IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 65 OF 2020

SAIDY MOHAMED SAIDY..... 1st APPELLANT

HASSAN MOHAMED LIKWENANGU.....2nd APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

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

(Ndeko- Esq, RM.)

dated 29th January, 2020

in

ECONOMIC CASE No. 07 of 2015

JUDGEMENT

26th February & 11th May 2021

AK. Rwizile, J

The appellants were arraigned on two counts. The first count is unlawful possession of government trophies, that is Impala meat valued at 1,571,973/= which is contrary to section 86(1),(2) (c), (ii) and (3) of the Wildlife Conservation Act, No. 5 of 2009, as read together with paragraph 14(d) of the first Schedule to and section 57(1) and 60 (2) of the Economic and Organized Crimes Control Act.

On the second count, they were accused of being in unlawful possession of ammunitions contrary to section 4(1), and 34(1),(2) of the Arms and Ammunitions Act [Cap 223 R.E 2002] as amended by Act No. 19 of 2007.

According to the facts, on 11th May 2015, following poaching intelligence reports, Zephania Daudi (Pw2) a game warden, in a company of fellow game wardens, Victor Joseph (Pw3) and Ashery Muganyizi (Pw4), as they patrolled part of the Selous game reserve, set a barrier/ road block at Nakafulu-Lupiro. At about 3.00hrs, the accused persons appeared. They were three in number. They had a motorcycle and two bicycles. As one of them managed to escape the two appellants were arrested.

A search was mounted on the baskets carried on their motorcycle and bicycles. It was found that they were having impala meat. However, they had no permit previously sought and obtained. They were henceforth arrested and charged of the offences. After a full trial, they were acquitted on the second count but convicted on the first count and sentenced to pay fine of 15,719,730/= or face an imprisonment term of 20 years each. They are now battling against both conviction and sentence. The grounds of appeal advanced are 4, coached in the following terms;

i. *That the trial court erred in law to convict and sentence the appellants basing on the fatally defective charge*
ii. *That the trial court erred in law and fact by convicting the appellants basing on evidence which did not tally with the offence charged*

iii. *That the trial court erred in law and fact in convicting the appellants without sufficient evidence to ground conviction beyond reasonable doubt.*

iv. *That the trial court erred in law and fact for failure to properly evaluate the evidence of both parties.*

Parties were represented when the matter came for hearing. It was argued by written submission. Mr. Mwanukuzi learned counsel appeared for the appellants, while Faraja learned State Attorney was for the respondent. The appellant filed their submission in time, but the respondent did not despite extension of time to do that. This appeal therefore contains one sided arguments for determination of this case.

When arguing the appeal, the appellants through Michael Michael Chami of Paluhengo and Company Advocates, abandoned the first two grounds of appeal and argued together the succeeding two. Arguing the first ground of appeal, the learned counsel was of the view that evidence of Pw1 and Pw4 is inconsistent and contradictory. According to him, while Pw4 said was directed on 11th May to prepare an inventory which he did, he then took to court the same for a disposal order.

Pw1 on the other hand, alleged, on 13th May valued the meat. It is surprising, he commented, that Pw1 valuated meat that was destroyed. This, in the eyes of the law, it was submitted, is a contradiction. In the strength of the decision in **Mohamed Said Matula vs R** [1995] TLR 3, this court was asked to hold that such a contradiction is material and has gone to the root of the case.

To resolve this material contradiction, it was further submitted, the appellants deserve an acquittal since they are entitled to the benefit of the doubt as held in **Hussein Idd and Another vs R** [1986] TLR 166.
Conclusively, it was stated that the evidence of Pw2, Pw3 and Pw5 is not enough to prove the charge. It is so, because the court based its finding on the evidence of Pw1 and Pw4 which raises material contradictions. The learned counsel asked this court to allow this appeal by acquitting the appellants.

In considering what has been submitted, it is clear that Pw1 is a wildlife officer mandated with powers to evaluate the trophies. It was his evidence that he evaluated the trophies at the police station at Mahenge and issued a certificate of valuation -exhibit P1. It was 80kgs of Impala meat. The same was done on 13th May 2015. As to Pw2, it was stated that he arrested the accused persons at Nakafulu where a barrier was set. It was on 11th May 2015. According to him, one of the suspects managed to escape. The appellants were found with two Impalas and two cartridges of a shotgun. That done, the same were taken to the police station with the exhibit. His evidence is as that of Pw3 and Pw5, because they were together when arresting the accused persons.

Pw4 a police officer, was of the evidence that he was assigned to prepare an inventory of the government trophies. They were two Impala carcasses. It was on 11th May. Upon doing so, he sent the same to the court where a disposal order was made. The inventory is exh. P2.

The appellants refuted the prosecution story. They denied being arrested with meat, since they were arrested at their homes on suspicion that they were poachers. They said, they were tortured and then charged as thus. There witnesses were in support of their evidence. According to the submission of the appellants, the evidence did not prove the charge.

To start with, exhibit P2 is an inventory form. According to Pw4, it was executed on 11th May. This means upon preparing the same, it was sent to court with meat for a disposal order. On examination of the same, it is apparent that the disposal order by a magistrate was made on 12th May. His evidence therefore does not clearly say, the order was not obtained on 11th day. He only said, upon preparing the same, I went to court to have the order. Since he prepared the same on 11th May, in the absence of evidence to the contrary, I take it that it was sent to court on that day. Why then is it dated 12th May. The same inventory has another problem. It is not signed by the officer in charge of the police station or the officer issuing it.

It has been submitted that Pw1 who is a wildlife officer valued two impalas at the police station. He did so on 13th May. It would appear therefore that trophies found on 11th May, sent before a magistrate on same day, an order for disposal made on 12th May, was valuated on 13th May. This poses a challenge as to when was it disposed of. There is no evidence to that effect. The evidence on its disposition was important because it is doubtful if the same was truly seen and evaluated by Pw1. The prosecution being cast with the duty to prove its case, it was enjoined to deal with this inconsistence.

The inventory is a key exhibit in this case. I say so because, that represents perishable goods that were the basis of the case. This means handling of the exhibit should, show consistence. Its integrity shouldn't be in question. Its chain should be rendered clean. This time around, Pw2, Pw3 and Pw4 simply said, they sent the impala meat to the police station. Who took it to the police station, who received it, where was it kept and the time it was disposed of are issues not stated. All these are key questions to ensure the integrity of the exhibit but the prosecution did not deal with the same in any way. It forms an impression that perhaps the exhibit did not exist or if it existed, it is not proved, it was the same as it came from the arresting officer. In the case of **Paul Maduka and 4 others vs R**, Criminal Appeal No. 110 of 2007. The chain of custody issue was discussed. It was important to record and ultimately testify how meat found in the hands of the appellants, was transferred to the police station, how was it kept, who kept it, when 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, 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. Pw2, Pw3 and Pw5 having alleged got meat from the appellants, 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 was directed by his boss, the OC-CID to prepare the inventory which he did on 11th May. This brokage of the chain, does not actually break the myth, as to whether the same meat was found with the appellants, or that if indeed it is the same that was taken to the police station. To put the chain of custody in motion, compliance to section 38 of the CPA was done. 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 that the certificate of seizure exhibit P5 was executed in compliance of the law. The process put in motion the chain that was broken in the course of handling other situations in the process.

In yet another incidence, the inventory was taken to court by Pw4, apart from inconsistences in the manner the exhibit was handled, still there is no evidence that an order for disposal was made by a magistrate in the presence of the appellants. There is no evidence showing that was done. The Court of Appeal made an elaborate decision in the case of **Mohamed Juma@Mpakama vs R**, Criminal Appeal No. 385 of 2017, 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.

Pw4, a police officer did not discharge his duty stated under the PGO. Worse still, the court, upon admission of the same exhibit, it was not read in court. It is therefore clear to me that this trial was not married by insufficiency of evidence alone but by poor prosecution as well. I better say at this time that, exhibit P1 certificate of valuation and identification of meat, and P2-an inventory, were married by incurable defects. They were admitted but not even read in court. As such, they deserve to be expunged from the record, as I hereby do.

Having done that, there remains no any exhibit proving existence of the case. To make matters worse, Pw1 did not say anything about how he knew the exhibit he found at the police station was Impala meat. Being an expert, he was to assist not only valuation of the same, but also to prove that he was indeed dealing with the carcasses or meat of the Impala. These anomalies cannot leave the prosecution case safe. It is therefore bound to suffer a serious fall. That being the case, this appeal has merit. It is allowed.

Conviction and sentence, as well as other resultant orders are quashed and respectively set aside. It is ordered that the appellants be released from prison with immediate effect unless held for some other lawful cause.

AK. Rwizile
Judge
11. 05. 2021

Delivered this 11th day of May 2021

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