IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 92 OF 2019

(Originating from Tabora District Court in Economic Case No. 12 of 2018)

FRANCIS FABIAN MASANJA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

22nd September & 6th November 2020

BAHATI, J.:

In the Resident Magistrate's Court of Tabora, the appellant **FRANCIS S/O FABIAN @ MASANJA** was convicted by the trial magistrate (C.M Tengwa, RM) in two counts of the offences of entry into a game reserve contrary to section 15 (1) and 20 of the Wildlife Conservation Act, No. 5 of 2009 and unlawful possession of government trophy contrary to section No. 86 (1) and (2) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Act, Cap 200.

The appellant was convicted of the two offences and the trial court sentenced the appellant to serve 20 twenty years imprisonment on the

second count and six months on the first count and ordered the sentences to run concurrently.

Being dissatisfied with both conviction and sentences, the appellant appealed to this court on the following grounds inter- alia that;-

1. *There is no cogent evidence was tendered to prove that the alleged wild pig and six pieces of warthog, to be a real wild pig and warthog meat because there is no any examination report which was brought and tendered before the trial court to prove the said exhibit (P2) if it was a wildlife pig and warthog meat, It is trite law that the burden of proof as to any particular fact shall lie to that person who wishes the court to believe in its existence unless the burden of proof of that fact lies on any other person as provided by the law. See Section 112 of the Evidence Act Cap 6 R.E. 2019. To bolster the point in the case of* ***MOSHI D/O RAJABU VS REPUBLIC.*** *[1967] HCD 122 and in the case of* ***MOHAMED SAID MATULA VS [1995] TLR 3; AVUHI OMARY ABDALLAH AND 3 OTHERS VS REPUBLIC*** *Criminal Appeal No. 28 of 2010, Cat at Dar es Salaam (unreported).*

2. *The learned trial Resident Magistrate erred in law and fact in believing and upholding that the said exhibit P2 was nothing but part of warthog and wild pig while knowing that there is no any scientific evidence brought and tendered before the court of law,*

worse still, no even certificate of evaluation of the said trophies and an inventory form. Therefore, the offence was not proved beyond reasonable doubt. See in the case of ***EMMANUEL SAGUDA SULULUKA AND ANOTHER VS REPUBLIC CRIMINAL APPEAL NO. 422B, CAT AT TABORA*** *(Unreported) on pages 9 and 10 of the typed version of the copy of the judgment, see also in the case of* ***MIRAJI MALUMBO VS DPP, CRIMINAL APPEAL NO. 229 OF 2005 (UNREPORTED).***

3. *The learned trial resident magistrate erred in law and fact in convicting me on reasons that there is nowhere I disputed the place to be a game reserve, my lord judge, it is trite law that the accused person has no duty to prove himself that he is innocent, please refer in the case of* ***SULTAN SEIF NASSORO VS REPUBLIC [2003] TLR 201.*** *All in all, the presence of the appellant on the road which is inside a game reserve does not make the appellant be responsible for that wild pig and warthog which was not found or caught. In his hands, because there is no evidence to show or to prove that the said exhibit was caught or seized in the hand of the appellant to bolster up my point in the case of* ***SALEHE SELEMANI VS REPUBLIC [1972] HCD NO. 21*** *at page 23 and in the case of* ***DAMIAN PETRO AND OTHERS VS REPUBLIC [1980] TLR NO. 260.*** *In the case of* ***DAMIAN PETRO AND OTHERS VS REPUBLIC (SUPRA)*** *the court held that; "mere presence*

at the scene of the crime does not necessarily evidence of committing the crime ***(EMPHASIS IS MINE).***

4. *The thumbprint appeared in the alleged certificate of seizure was not proved if it is the thumbprint of the appellant because there is no any expert evidence to prove that the said thumbprint is of the appellant FRANCIS FABIAN @ MASANJA, the prosecution side was supposed to prove the said allegation without any reasonable doubt it is trite law that a burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person. See in Section 110 (2), 112, and 114 (1) of the Evidence Act, Cap R.E 2002 in supporting my point see in the case of* ***WOOLMINGTO VS DPP*** *[1935] at page 462 and* ***THOMA ASAO VS REPUBLIC [1967] HCD NO. 250.***
5. *The learned trial resident magistrate erred in law and fact to conduct trial unfairly on the side of the appellant when the court convicted the appellant on the stage of determining the prosecution evidence. See the case of* ***VENANCE NUBA AND ANOTHER VS REPUBLIC CRIMINAL APPEAL NO. 425 OF 2013, CAT AT TABORA*** *(Unreported).*
6. *The learned trial resident magistrate erred both in law and fact in convicting me in suspicion that, indeed, presupposes that the accused knew the camp and that who constructed the camp in which the wild pig meat was found and seized. The accused person cannot be convicted on strong suspicion, although there may be strong*

suspicion against the appellant, in conformity with the above point of fact vide the case of ***OMARY MUSSA JUAM VS REPUBLIC, CRIMINAL APPEAL NO. 73 OF 2005, CAT AT TANGA*** *(unreported);* ***HAKIMU MFAUME VS REPUBLIC [1984] TLR 201; BOSCO AND LUCAS SUNGURA VS REPUBLIC [1967]HCG 186; ABDALLAH BIN WENDO AND ANOTHER VS REPUBLIC [1953] TLR 194****.*

7. *The judgment of the trial resident magistrate is invalid because it was prefaced by conviction. My lord Judge, to convict an accused person before the sentencing was considered by the Court of Appeal, there is a series of previously decided case on that point such as* ***SHABANI IDDI JOLOLO AND 3 OTHERS VS REPUBLIC, CRIMINAL APPEAL NO. 200 OF 2006, CAT AT DODOMA; SAMWEL SANYANGA VS REPUBLIC CRIMINAL APPEAL NO. 141 OF 2012, CAT AT IRINGA; OMARY HASSAN KIPARA VS REPUBLIC, CRIMINAL APPEAL NO. 80 OF 2012, CAT AT DODOMA*** *(all unreported). In the case of* ***OMARY HASSAN KIPARA*** *(supra) the CAT held,*

> *"In principle, where the trial court may have been satisfied that the evidence established the guilty of the accused but did not proceed to convict as demanded by Section 235 (1) of the Criminal Procedure Act Cap. 20 R.E 2002, such judgment is a nullity, so is any other judgment on appeal based on such judgment. Both such judgments cannot escape the wrath of being quashed and the sentences thereof being set aside."*

This stance was repeated in the case of ***BIGILIMANA METHOD VS REPUBLIC CRIMINAL APPEAL NO. 172 OF 2016, CAT AT TABORA*** *(unreported). In the present case on pages 11 and 12 of the judgment, there is no conviction which was entered; the omission rendered the judgment of the trial court a nullity, and therefore cannot avoid the consequences of being quashed.*

8. *That, from the above grounds of appeal, prayed that this appeal be allowed, sentence meted be quashed, and order for immediate release from prison custody forthwith.*

The background which was the basis of the appellant's conviction is concisely summarized as follows; on 2nd January 2019, PW1, Mussa Magoti, and PW2 Orest, Thomas Njau were in their routine patrol within the Ugalla Game Reserve. They traced a bicycle tire and started following them as they heard people talking. However, when the appellant saw them they started to run and it was only the appellant who was arrested and found possessing different kinds of stuff including three pieces of wild pig and six pieces of warthog meat. As a result, he was arraigned into the game reserve. Thereafter PW1 filled the seized stuff into the certificate of seizure, one bicycle, and a spear and knife and took him to the office and later to the police station.

At Ugala game reserve office PW3 E 1339 SGT Jonas recorded the appellant's (exhibit6) wherein he allegedly confessed to have committed the offence.

In his defence, the appellant rejected the prosecution's version of evidence. He testified how he was arrested on the 3rd of January, 2019 on his way to Pangale where he met the Natural Resources Van at river Wala. While they were driving they jumped from the van and arrested him, they took him and said that he was the one who escaped them yesterday. They took him to their cell until 8/1/2019. He was finally taken to the police station.

When this appeal was called on for hearing, the appellant was represented by Gahise Amos, learned counsel while the respondent was enjoying the services of Mr. Tumaini Pius, learned State Attorney.

In his submission, the counsel for the appellant submitted that there was no examination report to prove exhibit P2 whether the alleged meat was wildlife pig or warthog meat. The prosecution did not prove beyond reasonable doubt as per section 112 of the Evidence Act, Cap. 6 [R. E. 2019]. Also to substantiate his point he cited the case of **Moshi Rajabu Vs Republic 1967 HCD.** He further submitted that the accused was arrested with a knife and a sword. These exhibits were not presented before the court. In such circumstances, he thought those materials could be made available in court to prove those allegations.

This leaves doubt to the prosecution side, for that reason he prayed to this court to allow the appeal.

On the second ground of appeal. He submitted that the trial court erred in law and fact by believing that the accused was arrested with the wild pig. There was no scientific evidence brought and tendered to determine whether it was a wild pig or not. There was no certificate of evaluation tendered to prove of the said trophies and an inventory form if it was a domestic or wild animal. Looking at the statement it shows that the accused was arrested with the burnt meat. This is a contradiction on which one between the statements on burnt or dried meat in the exhibit. In that circumstance, there is a contradiction. The appellant's counsel prayed to this court to allow the appeal as this ground was also not proved beyond reasonable doubt. He referred the Court to the case **Emmanuel Sululuka and Other Vs. Republic Criminal Appeal 422 Court Appeal of 2013 (unreported).**

On the third and fourth grounds of appeal which the appellant combined and submitted that the trial court did not direct correctly as it convicted the accused on his plea as the accused which is against the principle in a criminal charge, that the accused person has no duty to prove himself that he is innocent. All in all, the accused was not caught with the meat in his hands. He was told to prove that the meat belonged to him. He further submitted that the fingerprints or thumb

was not proved if it was of the accused person again because there is no expert evidence to prove the same. This was again contrary to sections 110, 112, 114 of the Evidence Act, Cap.6. He cited the case of **Woolmingto Vs DPP (1935)** E.A, CA on page 462.

On the 5th ground of appeal, he submitted that the trial court erred in law and fact to conduct trial unfairly on the side of the appellant. There is no cogent evidence or exhibit that the accused was arrested at the scene of the crime.

On the 6th ground of appeal, the court erred in law and fact to convict the appellant. The prosecution did not prove beyond reasonable doubt. During defence, the court did not prove if the accused was arrested on 3rd January 2019 at Pangale and was brought in court on the 9th of January 2019. He submitted that there is no cogent reason from the prosecution as to why the accused was taken to court after 6 days. He stated that it is a general principle that, the law demands a person to be taken to court 48 hours after arrest. It is suspicious in this case. Why did they delay to send him to court? The whole procedure violates the principle of proof beyond reasonable doubt.

On the seventh ground of appeal. The was no one who came to testify that the accused was arrested on the same reserve. It was an opinion. There is no evidence to prove that the accused was seen on

the scene of the crime. In the case of **Shaban Idd Jololo and 3 others Vs. Republic, Criminal Appeal No. 200 of 2006, CAT at Dodoma**. He submitted that there is no evidence where the accused was arrested and this was not proved by any witness. The accused was arrested at Pangale and not at the game reserve as it was alleged on the 8th ground of appeal, the evidence adduced by the prosecution witnesses did not prove the offence against the appellant beyond reasonable doubt. The appellant prays to this court to allow the appeal.

In his reply, the learned State Attorney submitted on the 1st ground of appeal that PW1 and PW2 submitted that exhibit P2 as they were officers from wildlife and they testified according to their experience. Hence, there was no need of having a scientific report being there. Being the expertise, PW2 is the expert of government trophies. Thus their evidence is believed as submitted.

On 3rd and 4th ground of appeal, the learned State Attorney supported the appeal, on the proceedings; the prosecution brought 9 witnesses and 2 exhibits. These Exhibits were not read during Preliminary Hearing Exhibits. P2, P3, P4, P6. Further, he conceded that PW3, Jonas was not on the list of witnesses and there was no procedure followed for an additional witness. This was unprocedural. He swiftly prayed to this court to expunge the exhibits from the records of the court. He further submitted that after having expunged the

exhibit from the records, the prosecution remains with a certificate of seizure and certificate on the valuation of government trophies.

He further added that no witness came to support especially seizure. He prayed to this court also to expunge from the records. Having said so, the prosecution side will not have the evidence to prove this case. The learned State Attorney supported the appeal and the remaining appeal will have no impact at all.

In rejoinder, the appellant had nothing to add apart from his submission.

Having gone through the submissions made by both parties, I find that the main issue is whether the appeal has merit or not. It is undisputed that the State Attorney has conceded on the irregularities advanced by the appellants' counsel. The first irregularities stated are on the exhibits, which were not read during preliminary hearing exhibit P2, P3, P4, P6. Further, he admitted that PW3, Jonas who was not on the list of witnesses was added without proper compliance with the procedure of additional witness. Having conceded with those irregularities he prayed to this court to expunge the Exhibits from the records of the court on which when it is expunged from the record the remaining are seizure certificate and certificate on the valuation of a government trophy.

As rightly submitted no witness came to support especially seizure this should also be expunged from the records. The learned State Attorney submitted that the prosecution side will have no evidence to prove this case. The Republic also supported the appeal and thus the remaining appeal will have no impact at all.

Having considered the submissions made by both parties and examined the entire records of this case, I agree with the learned counsels that an exhibit that is tendered contrary to the established procedure cannot be relied upon. Such irregularity goes to the root of justice because it is not clear as to whether the witness was acquainted with facts related to such an exhibit. Therefore, I hereby hold that Exhibit P-3 should be expunged from the record. Once that evidence is discarded, there will be no other credible evidence to support the charge. Since the evidence was invalid, there can be no more best evidence in support of the charge.

Having expunged the purported evidence, the important question is; will the remaining evidence suffice to form the basis of the appellants' conviction? Under these circumstances, this procedural irregularity occasioned a miscarriage of justice. Thus, I find the grounds of appeal to have merits accordingly.

As these grounds dispose of the appeal, I won't dwell much on the remaining grounds of appeal as the discrepancies observed are so

substantial. I hereby quash the trial court's conviction entered and set aside the sentence resulting therefrom. I consequently order the immediate release of the appellant unless he is lawfully held.

Order accordingly.

A. A. BAHATI,

JUDGE

6/11/2020

Judgment delivered under my hand and seal of the court in the chamber, this 5th day November 2020 in the presence of the appellant only.

A.A BAHATI

JUDGE

06/10/2020

The right of appeal is explained.

A.A BAHATI

JUDGE

06/11/2020