IN THE HIGH COURT OF TANZANIA

AT TABORA

DC. CRIMINAL CASE NO. 4 OF 2020

(Originating from Resident Magistrate Court of Tabora Economic Crime No. 10 OF 2018)

MOSHI BAKARI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date: 23/9/2020- 13/11/2020.

BAHATI, J:

The appellant herein **MOSHI S/O BAKARI** in this appeal is challenging the decision of the Resident Magistrate Court at Tabora in Economic Case No.10 of 2018 in which he was charged on three counts contrary to various provisions of the Wildlife Conservation laws. Specifically, on the first count for unlawful entry in the game reserve contrary to 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 and the second count for Unlawful Possession of a weapon in a game reserve contrary to section 17(1) and (2) and third count for unlawful

Possession of Forest Produce contrary to section 84(1) (2) and (5) of 2004.

After a full trial, the court found the appellant guilty and he was sentenced on the first count: pay fine of TZS 50,000/= or six months in jail in default; second count 20 years in jail and third count pay fine of TZS 50,000 or one year in jail in default.

Before venturing into the determination of this, it is only prudent that the brief background of the event that led to the current appeal is narrated. On the 18th day of April 2018 during the afternoon the accused person Moshi Bakari entered at Sukamaembe area within Ugalla Game Reserve in Kaliua District within Tabora Region without a lawful permit and was found in possession of weapon one muzzleloader bullet, one cross-cutting saw 250 gm of one powder, one knife, and an axe and the accused was found in possession of forest produce to wit two pieces of Mninga timber of total value at TZS 29,380,000/= the properties of the government of Tanzania without a lawful permit.

At the end of the trial, the court was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt, and the conviction was entered.

Aggrieved by both the conviction and sentence, the appellant Moshi Bakari is challenging not only his conviction but the sentences imposed upon him. He raised five substantive grounds of appeal that;

i. *There was a break in the chain of custody of the properties allegedly found in possession of the appellant and tendered in court as exhibit P1 by PW1*
ii. *PW2 and PW3 did not take part in identifying exhibit P1 in court at the time they testified in court. This makes it difficult (if not impossible) to ascertain whether exhibit P1 was the very ones impounded by the appellant at the scene of the crime.*
iii. *The exhibit as P2 and P3 while containing information adverse to the appellant was not read aloud in court in the hearing of the appellant after they were cleared for admission as exhibits. Thus exhibits P1 and P2 ought to be expunged from records.*
iv. *The substance of the charge was not put to the appellant and his plea recorded at a post –PH stage, immediately before the first witness for the prosecution started testifying. The omission renders the trial nullity. See* ***Naoche Ole Mbile v R [1993] TLR 253***
v. *That the sentence imposed upon the appellant in the second count is manifestly excessive.*

When the appeal came up for hearing, the appellant fended for himself before this Court whereas Ms. Juliana Mokha, the learned State Attorney represented the respondent.

The appellant being a layperson, when called upon to expound his grounds of appeal, prayed to this court to adopt the grounds of appeal to form part of his submissions.

In reply, the learned State Attorney conceded the appeal. She specifically submitted on the 3rd ground of appeal. She thus submitted that the exhibit P2 and P3 were admitted however such exhibits were not read in court to know their contents contrary to the principles of the law although they were cleared for admission as exhibits. She urged the court to expunge the exhibits P1 and P2 from the records. She further went on that there was an error in admitting the exhibit. PW2, Olayce Kisalika a game warder tendered the exhibit without observing the procedure. The learned State Attorney added that the exhibit tendered was received by the court but there was no time for the accused to validate the exhibits tendered hence he was not given the right to identify the exhibit tendered. She prayed to this court to expunge such exhibits from the records. Therefore if those exhibits are expunged then the prosecution's case has no legs to stand.

Furthermore, she submitted that the exhibit admitted was not read in court. This exhibit was tendered by PW1, Innocent Kihwelo and the court gave him custodial of those exhibits. She argued that when PW2 was submitting, the certificate of seizure, the appellant was supposed to identify those as to whether he recognized the exhibits produced in court. Failure to identify makes the exhibit to be expunged from the records.

Therefore she expressed the evidence that remains from the prosecution side is the only evidence of PW1, Innocent Kiwhere. Hence, this lacks legs to stand.

More to that, she contended that there was a contradiction of the time when the accused was arrested on the Statement of Offence. According to the evidence adduced by PW1, he stated that it was at noon while PW2 stated that it was at 18 hours in the evening. There is no link between the witnesses on time. There is confusion in respect of time.

The counsel further submitted that PW1 in his evidence stated that the accused was with another person whom he did not mention. PW2 also mentioned but did not state clear. Failure to do so is also a contradiction that creates suspicions on part of the prosecution.

The State Attorney, therefore, supported the appeal since the evidence adduced by the prosecution side was not proved beyond reasonable doubt.

In rejoinder, the appellant did not object to the submission by the learned State Attorney.

Having objectively examined the grounds of appeal raised and the submission by the appellant in support of the same. This court is in agreement with the submission of the learned State Attorney that, the exhibits tendered were not read in court.

It is a fundamental law that failure to read an exhibited document denies the accused an opportunity to know its contents and therefore vitiates the trial. This court has been recently emphasized in the case of **Joseph Maganga and Dotto Salum Butwa v. Republic, Criminal Appeal No. 536 of 2015 (unreported)** where it was stated; "The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity." Under the established principle of law, such exhibits should be expunged. See **Robinson Mwanjisi and Others v Republic [2003] TLR 218.**

It is therefore clear that the consequence, in this case, is to expunge the exhibits from the records.

As to the other ground expressed by the learned State Attorney that there was a contradiction on the time when the accused was arrested on the Statement of Offence. According to the evidence adduced by PW1, he stated that it was at noon while PW2 stated that it was at 18 hours in the evening. There is no link between the witnesses on time. There is confusion in respect of time. I agree with the State Attorney that failure by the witnesses to state the exact time whether it was noon or evening.

It is settled principle that where there are contradictions in evidence the court is duty bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major ones that go to the root of the matter. This was held by the Court of Appeal of Tanzania in the case of **Lusungu Duwe v R, Criminal Appeal No. 76 of 2014 (Unreported).**

Similarly, in the case of **Sahoba Benjuda v The Republic, Criminal Appeal No.96 of 1989**, it was held that:

> *"Contradiction in the evidence of witnesses affects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the*

evidence of such witness touching on the particular point unless it is supported by some other evidence."

Basing on the above legal authorities, it is my considered view that the prosecution evidence was not credible and therefore I find this ground with merit.

As rightly submitted by the learned State Attorney, the prosecution's case has no leg to stand in the instant case when the exhibits are expunged from the records of the court. The court is also satisfied that given the defect pointed above, I find the appellant's appeal has merit and it is hereby allowed. I hereby quash and set aside the sentence imposed against the appellant. He should be set free forthwith unless held for other unlawful reasons.

Order accordingly.

A. A.BAHATI

JUDGE

13/11/2020

Judgment delivered under my hand and seal of the court in the chamber, this 15th day November 2020 in the presence of the appellant.

A.A BAHATI

JUDGE

13/11/2020

Right of appeal explained.

A. A. BAHATI

JUDGE

13/11/2020