IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 20 OF 2021

(Arising from Economic Case No. 01 of 2020 of the Kigoma District Court Before K.V. Mwakitalu, RM

ROBERT S/O YOHANA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

2nd June & 26th July, 2021

I.C. MUGETA, J.

The appellant was convicted of three counts one being of economic nature. The first count is unlawful possession of forest products without lisence or written authority c/s 88 of the Forest Act No. 14/2021. The Second count is unlawful possession of forest products without licence or written authority c/s 88 of Forest Act No. 14/2002 and the third count is unlawful possession of Government Trophy c/s 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5/2009 read together with paragraph 14 of the 1st schedule to the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2019] and section 57 (1) and 60 (2) of the Economic and

Organized Crimes Control Act [Cap. 200 R.E. 2019]. The third count being an economic offence, consent for its trial and certificate conferring jurisdiction to the District Court were filed on 2/11/2020.

In the first count, the appellant was sentenced to a fine of Tshs. 300,000/= or imprisonment for two years. In the second count fine of Tshs. 100,000/= or imprisonment for two years and imprisonment for twenty years in the third count.

The prosecution summoned seven prosecution witness who proved that the appellant was found at his residence at Kaparamsenga village, Uvinza District in possession of forest produce of Pterocarpus Chylothorax (Mkungu) tree timbers (109 pieces) and Cordia Spp (Mzingati) tree timbers (5 pieces). They also proved that he possessed a Panthera Pardus skin without a lawful authority from the Director of Wildlife.

Those witnesses are E.9488 Cpl. Mohamed (PW1), Elibonacius Tibanyebwa Bagarunda (PW3), (the Acting Village Executive Officer), Denis Nganyani (PW4) (a park ranger) and Philip Edward (PW5) (the appellant's neighbor). The VEO and the neighbour witnessed the search and they testified that the appellant voluntarily surrendered the properties in his possession.

At the Police Station the properties were stored by CPL Edward and they were taken to Kachengwa Masumbuko for Examination by DC Advent Kachengwa Masumbuko (PW2) who confirmed the skin animal type and the timber trees type to be as described in the charge sheet. The appellant has appealed against both conviction and sentence on four grounds of appeal. These are:-

i. *That the charge was not proved beyond reasonable doubts.*
ii. *That he was not properly identified.*
iii. *That the search was not properly conducted*
iv. *That he was convicted on the weakness of his defence.*

Being a lay person, he had little to say in relation to the grounds of appeal. He complained that he was arrested in the absence of the village chairman and that the Leopard was killed by villagers but he kept the skin as a ten-cell leader of the area for two years to await the wild life officials to collect it.

Antia Julius, learned State Attorney appeared for the respondent. She replied to each ground of appeal starting with the first one where she submitted that the charge was proved. According to her, possession was proved because according to the case of **John Peter Shayo and 2 others v. R.** [1998] TLR 198 possession includes knowledge of existence

of the thing and control of it. Therefore, the appellant is guilty because he had knowledge and control of the Leopard skin and the timbers. The learned State Attorney discredited the defence of the appellant that the timber belongs to another person whom he did not cause to testify to support his case. On the defence that the Leopard was killed by villagers she said the VEO (PW3) testified that she never heard of any Leopard having been killed by Civilians. The learned counsel submitted further that the search was proper as it was authorized by the OCS of Mgambo Police Station.

On identification the learned State Attorney submitted that the appellant was arrested at his residence, therefore, the question of mistaken identification does not arise. She concluded that the appellant was not convicted due to his weak defence but the strength of the prosecution evidence. Was the prosecution case proved beyond reasonable doubts?

The learned trial magistrate answered this issue in the affirmative. He considered the defence that the leopard was killed by villagers to be an after thought because in his caution statement (exhibit P6) the appellant said he trapped and killed it. On the timbers belonging to Issa Beji, the learned magistrate disbelieved the appellant because Issa Beji did not testify to support him.

I shall revert to the findings of the trial magistrate at a later stage. For now, let me consider the complaints in the grounds of appeal on identification and the search processes.

As submitted by the learned State Attorney, the search was conducted with the authority of the OCS of Mgambo Police Station. It was witnessed by one neighbor and a village leader. Therefore, it was proper.

On identification, I agree that the question of mistake identity cannot arise because the appellant was arrested at his residence and there is no evidence that at any given time thereafter he escaped from custody of the police. The complaint has not merits. I go back to the question whether the charge was proved.

The question of whether the charge was proved to the required standard shall be considered together with the complaint that the conviction is based on the weakness of the defence.

I start with the charge in the first and second counts. In the caution statement, the appellant said:-

> *'...hizo mbao siyo mali yangu ni mali ya Issa Itaba wa Kigoma'.*

During trial the appellant maintained that the timbers does not belong to him. When PW1 sought to tender them he objected and said:-

'I have an objection the timbers were not mine'

Therefore, in terms of section 88 of the Forest Act, the appellant was saying *'I came by such produce innocently'*. This shifted the burden to prove his guilty to the prosecution. There is no evidence on record that the appellant failed to identify Issa Beji to the Police. In his defence the appellant maintained that the timbers are a property of Issa Beji kept at his residence. On 15/12/2020, Issa Beji appeared in court to testify for the defence. However, he was not heard because the prosecutor had other assignment to attend. He never appeared again and the appellant reported that his witnesses have refused to cooperate. Since the court had not warned him to appear, the court did not help the appellant to secure his attendance even after the appellant reported that his witnesses have refused to cooperate. This was a compellable witness. It is my view that considering the age of the appellant (60 years) and being a lay person, he is not alone to blame for not bringing Issa Beji to support him that the timber does not belong to the appellant. The court too failed in its duty to guide him to obtain summons to summon the witnesses under sections 142-145 of the Criminal Procedure Act [Cap. 20 R.E. 2019] and to compel their attendance

in case of failure to honour the summons. I, therefore, hold that since the prosecution was made aware of the fact that the timbers belongs to Issa Beji at the earliest but he was not interviewed and since Issa Beji appeared in court but was not caused to testified and later on was not compelled to appear, the defence of the appellant that the timbers are not his property raises a reasonable doubt in the prosecution's case. On this account, I hold that the charge in the first and second counts was not proved.

Regarding the third count, I do not agree with the learned trial magistrate that the defence that the leopard was killed by civilians was an afterthought. This is because when PW1 sought to tender it, the appellant objected in these words:-

> *'I have an objection because the leopard was killed by villagers and I was given the skin by the village chairman so that I can store it until the game rangers come to pick them (sick) so I was given to store the skin because I was the ten cell leader'.*

It is my view that by this statement the appellant was setting the tone of his defence which he, indeed, presented. As rightly argued by the learned magistrate, the defence differs with what he said in the caution statement regarding how he got the skin. In the caution statement he said he

trapped the leopard. However, I hold a view that the caution statement ought to be treated with circumspection for two reasons. Firstly, because it was recorded by the arresting officer (PW1). The court has been reluctant to condone this practice because of the likelihood of bias on part of the arresting officer. Secondly, it was not proved that the villagers did not kill the leopard. Antia Julius referred me to the evidence of Elibonacius Tinyebwa Bagalunda at page 49 of the typed proceedings where she said that as acting village Executive Officer, she never received any report about the leopard that was eating cattle of the villager. However, this evidence is not helpful. The issue is the killing of the leopard not the reason for it being killed. Further, this witness was just Acting VEO. When on cross examination she testified on her status as follows:-

> *'The village chairman and the hamlet chairman were not present because it was during the election period so at that time were yet to be elected'.*

It follows, therefore, that her tenure as VEO was confined to the election period during which period the search was conducted and the appellant arrested. She could not have known of events on other periods. The village chairman was not interviewed and it is unknown if he is the one who refused to cooperate together with Issa Beji. When accused persons, especially the elderly and

unrepresented like the appellant allege that their witnesses have refused to cooperate courts are under a legal duty to compel attendance of such witnesses.

Further, it is not disputed that the appellant is the ten cell leader of the area. This leaves his defence made on cross examination that he was requested to keep the skin as a leader not only unchallenged but also highly probable. In my view, that is why when he was asked to bring the skin by the arresting officers he did so without any resistance. He voluntarily surrendered it. I understand wildlife offences are offences of strict liability nature. However, considering the circumstances of this case, facts are inconsistent with guilty of the appellant. In view of this analysis of the evidence, I find that the third count was also not proved.

In the event, I find merit in the appeal which is allowed. The conviction is quashed and the sentence is set aside. Appellant to be released from custody unless otherwise lawfully held for another offence.

I.C. Mugeta

Judge

26/07/2021

Court: Judgment delivered in chambers in presence of the appellant and in the presence of Miss Edna Makala for the respondent.

Sgd: G. Mariki

Ag. Deputy Registrar

26/7/2021

Ag