

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 281 OF 2019

ANDREA BAITI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from a decision of Ulanga District Court at Ulanga)

(Mahumbuga- Esq, RM.)

dated 15th August, 2019

in

ECONOMIC CASE No. 34 of 2017

JUDGEMENT

2nd October & 27th November 2020

ACK. Rwizile, J

The appellant was arraigned and charged on a single count of unlawful possession of government trophies contrary to section 86(1),(2) (c), (iii) and (3) of the Wildlife Conservation Act, as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2016, read together with paragraph 14 of the first Schedule to and section 57(1) and 60 (2) of the

Economic and Organized Crimes Control Act, as amended by Written Laws ((Miscellaneous Amendments) Act No. 3 of 2016.

According to the facts, it happened on 26th December 2017, at Makugira Malinyi village and District of Morogoro Region, at night hours, when game wardens, Pw1 and Pw3, had intelligence report to executed. They ran into the house of the appellant accompanied by Pw5, a leader of the same place. They arrested the appellant. Upon searching his house, they recovered 2.5 Kgs of what was considered as Puku meat. It was further alleged that the same was cooked and kept in the cooking pot. The meat was evaluated by the game officer Pw2, who upon weighing, it was found worth 800 USD. The meat, according to the prosecution was government trophies which illegally came into the hands of the appellant. He was then brought to court. Having denied commission of the offence, the trial court heard evidence of five prosecution witnesses. After a full trial, the appellant was found guilty, convicted and henceforth sentenced to pay fine of 17,852,000/= or serve a sentence of 20 years in prison.

His was aggrieved by the decision, he has now appealed to this court. While in prison at Kiberege, he filed three grounds of appeal. Later before the appeal took of for hearing, he got services of Mr. Benjamin Marwa learned

counsel from LITCOT Attorneys, who filed 5 supplementary grounds of appeal.

The grounds of appeal range from conviction based on insufficient evidence, conflicting and unreliable evidence, jurisdiction of the trial court to arrest, and prosecution procedures. The respondent being represented by Mr. Eliah and Ms Elizabeth learned State Attorneys did not support conviction. This court was therefore asked to acquit the appellant.

To determine this appeal, I will combine the first and fourth grounds which I consider enough to dispose of this appeal.

It was submitted by Mr. Marwa learned Attorney and agreed by the Mr. Eliah State Attorney that the evidence of Pw2, the game officer did prove that meat found in the house of the appellant was puku meat. His evidence on record is clear and leaves much desired. To be able to appreciate his evidence, it is reproduced hereunder as found at page 14 of the typed proceedings;

"...I remember on 26th December 2017, I was assigned to go and identify the government trophies arrested at the police station of Malinyi. I went at the police station and identified the meat of puku..."

Discerning from evidence of a witness called as an expert or rather someone with knowledge on wildlife. Pw2 if indeed was a competent person to identify the same, had to tell the court that it was not goat meat as the defence had been advanced. He had in my view to identify unique features of puku meat either based on his expertise or experience. He had to show how does goat meat differ from puku meat. His evidence therefore did not shed any light as to its identity. The prosecution did not bother to deal with his evidence to prove so. Being cast with the duty of proving the case, the evidence of Pw2 was not of assistance to the prosecution case. Support is rendered in the case of **Saidi Lyangubi vs R**, Criminal Appeal No. 324 of 2017 CA, (Unreported) as rightly cited by Mr. Eliah learned State Attorney.

As if that was not enough, Pw1 and Pw3 the arresting officers did not link their evidence with that of Pw2, Pw3 and Pw4. As submitted, this did break the chain of transfer of meat from where it was found to when it come to the hands of Pw2 for identification, and Pw4 for disposal. According to the case of **Paul Maduka and 4 others vs R**, Criminal Appeal No. 110 of 2007 as cited by Mr. Marwa. It was important to record and ultimately testify how, meat found in the house of the appellant, was transferred to the police station, how was it kept, who kept it, how was it disposed of and how the

evidence in relation to the same came to court. To show the importance of doing so, the Court of Appeal in **Paul Maduka** (supra) had this to say in respect of the chain of custody;

By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic.

The court went on stressing the reason way it is important to do so in the following extract;

The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.

The above is exactly what happened in this case. Pw1 and Pw3 having alleged got meat from the appellant they had to say when and how was it taken to the police station. Pw4, the police officer as well, did not say anything as to who, when and how the said meat got into the police station.

What he only testified is that he found meat at the police station. This brokage of the chain, does not actually break the myth of Puku and goat meat. It is not known if the meat found in the house of the appellant is the same as what Pw2 valued and identified at the police station.

To put the chain of custody in motion, compliance to section 38 of the CPA must be complied first. The law states;

Section 38

"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of the thing, being the signature of the occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

From the evidence, it is clear in my mind that this mandatory requirement of the law was not complied with. It is so because, exp. P1 which is said to have been executed in that behalf, it is called "Hati ya Upekuzi ya dharula". It is hand written, it has the signature and stamp of the village chairman, and signatures of game officers and as well the purported signature of the appellant.

The same has no name of the issuing office or officer and it was executed on 25th December 2017. It does not state the size of the meat found.

Apart from these anomalies, still the same upon admission in evidence was not read in court. This exhibit having been executed on a date different from when the appellant was alleged to have been found in possession of such trophies, casts doubt on whether what they have alleged against him is a true reflection of what happened. In yet another incidence, Pw5, the chairman of the same place, said he was called at the scene at night. He went to the house of the appellant with the game wardens who called him. He found the appellant arrested. They got into his house, he found cooked meat in a pot in the living room. This therefore contradicts the evidence of Pw1 and Pw3. As an independent witness, Pw5 could not exactly know where the meat came from and whether it was puku or goat meat.

Further, upon having meat identified by Pw2 at the police station, Pw4 a police officer, filled in the inventory form. He then got an order from the ward executive officer to have the meat disposed of. According to Mr. Marwa, this was a glaring misapplication of the law. He asked this court to apply section 101 and 106 of the Wild Conservation Act and follow the case of **Emmanuel Saguda@Salukuka and another vs R**, Criminal Appeal No. 422b of 2013 CA, (Unreported). Having gone through the provision and the case cited, I am of the position that this case is different from what has

been adumbrated in the authorities above. But it is true that basing on **Emmanuel's** case (supra), it is fatal to dispose of an exhibit in the absence of the accused person (appellant).

In here not only that disposition of the exhibit stated in the inventory -exhibit P3 was made under the authority of the Ward executive officer, but also it was made in the absence of the appellant.

Unlike in **Emmanuel's** case, the Court of Appeal made an elaborate decision in the case of **Mohamed Juma@Mpakama vs R**, Criminal Appeal No. 385 of 2017, as cited by Mr. Elish for the respondent, at page 22 and 23, it stated thus;

Concerning the way the Police are required to handle perishable exhibit when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states: 25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal

The court went on saying;

The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an

accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO.

It is therefore true that the WEO is not possessed with the mandate to order a disposal of the exhibit as he did in this case. Pw4 a police officer did not discharge his duty stated under the PGO. Worse still, the court, upon admission of the same exhibit, the same was not read in court. It is therefore clear to me that this trial was marred by not only insufficiency of evidence but also poor prosecution. I have said, that exh. P1 search order, P2 certificate of valuation and identification of meat, and P3-an inventory all were marred by incurable defects. As such, they deserve to be expunged from the record as I hereby do.

Having done that, there remains with no any exhibit proving existence of the fact in issue, puku meat. Worse still, the evidence by all prosecution

witnesses is contradictory. This cannot leave the prosecution case with any leg to stand on. It is therefore bound to suffer a serious fall. That being the case, this appeal has merit. It is allowed. This means, conviction and sentence are quashed and respectively set aside. It is ordered that appellant be released from prison with immediate effect unless held for some other lawful cause.

 Recoverable Signature

X 

Signed by: A.K.R.W IZILE

