth grounds of appeal are intertwined with the first. The learned State Attorney argued them in the alternative to ground one. From the outset, Ms. Thomas conceded that the case was not proved beyond reasonable doubt based on the following shortfalls; **One**, the certificate of seizure was not prepared within time. She clarified that the record of appeal show that the appellant was arrested on 30th May, 2018 at Izimbili, Ikumbizi, Ganga Kaliula District in possession of five (5) pieces of smoked Buffalo meat, on the following day. They took him to WEO's office and prepared a certificate of seizure without stating the reasons as to why

they did not fill in the certificate of seizure on the same day where and when they arrested the appellant. To buttress her submission, she cited section 38 of the Criminal Procedure Code Cap.20 (the CPA). Relying on the case of **David Athanas Makasi & another v. The Republic**, Criminal Appeal No.168 of 2017 (unreported), she submitted that PW1 ought to have signed the certificate of seizure at the place where they arrested the appellant and in the presence of an independent witness because the trophy was seized in the presence of Charles Shadrack who could be a material witness. Failure to do so the certificate of seizure cannot be accorded weight. **Two**, the chain of custody was broken. The learned State Attorney argued that the chain of custody of the suspected five (5) pieces of smoked Buffalo meat was not established since there is no record or explanation on how the same was handled after the arrest of the appellant. The record of appeal reveals that after his arrest, PW1 and PW2 took him to WEO's office then to the Game offices, however, they did not state the place at which the meat was taken. She valiantly contended that the custody of the suspected meat from its seizure on 30th May, 2018 to 5th June, 2018 when the valuation report was prepared until the same was tendered before the trial court, was short of proof.

Three, there was no scientific proof whether the suspect meat was Buffalo meat. She argued that PW2 did not explain his expertise or experience on how he identified the said meat. In her view, there was need to summon an expert to ascertain whether the suspected five (5) pieces of smoked Buffalo meat were Buffalo meat. **Four**, the cautioned statement was taken out of time. Ms. Thomas submitted that as per section 50 (2) of the CPA, the time is reckoned from when the appellant was brought to the police station. However, there was no any explanation as to why they kept the appellant at the game office and recorded his statement after a lapse of five days, instead of bringing him immediately to the police station. She clarified that the omission was against the rules of natural justice since the game officer was unable to record the appellant's statement at the place where they arrested him before the OICD. She added that worse enough there is no evidence as to at what time the appellant was brought to the police station in order to reckon the four hours of recording the appellant's statement. She added that the game officer did not state if the delay was caused by investigation as required by law.

In conclusion, the learned State Attorney was certain that the delay was not covered by the law, therefore, she urged us to allow the appeal and release the appellant.

On his part, the appellant offered no rejoinder after noting that the republic supported his appeal.

We have scrutinized and considered the submissions of the learned State Attorney. At the outset, we think that, the issue for our determination is whether the prosecution proved the case beyond reasonable doubt. In light of the submissions of the learned State Attorney, this appeal can be disposed of by our determination on the first ground of appeal, whether the prosecution case was proved beyond reasonable doubt. In the matter under scrutiny, we subscribe to Ms. Thomas's submission that, the prosecution failed to prove the case to the hilt. Regarding the issue of the certificate of seizure, the record reveals that it was not signed at Ukumbi Siganga area, the place where the exhibit was seized as required by the law. PW1 in his testimony simply testified that he prepared the certificate of seizure on the following day which means the same was not prepared at the place where he seized the Government trophy and there was no any independent witness. In the case of **David Athanas @ Makasi & Another v. The**

Republic, (supra) as correctly cited to us by Ms. Thomas, the Court categorically stated that, since the certificate of seizure was not signed at Chinangali, the place where the search was conducted and there was no independent witness present as required by law, the said certificate cannot be accorded weight. Therefore, we hold that failure to prepare the certificate of seizure at the place where the government trophy was seized and failure to involve an independent witness, the said certificate cannot be accorded weight, it was unprocedurally admitted in evidence. See also the case of **Chacha Murimi and 3 others v. The Republic**, Criminal Appeal No. 551 of 2015, (unreported).

We now turn to determine the listed shortfalls; it is unclear where the five (5) smoked pieces of Buffalo meat were kept until when the same was tendered in court. The evidence on record speaks loudly and clearly that the way in which the meat, which was the subject matter of the charge, was handled, did not ensure that there was an unbroken chain of custody. The record reveals that after the arrest of the appellant who had the suspected five (5) pieces of smoked Buffalo meat, PW1, and PW2 took him to their general office at Lumba 'B' Ukumbisi Sigana area. On the following day, they brought him to WEO's office then to Tabora Game office where PW1

prepared the certificate of seizure but they did not state the place where the meat was taken and they did not state how they handled it to ensure that there was unbroken chain of custody.

Moreover, having gone through the record we are unable to find sufficient evidence on how the seized meat was identified as smoked pieces of Buffalo meat. We, therefore, accept Ms. Thomas's submission that there was no proof that the seized meat was Buffalo meat. The prosecution was duty bound to call a person with the necessary expertise who could furnish the trial court with the necessary scientific criteria for testing the accuracy of whether the suspected five pieces of smoked meat were Buffalo meat or otherwise to enable the trial court to form its own findings.

The record shows that the trial court convicted the appellant based on the fact that he was caught in possession of the five (5) smoked Buffalo meat, as alluded above, which was not proved. The prosecution evidence does not show how the chain of custody of the suspected meat was observed from its seizure on 30th May, 2018 to 5th June, 2018 when the valuation report was prepared until the same was tendered in court. Contrary to that, it is doubtful if exhibit P2 was for the meat which was the subject matter of the charge. Therefore, we are satisfied that the prosecution failed to prove

the offence of unlawful possession of Government trophies against the appellant. See the cases of **Silverster Stephano v. The Republic**, Criminal Appeal No. 572 of 2016, [2018] TZCA 306 (3 December 2018) TanzLII and **Stephen Jonas & Another v. The Republic**, Criminal Appeal No. 337 of 2018 [2021] TZCA 503 (21 September 2021) TanzLII. In the latter case, the Court of Appeal held that:-

> *".....Since the prosecution was duty bound to establish that the three pieces were elephant tusks but failed to do so, we are satisfied that the prosecution failed to prove the offence of unlawful possession of government trophies against the appellants".*

Another flaw is related to the cautioned statement. The standing provision of the law is section 50 (1) and (2) (a) of the CPA which provides that: -

> ***"50**.-(1) 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.

(2) In calculating a period available for interviewing a person who is under restrain in respect of an offence, there shall not be reckoned as part of that period...

(a) while the person is, after being taken under restrain, being conveyed to a police station or other place for any purpose connected with the investigation."

Going by the above provisions of the law, we support the learned State Attorney's proposed rejection of cautioned statement (exhibit P2) which should not have been admitted in the first place. In the instant appeal before us, the charge sheet shows that the appellant was arrested on 30th May, 2018 and on 31st May, 2018 he was taken to WEO's office and then to Tabora. Detective Corporal Jeremiah (PW4) who recorded the appellant's cautioned statement stated that the appellant was placed before him for interview on 5th June, 2018, which was five (5) days after his arrest. There

is no doubt PW3 recorded the cautioned statement outside the four hours period prescribed by the law.

In our view, we think the four hours period in recording the appellant's statement was justifiable only if there would be enough explanation as to why they delayed to bring the appellant at the police station to record his statement. The record of appeal is silent on whether there was any ongoing investigation before bringing the appellant to the police station. Without cogent reasons of delay, it raises eyebrows over the authenticity of the cautioned statement. There are many other decisions where the Court has staked similar position such as in **Muhidin @ Kibatamo vs. The Republic**, Criminal Appeal No. 101 of 2008 (unreported) and **Mohamed Juma Mpakama v. The Republic**, Criminal Appeal No. 385 of 2017 [2019] TZCA 518 (26 February 2019) TanzLII, where the appellant's cautioned statement was recorded out of time and the Court expunged the statement from the record describing it to be a clear violation of the law under sections 50(1) and 51(1) of the CPA. We as a result expunge exhibit P2 from the record.

For the foregoing reasons, we entirely agree with Ms. Thomas that the conviction against the appellant is unsustainable and cannot be allowed to stand.

In the end result, we allow the appeal, quash the conviction, set aside the sentence imposed upon the appellant and we order his immediate release from prison, unless he is held for other lawful cause.

It is so ordered.

DATED at **TABORA** this 26th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P.KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 27th day of September, 2023 in the presence of Mr. Leonard Felesiano the Appellant in person and Ms. Alice Thomas, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL