IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 25 OF 2021

(Arising from Economic Case No. 37 of 2017 in the Resident Magistrate Court of Katavi at Mpanda)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

FRANK JULIUS @ MPANDANGAZI ..... RESPONDENT

Date of Last Order : 27/05/2021
Date of Judgment : 20/08/2021

JUDGMENT

C.P. MKEHA, J;

This is an appeal by the Republic. The appeal is against the decision of the Resident Magistrate Court of Katavi at Mpanda (the trial court) which was delivered on 05th day of July 2018. Before the subordinate court, the respondent was charged with the offence of unlawful possession of government trophy contrary to section 86 (1) and (2) (c) of the Wildlife Conservation Act, Act No. 5 of 2009 read together with paragraph 14 of the first schedule to, section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The above-named appellant, after being aggrieved by that decision, lodged a petition of appeal that was filed in this court on 16th day of March, 2021. The appeal consisted of the following three (3) grounds, that: -

1. The trial court erred in law and in fact by holding that the trophy valuation prepared and tendered by PW2 ought to have valued the three hippopotamus teeth instead of hippopotamus as an animal.
2. The trial court erred in law and in fact in assessing, analyzing and evaluating the prosecution evidence.
3. The trial court erred in law and in fact by heavily relying on the evidence of expert opinion and disregard substantial evidence.

When the matter was called for hearing, Mr. Glegory Mhangwa, learned State Attorney appeared the appellant, whereas the respondent appeared in his personal capacity, unrepresented.

As for the appellant in general, the concern is for the court to allow the appeal and order for the forfeiture of a motorcycle with registration number MC 915 AQM. Submitting on the first ground of appeal, Mr. Mhangwa told the court that, in terms of a certificate of valuation, three hippopotamuses were killed. However, the trial court suggested otherwise. He further submitted that, the statement in a certificate of valuation should be taken to be true. He referred the court to section 114 (3) of the Wildlife Conservation Act and GN No. 207 of 2017.

As for the second ground of the appeal, Mr. Mhangwa forcefully contended that, had the trial court considered other evidence than the certificate of valuation it would have convicted the respondent. He, nevertheless, admitted that the valuer's testimony does not tell how he had arrived at a conclusion that the three hippopotamuses were killed. The case of **Jonas Nkize v. R**, (1992) TLR 213 was cited to emphasize on how best the prosecution case should be analyzed.

Lastly, Mr. Mhangwa was displeased by the trial court's reliance over a single **witness in acquitting the respondent.** He urged the court, the first appellate court, to re-evaluate the evidence on record. He, in support of the argument, cited the following case laws; **Mathias Bundala v. R.**, Criminal Appeal No. 62 of 2004 and that of **Silvanus Leonard Nguruwe.**

The respondent's brief reply was as follows. He persistently denied the allegations and told the court that he is just a motorcycle ride. The one who had the luggage had ran away and he can neither read nor write.

The rejoinder by Mr. Mhangwa insisted that the respondent is guilty basing on the fact that there was communication between respondent and arresting officer.

Principally, having heard the submissions of both sides, the role of this court in this appeal as it has been over emphasized is to discuss the evidence and make its own evaluation. In other words, on first appeal, it is the appellant's legitimate right to have the entire evidence re-evaluated by the appellate court. The appellant is entitled to have the appellate court's own consideration and views of the entire evidence and its own decision thereon. See the following cases; **Kasema Shindano @ Mashuyi v. The Republic,** Criminal Appeal No. 214 of 2006, Court of Appeal of Tanzania (unreported), **D. R. Pandya v. R** [1957] EA 336 and **Salim Petro Ngalawa v. The Republic,** Criminal Appeal No. 85 of 2004, Court of Appeal of Tanzania at Arusha (unreported).

In brief, the respondent was alleged to have been, on the 29th day of July, 2017, found possessing government trophies, unlawfully. The said

trophies were five hippopotamus teeth weighing twenty (20) kilograms from three hippopotamuses. They were worth US$ 4500 which was equivalent to Tshs. 9,846,000/= only. The offence was alleged to have been committed at Matandalani area within Mpanda district in Katavi region. Essentially, the incriminating evidence in this case comes from the testimonial accounts of Damas Pascal (PW1), David Wilson Marruo (PW3) and G.8430 D/C Emmanuel (PW6) together with exhibits P1 (certificate of seizure), P4 (five teeth of hippopotamus) and P6 (cautioned statement of the accused person).

Basing on the facts gathered on those areas that I have highlighted; the respondent was alleged to have been apprehended while illegally possessing those trophies. The trap was set by PW1 and PW3 through phone communication. The respondent was a seller of the trophies whereas PW1 and PW3 posed as the buyers. The respondent was arrested ready handed and a certificate of seizure was filled by PW1 and witnessed by PW3. Ofcourse, prosecution called witnesses who testified on the chain of custody as from the arrest to when the case was ready for trial and the valuer who tendered a valuation report. The evidence on records also shows that, the respondent had, through his cautioned statement (exhibit P6) confessed to have committed the offence.

After a closure of prosecution case, the trial court ruled that a *prima facie* case was established to require the respondent to make his defence. In his sworn testimony, the respondent told the trial court that, he was arrested but demanded a proof of phone numbers that were alleged to make contact between him and PW1 and PW3. He further told the trial that,

the said trophy belonged to someone who asked him for a ride when he was on his way to a farm using his motorcycle. It was out of dispute, basing on the admitted facts during a preliminary hearing, the respondent was, on the eventful date, arrested when possessing his motorcycle (exhibit P3).

After a full trial, the respondent was acquitted and exhibit P3 was ordered to be returned to the respondent. Essentially, the trial court heavily concentrated on the testimonial account of PW2 (Mbonea Hassan) together with exhibit P5 (trophy valuation report). The trial court found inconsistencies between the charge sheet and the evidence on whether the said value was pegged on the five pieces of hippopotamus teeth or from the three hippopotamuses. The trial court found that, the charge leveled against the respondent was not in respect of the killed animals but on the illegal possession of those teeth. In the end, the prosecution was found to have failed to prove its case as against the respondent.

May be, it will be wise if I will start dealing with the second ground of the appeal. Frankly, a judgment of any court comes from the evidence that is properly adduced during trial. Otherwise, such a decision risks a danger of being declared nullity. I am also aware that, a distilled legal principle from a case, be it civil or criminal, which in legal parlance is called ratio decidendi, it is applicable in criminal matters as well. See for instance the following cases; **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 75 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **James Burchard Rugemalira v. The Republic and Another**, Criminal Application No. 59/19 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

This court can only discharge its duties upon the evidence that was

properly admitted during trial. It is my sincere observation that, exhibit P6 was improperly admitted during trial. When PW6, as per the original handwritten proceedings of the trial court unlike the typed one that refer him as PW5, sought for the admission of the cautioned statement of the accused person the prayer was contested by the respondent. The objection was that of voluntariness test. The respondent told the trial court that, he was not given the right to call his relative and he was beaten when the statement was recorded. He went further and said that he was beaten during the investigation and not during the recording. The objection was merely overruled even before giving an opportunity to the prosecution to address it or see the need of conducting an inquiry before admitting the same. There ought to be a further inquiry before admitting the said exhibit P6 on whether the respondent made it voluntarily or otherwise.

Considering such anomaly in the trial court's record I see no need of discussing other grounds of the appeal since it will just a mere academic exercise. Thus, I hereby quash the trial court's decision. On whether or not a retrial should be ordered in the circumstances of this case. I am alive to the principle of law that a retrial should not be ordered where it is likely to cause injustice to an accused person. In other words, a retrial may be ordered where the interests of justice demand it. See the following cases; **Ahmed A. D. Sumar v. Republic** [1964] E.A and **Fatehali Manji v. Republic** [1966] E.A. 343.

In the case of **Fatehali Manji v. Republic** (supra) the Court stated that;

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the*

conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must be depend on its particular and circumstances..."

In the present matter the respondent was charged with an offence of unlawful possession of government trophy. Whether the allegations are true or not the records of proceedings should provide an answer to that. In the circumstances, it will be in the interests of justice to order for retrial. Thus, I remit the matter to the Resident Magistrate Court of Katavi at Mpanda for a retrial before another magistrate of competent jurisdiction.

Dated at Sumbawanga this 20th day of August, 2021.

C.P. Mkeha

JUDGE

Date	-	11/08/2021
Coram	-	Hon. W.M. Mutaki – DR.
Appellant		Absent
Respondent		
B/C	-	Mr. A. Chitimbwa

Order: Notice to parties for judgment on 12/08/2021

Sgd: W.M. Mutaki

Deputy Registrar

11/08/2021

Date	-	12/08/2021
Coram	-	Hon. W.M. Mutaki – DR.
Appellant	-	Ms. Marietha Magutha State Attorney
Respondent	-	Absent
B/C	-	Mr. A. Chitimbwa

Court: Judgment delivered presence of State Attorney Marietha Magutha .

Sgd: W.M. Mutaki

Deputy Registrar

11/08/2021

Order: Record be returned for lower court for compliance

HIGH COURT OF TANZANIA
SUMBAWANGA ZONE

W.M. MUTAKI

DEPUTY REGISTRAR

12/08/2021

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