IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 166 OF 2019

SAMWEL KIBUNDALI @MGAYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

18th February, 2020 & 19th March, 2020

Kahyoza, J.

Samwel Kibundali @Mgaya was convicted by district court of Serengeti of being in possession with 30 dried pieces and 2 fresh pieces of wildebeest meat, unlawfully. He was sentenced to serve a custodial sentence twenty-five (25) years. He appealed to this Court contending that the trial court had no jurisdiction to trial the case and convict him with an economic offence without certificate from the Director of Public Prosecutions, that the pieces of meat were not properly identified by an expert as being wildebeest meat and that he was convicted on the weak prosecution evidence.

The issue for determination deduced from the four grounds of appeal submitted by the appellant are as follows: -

1. Was the trial conducted without certificate conferring jurisdiction from the DPP?
2. Were the pieces of meat properly identified as wildebeest meat?
3. Was the prosecution's evidence leading to the appellant's conviction weak?

The appellant and another person Neema D/o Thomas @ Koroso were on the 8th day of November, 2016 at **Stand Mpya Mugumu** within Serengeti District found in unlawful possession of pieces of meat identifies to be that of a wildebeest. They were arrested and charged. Wilbroad Vicent (Pw2) a wildlife warden, identified the meat as being that of the wildebeest. He testified that the meat was between grey and darker brown in colour and that the fresh meat had white oil all which signified to him that it was wildebeest meat. The trial court read the charge to appellant and Neema D/o Thomas on the 9th November, 2019 and the prosecution tendered 30 pieces of dried and 2 fresh pieces of meat of wildebeest as Exh. P.E.1. The exhibit was tendered by the prosecution. The trial court ordered the same to be destroyed.

Later, on the 6th December, 2019 the prosecutor filed a consent and certificate issued by the Principal State Attorney in-Charge. Trial commenced on the 17th January, 2017. The accused persons pleaded not guilty to the charge. The prosecution summoned three witness who were No. G3694 D/C Shaban (Pw1), Wilbroad Vicent (Pw2) and Neema Thomas Koroso. The third prosecution was the appellant's co-accused person. She was discharged on the 15th May, 2017 and on the same day she gave evidence on behalf of the prosecution. The appellant fended himself on oath.

Given the above facts I proceed to answer the above issues as follows. The appeal was heard *ex-parte* as on the date fixed for hearing on the 18th February, 2020 the State Attorney did not enter appearance despite the fact that the office of the National Prosecution Service (NPS), which represents the Republic was duly served.

Was the trial conducted without certificate conferring jurisdiction

from the DPP?

The appellant contended through his ground of appeal that the trial magistrate erred to convict and sentence him in the absence of the certificate conferring jurisdiction from the Director of Public prosecutions. I have shown above that the DPP filed a certificate to conferring jurisdiction on the 6th December, 2016. On the same date, the State Attorney also filed a consent by virtue of section 26 (1) of the Economic and Organised Crime Control Act, [Cap. 200 R.E. 2002]. It is therefore, not true that the trial court heard the case, convicted and sentenced the accused without jurisdiction.

I resolved, being the first appellate Court, to consider whole evidence on record. It is the position of the law that the first appellate court ought to treat the evidence as whole and subject the same to afresh and exhaustive scrutiny, failure of which constitutes an error in law. See *Prince Charles Junior v. R* 250/ 2014 and *Siza Ptrice V. R* Cr. Appeal No 19/2010. In the latter case the Court of Appeal held that-

> *"We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the enter evidence in an objective manner and arrive at its own findings of fact, if necessary. We respectfully hold that this was not done."*

Basing on the above principle, I scrutinized the prosecution's case and found as stated above that Exhibit P.E.1, which are 30 pieces of dried and 2 fresh pieces of meat of wildebeest were tendered on the 9th November, 2019. The exhibit was tendered before the trial court had jurisdiction to try the appellant. The trial court as shown above was conferred with jurisdiction on

the 6th December, 2019, when the Principal State Attorney in-Charge filed a certificate under section 12(3) of Cap. 200 R.E. 2002. For that reason, the trial court admitted the exhibit at the time it had no jurisdiction to admit the same.

Not only did the trial court admit Exhibit P.E. 1 before it was clothed with jurisdiction but also the exhibit was tendered by the public prosecution and the appellant was not afforded an opportunity to ask question to the person who tendered that same. There was a gap in the law on how such exhibit which were subject to speedy decay should be dealt by the courts. The gap was addressed by amending section 101 of the Wildlife Conservation Act, Cap. 283 by the Written Laws (Miscellaneous Amendments) Act No. 2/2017. However, the said amendments cannot come to aid to this case as the offence was committed before the said amendment came into existence.

For the reasons stated above, I find that Exh. P.E. 1 was not properly admitted and considered by the trial court. I expunge it from the record.

Were the pieces of meat properly identified as wildebeest meat?

The prosecution summoned one witness Wilbroad Vicent (Pw2) who testified how he identified the pieces of meat found with the accused as that of the wildebeest. Wilbroad Vicent (Pw2) also valued and prepared a certificate of trophy valuation and tendered it as Exhibit P. E. 2. The appellant did not cross-examine the witness how the identified the meat to be that of the wildebeest. It is therefore an afterthought for appellant to question how Wilbroad Vicent (Pw2) identified the meat to be of the wildebeest. It an established principle of law that failure to cross examine a witness on crucial point of evidence is taken as admission of that fact.

It is also the position of the law that an accused person is precluded from questioning that evidence on appeal see *Ismail Ally V. Republic*, Criminal Appeal No. 212 of 2016 (unreported). In that case, the appellant in a statutory rape case, complained on appeal on the age of the victim. The Court of Appeal observed that: "*the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought* - See the cases of ***Edward Joseph v. Republic*, Criminal Appeal No. 272 of 2009, *Damian Ruhele v. Republic*, Criminal Appeal No. 501 of 2007, *Nyerere Nyegue v. Republic*, Criminal Appeal No. 67 of 2010, and *George Maili Kemboge v. Republic* Criminal Appeal No. 327 of 2013**/ CAT (all unreported).

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

The appellant, therefore is considered to have accepted the pieces of meat found in his possession were of the wildebeest and he cannot question that fact at this stage. Thus, the first and second grounds of appeal have no merit.

Was the prosecution's evidence leading to the appellant's conviction weak?

I now, answer the last issue whether the trial court had enough evidence to convict the appellant. The Exh.P.E.1 was not properly admitted as result I have expunged it from the record. What remains is the evidence given by No. G3694 D/C Shaban (Pw1), Wilbroad Vicent (Pw2) and Neema

Thomas Koroso.

I will start with the evidence of **Neema Thomas Koroso Pw3.** Neema Thomas Koroso Pw3 was the appellant's co-accused. She was discharged and called upon to testify against her fellow accused person. The day **Neema Thomas Koroso Pw3** was discharged was the same day she testified on behalf of the prosecution's side. That piece of evidence amounts to an evidence of a co-accused or an accomplice. *It is well accepted that the evidence of a co-accused is on the same footing as that of an accomplice, that it is admissible but must be treated with caution and, as a matter of prudence, would require corroboration.* See *Bushiri Amiri v. Republic* [1992] TLR 65. Thus, evidence of Neema has to be corroborated.

I also considered the evidence of **Wilbroad Vicent (Pw2),** which was only in relation to valuation of the trophy. He was called to identify and value the meat. He gave no evidence that implicated the appellant. The only evidence of the witness which implicated the appellant was that of **No. G3694 D/C Shaban (Pw1). No. G3694 D/C Shaban (Pw1)** explained that the appellant found in possession of meat they suspected was meat of wild animals. He testified that the appellant did not show them any permit. The appellant did not cross examine **No. G3694 D/C Shaban (Pw1).** Basing on the above principle I find that the accused accepted the fact the he was found in possession of meat of wild animal. The meat was later identified to be the meat of the wildebeest.

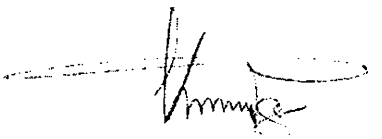
I find that the evidence of **No. G3694 D/C Shaban (Pw1)** has corroborative value and the same corroborates the evidence of **Neema Thomas Koroso Pw3.** I therefore, find that there was enough evidence for the trial court to convict the appellant with the offence under section 86(1)

and 2(ii) of the Wildlife Conservation Act, Cap. read together with paragraph 14 (d) of the fist schedule to and section 57(1) and 60 (2) of the Economic and Organized Crime Control Act [Cap.200 R. E. 2002. I uphold the trial court's conviction.

I now, consider the sentence. The appellant was sentenced to 25 years custodial sentence. The sentence is on the high side of what is provided under section 86 (2) (b) of **Cap. 283**. I reduce it to a fine of Tzs. 14, 300,000/= failure of which the appellant shall serve a custodial sentence of 20 years under section 86 (1) and (2) (b) of **the Wildlife Conservation Act Cap. 283**.

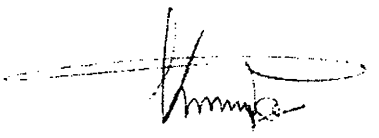
For reasons stated above, I find, save for the sentence which has been reduced, the appeal meritless.

It is ordered accordingly.



J. R. Kahyoza
JUDGE
19/3/2020

Court: Judgment delivered in the presence of the appellant and Mr. Temba State Attorney for the Republic. B/C Charles present.



J. R. Kahyoza
JUDGE
19/3/2020