THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 79 OF 2019

(Original from judgement of the District Court of Nanyumbu, in Economic Case No. 11 of 2017)

ABDALLAH THABIT ISSA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 10/02/2020

Judgement on: 19/02/2020

NGWEMBE, J:

The appellant was convicted and sentenced to twenty (20) years imprisonment by the District Court of Nanyumbu, for unlawful possession of Government Trophy contrary to section 86 (1) and **(2) (c) (ii) of Wildlife Conservation Act, No. 5 of 2009**, read together with paragraph 14 of the First Schedule and section 60 (2) & (3) of the Economic and Organized Crime Control Act Cap 200 R.E. 2002 as amended by Act No. 3 of 2016. It is alleged that the appellant was found in possession of Government Trophies to wit: one (1) kilogram of Greater Kudu meat, valued at **TZS 4,917,000/=** the property of the United Republic of Tanzania.

It is alleged that on 5th day of October, 2017 at Chimila Village within Nanyumbu District in Mtwara Region, the appellant was found in possession of Government Trophy. Thereafter was arrested and arraigned in court charged accordingly. The prosecution lined up six prosecution witnesses who proved the case to the satisfaction of the trial magistrate, finally, was found guilty, convicted and sentenced to twenty (20) years imprisonment. Being aggrieved with that conviction and sentence, just on the same date, he issued notice of intention to appeal and lodged his appeal in this court on 4th December, 2018. Lastly, his grounds of appeal were filed in this court on 4th September, 2019 armed with five grievances. For convenient purposes, the grounds of appeal may be summarized into two namely; the trial magistrate failed to compose an acceptable judgement as provided for under sections 235 and 312 (2) of Criminal Procedure Act. Second ground is failure of the prosecution to prove the case to the standard required.

On the hearing date of this appeal, the appellant did not procure services of learned advocate, hence has no valuable contribution to this appeal. He only relied to his grounds of appeal, then lamented bitterly that the arresting officer went to his house at the kitchen and found the alleged meat being already cooked for afternoon lunch. That he was arrested while he was at home preparing for afternoon lunch. He rested his argument by asking this court to consider his grounds of appeal and find him not liable.

In turn the learned State Attorney, Ms. Eunice Makala, objected strongly the appeal by advancing several reasons. That the trial magistrate properly convicted the appellant following the guidance provided for under section

235 and 312 (2) of the Criminal Procedure Act. She referred this court to the case of **Iman Charles Chimango Vs. R, Criminal Appeal No. 382 of 2016.**

On the production of the alleged meat as an exhibit during trial, the learned State Attorney responded that there was no need for the evidence adduced in court was watertight leaving only remote possibilities which may be neglected. She comprehended her argument by referring this court to the case of **Rashidi Kilanda Vs. R, [1990] TLR 60.** Further argued that the prosecution lined up reliable and credible witnesses who testified properly in court. The type of meat was proved by an expert from Wildlife, that it was a meat of Great Kudu (Tandala) valued USD 2,200/- equivalent to TZS 4,917,000/=. Thus, there was no need to take the said meat to the Government Chemist to prove same. Finally rested by a prayer that the appeal is irrelevant same should be dismissed and the court be pleased to confirm the conviction and sentence meted by the trial court.

Having summarized the arguments of the appellant and of the learned State Attorney, I may commence my consideration of this appeal with the alleged improper conviction of the trial court. At page 3 of the judgement, the trial magistrate convicted the appellant as follows:-

> *"Having being satisfied with the evidence adduced and confession of the accused before this court, I find the accused guilty and convict him to the offence as charged"*

According to the learned State Attorney, the quoted conviction is proper according to section 235 and 312 of the Criminal Procedure Act, while the

appellant in his grounds of appeal is challenging that, such conviction is irregular contrary to the provisions of law. The two sections are termed as yard stick of proper judgement. Every magistrate or judge sitting to decide a fate of an accused person, must strictly comply with those two sections when the accused is found guilty of the offence charged.

The Court of Appeal has tirelessly guided subordinate courts in several precedents that when the trial judge or magistrate find the accused liable to the offence charged, must proceed convict him/her according to the offence charged. This position was emphasized by the retired Chief Justice Othman Chande in **Criminal Appeal No. 266 of 2014** between **Baltazar Gustaf & Anthony Alphonce Vs. R (CAT – Arusha)** (Unreported), where he discredited any conviction wrongly entered held:-

> *"Another serious discrepancy that we could not have failed to notice was the appellants purported conviction by the District Court. It was entered under section 235 of the CPA and sections 285 & 286 of the Penal Code, the offence (armed robbery) they were specifically charged. That the District Court seriously, misdirected itself in convicting the appellants under section 235 of the CPA, which is a general provision directing the trial court to proceed to the conviction of the accused after hearing to the complainant and the accused persons and their witnesses and the evidence. The appellants were thus convicted on a wrong provision. As entered, the appellants' conviction by the District Court cannot stand. In law, they remain unconvicted. With utmost respect, this serious*

misdirection ought to have been noticed and corrected by the High Court"

Other similar decisions which are equally insisted on proper convictions are **Criminal Appeal No. 253 of 2013 Abdallah Ally V. R. (Court of Appeal) (unreported); Aman Fungabikasi Vs. R. Criminal Appeal No. 270 of 2008 (unreported); Shabani Iddi Jololo and three others Vs. R. Criminal Appeal No. 200 of 2006; Hassan Mwambanga Vs. R. Criminal Appeal No. 410 of 2013;** In all these cases, the Court of Appeal had similar pronouncement that:-

"It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgement and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".

Likewise, the Court of Appeal differentiated the term *"guilty as charged"* with conviction, in the case of **John s/o Charles Vs. R. Criminal Appeal No. 190 of 2011**, held: -

*"It is not sufficient to find an accused **guilty as charged**; because the term **"guilty as charged"** is not in the statute; and the legislature may have a reason for not using that term; but instead, decided to use the word **"Convict".***

Since then, the position on conviction was termed as settled in our jurisdiction, that conviction must be specific with citation of the offence charged. Failure to convict properly an accused person, renders the whole judgement nullity *abinitio.* However, I am aware of the recent decision of the Court of Appeal made on 20th February, 2019 in **Criminal Appeal No.**

382 of 2016, between **Imani Charles Chimango Vs. The Republic** whereby the trial court convicted the appellants as follows:-

> *"It is for the foregoing reason both accused in this case ....are hereby found guilty as per section 235 (1) of the CPA"*

The Court concluded that it suffices to say in the circumstances of this case that by all necessary implications a conviction was entered. The Court proceeded to hold:

> *"However, we emphasize that for avoiding doubt the word "Conviction" should be clearly and specifically appear in the judgement when the trial court had entered a conviction"*

The Court of Appeal in arriving to that decision was confronted with an appeal against gang rape contrary to section 130 (2) (e) and 131A (1) of the Penal Code. To my understanding, the Court of Appeal emphasized on proper conviction. The word conviction must appear vividly. In this appeal the trial magistrate used both terms, "guilty" and "conviction" but failed to cite the section of the offence as required by law. The trial magistrate said *"I find the accused guilty and convict him to the offence as charged."* One may ask which offence? But of course the accused knew the charge, which was read before him, that is unlawful possession of Government trophy. Section 312 (2) of CPA is quoted hereunder:-

> *"In the case of conviction the judgement **shall specify** the **offence** of which, and the **section of the Penal Code** or other law under which, the accused person is **convicted** and the punishment to which he is **sentenced**".*

Though, I need not to build mountain on this point alone, but according to the law, the conviction arrived by the trial court was contrary to the guidance provided for in the section quoted above. There are more issues to be discussed as rightly raised by the learned counsel.

This being the first appellate court, has a statutory duty to revisit the whole proceedings, evidences and any other records admitted in court during trial, with a view of understanding the nature of the evidence and procedures used to arrive to the conclusion. This position was promulgated in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) where the Court of Appeal held:-

> *"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"*

This being the legal position, and this court being the first appellate court, I think, reevaluation of the whole evidence recorded by the trial court, is inevitable.

Accordingly, the prosecution evidence of PW1 an Assistant Inspector of Police at Mangaka investigation department testified briefly that on 05/10/2017 when they arrived at Chimika in the morning hours, they saw young men running after seeing them. They ran after them and arrested the appellant. They proceeded to search his house and found one kilogram of meat of Great Kudu (Tandala). Thus prepared a certificate of seizure

which was signed by both parties. PW2 almost repeated the same evidence, but added that the said piece of meat was in the pot. PW3 likewise had similar evidences, but added that due to his expertise, he identified the meat to be of Great Kudu as opposed to a goat. The rest of prosecution witnesses had more or less similar to PW1. Having heard all six (6) prosecution witnesses, the trial court proceeded to find the accused having a case to answer.

The appellant proceeded to defend himself. That upon searching his house, they found in the kitchen a boiling meat. The meat was taken outside the fire, and later police took it under the cashew nut tree, where they ate the meat, leaving just a small portion of meat for exhibit purposes.

From such evidences of both parties, the accused was convicted and sentenced to twenty (20) years imprisonment. The question is whether that event or case was properly investigated by police? If so, what was the result of that investigation in respect to who killed that Great Kudu? Whether the accused was the one linked with the offence of killing that animal? These questions have no answers neither in the evidence of the prosecution nor in the proceedings and judgement of the trial court. The prosecution lined up six (6) prosecution witnesses, but unfortunate none of them testified on how he came to know that indeed the accused was the one who killed that animal and or how the appellant came to the possession of the said trophy? It is obvious there was no professional investigation by a competent investigator on the offence. Thus, the trial court had no advantage to know exactly the whole chain of criminal act.

Another glaring question is the style used to arrest the accused person. One may ask why the arresting officers arrested the accused for what accusations if any? I need not to go into details in this issue, lest I may become an investigator, but sincerely I have observed that the offence was not investigated leave alone proper and professional investigation.

More so, is the style of search. PW2 testified that when they searched the house of the accused, they found one kilogram of meat in a pot. This piece of evidence is supported by the defence evidence, that they found in the kitchen a boiling piece of meat, which they took it and ate under the cashew nuts tree leaving a small piece of meat as exhibit. That type of conduct leaves a lot to be desired. One may ask, if it is true, that police and wildlife officers behaved like that, who should be an accused person? All these questions emanate from poor investigation which led into poor prosecution. The court expected to receive a comprehensive investigative evidence from both police officers and Wildlife Officers supported with expert report on identity of the type of meat. Mere allegations that the meat was of Great Kudu (Tandala) may not convince the conscious of this court to support conviction and sentence.

The particulars in the charge sheet provided that the accused was found with one (1) kilogram of Great Kudu meat, valued at shillings four million, nine hundred and seventeen thousand (TZS 4,917,000/=). An immediate question is whether that one kilogram was worth such huge amount of money? Certainly, the answer is not, in the course of searching for an answer to this fundamental question on the true value of the meat, I came

across Regulation 3 (2) of Wildlife Conservation (Valuation of Trophies) Regulations, 2012 which is quoted hereunder:-

> *"Except where it is otherwise provided, the value of any part of the animal shall be calculated to be the value of the entire animal unlawfully hunted"*

If it is true that whatever part of the animal constitutes the whole animal, then literary, it means section 86 (2) as amended is inapplicable or in conflict with the regulation. Section 86 (2) (iii) as amended by Act No 2 of 2016 is hereby quoted for clarity and for better understanding:-

> *" Where the value of the trophy which is the subject matter of the charge exceeds one hundred thousand shillings but does not exceed one million shillings, to a fine of not less than the amount equal to thrice the value of the trophy or to imprisonment for a term of not less than ten years but not exceeding twenty years or both"*

In relation to this appeal, I think the regulation was used to calculate the alleged one (1) pieces of meat (one kilogram) found in the kitchen of the appellant, was equal to the whole animal that is, the whole Great Kudu valued **TZS 4,917,000/=.** It means the appellant with one piece of meat was equal to being found with the whole animal. I think, that is an absurd and serious conflict between the principle Act and its subsidiary law. I am sure the legislature had a purpose of amending the Act in year 2016.

Under normal circumstances, when there is a conflict between the principle Act and the subsidiary law, always the principle law will prevail. Be it as it

may, it does not make sense to equate one kilogram of meat to be equal to the whole Great Kudu (Tandala) valued **TZS 4,917,000/=.** I am sure the society will remain in total darkness with such type of calculations.

In arriving to the conclusion, I am fortified with the reasoning of Lord Reid in **S [an infant] Vs. Manchester City Recorder and others [1969] 3 All E.R. 1230** who held:-

> *"The desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty. The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilty may be proved by evidence. But also it may be confessed. The court, will however, have great concern if any doubt exists as to whether a confession was intended or as to whether it ought to have ever been made"*

In the circumstances of this appeal, I am inclined to note that, since the appellant was not represented during trial and in this appeal and may be, had no experience of appearing in court, possibly he appeared in court for the first time, hence had psychological shock to express himself, we have seen in court even the most experienced legal practitioners, when are faced with criminal cases that they need a help of an independent advocate.

That being the case and since the Republic/Respondent was represented during trial and in this appeal, certainly the duty of the prosecutor/State Attorney is greater than when both sides are represented by learned

counsels. Usually in such circumstances, the counsel has a dual responsibility, to defend his client, that is, the republic and to guide the court properly in terms of procedural law and substantive law. This proposition found its root from the judgement of the Court of Appeal in Criminal Appeal **No. 253 of 2012,** where **Chief Justice Juma C.J,** quoted the wording of Justice Philip Nnaemeka – Agu of Supreme Court of Nigeria in **Michael Okaroh Vs. The State, SC 58/1989** held:-

> *"It goes without saying that a Counsel in court in a capital trial has a very important and sacred duty to perform. He owes that duty to not only his client and the court but also to society at large. It is of the very essence of that duty he should promptly take objection to every irregularity at the trial, be that an irregularity relating to procedure or to evidence called at the trial"*

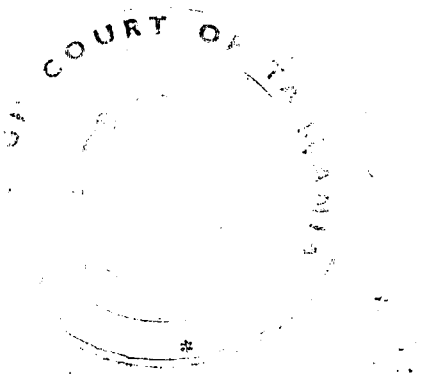
Without hesitating, I may add that prosecution is an art, legal profession, and procedure towards the main aim of arriving into a substantive justice. The role of a prosecutor is not to leave any misdeed to the trial court to be blamed later on, rather is to assist the court as an officer of the court, to defend the republic to the best of his/her knowledge, skills and ability and to protect the innocent citizens from criminal acts. In doing so the purpose of criminal legislation would be achieved. The key role of a prosecutor is to protect innocent citizens from criminal acts, while the duty of the court is to balance between the two cases, the case of the prosecutor and the defence case.

I have no doubt, the trial magistrate had he directed his mind on the defence of the accused which same was not disputed by the prosecution that such meat was consumed by Police and Wildlife Officers under the cashew nut tree, I am sure he would have arrived into a different conclusion. More so, I think the duty of Wildlife Officers are not to inspect kitchens of citizens, rather to protect animals wherever they are without limitation of course to search reasonably on poachers of wildlife.

In totality, and for the interest of justice, I find the appellant deserve second consideration. For the reasons so stated, I find this appeal has merit same is allowed. Consequently, the conviction is quashed and the sentence of twenty (20) years' imprisonment is hereby set aside. Exceedingly, order for an immediate release of the appellant from prison, unless otherwise lawfully held.

Order accordingly.

Dated at Mtwara this 19th day of February, 2020



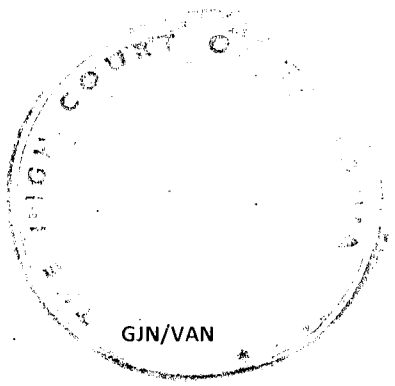
P.J. NGWEMBE

JUDGE

19/06/2019

Court: Delivered at Mtwara in Chambers on this 19th day of February, 2020 in the presence of the Appellant and Mr. Gideon Magesa, State Attorney for the Respondent – Republic.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE
JUDGE
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