

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF REGISTRY OF ARUSHA  
AT ARUSHA**

**CRIMINAL APPEALS NO. 45 OF 2018**

*(Originating from Economic Case No. 71 of 2016 of Resident  
Magistrate's Court at Arusha)*

**THOMAS KIMARO @ MNGONI.....APPELLANT**

**Versus**

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

**JUDGMENT**

**BEFORE: MAIGE, J.**

At the District Court of ARUSHA, the appellant, **THOMAS KIMARO @ MNGONI** was charged with and found guilty of an offence of unlawful possession of Government trophy contrary to section 86(1) (2) © (ii) of the Wildlife Conservation Act 2009 (Act No. 5 of 2009) read together with paragraph 14(d) and (b) of the first schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E 2002]. He was convicted and sentenced to twenty (20) years imprisonment.

Being aggrieved by the conviction and sentence of the **trial court**, the appellant has preferred this appeal questioning the correctness of the same in two accounts. First, for sustaining conviction without there being sufficient evidence. Second, for determining the issue of the specie of Government Trophy without there being an expert opinion.

The prosecution case at the trial court was that; on 4.06.2015 the appellant was found at his residence Kwamrobo area within Arusha in a possession of government trophy namely, a meat of zebra equivalent to one killed zebra valued USD 1,200, the property of the Government of the United Republic of Tanzania. In addition, he was in possession of two weight spring balance, zebra fat, three iron bars and one exercise book (exhibit **P-1B**).

**PW-1**, Salome Jeremiah, a game warden at KDU was among the persons who effected the search and filled in certificate of seizure and power of search (exhibit **P-2**). Presence in the search was also **PW-4**, Raymond Mdoe, a wildlife officer stationed at KDU Arusha. They told the trial court that the appellant was found in possession of the government trophy described in exhibit **P-3** and the items exhibited as **P1B**.

**PW-2** MARTINA KALUNDE is a wildlife officer who claims to have inspected and conducted a valuation of the said trophies. He identified it to be a specie of zebra worth 1 kg. He filled in certification of valuation (exhibit **P-3**). He also filled in an inventory which was exhibited as **P3A**.

**PW-3** JAMES ANTHONY KUGUSA was at the material time working with Ant-poaching Unit in Arusha. He claims to have been availed with the items in exhibit **P-1B** by Solomon Jeremiah. The handing over was done in writing as evidenced by the handing over form which was admitted as **P3B**. It is in the testimony of **PW-3** that

the appellant signed into the exhibit. After labeling the items listed in the exhibits, it is further in the testimony of **PW-3**, he handed them to **PW-2**.

In accordance with the testimony of **PW-2** and **PW-3**, the Government trophies under discussion could not be produced into evidence because they were destroyed subsequent to the conduct of valuation and issuance of the documents in exhibit in exhibit **P-3** and **P-3A**.

At the hearing of the appeal, the appellant was represented by Mr. Mgalula, learned advocate. The respondent had the service of Miss. Elizabeth Swai, learned state attorney.

In his submissions in respect to the first ground, Mr. Mgalula contended that the prosecution evidence on the allegation was incredible for the reason of contradictions in material respects. He pointed out some of the areas of contradictions as to include the weight and colour of the government trophy in question. Armed with the authorities in **Mohamed Said Matula vs. the Republic, TLR 1995** and **Mosses Muhagama Laurence vs. the Government of Zanzibar, Criminal Appeal No. 17 of 2002**, counsel invited the Court to hold that the inconsistencies were material enough to create a reasonable doubt on the prosecution evidence.

The counsel submitted further that the prosecution evidence was unreliable for want of proper chain of custody of the exhibits. He

clarified that, while the prosecution claims that the government trophy was destroyed in pursuit to a court destruction order, the proceedings for the destruction has not been exhibited. More importantly, the counsel submitted, the appellant did not take part in the destruction proceedings so as to witness the government trophy before the grant of the destruction order.

The evaluation report and inventory tendered in court, in the opinion of the learned state attorney, could not establish existence of the alleged government trophies since the appellants were not afforded an opportunity to see the exhibits. She referred the court to the provision of section 353 of the CPA read together with section 101 of Wildlife conservation Act. On this, the counsel placed reliance on the authority of the Court of Appeal in **EMMANUEL SAGUDA AND ANOTHER v. R**; Criminal Appeal No. 422'B" of 2013 (unreported) wherein the provisions of section 353 (2) of the CPA and 101 of the Wildlife Conservation Act were judicially considered.

On her part, **Miss. Elizabeth** learned state attorney who spoke for the Republic was of the humble opinion that the inconsistencies pointed out by the counsel for the appellant were so trivial that it could not affect the substantial credibility of the prosecution evidence. On the issue of proper chain of the exhibit, it was her submissions that the relevant provisions on destruction of perishable materials was complied with. She clarified that in

accordance with exhibit P3A, the destruction of the government trophy was preceded by a court order.

I have duly considered the rival submission. I have as well taken time to study the judgment and proceedings of **trial court**. I am inclined to agree with Mr. Mgalula, learned advocate that; the case against the appellant has not been proved beyond reasonable doubt. I will assign my reasons gradually as I go on.

The charge the appellant was convicted with was being found in illegal possession of Government trophy, to wit, one kilogram of zebra meat. The meat that the appellant was found in possession of was not tendered into evidence. The explanation of the prosecution according to the testimony of PW-2 and the counsel submissions is that it was destroyed after being valuated. The valuation report (exhibit P3A) was seeming produced in lieu of the government trophy. Parties are in agreement that under the express provisions of sections 253(2) of the CPA and 101 of Wildlife Conservation Act, that a valuation report and inventory can be produced in lieu of a physical exhibit where owing to the perishability of the object, it cannot await trial. For such evidence to be relied upon, the conditions under the respective provisions must be complied with. One of such requirements is that there must be procured a court destruction order in the presence of the appellant. This position was emphasized in **EMMANUEL SAGUDA AND ANOTHER v. R; SUPRA** where the Court of Appeal remarked at pages 9 and 10 of the judgment as hereunder:-

*It is evident from the provision 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 inventory form were tendered and admitted. The appellant did not have any 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 as conclusive. Given the position, the requirements under the law have not been met.*

It was submitted for the respondent that the destruction of the government trophy in question was preceded by a court order evidenced in exhibit P3A. With all respects to the counsel, I will not subscribe to her submissions. I have read exhibit P3A. It cannot for all intents amount to a court order. As the title of the document shows, the same is an inventory. The name, signature and seal of the author of the inventory is evident at the bottom of the document. It is Martin Kalunde, **PW-2**. Therefore, for the reason of the absence of the court destruction order, the provisions of sections 353 of the CPA read together with section 101 of the Wildlife Conservation Act were not complied with. The charge was therefore not proved in the required standard.

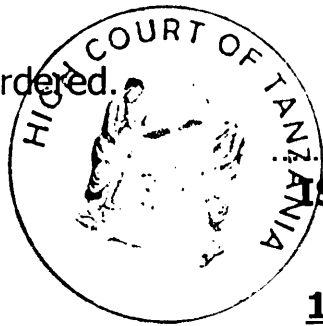


The foregoing notwithstanding, Mr. Mgalula is quite right that the prosecution evidence was guilty of material contradictions. I will mention some of the material contradictions. As for instance, while according to exhibit **P3A** what was evaluated was a meat of zebra with a piece of skin, in the evidence of PW-1, PW-2 and PW-3, the piece of skin does not feature out. Equally so in exhibit **P3B**. Besides, while exhibit **P-2** indicates that the appellant was also found in possession of fat of zebra, in exhibits **P3A** and **P3B** that item is missing. It is also missing in certificate of seizure apart of exhibit **P2**. Coupled with this, there are contradictions on the colour and weight of the government trophy. In the evidence of PW-1 for instance, the weight of the meat was one and a half kilogram whereas in exhibits P3 and P3A, it was only one kilogram. The contradictions pointed out above were not merely trivial. They are material. The Court of Appeal has held from time to time that material contradictions affect the credibility of the witness. It would suffice to refer the authority of the Court of Appeal in **MOSSES MUHAGAMA LAURANCE AND ANOTHER VS. THE REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2002** where such position was stated.

In my opinion therefore, the case against the appellant was not proved beyond reasonable doubt. The appeal is for that reason allowed. Both the conviction and sentence of the appellant are set aside and quashed. The appellant is set free unless withheld for other lawful reasons.



It is so ordered.



  
**ISSA MAIGE**  
**JUDGE**

**19.09.2018**

Date:- 19/9/2018

Coram:- I.Maige, J

Appellant :

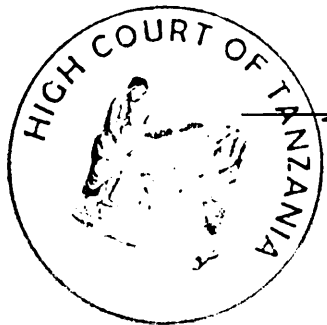
For the Appellant: Mr. Magdalena Advocate

Respondent:

For the Respondent: Elizabeth Swai

C/C:- Mariam.

**Court:-** Judgment delivered; appeal allowed.



  
**ISSA MAIGE**  
**JUDGE**

**19.09.2018**