IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 40 OF 2020

(Originating from Babati District Court in Economic Case No. 3 of 2018)

JOSEPH BARANI NANGAY .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

27/5/2021 & 6/8/2021

ROBERT, J:-

The appellant, **Joseph Barani Nangay**, was charged and convicted at the District Court of Babati with two counts of Unlawful Possession of Government Trophy contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009, read together with paragraph 14 of the 1st schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by sections 16 (a) and 13 (b) respectively of the written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The trial Court sentenced him to twenty

years imprisonment. Aggrieved, he preferred this appeal against the decision of the trial Court.

On the first count, the prosecution alleged that, on 17/06/2018 at Mutuka Village within Babati District in Manyara Region the appellant was found in possession of three pieces of Leopard skin valued at TZS 7,965,090/= the property of Tanzania Government without permit from the Director of wildlife. Whereas on the second count, it was alleged that on the same date and time, the appellant was also found in possession of one Eland tail valued at TZS 3,868,758/=, one spotted hyena skin valued at TZS 1, 252, 657/= and one ostrich egg valued at Tshs. 7,851,303/= the property of Tanzania government without permit from Director of wildlife. The appellant denied both charges.

Briefly stated, facts relevant to this matter reveals that, on 17/6/2018 at 20:00hrs two investigators from Babati Central Police station (PW1 and PW2) went to the house of PW5 asking for the house of the appellant who is her neighbour. They went to the appellant's house where the two investigators stated that they were tipped that the appellant was in possession of government trophies. They informed the appellant about their desire to search his house. Before searching his house, the appellant searched them to make sure they were not in possession of anything. In

the process of searching the appellant's room they found one box written the words "sabuni ya takasa" under his bed, they opened it and found one ostrich egg, one tail of Eland (pofu), three pieces of leopard skin and one piece of hyena skin.

Thereafter, PW2 filled a certificate of seizure and signed it together with PW1, PW5 and the appellant. The appellant admitted that he didn't have a permit to possess the government trophies found in his possession. They took him together with the trophies to a police station and later on he was arraigned before the court.

In his defence, the appellant denied to have committed the offence charged and claimed that, the police officers found him asleep, they woke him up and told him "Mzigo wako huu hapa". They were not accompanied with any village leader only Pw5 who was her neighbour. After a full trial he was convicted and sentenced to serve 20 years in jail in respect of each count to run concurrently. Aggrieved, he now appeals to this Court against both conviction and sentence on five grounds of appeal as follows:

1. *That, the trial court erred in law and in fact convicting the appellant basing on the certificate of seizure and search warrant which were defective and had many weaknesses.*

2. *That, the learned trial magistrate erred in law and fact in putting into conviction appellant while the evidence tendered in the court was not water tight.*

3. *That, the trial court grossly erred in law and in fact when it failed to notice and analyse contradictory evidence adduced by Pw1, Pw2 and Pw5 respectively on the issue of searching and arresting the appellant.*

4. *That, the learned trial court counsel erred in law and in fact when it failed to analyse and evaluate evidence in records and hence reaching unwanted judgment.*

5. *That, the trial court decisions were unhealth and unfair in favour of the appellant.*

When this appeal came up for hearing, the appellant appeared in person without representation whereas Mr. Ahmed Hatibu, Learned State Attorney appeared for the respondent.

Submitting on the first ground, the appellant argued that, the search warrant and certificate of seizure (exhibit P1) were not properly admitted before the trial court. He maintained that the document was received as exhibit without being admitted. He argued that the document intended to be produced as exhibit needs first to be cleared for admission before the court can receive it and admit it as exhibit. Once it is admitted the next step is to read it out in court. He made reference to the case of **Walii Abdalah Kibutwa and 2 Others vs Republic**, Criminal Appeal No. 181 of 2006, CAT (unreported) in support of his argument. He explained that,

in the present case the document received as exhibit P1 was never admitted as exhibit and it was never read out in court. Thus, it found its way in the evidence of this matter improperly and it needs to be expunged.

He maintained that the same argument is applicable in respect of exhibit P2. He made reference to page 16 of the trial court proceedings where the court said *"Court: Three pieces of leopard skin, one piece of hyena skin, ostrich egg and eland tail received collectively."* He argued that, the trial Magistrate ought to have received them as exhibit, failure to do so meant the government trophies were not admitted as exhibit. He argued that, if the said exhibits are expunged from the record there will be no government trophies admitted in this case to prove the charge against the appellant. The prosecution will remain with only the evidence of PW1, PW2 and PW5 which is not sufficient proof for the charges against the appellant.

Coming to the 2nd to 5th grounds, he maintained that, the main issue is that, the trial court did not properly evaluate the evidence for the following reasons: Firstly, PW1, PW2 and PW5 each gave a different version of facts. While PW1 testified that they didn't know the house of the appellant, PW2 said they met PW5 at the appellant's house, and PW5

said when she went at the appellant's house he was already under custody. Another inconsistency arises when PW2 mentioned different officers from the one mentioned by PW1 who went together with them at the appellant's house. PW2 said Pw5 searched them before they searched the appellant's house and PW1 said PW5 never searched them it was the appellant himself. On the issue of trophies while PW1 and PW2 said they found one egg of ostrich, three pieces of leopard skin and one piece of hyena skin, PW5 said they found only an ostrich egg, three pieces of leopard skin and three pieces of hyena skin. He argued that, the noted inconsistency ought to have been resolved in favour of the appellant herein.

He submitted further that, the trial court failed to analyse the evidence in respect of the chain of custody of the trophies allegedly found in the appellant's house. He maintained that, PW1, PW2 and PW5 were not experts on wildlife and therefore it is not clear how they knew that what they seized were government trophies. Furthermore, there is no evidence that the seized trophies were sealed after being seized to remove the likelihood of someone tempering with them or exchanging what was seized with something else. He also maintained that as the said

trophies were not properly admitted in Court, he was of the view that the chain of custody was broken.

On the other hand, counsel for the respondent supported both the conviction and the sentence meted against the appellant. Responding to the first ground of appeal, he agreed with the appellant that exhibit P1 has to be expunged from the records on the grounds that it was not read out after being admitted by the Court. To support this position, he made reference to the case of Kassim Salum vs Republic Criminal Appeal No. 186 of 2018 (unreported). However, he maintained that exclusion of exhibit P1 from the records do not affect prosecution evidence since the testimony of PW1, PW2 and PW5 is sufficient in establishing that the appellant was found in possession of government trophies.

With regards to exhibit P2, he submitted that, there is no legal procedure which was violated, it was properly admitted and the appellant did not object its admission. As long as the appellant did not cross examine the witness on a vital matter it implies that he accepted the testimonies given by the witnesses and anything raised thereafter should be regarded as an afterthought.

Responding to the second to fifth grounds, he contended that, the alleged contradiction found on the testimony of PW1, PW2 and PW5 was

minor and did not go to the root of the case. He argued that, the major point of concern raised by the appellant in respect of the testimony of PW1, PW2 and PW5 is centred on calling and arrival of PW5 at the scene of crime. He maintained that, PW1 and PW2 illustrated that PW5 was called before the search was conducted and she witnessed the said search. At page 31 PW5 said the police went to her home and asked where the appellant was living and they went together to the appellant's house. He prayed that this ground of appeal is should not be considered.

With regards to the chain of custody, he argued that the principle in the case of **Paulo Maduka and 4 Others vs Republic**, Criminal Appeal No. 110 of 2007 CAT, (unreported), which established the requirement for the paper trail from the time of seizure to the stage of tendering exhibits in Court was relaxed in the case of **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017 [2018] TZCA 361 (TANZLII) where the Court considered elephant tusks as items which cannot change hands easily and therefore not easy to temper with. He maintained that, since in the present case the subject matter was government trophies which cannot change hands easily, the principle of keeping paper trail on chain of custody can be relaxed. Instead, oral evidence on handling of exhibits can be sufficient in establishing the chain

of custody. He therefore prayed for this appeal to be dismissed for lack of merit.

In his rejoinder, the appellant reiterated what was submitted in his submissions in chief and argued further that even if the court will believe the story told by PW1, PW2 and PW5 still the items seized from the appellant were not sealed and therefore they could be easily tempered with. If the court will expunge exhibit P1 and P2 the prosecution will have nothing to prove the case against the appellant. Thus, he maintained his prayer that this court should quash the conviction, set aside the sentence and let him at liberty.

Having considered submissions of both parties and examined records of this matter, I will now determine the merit of this appeal in the light of grounds raised and argued by parties.

Starting from the first ground, it is not disputed that the search warrant and certificate of seizure (exhibit P1) were received in evidence without being read out in court as required by the law. Thus, both parties are in agreement that the said documents should be expunged from the records of this case.

The requirement of reading out a document after being admitted as exhibit has been emphasized in many cases. In the case of **Jumanne**

Mohmed and @ Others vs The Republic, Criminal Appeal No. 534 f 2015, CAT at Tabora (Unreported) that;

> *"...failure to read a document after it is admitted as exhibit is fatal. A well-established practice is that after any document is cleared for admission and is actually admitted as an exhibit, it should be read out to the accused person to enable him understand the nature and substance of the facts contained in it. The interest of justice and fair trial demands that be done."*

Since in the present case exhibit P1 was admitted in evidence without being read out in court this Court finds that the appellant was not enabled to understand the details contained in the said exhibit thereby causing injustice on the part of the appellant. That said, this Court expunges exhibit P1 from the records of this case.

With regards to the government trophies (exhibit P2) the concern raised by the appellant is that the exhibits were received collectively without the trial court indicating that they were admitted as exhibits. Having looked at the proceedings of the trial Court, it is obvious that, the exhibits were cleared for admission and the appellant indicated that he had no objection against the trophies being tendered as exhibits. The trial Court received the trophies as exhibit P2 without using the words

"admitted as exhibit". This Court is of the firm view that, the requirements for admissibility of the trophies having been fully observed and the trophies having been received as exhibit and marked exhibit P2, the said exhibit is considered to have been properly allowed or admitted in the body of evidence and that cannot be affected by the alleged failure of the trial magistrate to use the words "admitted as exhibit". Most importantly, the appellant has not indicated if failure to use the said words violated a specific provision of the law or caused any injustice on his party. I therefore find no merit on this argument.

Coming to the second, third and fifth grounds, the main issue for determination is whether the trial court properly evaluated the evidence placed before it. The appellant alleged that there were contradictions on the testimonies of PW1, PW2 and PW5, hence it was unhealthy for the court to rely on their evidence.

Having examined the testimony of the three witnesses, it is clear to this Court that the alleged contradictions are not substantive as to affect the gist of evidence adduced by the three witnesses. It is clear that, although the names of persons mentioned by PW1 and PW2 as persons who went to the appellant's house appears to be different, it should be noted that both PW1 and PW2 mentioned each other as one of the

persons who went to the house of the appellant to conduct search and they are the ones who testified in court in respect of the alleged search. Similarly, this Court does not consider the issue whether PW5 also searched the two police officers before conducting search in the appellant's house to go to the root of this case as it doesn't address or remove the allegation that the appellant was found with the mentioned government trophy. On the facts that, Pw5 mentioned different trophies from what was mentioned by PW1 and PW2, this Court considers that since the two officers (PW1 and PW2) testified exactly on what they found in the appellant's house, it is possible that PW5 could have mixed the numbers of trophies found in the appellants house and that contradiction only cannot dismantle prosecution evidence.

Lastly, on the issue of chain of custody, it is a well-established position of the law that for a seized substance to be relied upon by the court to convict the accused persons, its chain of custody from the time of its seizure to the moment it is tendered in Court as exhibit has to be reasonably established.

In the case of **Paulo Maduka and 4 Others vs Republic** (supra) the Court of Appeal gave an elaboration as to what is a chain of custody by stating that;

"...*chain of custody is the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*"

In order to establish the chain of custody in the present case, I had to go back to the evidence on record. The two police officers (PW1 and PW2) testified that they arrested the appellant at his home and PW2 prepared a certificate of seizure, thereafter they took the appellant together with the said exhibits to police station for further actions and the seized exhibits were handed over to the Exhibits Keeper, E 4615 CPL Mondu (PW3). On 19/6/2018 PW3 handed the exhibit to one DC Frank who took them to the game office for identification, then he received the same exhibits back on the same day and continued to keep them. On

23/6/2018 he handed over the same exhibits to A/Insp Aloyce to bring them to Court as exhibit.

From the series of events narrated herein, it is apparent that there has been change of hands of exhibits P2 from different persons, that is to say, from the police officer who seized the trophies (PW1 and PW2) to the exhibit keeper who stored them (Pw3) and then to D/C Frank who handled over the exhibits to the valuer and back to the exhibit keeper.

This Court is aware that some exhibits cannot change hands easily compared to other exhibits like Narcotic Drugs as elaborated in the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) where the Court of Appeal held that:-

> "*It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case, say, where the potential evidence is not in the danger of being destroyed, or polluted and/or in any way tempered with*".

In the light of the above explanation, this Court finds that the chain of custody in respect of exhibit P2 in the present case which are one ostrich egg, one tail of Eland (pofu), three pieces of leopard skin and one skin piece of hyena was satisfactorily established.

The chain of custody having established that the alleged government trophies were found in possession of the appellant herein, the question for determination is whether the appellant managed to establish if the said government trophies were lawfully possessed. As a general rule, in criminal cases prosecution has to prove the charge filed against the accused person beyond reasonable doubt (see **Mohamed Said Matula vs Republic** [1995] TLR 3). Always such duty lies upon prosecution except where any other law expressly provides otherwise. Section 100 (3) (a) (b) of the **Wildlife Conservation Act**, is one of such exceptions. The provisions provides that, the accused person has a duty to prove that the possession or selling of the government trophy is lawful. When the burden of proof shifts to the accused person, the standard of proof is not the same as the one for prosecution. In **Said Hemed vs Republic** [1987] TLR 117 the Court held that:-

> "*In criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities*"

In the present case, it was the duty of the prosecution to prove beyond reasonable doubt that items seized were government trophies which they did through PW6 (wildlife officer); and that they were found

in possession of the appellant, which is established by the testimony of PW1, PW2 and PW5. Equally, it was the duty of the accused person (appellant) to prove on the balance of probabilities that, the possession of the said trophies was lawful and he had a permit from a wildlife officer to that effect. Unfortunately, the appellant failed to prove that he possessed those trophies lawfully.

In the circumstances, I find no reason to fault the findings and decision of the trial Court. As a consequence, this appeal is hereby dismissed for want of merit.

It is so ordered.

K.N. ROBERT
JUDGE
6/8/2021