**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 66 OF 2021**

*(Originating from Economic Case No. 2/2020 of 2017 of the Resident Magistrate's Court of Moshi)*

**SALIM MARIJANI MSOFE.....APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

*19/4/2022 & 2/6/2022*

**SIMFUKWE, J.**

Before the Resident Magistrate's Court of Moshi, Salim Marijani Msofe, hereinafter referred to as Appellant was charged and convicted with two offences: unlawful possession of Government Trophies namely eland meat and grant gazelle contrary to **section 86(1)(2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** read together with **paragraph 14 of the 1st Schedule and section 57(1) and 60(2) of Economic and Organised Crimes Control Act,** Cap 200 R.E 2002 as amended by **section 16(a) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016**.

On the first count it was alleged that on or about 15th day of October 2018 at Sanya Juu area within Siha District in Kilimanjaro Region, the appellant was found in possession of one Eland meat valued at Tsh 3,910,000/- only the property of the Government of the United Republic of Tanzania.

On the second count it was alleged that on or about 15th of October 2018 at Sanya Juu area within Siha District in Kilimanjaro Region, the appellant was found in possession of one Grant Gazelle meat valued at Tsh 1,035,000/- only the property of the Government of the United Republic of Tanzania.

The prosecution case in a nutshell was that, following the information received from their informer that the appellant is dealing with transporting government trophies, they set a trap and arrested the appellant while driving the motorcycle carrying a bag. After searching the said bag, they found that he was possessing meat which was later on identified by PW4 to be eland meat and grant gazette.

The appellant was arraigned before the Resident Magistrate's Court of Moshi (trial court) where he was charged as above. Upon hearing the prosecution who marshalled four (4) witnesses and the defence case which presented only one witness. The trial court convicted the appellant as charged and sentenced him to serve 20 years in prison. The court also confiscated and forfeited to the government the motorcycle with Registration No.MC 486 BRK.

Aggrieved, the appellant has now appealed before this Court on the following grounds: -

1. *That the trial Magistrate erred in law and in fact when failed to properly evaluate assess and analyse the evidence adduced during the trial and hence ended in convict the appellant. (sic)*

2. *That despite irregularities underlines the respondent's evidence, the Trial Magistrate proceeded to convict the Appellant.*
3. *That the trial magistrate erred both in fact and in law in convicting the Appellant without take note that the chain of custody was broken.*

Hearing of this appeal was conducted *viva voce*, the appellant was represented by Mr. Gideon Mushi, learned advocate while the respondent was represented by Mr. Rweyemamu, the learned State Attorney.

The learned advocate of the appellant consolidated the 1st and 2nd ground of appeal. He faulted the trial court for failure to evaluate, assess and analyse evidence adduced during the trial on part of the appellant which led to his conviction.

Mr.Gideon Mushi referred to a number of cases. The first one was the case of **Stanslaus Rugaba Kasusula and the Attorney General vs Fares Kabuye [1993] TLR 334** which held that the trial judge should have evaluated the evidence of each witness, assessed their credibility and make a finding on the contested fact in issue.

The second case is the case of **Nkungu vs Mohamed [1984] TLR 46** which held that: -

> *"The judgment must be based on evidence adduced and not otherwise."*

Mr. Gideon also referred to the case of **Yohanes Msigwa vs Republic [1990] TLR 143** in which the same decision was reached in **Hassan Juma Kanengera vs Republic [1992] TLR 100** that:

*"There is no specific number of witnesses required to prove the case what is required is the quality of evidence and credibility of witness."*

Mr. Gideon also cited the case of **Deemay Daati and 2 others vs Republic [2005] TLR 132** which stated that: -

*"Once a lower court fail to evaluate, assess the evidence adduced, the higher court will jump into the shoes of the trial court and re-assess the same and come up with its own findings."*

Having established the authorities above, the learned advocate thus faulted the trial court for failure to consider and analyse the evidence on record which led to the conviction of the appellant. That, as per **section 110,111 and 112 of the Evidence Act, Cap 6 R.E 2019** it is the duty of the Republic to prove the offence charged beyond reasonable doubts and if there is any doubt, the accused should be given benefit of doubt. It was alleged by Mr. Gideon that, before the trial court, the accused was found trafficking meat suspected to be wild meat (government trophy) contrary to **section 86(1) and (2) (c) 11 of the Wildlife Conservation Act**, (supra). However, the Republic failed to prove which mode of transport was used to transport the alleged government trophy. That, in the trial court judgment it is not certain which of the motorcycle was used to transport the suspected meat among the motorcycle with registration Number MC 489 BRG or MC 489 BKG or MC 489 BRK. That, the motorcycle which is suspected to have been used to transport wild meat was admitted before the court as Exhibit P4.

The appellant's counsel also invited the court to consider whether the charge sheet matched the evidence which was tendered before the court. That, the above noted section of the **Wildlife Conservation Act** do not provide anything in respect of unlawful possession of Government Trophies. He also implored the court to consider if the said section of the law matched with evidence which was adduced before the court. In that respect, he faulted the trial court for failure to consider the evidence tendered by the appellant. That, before the trial court, the appellant stated that he was a ***'bodaboda'*** driver and that he had never engaged himself in transporting government trophies as alleged by the prosecution. The learned advocate thus contended that failure to consider evidence which was adduced before the court rendered the decision to be a nullity. Therefore, he prayed this court to set aside the said decision and quash all the orders issued.

Submitting on the 3rd ground of appeal that the trial court did not consider that chain of custody was broken, Mr. Mushi argued to the effect that the record shows that the alleged wild meat was destroyed before the Primary Court Magistrate of Sanya Juu whereby the appellant was not shown the said meat and he did not sign the inventory form (Exhibit P3) for discarding the said meat. For that reason, the learned advocate was of the view that the chain of custody was broken which renders the whole decision of the trial court a nullity.

In conclusion, the learned advocate prayed the court to allow the appeal and quash the conviction and sentence and set the appellant free.

In his reply to the submissions in chief, Mr. Rweyemamu for the respondent stated that the appellant was charged with two offences

before the trial court; to wit Unlawful possession of Government Trophy contrary to **section 86(1) and (2)(c)(ii) of the Wildlife Conservation Act, No 5 of 2009** read together with paragraph 4 of the **1st Schedule to section 57(1) and 60(2) of the Economic and Organised Crimes 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.** He argued that the appellant has never been charged under **section 86(2) (c) (11) of the Wildlife Conservation Act (supra)** and the said subsection (11) is not a creature of statute.

Responding to the submission that the section does not provide about possession and transportation of government trophies, Mr. Rweyemamu contended that the said section provides about the offence charged and the appellant was found guilty of unlawful possession of government trophies whereas he was found carrying the said wild meat on his motorcycle as per evidence of PW1 and PW3.

Concerning the issue that it was not certain which motorcycle was used to transport the said wild meat, the learned State Attorney argued that at page 5 of the typed judgment, MC 489 BKG is faint and he opined that the same is typographical error. That, according to the proceedings the motorcycle which was used to transport the said wild meat is MC 489 BRG. At page 7 of the typed proceedings the motorcycle which is mentioned is MC 489 BRG. Also, at page 10 of the typed proceedings when the handing over document was tendered as exhibit among the listed exhibits was motorcycle with registration No. MC 489 BRG. The appellants counsel also said that at page 11 of the typed proceedings a motorcycle which was tendered as exhibit was MC 489 BRG. That, at page 12 of the typed

proceedings the exhibit keeper testified to the effect that he received a motorcycle with Reg. No. MC 489 BRG. The learned State Attorney was of the view that the motorcycle which is mentioned as MC 489 BKG is a slip of a pen.

Responding to the allegations that evidence of the appellant was not considered, Mr. Rweyemamu stated that the same was considered at page 5 of the typed judgment where the trial magistrate analysed evidence of the appellant and found the same to have no merit. He added that at page 7 of the typed proceedings the appellant denied to be the owner of the alleged motorcycle. Also, at page 11 of the typed proceedings the appellant admitted that the said motorcycle belonged to him.

The learned State Attorney prayed that the 1st and 2nd ground of appeal be dismissed.

On the 3rd ground of appeal which concerns chain of custody and that the appellant did not sign the inventory form, Mr. Rweyemamu submitted that at page 10 of the typed proceedings of the trial court the appellant signed the inventory before the Magistrate. Thus, the same is an afterthought. In addition, it was maintained that when the inventory was tendered before the trial court, the appellant did not object the same. The learned State Attorney questioned as to whether signing an inventory is related to chain of custody, he opined that the same are not related. He called upon the court to dismiss the 3rd ground of appeal.

As far as the cited cases by the learned counsel for the appellant are concerned, it was submitted that it has not been stated how the cited cases relate to the instant matter, or the principle found in them. Thus, he found the same to be a mere academic exercise.

Mr. Rweyemamu was of the view that this appeal has no merit and he prayed the same to be dismissed.

In his short rejoinder, Mr. Gideon reiterated what he submitted in chief. Responding to the allegation that possession was proved by PW1 and PW3, it was stated that the same is not about possession of Government trophies. That, at page 2 of the typed judgment it has been stated that PW1 after receiving information that the appellant was involved in transporting government trophies, they trapped the appellant and arrested him while driving his motorcycle.

The learned counsel also contested the allegation that PW3 testified to the effect that the appellant was found in possession of Government trophies. He argued that PW3 was an independent witness who was called after the arrest of the appellant.

He said that their concern is the provision under which the offence was charged *vis a vis* evidence which was adduced before the court. He emphasized that the Republic failed to prove the offence charged against the appellant especially on the issue as to whether the accused was found in possession of government trophies or was found transporting government trophies.

Concerning the registration number of a motorcycle, he said that it was just a typing error. Mr. Mushi formed the opinion that the trial magistrate misdirected herself in respect of the motorcycle which the appellant was found in possession/arrested with. That, the differences on the registration number appear more than twice. He referred to page 2 of the judgment where a motorcycle is mentioned as MC 489 BRG; at page 5 of the judgment the motorcycle is indicated to have registration number MC

489 BKG and at page 6 the motorcycle is No. MC 486 BRK. This is pursuant to registration of motor vehicles. The learned counsel insisted that these are three different motor motorcycles.

Regarding chain of custody that signature of accused on the inventory form has nothing to do with chain of custody, it was stated that it is not correct as the accused has a right to sign on the inventory form in respect of meat as he was suspected to have been found in possession of the same.

After going through parties' rival submissions and trial courts' proceedings and judgment, the main issue for consideration is ***whether the case against the appellant was proved on the required standard.*** This issue will squarely answer the three raised grounds of appeal.

It is an established principle of law that the prosecution has the duty to prove the case against the accused beyond reasonable doubt. In case of any doubt, such doubt should benefit the accused. That position has been underscored in numerous decisions of this court and the Court of Appeal. In the case of **Jonas Nkize V. R. [1992] TLR 213** the late Justice Katiti, J had this to say:

> *"While the trial magistrate has to look at the whole evidence in answering the issue of guilt, such evidence must be there first - including evidence against the accused, adduced by the prosecution which is supposed to prove the case beyond reasonable doubt."*

Having established the position of the law, I now turn to the grounds of appeal. On the 1st and 2nd grounds of appeal, the appellant has raised 3 concerns and I will deal with them one after another.

The 1st allegation is that the learned counsel for the appellant condemned the prosecution for failure to prove which mode of transport was used to transport the alleged wild meat since it is not certain which of the motor motorcycles was used between MC 489 BRG or MC 489 BKG or MC 489 BRK. The learned State Attorney argued that it is only in the trial court judgment where there was a typing error whereby the motorcycle was written as MC BKG.

I have keenly examined the alleged shortcoming. The records unquestionably disclose that the means which was used to transport the said government trophies was a motorcycle. The dispute is on the numbers of the said motorcycle. It is true that the learned trial magistrate referred differently the said motorcycle where at page 2 and 4 of her judgment she wrote MC 489 BRG, at page 5 she wrote MC 489 BKG. However, this discrepancy is not the discrepancy in the eyes of the law since the same is the typographical error of the trial magistrate and not witnesses. Considering the fact that witnesses consistently named the motorcycle as MC 489 BRG as shown at page 10,12 and 14 then this ground/allegation has no basis.

On the 1st and 2nd ground of appeal, the learned counsel called upon this court to consider whether the charge sheet match with the evidence since the charged sections didn't provide for unlawful possession/transportation of government trophies.

As per charge sheet the appellant was charged with two counts under **section 86(1)(2) (c) (ii) of the Wildlife Conservation Act**, (supra) read together with **paragraph 14 of the 1st Schedule** and **section 57(1) and 60(2) of Economic and Organised Crimes Control Act**

(supra) as amended by **section 16(a) of the Written Laws (Miscellaneous Amendments) Act,** (supra) for unlawful possession of eland meat and grant gazelle respectively. **The Essential Law Dictionary**, at page 378 has defined the word **"possess"** to mean: -

> *"To own; to hold without owning; to control something; to occupy physically."*

Basing on the above definition, I am of the firm view that since there is enough evidence showing that the appellant was transporting wild meat, then he cannot avoid the offence of possession of the same since at that particular time he was holding and controlling the said government trophies. Therefore, the charge sheet exactly matched with the available evidence.

The learned counsel for the appellant also raised a concern that the trial court did not consider evidence of the appellant. I am alive with the principle that failure to consider defence evidence is fatal. See the case of **Leonard Mwanashoka v Republic, Criminal Appeal No.226 of 2014** which held that: -

> *"It is one thing to summarize the evidence of both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis.*

In the trial court judgment, the trial magistrate not only summarized the evidence of both sides but also considered the same as seen at page 4

and 5 of the typed judgment where the trial magistrate was quoted to have said:

> *"On the other hand, accused told the court he didn't see meat in this court and he didn't sign in inventory form which allowed prosecution to discard meat. This court found that the accused has no objection that he was arrested by police officer near white Pub riding his motorcycle..."*

At 3rd paragraph of page 5 the trial magistrate said that:

> *"What accused is in dispute is that he was not arrested with the said wildlife meat although he signed a certificate of seizure in presence of PW3 independent witness. by saying that he was not arrested in possession of wildlife meat, this court found it is mere saying. He just wants to escape from this offence."*

Basing on the above quotations from the trial court judgment, it goes without saying that the learned counsel for the appellant misdirected himself by alleging that evidence of the appellant was not considered.

The last ground of appeal is in respect of chain of custody. Mr. Gideon submitted that chain of custody was broken because the appellant was not shown the said meat nor did he sign the inventory form (Exhibit P3). Without any further ado, this ground has no merit simply because the inventory was admitted at the trial without objection from the accused. Therefore, raising the concern that the appellant did not sign it or that he was not shown the said meat at this stage is an afterthought. I subscribe to the position established by the Court of Appeal in the case

of **Abas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017** at page 20, the Court quoted with approval the Supreme Court of India in **Malanga Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162** which held that: -

> *"It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless the author thereof is examined, the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of Law."*

Moreover, the prosecution succeeded to establish systematically how the said government trophies were handled by the prosecution witnesses from the arrest of the appellant, seizure, disposal of the government trophies, until when the inventory form was tendered at the trial court. Thus, chain of custody was not broken.

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubts. Therefore, I find the appeal to have no merit. I dismiss it in its entirety. Conviction and sentences of the trial court is hereby upheld.

Dated and delivered at Moshi this 2nd day of June, 2022.

**S.H. SIMFUKWE**

**JUDGE**

**2/6/2022**