IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 36 OF 2020

(Appeal from the decision of Resident Magistrates' Court of Arusha at Arusha in Economic Case No. 84 OF 2017)

JUMANNE PAUL @ NDABILA .....APPELLANT

VERSUS

THE D.P.P ..... RESPONDENT

JUDGMENT

18/11/2020 & 29/12/2020

GWAE, J

In the court of Resident Magistrate of Arusha at Arusha (hereinafter the 'trial court'), the appellant, Jumanne s/o Paul Ndabila and another person called Ally S. Muna stood charged with unlawful possession of Government Trophy c/s 86 (1) and (2) (ii) of the Wildlife Conservation Act No. 5 of 2009 (the Act) as amended by sect. 59 (a) of the Written Laws (Miscellaneous Amendment (No. 2) Act, 2016 read together with paragraph 14 of the 1st schedule to and section 57 (1) both of the Economic and Organized Crimes Control Act, chapter 200, Revised Edition 2002.

It was alleged that the appellant and another on the 19th August 2017 at Randland Wildlife Management area within Monduli District in Arusha Region

jointly and together were found in possession of skinned meat of Impala which is equivalent to one killed Impala valued at USD 390 which is equivalent to Tshs. **875, 074.2**, the Property of Government of the United Republic of Tanzania.

The substance of the prosecution evidence which led to the satisfaction of the trial court that, the appellant was guilty of the offence as opposed to that other person, was as follows; that there was a patrol conducted by game reserve officers (PW1 & PW2) on the material date, time and place aforementioned. The game officers saw a hut and proceeded to that hut where they found the appellant therein, interviewed and searched him but they could not find anything illegal in the house except outside the hut where impala skinned meet and a knife were found. When the appellant was asked as to where he got the meat, he replied that, he was the one who unlawfully hunted and killed Impala while in a company of the said Ally S. Muna.

The game reserve officers prepared and filled the certificate of seizure which they signed and the accused also signed by his thumb. Thereafter the appellant took lead to showing the residence of Muna who was found in his hut and was arrested. According to PW1, the said Muna was also found in possession of impala skinned meat and that he confessed to have unlawfully hunted and killed one impala. He was searched and skinned meat was similarly found while

in a white sulphate. The seizure note was prepared by PW2 who signed as well as the said Ally Muna.

That the seized meat and knife were sent by PW4 to KDU where the same exhibits were handed over to PW3, Mary. The valuation report was prepared and thereafter the skinned meat was destroyed and in lieu therefore an inventory was issued by a magistrate.

In support of the charge, there were exhibits that were tendered by the prosecution and received by the trial court, these were; a knife (PE1) certificate of seizure in respect of the skinned meat (PE2), handing over note between and PW1 and PW4 (PE3) and handing over certificate between PW4 and PW3 (PE4) valuation report (PE5), Inventory report (PE6) and the 1st accused's cautioned statement.

During defence, the appellant denied the charge and contentedly stated that he was arrested on 18/8/2017 and brought to court on 4/09/2017 and that the hut searched was not his but of one Claud. He further denied having been familiar with Muna whereas the said Ally Muna defended that he was arrested on 18/8/2017 and seriously refuted to have been found in unlawful possession of the skinned meat.

Upon conviction against the 1st accused now appellant, the trial court sentenced the appellant to pay a fine of Tshs. 8, 700,000/ that means ten times the value of the trophy or in default to pay the ordered fine, the appellant was ordered to serve the term of twenty (20) years imprisonment.

Aggrieved by the trial court decision, the appellant filed this appeal armed with the following grounds;

1. That, the learned trial magistrate erred in law and fact to convict the appellant basing on the defective charge
2. That, the learned trial magistrate erred in law and fact by relying on the exhibit PE2 contrary to the law
3. That, the learned trial magistrate erred in law and fact to convict the appellant relying on the evidence of PW1 and PW2 as there was no independent witness according to the directive of the law
4. That, the purported cautioned statement was taken contrary to the mandatory provision of the law
5. That, the learned trial magistrate erred in law and fact to convict for failure to evaluate the evidence tendered by defence side which raised reasonable doubt
6. That, the learned trial magistrate erred in law and fact to convict in his judgment when he held that the prosecution had proved its case beyond reasonable doubt.

Before me, the appellant appeared in person, unrepresented whilst the Director Public Prosecution (DPP) was duly represented by **Mr. Ahmed Hatibu**,

the learned state attorney. The appellant had nothing substantial to argue in support of grounds of appeal however he added that he was charged with wrong provision of the law as it was supposed to be S.86 (1) (b) of the Act and not 86 (1) (c) of the Act. According to him, he was not therefore availed an opportunity to prepare his defence and that the trial court wrongly relied on his alleged cautioned statement since it was not recorded as per law.

On other hand, Mr. Hatibu strongly opposed this appeal by stating that the appellant was properly charged with proper statutory provisions of the law (**GN. 2007/2017)** the charge was therefore not defective as wrongly complained by the appellant.

Arguing the 2nd appellant's complaint, learned state attorney stated that, the trial court did not only rely on the certificate of seizure but also to other pieces of evidence adduced by prosecution witnesses. However, he admitted that the certificate of seizure (PE2) is not clear if Impala skinned meat was found in possession of the appellant or his co-accused. He thus sought the PE2 be expunged from the record due to its uncertainty. Mr. Hatibu also sought an order expunging the appellant's cautioned statement on the ground that the same was recorded by incompetent person as rightly complained by the appellant.

Despite the fact that the learned sought an order expunging two exhibits named above nevertheless he argued that there is strong evidence adduced by

PW1 and PW2. Cementing his argument Mr. Hatibu urged this court to make a reference to a decision of the Court of Appeal sitting at DSM in **Kassim v. Republic,** Criminal Appeal 186 of 2018 (unreported) where it was held that oral evidence was credible to safely secure a conviction notwithstanding the order expunging exhibit P2.

In the 3rd ground, Mr. Hatibu argued that reason for failure to involve independent witnesses was well explained that is there was no civilian the place where the appellant was arrested.

Mr. Hatibu further argued that in previous years the accused persons were not involved during destruction of Government trophies if are subject to decay as the case here. Mr. Hatibu went on arguing the 5th ground of appeal that the same is baseless since the trial court magistrate considered the defence given by the accused persons and that the prosecution evidence in record was credible and the charge against the appellant was proved beyond reasonable doubt.

The appellant, in his rejoinder, stated that his grounds of appeal are meaningful to justify this court to release him from prison

Having given a brief of what transpired before the trial court and on this appeal, I am now obliged to determine the appellant's grounds of appeal as herein under;

In the 1st ground, looking at the quantity and value of the trophy that the appellant is alleged to have been found in unlawful possession (Tshs. 875,074/=) which exceeds one hundred thousand shillings but does not exceeds one million as provided for under section 86 of the Act as amended by section 61 of Act No. 2 of 2016 (supra) and **not section** 59 (a) of the said Act. Section 59 (a) cited in the charge is therefore wrong provision of the law since sec. 59 of Act No. 2 of 2016 is all about amendment of Veterinary Act. Hence this ground of appeal meritorious as rightly complained of by the appellant nevertheless I am not convinced if that alone denied the appellant's right of defence

More so I have carefully looked at the wordings of section 86 (2) of the Act as amended by section 61 of the Act No. 2 of 2016 (supra) and sentence imposed thereto which is, to my understanding, is illegal for being not in conformity with the provision of the law for the sake of clarity section 61 of Act of 2016 reads and I quote.

> "61. The Principal Act is amended in section 86 (2)
>
> (a) Adding immediately after paragraph (ii) a new paragraph as follows
>
> (iii) Where the value of trophy which is the subject matter **exceeds one hundred thousand shillings** but **does not exceeds one million shillings**, to a fine of not less than the amount equal to **thrice** the

value of the trophy or for imprisonment for a term of not less than ten years but not exceeding twenty years (emphasis supplied)".

According to the wording of the statutory provision cited above, the trial court sentence was therefore illegal as the value of the impala skinned meat was Tshs. **875,074.2/=)** which means above Tshs. **100, 000**/= which is glaringly not exceeding Tshs.1,000,000/=. As envisaged by the law above, therefore, the trial court ought not to order a fine of Tshs, 8,7000,000/= but a fine which is in conformity with the law that is **875,074.2/x 3=**Tshs. **2, 625, 222.06** and custodial sentence would not necessary be twenty years since that is a maximum sentence but it should be between ten (10) to twenty (20) years.

Considering the illegal sentence that was imposed against the appellant curtailing him an opportunity of paying fine as the first option. I say 'curtailing' simply because the ordered fine by the trial court is far away excessive as the difference between the one provided by the law and that the one imposed by the trial court is **six million** shillings.

Considering the fact that the appellant has spent a term of more than 2 ½ as a prisoner and that since 4.9.2017 while as staying therein as a remandee, I thus find just and fair to order his immediate release. Having taken this course, I

therefore find not necessary to be curtailed by other appellant's grounds of appeal.

However, I find it apposite to air my view on the issue of destruction of exhibits which are subject to speedy and natural decay or perishable exhibits and subsequent acts of tendering inventory in lieu of such exhibits as per section 353 (2) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019. Generally, criminal justice requires parties to be given a fair hearing and not otherwise. An accused person should be involved in the destruction exercise and record to that effect be made available (**Emmanuel Saguda and another v. Republic**, Criminal Appeal No.433B of 2013 (unreported-CAT)).

In the final event, therefore, the appellant's appeal is allowed to the above extent; For the interest of justice and taking into account that the appellant had already spent more than three (3) years in jail and an order of the trial court hindering him to exercise his first option of paying fine by imposing illegal and excessive fine, in such circumstances, I order that the appellant be immediately released from prison forthwith.

It is so ordered.

M. R. Gwae
Judge
29/12/2020

Court: Right of appeal to the Court of Appeal of Tanzania is fully explained.

M. R. Gwae
Judge
29/12/2020