IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

CRIMINAL APPEAL NO. 23 OF 2021

(Appeal from the Judgment dated 09/03/2021 of the Resident Magistrate Court of Arusha at Arusha in Economic Crime Case No. 34/2018 before Hon. P. Meena)

MEPUKORI S/O BIRIKA KERETO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

07th June, 2022

TIGANGA, J

Before the Court of Resident Magistrates of Arusha, at Arusha, the appellant Mepukori s/o Birikaa Kereto, stood charged with five counts for unlawful possession of government trophies. Two of these counts that is the 1st and 2nd counts are charged under section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 05 of 2009, read together with paragraph 14 of the first schedule to, and section 57(1) and 60 (2) both of Economic and Organized Crimes Control Act [Cap 200 R.E. 2002] as amended by section 16 (a) and 13 (b) respectively of the Written Laws Miscellaneous Amendment, Act No. 03 of 2016.

The 3rd and 4th counts are charged under section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 05 of 2009, as amended by section 59 (a) and (b) of the (Miscellaneous Amendments) (No.2) Act No.

4 of 2016 read together with paragraph 14 of the first schedule to, and section 57(1) and 60 (2) both of Economic and Organized Crimes Control Act [Cap 200 R.E. 2002] as amended by section 16 (a) and 13 (b) respectively of the Written Laws Miscellaneous Amendment, Act No. 03 of 2016.

While the 5th count charges him under section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act No. 05 of 2009, as amended by section 59 (a) and (b) of the (Miscellaneous Amendments) (No.2) Act No. 4 of 2016 read together with paragraph 14 of the first schedule to, and section 57(1) and 60 (2) both of Economic and Organized Crimes Control Act [Cap 200 R.E. 2002] as amended by section 16 (a) and 13 (b) respectively of the Written Laws Miscellaneous Amendment, Act No. 03 of 2016.

In the first count, it has been particularized that, on or about 07th day of May, 2018 at Esilaki Village within Monduli District in Arusha Region the appellant was found in unlawful possession of government trophies to wit, one (1) piece of elephant tusk which is equivalent to one killed elephant, valued at USD 15,000, equivalent to Tanzanian shillings thirty-four million, one hundred thirty-seven thousand, one hundred fifty (Tshs. 34,137,150) only, the property of the United Republic of Tanzania, without permit from the Director of Wildlife.

In respect of the second count, he was accused of being in unlawful possession of one lion tooth which is equivalent to one killed lion valued at USD 4,900, equivalent to Tanzanian shillings eleven million, one hundred fifty-one thousand, four hundred sixty-nine (Tshs. 11,151,469/=) only, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

In respect of the third count, on the same date and at the same time and place, he was accused of being found in unlawful possession of one piece of Eland horn which is equivalent to one killed Eland, valued at USD 1,700/- equivalent to Tanzanian Shillings, Three million, eight hundred, sixty-eight thousand, eight hundred seventy-seven (Tshs. 3,868,877/=) only, the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

In the fourth count, the particulars of offence are that, on the same date, and at the same place and time as in the preceding counts, he is accused of being found in unlawful possession of three Pangolin scales which is equivalent to two killed pangolin valued at USD 960, equivalent to Tanzanian shilling one million one hundred eighty-four thousand seven hundred, seventy-seven and six cents (Tshs. 1,184,777.6/=) only, the

property of the United Republic of Tanzania without a permit of a Director of Wildlife.

While in respect of the fifth count, the particulars are that, on the same date, at the same place and time, he was accused of being found in unlawful possession of one bush pig nose which is equivalent to two killed bush pig valued at USD 420, equivalent to nine hundred fifty-five thousands eighty hundred forty and two cents (Tshs. 955,840.2/=) only, the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

Upon completion of investigation, the DPP issued a consent in terms of section 26 (2) of the Economic and Organized Control Crimes Control Act [Cap 200 R.E. 2002], read together with part II of the 1st schedule to the Government Notice No. 284 of 2014, and a certificate in terms of Section 12 (3) of the same Act, to the Court of Resident Magistrate of Arusha.

The accused, who is now the appellant, upon arraignment pleaded not guilty to the charge. Following that plea, the prosecution called four witnesses namely Nyamsingwa Iddi Nyamsingwa, G. 7663 DC Daniel, Muungwana Abeid Mchomvu, and Solomoni Jeremiah, who testified as PW1, PW2, PW3, and PW4.

They also tendered four exhibit namely, the handing over form between PW1 and PW4, which was admitted as Exhibit P1, one Eland horn, one bush pig nose, three pangolin scales, one lion tooth, and one piece of elephant tusks all of which were admitted and marked as exhibit P2 collectively. They also tendered a certificate of seizure as exhibit P3 and a trophy valuation certificate as exhibit P4.

To appreciate the appeal before this Court I find it apt to narrate albeit briefly the background facts which led to the appellant's arrest and arraignment before the trial court.

It is apparent from the evidence on record that, PW2, a Police Officer stationed and working at Ngorongoro Police Station was on 07/05/2018 with PW4 a Wildlife officer, they both received information from an informer that, there were people who were owning elephant and hippo tusk and they were in the process of selling the same.

That informer told them that, they could get these persons through a witchdoctor called Mepukori Birikaa, and gave them the phone number of the said Mepukori Birikaa who they were informed that, he was living at Esilaki along Makuyuni road. Having been given all those details, they contacted the said Mepukori Birikaa, and in that trap, PW4 pretended to be a buyer of the said tusks, and agreed to meet under a certain tree.

However, when they met him, PW2 introduced himself as a Police Officer, the said Mepukori Birikaa attempted to run away before he was arrested by PW2 and PW4. They thereafter conducted search in his person and the bag which he was carrying where they found exhibits P2 collectively. They seized those items, and PW4 seized those items, prepared a seizure certificate by recording in all the trophies which they seized from the accused.

When they interrogated the appellant, he said had no licence, but he inherited the same from his late father. They took the accused up to Ngorongoro Conservation Area where they handed over the said exhibits to PW1 before taking the accused person, now the appellant, to Karatu Police Station.

The trophies seized by PW2 and PW4, which were kept by PW1, the exhibit keeper, were identified and valuated by PW3 on 14/05/2018, in that exercise, he actually identified them to be one piece of elephant tusk, one lion tooth, three pangolin scales, one bushpig nose and one Eland horn and assigned them valued as to per exhibit P4 and all were valued to a total of USD 22,980 which is equivalent to Tshs. 52,298,113.80/=.

On the defence side, the appellant introduced himself to be a son of the late Birikaa Kereto who was a witchdoctor or traditional healer

before passing away. According to the appellant who testified as DW1, his late father was conducting that business with permit which also allowed him to possess and use and the exhibits P2 collectively, in his job as the witch doctor or a traditional healer.

He said on 08/05/2018, he was at his father's compound together with his three brothers, where they were arrested, tied and searched but nothing was found from them. Thereafter, those people conducted search in the houses in the compound, where from one house which was used by their deceased father, a bag was found. In that bag there were items which were used by their late father in his traditional healing or witchdoctor activities.

Following that seizure, all sons of the late Birikaa Kereto who were present at home at that material time were arrested, taken to police station. His fellows were charged before the High Court but they were acquitted on 16/11/2020. He said the bag the which they seized had among others, a piece of Elephant tusk and an Eland horn. He tendered a copy of the permit which he found in the house of his father for identification purpose as D1.

On cross examination, DW1 said that, the house of his late father is not habited because in their customs the house which is used by the

person who had passed away should be kept closed, and was supposed to be opened after one year. Therefore, no one, among the heirs or family members inherited the bag and the items therein.

That position was maintained by DW2 Naotean Birikaa a step member of the appellant, she told the Court that the trophies which are the subject matter of the case at hand were the properties of her late husband Birika Kereto, and that they were seized from the house which was used by her late husband, in her presence after the police officer had broke into and searched in that house. She said they broke the house because that house was closed following the death of her late husband. In her further evidence, she said those items were used by the late Birikaa Kereto in his activities as a traditional healer. DW2 tendered the copy of permit No. 0018852 No. N12 as exhibit D1 and a trophy handing over form as Exhibit D2.

Basing on that evidence the trial court acquitted the accused person, now the appellant, in respect of the 4th and 5th counts, due to the apparent discrepancy between the oral evidence and exhibit P4, which is a trophy valuation report, as well as the physical exhibits, which are three pangolin scales and one bushpig nose.

That very court, found the accused guilty and convicted him in respect of the 1st, 2nd and 3rd counts. He was consequently sentenced to pay a fine of Tshs. 341,371,500/= or to suffer 20 years in jail, in the first count, Tshs. 111,574,690/- or to suffer a jail imprisonment for 20 years in the second count, while in the 3rd count he was sentenced to a fine of Tshs 38,668,770/- or to serve 20 years' jail imprisonment. In case he fails to pay the imposed fine, the custodial sentences were to run concurrently.

Dissatisfied by the conviction and the sentence, the appellant through the service of Mr. Fridoline Bwemero, Advocate at first filed five grounds of appeal, but later on, 02/11/2021 the counsel filed two additional grounds of appeal, making the total grounds to be seven. I will therefore for convenience purpose rearrange the said grounds by numbering the 1st additional ground to be the 6th ground while the 2nd additional ground I will re arrange it to be the 7th grounds as listed hereunder.

1. That the trial Court erred both in law and in fact by convicting the appellant while the prosecution side failed to prove its case beyond reasonable doubt.
2. That the trial court erred both in law and in fact by failing to consider the exhibits of the appellant tendered during trial;

3. That the trial court erred both in law and in fact by convicting the appellant while it was proved that the trophies seized, belonged to the appellant's father
4. That the trial court erred both in law and in fact by relying on the weak evidence by the prosecution case;
5. That the court erred both in law and in fact by giving out the judgment which does not collocate to the evidence given during trial.
6. That the trial Court erred both in law and facts by convicting and sentencing the appellant on the defective charge sheet.
7. That the trial Court erred both in law and fact by convicting and sentencing the appellant relying on the seizure certificate which was not signed by the independent witness.

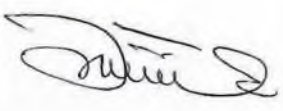
He asked the court to allow the appeal, by quashing and setting aside the decision handed down by the trial Court and the appellant be set free.

At the hearing, the appellant who was present in person enjoyed the service of Mr. Fridoline Bwemero, learned counsel, while the Respondent, Republic was represented by Ms. Akisa Mhando, learned Senior State Attorney.

For the sake of brevity and avoidance of unnecessary repetition, I will be going straight to the arguments by both sides as presented in support and against the appeal respectively, consider them and decide on one ground after the other.

Before determining the merit or demerit of the appeal, I find it apposite to point out that, reading the grounds of appeal wholesomely, they zero around the common and main ground that, given the nature of the evidence, had trial court properly considered the evidence before it, it would not have convicted the appellant basing on the charge and evidence, as the evidence did not prove the case beyond reasonable doubt.

This ground is hinged on the principles provided under section 110 and 111 read together with section 3(2)(a) of the Evidence Act [Cap 6 R.E 2019], which requires the prosecution to prove criminal cases to the standard of beyond reasonable doubt. This duty is in two folds, **first**, to prove that the offence was committed, and **second**, that, it was the accused who committed that offence. See **Maliki George Ngendakumana versus The Republic**, Criminal Appeal No. 353 of 2014, CAT- Bukoba (unreported).



As earlier hinted herein above, all arguments by the counsel for the appellant were focusing to prove that theory. In support of the Appeal Mr. Fridoline Bwemero submitted at length, but generally stating that the appeal is devoid of merit. In such an endeavor the appellant started the 6th ground of appeal, in which in support of it he submitted that, the court erred when it convicted the appellant basing on the defective charge sheet.

Pointing out the defect of the charge, he submitted that for instance in the 3rd count the appellant he was charged with unlawful possession of government trophies contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 05/2009 as amended by section 59 (a) and (b) of the Written Laws Misc. Amendment (Act No. 2) Act No. 4 of 2016, read together with paragraph 14(1) of the 1st schedule and Section 57 (1) and 40(2) all of the Economic and Organized Crimes Control Act, [Cap 200 R.E 2019] as indicated under that section of the Written Laws Miscellaneous Amendment 2009. However, in Wildlife Conservation Act, (supra) there is no section 86 (1) and (2) (c) (iii), and if there is one, then it would not have been talking of the unlawful possession of the government trophies. Charging him under that law and continuing

sentencing him after convicting him is unforgivable error which has caused him failure to defend himself.

To support his argument, the counsel cited the case of **David Athanas @ Makasi & Joseph Masima @ Shandoo vs The Republic,** Criminal Appeal No. 168/2017, Court of Appeal of Tanzania, at page 11-15 of the Judgment. He said the charging on a non existing provision is fatal, as it constructively means that, the appellant has really not been afforded opportunity to defend himself, therefore, he was prejudiced.

In her reply to the 6th ground of appeal, Ms. Akisa Mhando, learned Senior State Attorney for the respondent/Republic, did not dispute the fact that Count No. 3 was charged under the provision which is a non existing one. She however submitted that the presence of that provision of subsection (iii) in the provision charging the appellant in count no.3 that is section 86 (1) (2) that the same did not prejudice the applicant.

She also submitted that this kind of wrong citation is curable under section 388 (1) of the Criminal Procedure Act, because the appellant managed to defend himself as reflected at page 70 and 71 of the proceedings. That means according to her, the appellant understood the nature of the offence which was facing him. Also that the fact that the appellant was represented by the Advocate takes away the possibility of

prejudice because the Advocate was better positioned to properly lead the appellant. To buttress her arguments, she cited the case of **Jamali Ally @ Salum vs The Republic,** Criminal Appeal No. 52/2017, Court of Appeal of Tanzania Mtwara (unreported) at page 17 and 18, specifically page 18 paragraph 2 which held inter alia that, wrong citation of the law or citation of inapplicable provision is curable under section 388 (1) of the Criminal Procedure Act. On that base she prayed for the disallowance of this ground of appeal.

Looking at the charge sheet, it is true that the provision particularly a subsection and paragraph does not exist in the Wildlife Conservation Act, (supra). That means in that count, the appellant was charged and convicted on the non existing paragraph of the law, though under the proper section. However, the particulars of the offence are very clear that, he was charged with an offence of unlawful possession of government trophy to wit one piece of Eland horn, the particulars of the offence also mentioned the place, where he was arrested, the owner of the said trophy and the value of the same, and that he so possessed the trophy without the permit of the Director of Wildlife. In law, that is section 388(1) of the Criminal Procedure Act, no finding, sentence or order made or passed by a court of competent jurisdiction are reversed or altered on appeal or

revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under the Criminal Procedure Act; except where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice. Where the court is satisfied that there was such miscarriage of justice, then it may order a retrial or make such other order as it may consider just and equitable.

Looking at two cases cited by both counsel herein above, **David Athanas @ Makasi & Joseph Masima @ Shandoo vs The Republic,** (supra) and **Jamali Ally @ Salum vs The Republic,** Criminal Appeal No. 52/2017, Court of Appeal of Tanzania Mtwara (unreported), they insist of the curability of most of the irregularities. They also insist that it is only when the court is satisfied that the irregularities and the omission occasion the miscarriage of justice when it may reverse the finding, order or sentence.

Looking at the authority in the case of **David Athanas @ Makasi & Joseph Masima @ Shandoo vs The Republic,** (supra) it is apparent that, the Court of Appeal of Tanzania vitiated the conviction and sentence in that case after satisfying itself that, the particulars of the offence did not disclose important ingredient of the offence of dealing with the

government trophies. Unlike the case at hand where the particulars of the offence are clear, and are establishing all important ingredients of the offence and the accused was represented by the Advocate. It cannot be conceived that with the clear particular of offence and the representation of the Advocate, that he did not understand the nature of the offence they and managed to defend himself.

Furthermore, a similar scenario happened in the case **Ally Ramadhani Shekindo and Another vs The Republic,** Criminal Appeal No. 532 of 2017, CAT, (Unreported) where the appellant was convicted of an offence of gang rape, while the charge sheet charged him with an offence ganga rape contrary to section 131A (1) and (2) of the Penal Code Cap 16 of the laws while he was supposed to be charged under section 130(1) and (2)(a) but he instead, he was charged under section 131A (1) and (2) which does not create the offence. The Court of Appeal while agreeing that, there was such failure to cite the proper provision, it went a head and held as follows.

> *"...However, the question we ask ourselves is whether the appellants were prejudiced from such failure to cite section 130(1) and (2)(a) of the Penal Code in the sense that, such omission prevented them to comprehend the nature and*

gravity of the offence of gang rape they were facing and disabled them to prepare their defence."

After alluding on a number of its previous decision, some of which are **Charles Mkande vs R,** Criminal Appeal No. 270 of 2013 (unreported) **Jamal Ally @ Salum vs R**, Criminal Appeal No. 52 of 2017 (unreported) the Court of Appeal held *inter alia* that, recently the court has taken different stance on defective charges and non or wrong citation of the law, that as long as the accused has not been prejudiced, the non or wrong citation is curable under the provision of section 388(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019]. In the circumstance it is my strong view that there is no prejudice or failure of justice occasioned. The defect is therefore curable under section 388(1) of the CPA. This ground of appeal is dismissed for want of merit.

On the 7th ground of appeal which is the second additional ground of appeal, he said the trial court erred in law and fact by convicting and sentencing the appellant by relying on the seizure certificate which was not signed by independent witness. The appellant's Counsel submitted that the seizure certificate which was admitted as exhibit and relied upon by the trial court in convicting the appellant had incurable shortcoming.

He said there was no reason given as to why the search was not witnessed by the independent witness while the seizure was not under emergency and was made in the daylight in the village. This according to him, has been substantiated by the evidence that the arresting officers were informed that there were people who were selling Rhino and elephant tasks. So they went there while knowing what they were to arrest the suspect and seize the items. Therefore, the seizure was supposed to be in accordance with section 38 (1) of the CPA [Cap 20 R.E. 2019). In support of that stand, he cited the authority in the case of **David Athanas @Makasi & Another vs The Republic (supra)** at page 8 - 9. That the certificate which has not been issued in the presence and signed by independent witness cannot be accorded weight.

On that point the learned senior State Attorney submitted that, the appellant did by conduct admit the said trophy to have been found in his possession. She submitted that, where there is no dispute that the person was found with the substance there is no need of having the independent witness to witness the obvious. The evidence that he admitted is signified by the accused signature to the certificate of seizure. It means that, he admitted to be found in possession of the said trophies. That according to her, was signified by the fact that, even when the seizure certificate

was tendered here in court as exhibit, the appellant did not object it despite the fact that he was represented by the Advocate.

It is true that section 38(3) of the CPA that once a search is conducted in the presence of the witness of search, then that witness will also be required to sign the receipt issued to the person searched. The use of the word '*the witness of search if any'* signifies that the witness is not mandatory where the search is conducted in emergency circumstances.

In this case there is really no witness of the search something which in terms of section 38(3) does not vitiates search especially where like in this case where there are some of defence witnesses including the appellant himself and DW2 who acknowledge that search was conducted, but the items were not found in the custody of the appellant but in the house which was used by his late father. In the circumstances, I find the ground to have no merit.

The second anomaly in the seizure is that the seizing officer did not issue receipt or certificate and did not say whether they had search warrant by then. The counsel was of the view that, failure to issue or receipt and failure to have search warrant also went against section 38 (1) (c), and Section 38 (2) of the Criminal Procedure Act, (supra) which

talks about the issuing of the receipt. In his view therefore the conviction and sentence were against the law because the procedure was not followed in seizing the exhibits which was relied upon to found a conviction.

In support of that proposition, he relied on the case of **Badine Mussa Hanogi vs The Republic,** Criminal Appeal No. 118/2020 Court of Appeal of Tanzania, at Mtwara (unreported) at page 8-13 of the judgment which talks of the failure to issue the receipt. He submitted that the conviction was illegal, therefore its appellants be released.

Regarding this ground of appeal, the learned Senior State Attorney submitted that, although there was no receipt which was given to the appellant, the accused admitted to the seizure of the trophies by signing on the certificate of seizure. It means that, he admitted to be found in possession of the said trophies. That according to her, was signified by the fact that, even when the seizure certificate was tendered here in court as exhibit, the appellant did not object it despite the fact that he was he was represented by the Advocate. It is also her evidence that, when PW2 tendered the exhibit, was not cross examined by the defence counsel on the document.

Therefore, raising this ground at this stage she submitted that this ground cannot be raised as it is imaginary. Therefore, it should not be given room. To support her argument, she cited the case of **Damian Lehule vs The Republic,** Criminal Appeal No. 501 of 2007, Court of Appeal of Tanzania, Mwanza (unreported) at page 7 of the judgment where it was held that, failure to cross examine the witness is constructively an admission of the evidence so said or submitted.

Alternatively, she submitted that, if the court will find the document unmaintainable in law, there is the evidence of PW2 and PW4 who arrested the accused with the said trophies, their oral evidence is direct which is compatible with Section 62 (1) (a) of the Evidence Act [Cap 6 R.E. 2019]. On the strength of her arguments, she said, the that ground should be thrown away for lack of substance.

The issues of issuing receipt after seizure is not the domain of only one law, there is a number of laws providing for that requirement. To mention but few laws which impose such a duty to the seizing officer, I will start with section 38(3) of the Criminal Procedure Act, [Cap 20 R.E 2019] which provides that;

> *"(3) 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,*** *bearing 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."* [Emphasis added.]

The other provision which impose such duty to the seizing officer is section 35 (3) of the Police Forces and Auxiliary Services Act Cap 322 R.E 2002] which provides in a similar wording like CPA, that;

"(3) 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*** *bearing the signature of the owner of the premises, and those of witnesses of the search if any".* [Emphasis Added.]

Further more section 22(3) (b) The Economic and Organised Crimes Control Act Cap 200 of the laws provides,

"(3) Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall–

(ii) ***issue an official receipt evidencing such seizure and on which the value of the property*** *as ascertained and bearing in addition to his signature, the signature of the*

owner of the premises searched and that of at least one independent person who witnessed the search;"[Emphasis added.]

While PGO 226(2)(d) also provides that;

"Where anything is seized in pursuance of the search the officer seizing the thing ***shall issue a receipt acknowledging the seizure of that thing,*** *bearing 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."* [Emphasis added.]

Last is the provision of Exhibit Management Guideline, 2020 chapter three, paragraph 3.8 (f) (i) which provides that the officer seizing the article has to issue a receipt acknowledging seizure of the thing.

Now that being the case, what is the remedy? The answer is in the case of **Mustafa Darajani vs The Republic,** Criminal Appeal No. 277 of 2008 CAT-Iringa, which cited with approval the decision of **Patrick Jeremiah vs The Republic,** Criminal Appeal No.34 of 2006 CAT-(Unreported), in which the Court of Appeal was faced with the question of non compliance with section 38(3) of the CPA, and it held that;

"Upon completion of the search, if any property is seized, a receipt must be issued, which must be signed

by the occupier or owner of the premises and the witness around, if any as required under section 38(3) of the CPA. Failure to comply with section 38(3) of the CPA is a fatal omission."

Also see. **Abdallah Mussa & Juma Rashidi vs Republic** [2013] TLR 11

That said, I find failure to issue receipt to be fatal as indicated herein above, to the extent of affecting the competence of the exhibits thus affecting the admissibility and reliability. This ground of appeal is meritorious and it is upheld.

Thereafter he argued the 2nd and 3rd grounds together which reads that, the trial court erred in law and facts by failure to consider the evidence given by the appellants during the trial and failure to consider the exhibit admitted as D1.

He said during defence hearing, DW2 told the court that, the trophy submitted or tendered in court were the trophy of her late husband which he was using in his traditional healing activities. She substantiated that by tendering the i.e exhibit D1 proving that, trophies were the owned by of the late Birikaa Kereto. It was her testimony also that as a member of the village government who was present when the arrest and search of the appellant was conducted, she witnessed the officers seizing the trophies

and taking them out of her husband's house which was closed waiting for administration of the probate or estate of her late husband. She said the trophies were owned by her late husband and that he had never involved any other person in that matter. Hi her further evidence, she said she these facts were made clear to the police officers who arrested the appellant and seized the said trophies. She went as far showing them the permits exhibit D1, which allowed his late husband to possess the trophies which was also seized by the police officers and handed them over to those police officers vide exhibit D2, the handing over form.

Mr. Bwemero submitted that, with all this evidence, it was a big error for the trial court to find that the offence was proved beyond reasonable doubt, find the appellant guilty and convict him. The learned counsel submitted further that, although the appellant tendered the copy of the judgment of the **The Republic vs Saipi s/o Birikaa Kereto and 3 others,** Economic Case No. 5 of 2020, before the Economic and Corruption Court at Arusha in which all accused were arrested together with the appellant and that the said trophies also tendered in that case, the court disregarded the evidence.

Replying to these grounds of appeal the learned state attorney submitted that, the grounds is devoid of merits because the trial

Magistrate did not only base on exhibit P3 in his judgment. She referred this court at page 14 of that judgment of the trial Court, where in her view the evidence was analyzed and exhibit D2, the permit of possession of the government trophies was considered. In her considered view, by analyzing evidence, and taking into account the exhibit D2, it means the trial court considered the defence evidence. He therefore assessed the demeanor of the witnesses and considered all the exhibits.

It is true that, the record shows that, during defence, the appellant who testified as DW1 and his witness DW2, told the trial court that the trophies were the property of the late Birikaa Kereto the father of the appellant who was owning the trophies legally pursuant to the trophy possession permit that is exhibit D1. DW2 who introduced her self as the junior wife of the late Birikaa Kereto tendered in court the copy of the document titled Kibali cha Nyara (Vipusa) permit Number 0018859No. NHZ which was signed by Joseph Ole Koromo, the conservator of Ngorongoro as exhibit D1. She also tendered the memorandum of handing over between her and A/Insp. Kaitira on 11/05/2018. There is also evidence that the said trophies were being used by the later Birikaa Kereto in his practice as a traditional healer, and has been using them

since 1970's. There is also evidence that the said trophies were seized from the house which was used by the deceased, the late Birikaa Kereto.

That being the case and bearing in mind the principle of burden and standard of proof as enunciated in the case of **Christian Kale and Another vs Republic** [1992] TLR 302 and **Marwa Wangiti Mwita & Another vs Republic** [2002] TLR 39 that the prosecution is duty bound to prove the case at the standard of beyond reasonable doubt. And considering the principle that, the accused person need not to prove that his defence is true, but only to raise reasonable doubt.

In the circumstances of this case it is glaringly clear that, with the evidence from the defence, it goes without saying that, the same was raising doubts as to whether the said trophies were really found in the possession of the appellant or was initially owned by the appellant's father with the permit. That doubt has not been cleared by the Republic. In the circumstances, the trial court was not justified to believe and rely on the evidence by the prosecution while disregarding the clear doubt which would have been resolved in the favour of the accused person. Therefore, these grounds are found to be meritorious, and consequently allowed.

As these grounds suffices to dispose the appeal, I find it un economical to venture discussing the rest of the grounds, as doing so will be for no

value but just an academic exercise which I am not prepared to undertake.

That said, I hold that on the above discussed grounds. I find the appeal to be meritorious, it is allowed for the reasons I have just given herein above. The conviction entered against the accused person is hereby quashed, and the sentence is set aside. Consequence of which the immediate release of the appellant is ordered unless other wise held for other lawful purpose.

It is accordingly ordered.

DATED at **ARUSHA**, this 17th day of June, 2022

J.C. TIGANGA

JUDGE