IN THE HIGH COURT OF THE UNITED fhyREPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 81 OF 2018

(Arising from Criminal Case No. 111 of 2016 of District Court of Bariadi at Bariadi)

SENI NDONGO ..... 1ST APPELLANT
AMALOSI LUSHINGE.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of the last Order: 17th January, 2020
Date of the Judgment: 27th February, 2020

E.Y. MKWIZU, J.

The Appellants **SENI NDONGO** and **AMALOSI LUSHINGE** were arraigned before the District Court of Bariadi at Bariadi tried and found guilty of 28 counts contrary to the provisions of the Wildlife Conservation Laws. They all pleaded not guilty and totally denied the charges.

The facts leading to the arraignment and conviction of the appellants can be briefly stated as follows: In 21/12/2016, while on duty at Mwashalanga area within Maswa Game Reserve,PW1 and PW2, Game reserve officers ,caught appellants hunting without a permit. Appellant were found in

possession of the various government trophies to wit 7 skull of zebra,3 tails of wilderbeest,2 skin of wildebeest,2 paws (viganja) of hyena, one piece of buffalo skin,1 horn of Eland (pofu), 3 heads of vulture, 1 head of ostrich 3 pieces of ostrich skin,1 piece of buffalo skin,1 skin of Thomson gazelle, 3 skin of Topi, 2 skin of hartebeest (kongoni) ,1 skin of steen back, 2 skin of impala, lower jaw and one teeth of wathong, The appellants also were in possession of one panga, two knives and 5 trapping wires.PW1 and PW2 arrested the appellant and took them with their exhibits to the police for interrogation.PW3,on 27/12/2016 did the evaluation of the seized government trophies and prepared a valuation certificate which he tended as exhibit P1 in court without objections from the appellant.

In their defence, the appellants denied the charges. The 1st appellant (DW1) testified that he was arrested on 24th December,2016 while grazing at about 1000 meters away from the game reserve.Thereafter,2nd appellant was arrested, and they were taken to Nyasosi station and later to Bariadi. It was in his testimony that, they were not found with the alleged government trophies.He challenged the prosecution evidence contending that exhibits mentioned were not tendered in court.

On his part, the 2nd appellant, who gave his defence as DW2, denied the allegation that he was one of the culprits who committed the offence. He testified that he was arrested on 24/12/2016 while grazing near the Game reserve. He was taken to a vehicle where he met the 1st appellant and later they were taken to Bariadi police station. He challenged the prosecution's evidence that while initially, prosecution alleged to have collected 28 exhibits from the appellant, the valuation certificate indicated that, the exhibits were 16 and the investigator tendered 10 exhibits only in court. He prayed for an acquittal as, stated DW2, the case was a frame up.

After a full trial, the trial court held that, the prosecution proved all counts and convicted the accused persons for all counts and were sentenced to imprisonment for twelve (12) months in respect of the first and second count and a jail term of twenty (20) years for the rest of the counts. Aggrieved, appellants have preferred this appeal.

In this appeal, the appellant who fended for themselves through an interpreter filed a joint petition of appeal containing six grounds of complaint. But in essence, they boil down to **two** main grounds that, the

prosecution did not establish their case and that the **sentence imposed by the trial court is excessive.**

At the hearing of the appeal, the appellants appeared in person whereas the respondent/ Republic was represented by Ms Immaculate Mapunda, learned State Attorney. In arguing their appeal, the appellants opted to hear first, the learned State Attorney's response to the appeal and that they would thereafter make a rejoinder if the need to do so would arise.

Ms Mapunda informed the Court at the outset that, the respondent/Republic was supporting the appeal. Before she made her submission however, she pointed out to the court, existence of a procedural irregularity in the proceedings of the trial court. According to the proceedings, 2nd accused was not conversant to the language of the court and therefore needed an interpreter. The record indicates that, interpreter was availed to the 2nd accused/2nd appellant from 7th august ,2017 when 2nd accused now 2nd appellant expressed his inability to follow the proceedings to 15th November,2017 when PW2 gave his evidence in court. The record is silent as to whether interpreter was used in the rest of the proceedings. It was Ms Mapunda's contention that, the record is silent as to whether 2nd appellant understood the proceedings or not. To her, this

irregularity resulted to unfair trial to the 2nd appellant, and therefore, the 2nd appellant's trial was a nullity.

On the substance of the appeal, it was the learned State Attorney's submission that the case before the trial court was not proved beyond reasonable doubt. The arrest of the appellants, seizure of the trophies and the tendering of the exhibits in court did not follow the legal procedure, said the State Attorney.

Making reference to pages 33 to 34 of the records of the trial court proceedings, she explained PW1 and PW2 were the arresting officers, but their evidence is silent on whether they complied with the procedure enumerated under **section 106 of the wildlife conservation Act**. The evidence by PW2 is to the effect that they burnt some meat which were found with the appellant with, the record is silent as to which among the seized exhibit were taken to the police and which one were destroyed.

Another reason the Republic is supporting the appeal is said to be the contradiction in the prosecution's evidence. According to Ms Mapunda, the contradiction was in respect of the number of exhibits said to be found with the appellants. While PW3 said he evaluated and prepared a valuation

certificate on 16 exhibits ,PW4, exhibit keeper and who handed the said exhibits to PW3 ,tendered in court 14 exhibits only and could not explain the whereabout of the rest even after being prompted to elaborate on them on cross examination. She maintained that; this inconsistency was material. She relied on the cases of **Mohamed Juma @ Mapakana vs the Republic**, Criminal Appeal no,385 of 2017 to bolster her argument.

She finally urged the court to allow the appeal, quash the conviction and sentence meted against the appellants be set aside.

After having heard the arguments by the learned State Attorney, the appellants adopted their petition of appeal, understandably because they are laypersons and the submission was made in support of their appeal.

Having considered the submission made by Ms Mapunda, I agree with her, firstly, that the omission to avail the 2nd appellant with an interpreter throughout the proceedings as prayed for creates uncertainty as to whether the 2nd appellant understood the substance of the charges as well as the trial proceedings. **Section 211(1)** of the CPA governs the situation at hand. It provides:-

" *211-(1) Whenever any evidence is given in a language not understood by the accused and he is present in person,* ***it shall*** *be interpreted to him in open court in a language understood to him."* (Emphasis added)

The above provision is couched in a mandatory term. It requires that, an accused person who appears not to understand the language of the court, should be provided with an interpreter.

In a similar situation, in the case of **Joachim Ikwechukwu Ike v. Republic,** Criminal Appeal No. 272 of 2016 (unreported), the court of appeal nullified the proceedings and judgment of the trial High Court and quashed the conviction and set aside the sentence after it learned at an appellate stage that though the appellant was represented, but no interpreter was provide to him to interpret "Kiswahili" to the language the appellant understood.The court said:-

" *We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's right to understand and follow up proceedings of the case against him. It was a fatal omission.* "

In the criminal appeal No. 179 of 2017 between **Dastan Makwaya and Another V the Republic**, Court of appeal stated at page 6 of its decision that the omission not to comply with the requirements of **section 211(1)** of the CPA renders the proceedings of the case null and void. The court elaborated further that;

> *"We have also found it prudent to emphasize the compliance with the requirement provided under section 211(1) of the CPA even to those accused persons who are represented, because there may be instances where even the advocate representing an accused person do not understand the language of his client. The question is how will such an accused person follow up his case and in such a case would there be* ***a fair trial to him?. We think no.***
>
> *Taking into account the requirement stated in the provisions of section 211(1) of the CPA together with the authorities from the decision of this Court shown above, we are of the view that the effect of such an anomaly renders the proceedings and judgment of the High Court a nullity." (Emphasis added)*

The court of appeal had time to explain what constitutes a fair trial. In the case of **Mussa Mwaikunda V R** [2006] TLR 387 at page 393 Court of Appeal sitting at MBEYA set minimum standards which must be complied with for an accused person to undergo a fair trial.The court had this to say:-

> *"Perhaps it is useful to digress a bit and state here that there must be minimum standards which have to be complied with if an accused person is to undergo a fair trial. As stated in Regina V. Henley (2) (a case from New South Wales Court of Criminal appeal) quoting Smith J.in R. V. Prosser (3) at page 48 the standards are:*
>
> *(a) To understand the nature of the charge,*
>
> *(b) To plead to the charge and to exercise the right of challenge*
>
> *(c) To understand the nature of the proceedings namely, that is an inquiry as to whether the accused committed the offence charged*
>
> *(d) To follow the course of the proceedings.*
>
> *(e) To understand the substantial effect of any evidence that may be given in support of the prosecution*
>
> (f) *To make a defence or to answer the charge"*

Guided by the above authorities, I am of the strong view that, given the circumstances of the case at hand, it could not be said with certainty that 2nd appellant followed the course of the proceedings . Absence of an interpreter, in my opinion, denied the 2nd appellant a fair trial and therefore vitiated the 2nd appellant's trial. For the above reasons, I am inclined to find the trial as against the 2nd appellant a nullity and proceed to quash his conviction and set aside the sentence meted against him. I think I should pose here before I decide on the fate of the 2nd appellant.

To appreciate the submissions by the State Attorney, I had to give a the entire trial court records a thorough scrutiny having in mind that this is a 1st appeal.

To start with the evidence by PW1 and PW2. They participated in arresting and seizure of exhibits which were in possession of the appellants. They are the one who handled the exhibits to the police (PW4). Their evidence was brief that, when on a normal Game reserve Patrol, they saw many vultures flying, Vultures eat meat so seeing them in an area was a sign of the presence of meat. They, on surrounding the area, arrested the

appellants with various government trophies. The appellants also were in possession of one panga, two knives and 5 trapping wires. On interrogation, appellants seemed to have no permit to enter the game reserve, hunt and possess the mentioned government trophies and the weapons clarified by PW2.They arrested them and conveyed them to the police station where they also handled the exhibits.

The evidence on record do not disclose as to whom the exhibit were handed to. The totality of the evidence do not shed light as to the chain of custody of the items seized from the appellants up to the point when they were tendered in the trial court as exhibit.In **Onesmo** s/o **Miwilo vs. R.,** Criminal Appeal No. 213 of 2010(unreported) the Court of appeal found no proof of the chain of custody of the items found regarding the person who took care of them from where they were found up to the point when they were tendered as exhibits in the trial court. The Court concluded that without such proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence.

Again, in **Paulo Maduka and Others vs. R.,** Criminal Appeal No. 110 of 2007 (unreported), court of appeal underscored the importance of proper chain of custody of exhibits.It was said:-

" chronological documentation and/or paper trail, showing the seizure; custody, control, transfer analysis and disposition of evidence/ be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime "

In the case at hand, there is no explanation from all the Prosecution witnesses on how the exhibits were taken care of, from when they were found in appellants' possession to the time when they were tendered in court as exhibits. The evidence by PW1 and PW2, the arresting officer is to the effect that, after they arrested the appellants, both, they took them and the exhibits to the police . The evidence is silent so to say on whose hand the exhibits were handed. Page 31 and 33 of the trial court records sheds light to what was done by PW1 and PW2 . PW1 is recorded at page 31 to have said;

"We took them to police for further interrogation. We took exhibits to police. We handed them there with exhibits. We handled them to police and their exhibits. My statement was recorded"

At page 33 PW2 said;

> *"They had no permit allowing them to enter, hunt possess trophies and weapons we arraign them to police. We also handed their exhibits."*

Tegemea Exaud, an officer from the Regional Commission under the department of National Resources who deals with the valuation of the government trophies, gave evidence as PW3 on how he was assigned the task of evaluating exhibits alleged to have being found with the appellant. He also tendered a valuation certificate as exhibit in court. In his evidence a person who had handed him the exhibit for valuation is not mentioned. On his part PW4 who is the police officer testified that he was given a file concerning this case on 27/12/2016 by the OC-CID Masalu. He then called an officer from Natural resources for valuation on the same date that is 27/12/2016. It is a fact that appellant were arrested on 24/12/2016.Much as PW4 was handled the file on 27/12/2016, 4th day after the arrest of the appellant. Prosecution was required, in my view to explain as to where/whose hand the exhibit were kept from 24th December,2016 when the appellant were arrested to 27th December,2016 when the valuation was done. This was not done. That breaking of the chain of custody, in my

view, culminated to a doubt as whether exhibits that were tendered in the trial court were the exhibits found with the appellants at the scene.

In the case of **Moses Muhagama Laurence v GVT of Zanzibar;** Criminal Appeal no 17/2002 the court of appeal had this to say;

> *"There is need therefore to follow careful the handling of what was seized from the appellant up to the time of analysis by the government of what was believed to have been found on the appellant"*

The lack of proof on the chain of custody in the present case can clearly seen by the failure by the prosecution witnesses to tell with certainty a total number of exhibits that were found in possession of the appellants. This can be observed by the discrepancies in the various account of the evidence given by the prosecution witnesses. The illustration by the State Attorney in this respect was that the witnesses gave different numbers of the exhibits which to her, constituted serious discrepancies.

Going by the records, all PW3 and PW4 gave evidence of the exhibits found with the appellants.PW3 testified that there was sixteen government

Trophies. At page 38 of the record of the trial court, PW3 is recorded thus:-

> *"... I recall they were 16 government trophies and they appeared in three forms"*

On his part PW4 gave a very brief evidence .His testimony on the exhibits at page 39 and 40 of the record is to the effect that, I quote for convenience;

> *"...there were two accused in the locup and the exhibits were government trophies which were skul for Pundamilia,3 tails of wilderbeest,2 skin of wildebeest, viganja 2 vya fisi, skin of pofu,3 heads of tumbusi, a head of mbuni, skin of Nyati, 3 skin of mbuni, skin of swala town, 3 skin of nyamıla, skin of toe, skin of swala impala, taya of ngili, I also given 5 trapping wires, a panga and two knives. I called the officer from natural resources and made valuation."*

From the above extract of PW4's evidence, a normal counting would result into 28 exhibits that were alleged to have been found in possession of the

appellant. That notwithstanding, PW4 tried to expel in cross examination the said contradictions. He explained that some of exhibits were destroyed, however, he left the court untold as to which exhibits were destroyed, the reason for its destruction and no clarification was given as to the procedure that was adopted in exhibit destruction.

This being a criminal case and taking into account the manner the exhibits were handled, it could not be safely said and concluded that the government trophies that are allegedly, found with the appellant, were necessarily the same exhibits that were examined, evaluated and certified by PW3 and that they are the same that were tendered in court. See the case of **Maliki Hassan Suleiman V. SMZ** [2005] TLR 236.

I have also perused the trial court's judgment. It relied on the evidence of PW1 and PW2 only to ground conviction though in reality no analysis of evidence was done by the trial court. The Judgement contains a summary of the charges against the appellants, evidence of PW1 and PW2, defence evidence and one concluding paragraph which reads:-

> *"For that reasons, no way they could have cooked this case against them. The defence said that no exhibit were brought on*

the date the accused were brought in court cannot stand on ground that the exhibits were brought when the hearing commenced. Since the accused did not proof that they were arrested outside the game reserve, by calling other independent witnesses and the fact that the defence of alibi was brought at the hearing stage this can be termed as afterthought. For this reason, I find out that a prima facia case to have been made out against the accused persons to warrant conviction therefore convict Seni Ndongo and Amalosi Lushinge for all the counts stand charged. It is so ordered"

As it can be gleaned from the above quoted part of the trial court's decision. No analysis of evidence as against the charges was done which would have disengaged the grain from the chaff to enable the trial magistrate to come to a light on what was the position of the case against the appellant. I say so because, this is a criminal case where the burden of proof always lies on the prosecution to prove its case beyond reasonable doubt, the burden never shifts and no duty is cast on the appellant to establish his innocence. See the case of **Mohamed Said Matula v Repulic** [1995] TLR 3. 32 and **John Gilikola V Republic,** Criminal Appeal

No. 31 of 1999 CAT (all unreported). The blame thrown to the appellants for not calling witness to substantiate the location of their arrest is unfounded. The trial Magistrate, in my view, was duty bound to evaluate evidence of both parties before coming to its conclusion.

From the above analysis therefore, I am convinced that the evidence on record failed to establish to the required standards the charges against the appellants. I find this ground alone sufficient to dispose of the appeal. The appeal is therefore allowed, conviction quashed and sentence set aside. The appellants, **SENI NDONGO** and **AMALOSI LUSHINGE** to be released from custody forthwith unless held for some other lawful cause.

DATED at **Shinyanga** this **27th** day of **February**, 2020.

E.Y MKWIZU
JUDGE
27/2/2020