IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 119 OF 2022

IDD HAMIS .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Nasari, Ext. Juris.)

dated 10th day of December, 2021

in

Criminal Appeal No. 33 of 2021

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JUDGMENT OF THE COURT

13th & 20th February, 2024

ISMAIL, J.A.:

The appellant was arraigned in the District Court of Kondoa at Kondoa on a single count of being in an unlawful possession of Government Trophy, contrary to sections 85 (1) (a), (b), (d), 86 (1) (2) (c) (ii) and (3) (b) of the Wildlife Conservation Act, No. 5 of 2009, as amended by section 61 (a) and (b) of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016 (the WCA), read together with Paragraph 14 of the First Schedule to and section 57 (1) and

60 (2) both of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2002, as amended by section 16 (a) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

It was alleged that, on 3rd November, 2017 at Itaswi Village within Kondoa District in Dodoma Region, the appellant was found in an unlawful possession of one kilogram of dik-dik fresh meat valued at US$ 250, equivalent to Tshs. 562,175/= the property of the United Republic of Tanzania.

Gathering from the prosecution's side of the story, on the fateful day, Praygod Raphael Nko (PW1) was with a trio of his colleagues namely; Richard Malisa (PW3), David Kaira and Atupele Kasenene, all Wildlife Officers, and they were on routine patrol in Mkungunero Game Reserve. At about 12.00 noon, they received a tipoff that, at Kutish area, a person was dealing in government trophies. Their visit to Kutish was belated as the alleged dealer had left for a nearby Itaswi Village. In the company of their informer, the said officers left for Itaswi. As they drew closer, they saw a person carrying a polythene bag. Suspecting that those aboard the vehicle were reserve officers, the suspect, who turned out to be the appellant, ran away. Their chase took them to Itaswi Village where they got the better of him and put him under restraint. On interrogation the appellant allegedly told the officers that the parcel he was

holding had dik-dik fresh meat that had been captured by his dog. On realizing that the appellant did not have a permit, they seized the trophy vide a certificate of seizure (exhibit P1) which was allegedly signed by the appellant. Subsequently, the appellant was conveyed to Kondoa Police Post for interrogation and investigation. The trophy was subjected to an evaluation, conducted by Zahara Juma Mkude (PW2) who assigned the value of Tshs. 562,175/=. The valuation certificate was admitted as exhibit P3. Because of the perishable nature, an order was issued for destruction of the trophy. An inventory form was tendered during trial as exhibit P2.

The appellant protested his innocence, contending that he was not found with anything that he is accused of. His defence that he was found at his farm at Kutish did not find any purchase as the trial court held that a case against him had been made out. He was convicted of the charged offence and sentenced to a custodial term of 17 years. His attempt to reverse the decision through an appeal fell to naughty as his appeal was dismissed. The 1st appellate court found nothing blemished in the trial court's verdict.

In an appeal to this Court, the appellant has raised six grounds of appeal which, for reasons that will become apparent in due course, we will not reproduce them.

At the hearing of the appeal, the appellant fended for himself, unrepresented, whilst Ms. Beatrice Nsana, learned Principal State Attorney assisted by Ms. Rachel Balilemwa, learned State Attorney appeared for the respondent.

When the appellant was invited to address us, he prayed that he be heard after the respondent's counsel's submissions. Submitting for the respondent, Ms. Nsana supported the appeal. She raised some deficiencies that pointed to the fact that the case for the prosecution was not proved beyond reasonable doubt. By and large, Ms. Nsana's contention dwelt on the absence of an independent witness when the search was conducted. She argued that, PW1's testimony would give clarity on where the appellant was arrested and whether circumstances of his arrest did not allow presence of an independent witness as required under section 106 (1) of the WCA. To buttress her contention, she cited the decision of this Court in **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019. The learned counsel argued that, the prosecution had a duty to prove that circumstances did not demand the presence of an independent witness, and that the appellant was not arrested in a dwelling house.

On his part, the appellant had nothing useful to submit, other than agreeing with the respondent's counsel. He prayed that his appeal be allowed.

The parties' brief and unanimous submissions bring out a narrow issue as to whether the case for the prosecution was satisfactorily proved to warrant the appellant's conviction.

As we sit to determine this matter, we wish to restate what is now a certainty in our legal system, which is that, when it sits on a second appeal, this Court should rarely interfere with concurrent findings of the lower courts on points of fact. It should only do so if the concurrent findings of fact are perverse, demonstrably wrong or clearly unreasonable or a result of complete misapprehension of the substance, nature or non-direction of the evidence or violation of a principle of law or procedure – see: **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387; and **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported).

It is worthwhile to recapitulate, as well that, in criminal trials, after evidence for the prosecution and for the defence is heard and taken, the trial court's duty is to determine if the prosecution's evidence has proved the charges levelled against the accused. As it does that, it has to be mindful of

the fact that such proof must be beyond reasonable doubt. This household principle has been restated many a time by this Court. In **Joseph John Makune v. Republic** [1986] T.L.R. 44, it was held that it is the prosecution that has the burden of proof of its case and that the duty is not cast on the accused to prove his innocence.

It is also a settled position that, in deciding guilt of the accused, courts are guided, not by quantity, but quality of the evidence. This means, therefore, that weakness of the defence, however glaring it may be, cannot be the basis for conviction. Rather, it is the weight of the prosecution case which should hold the sway. Thus, where the prosecution testimony constitutes a mere aggregation of separate facts all of which are inconclusive and are as consistent with innocence as they are with guilt then, the probative value thereof is said to be missing. Such testimony, should be cast away and the benefit of the doubt should be construed in the accused's favour - see: **Chhabildas D. Sumaiya v. Regina** (1953) 20 E.A.C.A. 14; **Okare v. R** (1955) E.A. 555; **Mswahili v. Republic** [1977] L.R.T. 25); **Said Hemed v Republic** [1987] T.L.R. 117; and **Mohamed Said Matula v. Republic** (1995) T.L.R. 3.

What is clear and incontrovertible in the instant appeal is, in our view, that, by and large, conviction of the appellant hinged on testimony of PW1 which was to the effect that the appellant was arrested at Itaswi Village and found with a kilogram of dik-dik meat. He testified further that, seizure of the trophy was documented vide exhibit P1. PW4 is recorded at page 129 of the record of appeal that the seized trophy was conveyed to the District Court of Kondoa at Kondoa in the presence of the appellant. From this, an inventory (exhibit P2) was prepared.

While destruction of the trophy and eventual generation of exhibit P2 has bred no qualms from the appellant, a cloud of uncertainty resides in the process that preceded the destruction and preparation of exhibit P2, and if it complied with the law. It is common knowledge that a perishable exhibit which cannot withstand a protracted trial may be destroyed with the order of the court. The process leading to destruction is multipronged and dependent on the stage of the matter. Where destruction is sought before the trial commences, a prayer for a destruction order is governed by the paragraph 25 Police General Orders (PGO) 229, whose substance stipulates:

> *"Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that*

the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."

In some cases, destruction may be ordered in the course of the trial proceedings. In such cases, the destruction is predicated on the provisions of section 101 (1) of the WCA, which provides as follows:

"Subject to section 99 (2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation be placed at the disposal of the Director."

Having reviewed the record of appeal we gather that, whereas, as stated by PW4 (line 14 at p. 129 of the record of appeal), the order for destruction of exhibit P2 was sought and obtained on 6th November, 2017, the certificate that conferred jurisdiction on the District Court of Kondoa at Kondoa to try the case was issued on 19th November, 2018, for a charge which was instituted in that court on 8th January, 2019. The clear implication here is that destruction of the trophy preceded the commencement of the trial proceedings. In our view, the guiding provision in that respect was

paragraph 25 of PGO 229. The first appellate court, though, was of the view that the process was guided by section 101 (1) of the WCA. This is found at page 180 of the record of appeal.

But even assuming that the procedure was governed by section 101 (1) of the WCA, our scrupulous review of the said provision brings out two key aspects which deserve a minute or two for our consideration. These aspects are conditions precedent for vindication of the destruction process and exhibit P2. **One**, that the order for destruction must be sought and obtained in the course of the proceedings, and we must add that, in respect of the instant appeal, in the course of the trial proceedings. **Two**, that, the end result of the order for destruction of the perishable object must be placed at the disposal of the Director. For avoidance of doubts, the director in this respect is a Director of Wildlife as defined in section 3 of the WCA. No evidence, in the entirety of PW4's testimony, or any other prosecution witness, indicates that the Director was involved in the process. Going by the sequence of events as alluded to herein, it is clear that the process of destruction was done before the proceedings got under way, meaning that the first condition precedent was not observed. This was irregular.

We take the view that, whereas the anomalies pointed out may be considered of a lesser effect, the question relating to participation of the appellant and according him the right to be heard is more concerning. So significant is the question that it featured in the 1st appellate court's decision (p. 180 of the record of appeal), in which the court observed:

> *"…. it's obvious that accused person is required to be brought before the magistrate but also to be accorded the right to be heard, PW1 told the trial court that accused was brought before the Magistrate but he did not tender the order of the court to that effect. The prosecution also was silent on whether the accused was accorded right to be heard, however, accused in his defence at page 23 of the proceeding admitted that he was brought before the Kondoa District Court and he refused the meat to be destroyed…."*

Instructively, the 1st appellate court relied on the appellant's assertion that he was accorded all the rights throughout the hearing of the application. What those rights were, is a matter of conjecture, as only the testimony of the prosecution, which would include tendering of the proceedings before the court that ordered the destruction, would quell all the speculations. We hold that the 1st appellate court's decision to rely on the appellant's assertion

was fraught with dangers of indulging in injustice especially where, as we all know, the appellant is an illiterate person who cannot tell with precision what his rights were. We are convinced that demonstration of compliance with the requirements was an unfailing duty of the prosecution, particularly where the appellant has persistently and consistently denied that he was found with anything. The net effect of what we have stated above is to cast, as we do, a suspicious eye on the legitimacy of exhibit P2.

Glancing through exhibit P2, the inventory form, we find no indication that the appellant, who is alleged to have participated in the process, was allowed to append his signature. Appendage of signature on the document is an inalienable right which, if accorded to him, would be a near certainty of his participation in the process. No reason was given by the prosecution to justify this omission. This heightens the contention by the appellant that nothing was seized from him, and we hasten to add that there was, probably, nothing against which a destruction would be ordered.

The record of appeal, which we have dispassionately reviewed time and again, does not convey any semblance of indication, either, that when the destruction was carried out pictures were taken to document what happened on the day. Absence of the pictures has left a void in the

prosecution case, and it cannot be said with certainty that the much talked about destruction ever took place.

The infractions pointed out have been the subject of discussion in our previous decisions. In the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Case No. 385 of 2017 (unreported), we held:

> *"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.*
> *Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies in the charge sheet."*

The consequence of the highlighted infractions is that, in terms of the reasoning in **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019 (unreported), the inventory form (exhibit P2) could not be proved

against the appellant, and Ms. Nsana was spot on when she submitted that the prosecution did not prove its case against the appellant beyond reasonable doubt. Such failure had the effect of making the charge crumble in the appellant's favour.

In the upshot, we allow the appeal, quash the conviction and set aside the sentence. We also order that the appellant be immediately set free unless held for some other lawful cause.

DATED at **DODOMA** this 19th day of February, 2024

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

This Judgment delivered this 20th day of February, 2024, in the presence of the appellant in person and Mr. Francis Kesanta learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL