IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 15 OF 2020

(Originating from Economic Case No. 02 of 2016 of the District Court of Morogoro)

EMMANUEL ALOYCE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 09/07/2020
Date of Judgement: 23/07/2020

MLYAMBINA, J.

Before the District Court of Morogoro at Morogoro, the appellant herein was charged for unlawful possession of government trophies contrary to Section 86 (1), (2) (b) and (3) of *the Wild Life Conservation Act No. 5 of 2009,* (Cap 283) read together with paragraph 14 (d) of the first schedule and Section 57 (1) and (60) (2) of *the Economic and Organized Crime Control, (Cap. 200 R.E 2002)* and sentenced to five (5) years for each count and on unlawful entry into a game reserve contrary to *Section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009, (Cap. 283)* was sentenced to three (3) years imprisonment or a fine of TZs 500,000/=. The 4th count was unlawful possession of weapon in

game reserve contrary to Section 17 (1) and (2) of *the Wildlife Conservation Act No. 5 of 2009, Cap. 283* read together with paragraph 14 (c) of the first schedule to and Section 57 (1) and 60 (2) of *the Economic and Organized Crime Control Act No. 9, (cap.200 R.E 2002)* and sentenced to three (3) years imprisonment or a fine of TZs 500,000/= jail. The sentences were ordered to run concurrently. The appeal is against both conviction and sentences on the following grounds:

1. That, the learned trial Magistrate grossly erred in law and in fact in holding that the appellant was found possessing elephant and wild beast tails where his jacket/coat from which the same were allegedly seized from as expounded by PW1 and PW2 was not tendered to cement the prosecution case.
2. That, the learned trial Magistrate erred in law in fact to convict the appellant based on exhibit P1 (club, sime, elephant and wild beast tails) which were tendered in court un-procedurally as the same were:
    a) Not prescribed and identified by the witness (PW1) prior to its tendering and admission by the court.
    b) Tendered by Public Prosecutor who was not a witness contrary to *Section 198 (1) of the Criminal Procedure Act, (Cap 20 R.E 2002).*

3. That, the learned trial magistrate erred in law and fact in holding by relying on exhibit P1 (elephant and wild beast tails, club and sime) where PW2 and PW3 were not led to identify the same before court for its verification.
4. That, the learned trial Magistrate erred in law and fact to convict the appellant based on exhibit P2 (evaluation report) which was tendered and admitted un-procedurally as the same was not read over after its admission before the court.
5. That, the learned trial Magistrate erred in law and fact to convict the appellant in a case where the prosecution side failed to lead evidence as to how he was re-arrested to ascertain whether his apprehension had any connection with the offences at hand.
6. That, the learned trial Magistrate grossly erred in law and fact to convict the appellant un-procedurally whereby the court did not re read the substance of the charge to the appellant prior the defense case as required by *Section 231 (1) of the Criminal Procedure Act, (Cap. 20 R.E 2002).*
7. That, the learned trial Magistrate erred in law and fact in ordering sentences to run concurrently to the offences committed in one transaction.

8. That, the learned trial Magistrate grossly erred in law and fact for failure to consider the time spent by the appellant awaiting the trial in remand custody.
9. That, the learned trial Magistrate erred in law and fact to convict the appellant without considering his defense evidence which had merit without assigning any convincing reason (s).
10. That, the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.

Whereof, the appellant prayed this court that allow the appeal, quash the conviction and set aside the sentence and acquit.

At the hearing of the appeal, learned State Attorney Tully Helela supported the appeal basing on not proving their case beyond reasonable doubt as required by the law. In the case of **Mohamed Haruna Mtupeni and Another v. The Republic,** *Criminal Appeal No. 25 of 2007* (unreported) the Court of Appeal of Tanzania stated:

> *...of course in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused*

person can only be convicted on the strength of the prosecution case and not on the basis on the weakness of his defence.

As correctly conceded by the republic counsel, on the first and second charge, the republic brought three witnesses. The 1st and 2nd witness were the arresting officers. The 3rd witness was the valuer who made evaluation of the trophies but the republic failed to prove chain of custody from one witness to another. For example, the 3rd witness was the valuer. He stated that the elephant tales and wild beast tales were handled to him by the police officer from Kisaki Police Station in the name of Manfred. The said Manfred was not summoned to prove how he got such exhibits.

Also, at page 21 of the proceedings, the appellant testimony that the exhibits were brought to him at the camp was not considered in the judgement. It is the view of this court, as aptly stated by the republic, the appellant's evidence was attacking the chain of custody.

Further, at page 21 of the proceedings there is an evidence of the appellant that after Kisaki he was taken to Morogoro Central Police

station. However, there is no any witness of the republic who testified on the movement from Kisaki to Morogoro Central Police.

It is the considered view of the court that one of the essential principle in proving a case beyond reasonable doubt in cases of this nature, is to establish chain of custody of the individual who has had possession of the exhibit from the time it was seized up to the time such exhibit was presented in the court.

If there is break of the chain of custody, the evidence remains not worth to be relied upon. (See **Mustapha Maulidi Rashid v. R**, 2014 Court of Appeal of Tanzania at Mtwara (unreported).

The other prosecution case weakness is that the valuation report was not read after its admission. At page 19 of the proceedings it clearly shows that PW3 tendered the valuation report but there is nowhere to show that it was read thereafter. The effect is to expunge it.

The importance of the valuation report was to ascertain the value of the animal. If the valuation report is expunged, the value of the animal remains unknown. In he cited case of **Robson Mwanjisi and 3 Others v. Republic** *2003 TLR 218* it was held *inter alia* that:

Any document must be read after admission for the charged person to know the contents.

As regards the third and fourth counts, it was undisputed fact that the appellant was found in the game reserve with a weapon without permission from the game reserve officer. During hearing of the appeal, the appellant told the court that he was with a mere knife and "Rungu" which a Maasai Man must possess all the time. The appellant stressed that, telling him not to carry such weapon is like telling him to walk naked.

It is very fortunate the law does not treat people differently. The Maasai Culture of walking with a weapon is not an exception to the prohibitive rule of not possessing weapon in game reserve.

Needless the afore observation, *Section 17 (2) of the Wildlife Conservation Act* clearly tells that if a person is found in the game reserve with weapon, he is supposed to pay a fine of TZs 200,000/= or imprisonment of 3 years jail. To the contrary, at page 9 of the judgement, the appellant was convicted and sentenced to 3 years imprisonment or TZs 500,000/= fine. As properly stated by the republic counsel, the sentence was illegal. The appellant being the first offender, ought to had fined not more that 200,000/= oat first place.

On the 3rd charge of entering into the game, the fine is not less than 100,000/= and no more than 500,000/= or sentence of not less than one year or not more than three years. But in this case, the appellant was sentenced to serve imprisonment of 3 years or pay fine of 500,000/=. The trial Magistrate did not take into consideration that the appellant was the first offender.

Considering that the 1st and 2nd charges were not proved beyond reasonable doubt and the appellant has served sentence in respect of the third and fourth counts, I do agree that the appeal is full of merits.

Consequently, the court order that the appellant be released free forthwith unless otherwise held under lawful cause. The appellant's conviction on the 1st and 2nd charges are set aside. For putting the records correctly, the sentence on court 3rd and 4th charges is set aside. The record to read the appellant was convicted and sentenced to serve 3 years.

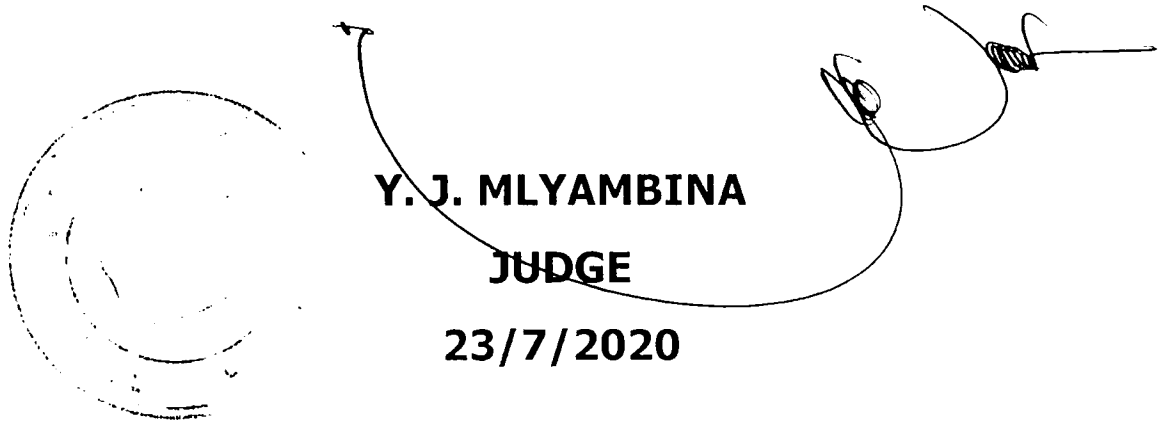
Order accordingly.

Y. J. MLYAMBINA

JUDGE

23/7/2020

Judgement pronounced and dated 23rd July, 2020 in the online presence of the appellant and Elia Athanasy State Attorney for the respondent.



Y. J. MLYAMBINA

JUDGE

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