IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 117 OF 2020

(C/F ECONOMIC CRIMES CASE NO. 85 OF 2018

IN THE RESIDENT MAGISTRATE'S COURT OF ARUSHA AT ARUSHA)

ALPHONCE KISUDA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

11/8/2021 &22/09/2021

GWAE, J

In the Resident Magistrate's Court of Arusha at Arusha (trial court), the appellant, **Cleophance Kisuda** and another person, Malaki Juma were charged with and finally convicted of the offence termed "unlawful possession of Government Trophy" contrary to section 86 (1) and (2) (ii) of the Wildlife Conservation Act No. 5 of 2009 ("the Act") read together with paragraph 14 of the 1st schedule to, and section 57 (1) and section 60 (2), both of the Economic and Organized Crimes Control Act, chapter 200, Revised Edition 2002 as amended by section 16 (a) of the Written Laws (Miscellaneous Amendment (No. 3) Act, 2016.

The prosecution initially alleged that, the appellant and that other person named above on the 21st November 2018 at Lobosireti village, within Simanjiro District in Manyara Region jointly and together were found in unlawful possession of Government Trophy to wit; skinned meat of Impala and a piece of meat of Impala which is equivalent to one killed Impala valued at USD 390 which is equivalent to 893, 100/= the Property of Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

Brief material facts of the prosecution evidence which led to the appellant's conviction can be conveniently screened as follows; that, on the material date and places aforementioned, the appellant was found drinking local brew at the residential house owned by one Rehema, the appellant was searched and found in possession of the said Government trophies. A seizure certificate (PE1) was filled, the appellant confessed before a police officer (PW5) and his cautioned statement (PE5) was duly recorded. The appellant, upon interrogation by PW5, named another person, Malaki Juma to have been together in the commission of the offence. That other person was subsequently arrested on the 25th November 2018.

Upon interrogation, that other accused person confessed before PW5 who duly recorded his statement by way of caution (PE5). The said trophies was valuated (PE3) and as the same was subject to decay, there was an order of its

destruction, inventory (PE4). It is also the prosecution evidence that the chain of custody (PE2) was observed.

As usual, the appellant and his co-accused when afforded an opportunity to defend, they merely denied to have involvement in the offence adding that they were just ordered to sign the already written papers. Uniquely, the 2nd accused denied to have neither known the said Rehema nor the appellant prior to his arrest.

In its conclusion, the trial court found the appellant's guilt to have sufficiently been established as opposed to that other accused person. Upon conviction against the appellant, the trial court sentenced him to the term of twenty (20) years jail which is a minimum statutory sentence. Aggrieved by both trial court's conviction and sentence, the appellants are now appealing to the court on the following grounds;

1. That, the learned trial magistrate entertained the case without jurisdiction as no consent that was issued by DPP
2. That, the learned trial court erred in law and fact by not reading the contents of admitted documents
3. That, the learned trial magistrate erred both in law and fact when he failed to note that the searched house was of Rehema, hence,

it cannot be certainly said that he was found in unlawful possession of the trophies

4. That, the learned trial magistrate erred both in law and fact by failing to note that the appellant was not involved in the alleged destruction of the said government trophies

On the 11th August 2021, the appellant appeared in person, unrepresented whereas the Director of Public Prosecutions ("DPP") was duly represented by **Ms. Mary Lucas**, the learned state attorney. The appellant had nothing to verbally add to his petition of appeal.

Supporting this appeal, the learned counsel for the respondent focusedly argued that the appellant's grounds of appeal are meritorious since the trial court did not read over the contents of the documents which were produced and admitted including cautioned statements which were also recorded out of the prescribed period. She thus urged this court to quash and set aside conviction and sentence meted against the appellant.

As to the 1st ground, I am alive of the principle that all economic offences are triable by the High Court, Economic and Corruption Division (ECD-HC) and the offence leveled against the appellant was economic offence. That, means the court vested with jurisdiction to hear and determine the case was the High Court unless the DPP issue a certificate of transfer and consent as per section 12 (3)

and section 26 of the Economic and Organized Crimes Act, Cap 200, R. E, 2019 which provides that the DPP or any state attorney duly authorized by him may issue a certificate in respect of a certain case triable by the High Court be tried by a court subordinate to the High Court. In our case, upon my perusal of the trial court record nothing like consent and certificate of transfer from the office of the DPP that were found therein. Thus, the trial court acted without jurisdiction. It follows that such proceedings and judgment are rendered a nullity as it was correctly stressed in the case of **Nico Mhando and Two Others vs Republic,** Criminal Appeal No. 332 of 2008 (unreported) where it was stated that:

> "In the circumstances, the consent of the DPP to prosecute together with a certificate of transfer to the District Court were mandatorily required. Otherwise, in the absence of such consent and certificate, the District Court lacked jurisdiction and hence the entire proceedings were a nullity."

According the wordings of the statutory provisions and judicial decisions, I am justified to hold that the trial court lacked jurisdiction to entertain the matter. In that premises the best practice was to remit the file for a trial deno. Nevertheless, in this case, I am not persuaded if doing so will not prejudice the appellant since the errors complained of by the appellant had been admitted by

the learned counsel for the Republic and they indeed affect the weight of the prosecution evidence.

I have also scrutinized the trial court's record and observed that all documents so admitted as exhibits, their contents were not read over to the trial court constituting a contravention of the law which requires an accused person to know contents of the exhibits so produced and admitted in order that such accused person can be able to cross-examine a witness.

More so, the appellant was not involved in the alleged destruction exercise as clearly complained in the 4th ground and depicted in the PE4. That is wrong in law as it infringed the appellant's right to of being heard. If he was found in unlawful possession of that trophy, signed the seizure note, how is it possible to deny him a right of being involved during its destruction taking into account that the same was not tendered during trial in lieu thereof an inventory was tendered but the same (inventory) was not signed by the appellant implying he was not involved. Furthermore, the appellant's cautioned statement was recorded out of the time without any explanation from the prosecution side.

In the circumstances of this case, I am of the considered view that an order of re-trial will inevitably amount to injustice on the appellant's side since the same will lead to corrections of the errors so caused and complained. In **Manji v Republic** (1966) EA 343 where it was held and I quite;

> "In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purpose of enabling the prosecution to fill in the gaps in its evidence at the first trial ...each case must depend on its own facts and in order for the retrial should only be made where the interest of justice requires

Instantaneously, the appellant is found to have been in remand since 6th day of December 2018 and considering the fact that the trial court's accumulative errors complained of and readily conceded by the appellant and respondent respectively, neither were there DPP's consent and transfer certificate to the trial court, I therefore find it just and prudent to allow this appeal by releasing the appellant from the prison.

That said and done, this appeal is allowed. The appellant shall immediately be released from prison forthwith unless he is held therein for a different lawful cause.

It is so ordered.

M. R. GWAE
JUDGE
22/09/2021