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

AT MUSOMA

CRIMINAL APPEAL NO. 173 OF 2020

ROBERT NYAMBURETI NYANCHIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 79 of 2020)

JUDGMENT

20th April and 16th June, 2021

KISANYA, J.:

In the District Court of Serengeti at Mugumu, Robert Nyambureti Nyanchiwa, the appellant herein was charged with one count of Unlawful Possession of Government Trophy, contrary to Section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) as amended by the Written Laws Miscellaneous Amendment 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] as amended by the Written Laws Miscellaneous Amendments Act No. 3 of 2016. He was convicted of that offence and sentenced to twenty (20) years imprisonment in jail.

It was alleged by the prosecution that on 7th day of August, 2019, at the appellant's dwelling house located at Morotonga village area within Serengeti District in Mara Region, the appellant was found in unlawful possession of Government trophy to wit, sixteen (16) pieces fresh meat and eleven (11) pieces fresh skin of zebra valued at TZS 2,640,000, the property of the United Republic of Tanzania.

The background of this appeal is to the effect that, on the material day, the police officers were tipped that the appellant had Government trophies. Led by Insp. Abdallah and Assistant Insp. Paulo Pareso, the police officers headed to the appellant's house located at Morotonga Village within Serengeti District. The sub-village chairman one, Jumanne Wambura @ Nyagara (PW2) and appellant's neighbour namely, Petro Masaba were called to witness the search. Sixteen (16) pieces fresh meat of zebra and eleven (11) pieces of skin of zebra where found in the appellant's house. The said items were seized because the appellant had no permit to possess them. A search order and certificate of seizure (Exhibit PE1) was signed by the police, appellant and independent witnesses. The appellant was arrested and the seized trophies were taken to Mugumu Police Station where case file No. MUG/IR/2384/2019 was opened.

At Mugumu Police Station, a wildlife warden from Ikorongo Grumet Game Reserve one, Wilbroad Vicent (PW3) was summoned to identify and value the trophies found at the appellant's house. He confirmed that the meat and skin found in the appellant's house were Government trophies to wit, meat and skin

of zebra and valued the same at TZS 2, 640,000 (See also Trophy Valuation Certificate -Exhibit PE2). Thereafter, No. H90 Faraja (PW4) prepared the Inventory Form and sought the order for disposing of the trophies before the magistrate. The Inventory Form (Exhibit PE3) was tendered in evidence to supplement PW4's oral testimony.

In his defence, the appellant denied to have committed the offence. He deposed to have been arrested on 5th August 2019 at Mugumu Bus Stand and taken to the police station where he was forced to sign a document. The appellant told the trial court that the prosecution had not proved its case.

At the end, the appellant was convicted and sentenced as stated herein. Aggrieved with conviction and sentence, he preferred the appeal at hand through his advocate one, Cosmas Tuthuru. The learned counsel had raised five grounds in the petition of appeal. However, during the hearing, he abandoned two grounds and argued the following grounds:-

1. *That the sixteen (16) pieces of fresh meat and eleven (11) pieces of Zebra skin alleged to be seized from the appellant home being items changes hand easily, the trial Court wrongly convicted and sentenced the accused (sic) on the offence charged without proper account of the chain of custody of the alleged items.*
2. *That the search conducted at the appellant home violated the provision of law and hence certificate of seizure was illegally admitted in evidence.*
3. *That the whole prosecution case was not proved to the required standard in criminal case.*

When this appeal came for hearing, the appellant was represented by Mr. Cosmas Tuthuru whereas Mr. Byamumgu Nimrod, learned State Attorney appeared for the respondent.

Submitting on the first ground, Mr. Tuthuru submitted that Exhibits PE1 and PE2 contravened PGO No. 229/31 which requires every person handling the exhibit to record the Exhibit Label No. 45. In that regard, Mr. Tuthuru argued that the prosecution did not prove whether the trophies found in possession of the appellant are the same tendered in court due to failure maintain chain of custody. He fortified his argument by citing the case of **Marumbo vs DPP** [2011] 1 EA 280 where the Court of Appeal underscored the requirement of handling exhibits in accordance with the PGO (PF45). Making reference to the case of **Kadiria Said Kimaro vs R**, Criminal Appeal No. 301 of 2019, CAT at DSM (unreported), the learned counsel argued that the prosecution was required to maintain the chain of custody because the trophies items in the case at hand could change hand easily.

As regards the second ground, Mr. Tuthuru argued that the search at the appellant's house contravened the law. He pointed out that a receipt was not issued to the appellant as required by section 38 (3) of the Criminal Procedure Act [Cap. 20, R.E. 2019] (the CPA) and cited the case of **Mbaruku Hamis and 5 Others vs R**, Consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018, CAT at Mbeya (unreported). The learned counsel argued

further that the appellant was not asked whether he was satisfied with the search thereby contravening PGO 229, paragraph 19.

On the third ground, Mr. Tuthuru argued that the prosecution failed to prove its case due to the reasons stated in the first and second grounds. He therefore invited the Court to allow the appeal by quashing the conviction and setting aside the sentence.

The respondent did not support the appeal. In response to the first ground, Mr. Byamungu argued that the items subject to this case could not change hands easily. Referring the Court to the case of **Kadiria Said Kimaro** (supra), he argued that the trophies could not change hand easily and hence required to be admitted even if the chain of custody was not maintained. The learned State Attorney contended further the prosecution adduced evidence which shows no possibility of tempering with the trophies at the appellant's house.

On the issue of search (second ground), Mr. Byamungu submitted that the search was conducted according to section 106 (1) of the WCA. He argued that, the police officer had a search warrant/order (Exhibit PE1) and that an independent witness (PW2) was present. It was the learned State Attorney's contention that, the WCA does require the searching officer to issue receipt. He was of the view that non-issuance of receipt does not vitiate the search.

As to the third ground whether the prosecution proved its case, Mr. Byamungu argued the said ground was meritless. His argument was based on the fact that the said ground is premised on unfounded first and second grounds of appeal. In his view, the prosecution case was proved beyond all reasonable doubts. Therefore, the learned State Attorney urged me to dismiss the appeal.

I have carefully gone through the records and submissions by both learned counsel on the issues pertaining to the appeal. In determining the merit of appeal or otherwise, I will address the grounds in the manner tackled by the learned counsel for the parties.

The first ground calls us to determine whether the chain of custody of the items (trophies) alleged to have been seized from the appellant's house was maintained. It is deduced from PW1 that the search was conducted in the presence of a sub-village chairman (PW2). Both PW1 and PW2 told the trial court that 16 pieces fresh meat and 11 pieces fresh skin of zebra were found and seized from the appellant's house. PW1 further testified that the trophies seized from the appellant was taken to Mugumu Police Station where case of unlawful possession of Government trophies Ref. No. MUG/IR/2384/2019 was opened. On his part, PW3 testified that he identified and valued Government trophies in relation to case with Ref. No. MUG/IR/2384/2019. Furthermore, the evidence of PW4 and Exhibit PE3 shows that the trophies disposed by order of the magistrate were in relation to MUG/IR/2384/2019.

It is my considered opinion the above evidence implies that the chain of custody was not broken. I am mindful of the legal requirement and principle that that chain of custody must be maintained. However, the case of **Kadiria Said Kimaro** (supra) relied upon by Mr. Tuthuru set a principle that requires courts to distinguish items which change hands easily from items which cannot change hand easily. If the item cannot change hand easily and therefore, not easy to be tempered with, the court may rely on evidence adduced by the prosecution even if the record as to chain of custody is not tendered.

It is common ground that the item subject to the case at hand is Government trophy. The law is settled as held in **Issa Hassan Uki vs R.**, Criminal Appeal No. 129 of 2017 (unreported), that government trophy cannot change hand easily. Therefore, having considered evidence of PW1, PW2, PW3 and PW4, I find nothing suggesting that the trophy alleged to have been found in the appellant's house was tempered with. For that reason, the ground one is unfounded.

Moving to the second ground, did the search and seizure of trophies from the appellant's house contravene the law? While Mr. Tuthuru is of the view that the provision of section 38 of the CPA was not complied, Mr. Byamungu is of the view that the search and seizure were conducted under the WCA. I agree with Mr. Byamungu that section 106 of the WCA empowers the authorized officer to search and seize items in contravention of that Act. I am also at one with him that an independent witness is required where the search is conducted

in a dwelling house. However, the search and seizure in the present were not conducted under the WCA. In view of PW1 and Exhibit PE1, it is clear that the search order was made under section 38 (1) of the CPA. Therefore, the procedure provided for under section 38 (3) of the CPA were required to be complied with. This position was taken in the case of **Pascal Mwinuka vs R**, Criminal Appeal No. 258 of 2019, CAT at Iringa (unreported) when the Court of Appeal held that:

> *"In this regard, in the circumstances of this appeal, section 106 of WCA could not apply as the process of search and seizure was initiated under section 38(1) of the CPA using Police Form No.91 issued in terms of section 35 of the Police Force and Auxiliary Services Act [Cap 322 R. E. 2002].*

In view of the above position, I agree with Mr. Tuthuru that the police officer who seized the items from the appellant's house were among others required to the issue the receipt acknowledging the seizure. This is pursuant to section 38(3) of the CPA which reads:

> *" 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 that thing, being the signature of the owner or 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."*

The above cited provision is couched in imperative manner. The need of appending issuing a receipt was underscored in the above named case where

the Court of Appeal cited quoted in decision in **Selemani Abdallah and Others vs R**, Criminal Appeal No. 384 of 2008 where it was held that: -

> *"...The whole purpose of issuing a receipt to the seized items and obtaining signatures of witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized".*

In our case, the receipt of seizure not issued to the appellant. The prosecution relied on the search order and certificate of seizure (Exhibit PE1) which does not show that a copy thereof was issued to the appellant. It was PW1's evidence that the said Exhibit PE1 was duly signed by the appellant and PW2 who witnessed the search and items seized from the appellant's house. Upon reading evidence of PW1, PW2 and Exhibit PE1, I find irregularities during the search and seizure and hence, doubts on whether the appellant was found in possession of the alleged trophies due to the following reasons:

First, there are contradiction on items seized from the appellant. While PW1 testified that the search order contained "16 pieces of zebra meat and 11 pieces of zebra skin, PW2 did not specify what were seized and filled in "form" which he signed. On the other hand, Exhibit P1 shows that the following items were seized from the appellant's house:

1. *Ngozi vipande kumi na moja vidogodogo vibichi vya nyamapori pundamilia.*

2. *Nyama vipande kumi na sita vidogodogo vya nyamapori pundamilia vibichi.*
3. *Sufuria mbili, beseni moja na ndoo moja vyote vikiwa na nyamapori tajwa hapo juu na mfuko mmoja wa sandarusi uliokuwa na vipande vya ngozi.*

Therefore, it is clear that PW1 and PW2 did not tell the trial court whether the vessels named in paragraph (3) above were also seized by police officer. In my view, contradiction on the items seized from the appellant is not minor. It goes to the root of the case on what were seized from the appellant. This is so when it is considered the said vessels were not tendered in evidence.

Second, it is not clear whether the certificate of seizure (Exhibit PE1) was signed by the appellant and independent witness. Although PW1 adduced that the certificate of seizure was signed by the appellant and the village sub-chairman such evidence is not supported by PW2 who introduced himself as the village sub-chairman. He named himself, Peter Masaba and Sabato Magasi as the persons who signed the form prepared by the police. The appellant was not named by PW2. Again, the only witness who signed the Exhibit PE1 is Petro Masaba. This contradicts the evidence of PW2, that he and one Sabato Magasi did sign Exhibit P1. I think that is why Exhibit PE1 was not shown to him to confirm whether the items were seized from the appellant.

Three, the village sub-chairman (PW2) was called to witness the search at the time when the appellant was already under arrest and his house under

control of the police. It is not known as to why PW2 was not involved when the police went to the appellant's house. In my view, Failure to involve an independent witness from the commencement of search is fatal. Therefore, PW2 was not in a position of knowing whether the items were in the appellant's house before arrival of the police.

Four, the search order (Exhibit PE1) suggests that it was prepared by the officer in-charge of Mugumu Police Station on 07/08/2019 at 1530 hours. However, evidence of PW1 shows that the search order was prepared after finding the trophies in the appellant's house. He adduced as follows:

> *"We asked the accused persons (sic) of he had any permit to possess the government trophies in question, he had none.*
>
> *We prepared and filed a search order. Search order is the order allowing us to conduct search and seizure. The search order contains 16 pieces of zebra meat and 11 pieces of zebra skin."*

Therefore, it is my considered view that, the above pointed irregularities and contradictions on the procedure of the searching and seizing the trophies from the appellant house contravened the law. Thus, the second ground is meritorious.

This takes us to the third ground whether the prosecution case was proved. Having considered the defects in searching and seizing the items from the appellant's house, I am at one with Mr. Tuthuru that the prosecution case

was not proved beyond reasonable doubt. The said contradictions pointed hereinabove discredit evidence adduced by PW1 and PW2.

Apart from the defect in the process of search and seizure, it is common ground that the government trophies subject to this case were not tendered in evidence. In terms of evidence of PW1 and PW4 the trophies were disposed of by order of the court because they could be preserved until the hearing of the case. In terms of PW4 and the Inventory Form (Exhibit PE3), the trophies were disposed of under the Police General Orders (PGO). However, no evidence was adduced to prove that the appellant was heard by the magistrate who issued the order for disposal of trophies. This contravened paragraph 25 of the PGO No. 229 (INVESTIGATION - EXHIBITS) which requires the magistrate to hear the accused before issuing the disposal order. Pursuant to the decision of the Court of Appeal in **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), such Inventory Form (Exhibit PE3) cannot be proved against the appellant who was not accorded the right to be heard.

In the final analysis, I allow the appeal, quash the conviction, set aside the sentence and order that the appellant be released from custody unless held for other lawful cause.

DATED at MUSOMA this 16th day of June, 2021.

E. S. Kisanya
JUDGE