

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CRIMINAL APPEAL NO. 158 OF 2020

**MASAGALI S/O MEBACHA @ MAZANZU APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

***(Appeal from the judgment of the District Court of Serengeti at
Mugumu in Economic Case No. 115 of 2019)***

JUDGMENT

4th and 17th June, 2021

KISANYA, J.:

In the District Court of Serengeti at Mugumu, the appellant, Masagali Mebacha @ Mazanzu and Nyerere Samla @ Mgesi (2nd accused who was discharged at the trial) were arraigned for three counts of unlawful possession of Government trophies.

All counts were preferred under section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act, 2009 (the WCA) as amended by the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 read together with paragraph 14 of the First Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (now R.E. 2019) as amended by the Written Laws (Miscellaneous Amendments) Act,

No.3 of 2016.

Pursuant to the particulars of offence, the appellant and second accused were, on 21st September, 2019, at Robanda village within Serengeti District, found in unlawful possession of Government trophies to wit, dried rib of zebra, three pieces dried meat of Thomson's Gazelle and five pieces of fresh meat of Grant Gazelle valued at TZS 2,640,000, TZS 1,110,000 and TZS 990,000 for the first, second and third counts respectively.

The appellant denied to have committed the offence. Therefore, in its endeavor to prove its case, the prosecution called five witnesses and tendered three exhibits. On the other side, only the appellant testified for the defence.

In terms of the evidence adduced by the prosecution, the trophies subject to this case were seized from the appellant's house at Robanda Village within Serengeti District on 21/09/2020. That was after a search conducted by the park rangers (PW1 and PW2) and G.4076 DC Saidi (PW4). The search was also witnessed by the appellant's neighbours namely, Mwajuma Thomas (PW6). The appellant and second accused were arrested and the trophies seized because they had no permit to possess the said trophies. This fact is supported by a search order and certificate

of seizure filled in and signed by the searching officer, the appellant, second accused and PW6 who witnessed the search.

The appellant and second accused were then taken to Mugumu Police Station where case file No. MUG/IR/2893/2019 was opened. The police called Wilbroad Vicent (PW3) to identify and value the trophies. According to PW3 and the Trophy Valuation Certificate (Exhibit PE2), the dried rib of zebra, three pieces dried meat of Thomson's Gazelle and five pieces of fresh meat of Grant Gazelle were valued at TZS 2,640,000, TZS 1,110,000 and TZS 990,000 respectively. At the end, G.6873 D/CPL Benson (PW5) sought an order of disposing of the trophies on the ground that the same were subject to speedy decay. He tendered the Inventory Form duly signed by the magistrate (Exhibit PE3) in lieu of trophies alleged to have been found in possession of the appellant.

The appellant defended himself on oath. He disputed to have committed the offence. He told the trial court that the alleged meat was brought to him by his boss and that he had no knowledge whether the same was Government trophies.

After due consideration of evidence adduced by each party, the trial court found the appellant guilty of all three counts and sentenced him to twenty (20) years imprisonment for each count. The sentence was ordered

to run concurrently.

Dissatisfied, the appellant appealed to this Court against the conviction and sentence. His petition of appeal had the following grounds:

1. The trial court did not accord him the right to call key witnesses.
2. The trial was conducted without the consent of the Director of Public Prosecutions (DPP) and Certificate Conferring jurisdiction on a subordinate court to try the economic and non-economic offence.
3. The trial court failed to consider that the appellant was not present at the time of disposing of the Government trophies.
4. That the trial court erred in law and fact in convicting and sentencing the appellant who did not sign the Inventory Form.

When the appeal was called on for hearing, the appellant appeared in person whereas, the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

Submitting in support of the appeal, the appellant contended that he was arrested at his friend's house and that the case was not proved because the trophies subject to this case were not tendered in evidence. He went on to submit that he was not present at the time of disposing of the said trophies and that he did not sign the Inventory Form.

At the outset, Mr. Byamungu indicated that he was supporting the appeal basing on the third and fourth grounds of appeal. He argued that the trophies were disposed of in contravention of the law. His argument was based on the evidence of PW5 and Exhibit PE3, which does indicate that the appellant was not heard in the process of disposing the trophies. Citing the case of **Mohamed Mpakama vs R**, Criminal Appeal No. 385 of 2017 (unreported), Mr. Byamungu argued that the Inventory Form (Exhibit PE3) could not prove the counts preferred against the appellant. He therefore invited me to quash the conviction and set aside the sentence.

I have examined the grounds of appeal, records and submissions by the parties. The issue is whether the appeal is meritorious.

The first and second grounds suggest that the proceedings of the trial court were tainted with irregularities. Therefore, although the said grounds were not addressed by the learned State Attorney, I am inclined to address them.

Starting with the first ground, was the appellant denied the right to call witnesses? The answer to this issue is found in the proceedings of the trial court. Page 51 and 52 of the typed proceedings show that, upon being addressed of his right to call witness, the appellant informed the trial court that he had no witness. Further to that, the defence case was closed

at the instance of the appellant as reflected at page 53 of the typed proceedings. It is my considered opinion that the appellant was not denied of the right to call witness. Thus, the first ground fails for want of merit.

I have also perused the record to satisfy myself whether the trial commenced without the DPP's consent and Certificate Conferring jurisdiction on a subordinate court to try the economic as stated in the second ground. In terms of sections 26(2) and 12(3) of the EOCCA, the State Attorney In-charge has mandate of filing the consent and certificate on behalf of the DPP.

It is on record that the consent and certificate duly signed by the State Attorney In-Charge were filed and admitted by the trial court on 26/02/2020. Thereafter, the preliminary hearing was held on 26/03/2020 and the hearing commenced on 19/05/2020. With that findings, the second ground is unfounded.

In my view, the third and fourth grounds call us to determine whether the prosecution case was proved beyond all reasonable doubt. It is common ground that the dried rib of zebra, three pieces dried meat of Thomson's Gazelle and five pieces of fresh meat of Grant Gazelle subject to all counts were not tendered in evidence. The prosecution relied on evidence of PW5 and the Inventory Form (Exhibit PE3) that, the said

trophies were disposed of by order of the magistrate because they were subject to speedy decay. Both grounds are to the effect that the trophies were not disposed of according to the law.

It is common knowledge that, a trophy which cannot be preserved until the case is heard can be disposed under section 101 of the WCA as amended by the Written Laws (Miscellaneous Amendments) Act, 2017 or paragraph 25 of the Police General Orders (PGO) No. 229 (INVESTIGATION - EXHIBITS).

In terms of section 101 of the WCA as amended, the trial court may on its own motion or on application made by the prosecution, order that the trophy subject to speedy decay be disposed of. In any case, the accused must be heard before the trophy or any exhibit is disposed of by order of the magistrate. Such requirement is also provided in paragraph 25 of the Police General Orders (PGO) which governs disposal of exhibits under the custody of police. The said provision reads:-

"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."

In our case, the evidence of PW5 and Exhibit PE3 display that the said dried rib of zebra, three pieces dried meat of Thomson's Gazelle and five pieces of fresh meat of Grant Gazelle alleged to have been found in possession of the appellant were disposed under the PGO. However, I am at one with Mr. Byamungu that, neither PW5 nor Exhibit PE3 shows that the appellant was taken before the magistrate and heard before the issuance of the order for disposal of trophies. The law is settled that an Inventory Form which violates the right to be heard cannot be used to prove the offence against the accused. This stance was taken in the case of **Mohamed Juma @ Mpakama vs R**, (supra) where the Court of Appeal held: -

*"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.** (Emphasize supplied).*

Therefore, Exhibit PE3 is expunged from the record. Since the same was tendered in lieu of trophies there remains no evidence to prove the offence of unlawful possession of Government trophies. From the foregoing, I find that all counts were not proved.

In the result, I allow the appeal by quashing the conviction and setting aside the sentences imposed by the trial court to all counts. I order that the appellant be released forthwith from prison unless he is otherwise lawfully held.

DATED at MUSOMA this 17nd day of June, 2021.



E. S. Kisanya
JUDGE