

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)  
AT DODOMA**

**DC CRIMINAL APPEAL NO. 153 OF 2020**

*(Originating from Manyoni District Court in Economic Case No. 75 of 2018)*

**GEORGE CHALO STEPHANO.....1<sup>ST</sup> APPELLANT**  
**THOMAS SIMON MKWAVI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

18/05/2022 & 15/06/2022

**KAGOMBA, J**

George Chalo Stephano (1<sup>st</sup> appellant) and Thomas Simon Mkwavi (2<sup>nd</sup> appellant) (herein after jointly referred to as the "appellants") have filed this appeal to contest their innocence after having been convicted by the District Court of Manyoni (the trial Court) for the offences of unlawful entry into a game reserve; unlawful possession of weapon in a game reserve; unlawful hunting of scheduled animals and unlawful possession of government trophy under sections 15(1) and (2), 17(1) and (2), 47(a), 86(1), (2) (i) (ii) and (3) (b), 111(1) (2) (b) (d) and section 113(1) (2) of Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) and (b) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with paragraph 14 of the first schedule to, sections 57 and 60(1) both of the Economic and Organized Crime Control Act, [Cap 200 R.E 2002] as amended by section 13(b)(2)(3)(4) and (16) (a) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

It was alleged before the trial Court that on 15<sup>th</sup> day of October 2018 at Chisinga area within Muhesa Game reserve in Manyoni district, Singida region, the appellants did enter into the Game Reserve without a written permission of the Director of Wildlife. With respect to the second, third, fourth, fifth and sixth count it was alleged that on the same date and place as stated above, the appellants were found in unlawful possession of weapons in a game reserve to wit; one unregistered muzzle loader, two axes, two knives, ten grams of locally made gun powder and one muzzle loader bullet without written permission of Director of Wildlife.

In relation to the seventh count, it was alleged before the trial Court that on the same date and place as per previous counts, the appellants unlawfully, by using one unregistered muzzle leader did hunt and killed one impala valued at USD 390 which is equivalent to Tsh. 884,130/= the property of United Republic of Tanzania.

On the eighth count, it was alleged that on the same day and place as per previous counts the appellants were found in unlawful possession of government trophy, namely, five kilograms of dried impala meat from one impala valued at USD 390 which is equivalent to Th.s 884,130/= the property of united republic of Tanzania.

The appellants denied the charges but upon hearing of four prosecution witnesses and receiving five exhibits, the trial Court relying as it said, "to the largest extent on the evidence of PW2 because he produced a best type of evidence" found the appellants guilty, convicted them and

sentenced them to pay fine of Tsh. 100,000/= each and in default thereof to serve one year imprisonment in respect of the first count; to serve twenty (20) years imprisonment for each of the second third, fourth, fifth and sixth count, to serve twenty (20) years imprisonment for each of the seventh and eighth count. The trial Court also ordered the sentences to run consecutively.

It is the above decision which has prompted the appellant to file their respective separate appeals, which were consolidated by the Court, and grounds were as follows:

With regards to the 1<sup>st</sup> appellant, George Chalo Stephano, he faulted the trial Court's decision for reasons that;

1. The evidence adduced by PW2 the arresting officer was not supported by any independent witness in order to prove the case beyond reasonable doubt.
2. No any documentary exhibit tendered to certify that the alleged gun belonged to the 1<sup>st</sup> appellant.
3. 1<sup>st</sup> appellant was not given his legal rights during recording of the cautioned statement.

With regard to the second appellant, Thomas Simon, the grounds of appeal are:

1. The cautioned statement recorded at police station was not tendered before the Court by prosecution side.

2. There is no certification of Government Chemist that the meat was obtained from impala.
3. The 2<sup>nd</sup> appellant was kidnapped by arresting officer without informing any village leader.
4. There was no independent witness to support the evidence adduced by the arresting officer.

Both appellants prayed the Court to quash the decision of the trial Court and set them free because they are innocent.

On the date set for hearing the appellants who fended for themselves prayed the Court to consider their petition of appeal and the grounds stated therein as their submission to the Court. Being laymen, they were unable to add anything to those grounds in their submission in chief.

Ms. Bernadetha Thomas, learned State Attorney appeared for the respondent, the Republic. She opposed the appeal and prayed the same to be dismissed;

On her submission Ms. Benadetha Thomas conceded to the fact that during trial, the prosecution didn't tender cautioned statement as evidence but stated that the omission, in her opinion, did not downfall other evidence against the 2<sup>nd</sup> appellant. Therefore, it was Ms. Thomas's contention that, the fact that the 2<sup>nd</sup> appellant was arrested in possession of meat of impala and locally made gun subsist. She further stated that both appellants were arrested by PW2 and the testimony on their arrest is recorded from page 44 to 47 of the trial Court proceedings.

Regarding the contention by the 1<sup>st</sup> appellant that he was denied his rights during interrogation, Ms. Thomas submitted that the trial Court didn't get an opportunity to examine if the 1<sup>st</sup> appellant was not afforded his rights during interrogation, since his cautioned statement was not tendered in Court as exhibit.

Ms. Thomas further opposed the argument by the 2<sup>nd</sup> appellant that the meat was not proved by the Government Chemist to be impala meat. She submitted in this regard that the testimony of PW3 and the Certificate of Trophy Valuation exhibit P5 show that the meat was dry impala meat.

On the argument by the appellants that their arrest was not witnessed by an independent witness, Ms. Thomas stated that the evidence of PW2, shows that the appellants were arrested in the game reserve and one of them was holding a gun while attempting to escape. She added that in such circumstance it was not possible to get an independent witness. She argued that absence of independent witness does not invalidate the arrest citing the case of **Tongora Wambura V. DPP**, Criminal Appeal No. 212 of 2006, Court of Appeal of Tanzania at Arusha.

On the argument by the 1<sup>st</sup> appellant that there was no documentary evidence produced by prosecution to show that the alleged gun belonged to him, it was Ms. Thomas' contention that a certificate of seizure (exhibit P3) filled by PW2 after arresting the appellants disproves the 1<sup>st</sup> appellant's argument as it shows that the gun was seized from him and belonged to him and the same proved that the appellants were seized with the said meat.

In totality, Ms. Thomas contended that the case against the appellants was proved beyond reasonable doubt. That a total of four (4) prosecution witnesses testified to prove the case including PW1, the exhibits keeper who tendered the gun, knife and gun powder (collectively exhibit P2) having received them from PW2; PW2, arresting officer who tendered other exhibits including exhibit P4, an inventory form which shows that the alleged meat was destroyed and PW4, Primary Court Magistrate who corroborated the fact that the meat which was seized was destroyed; and PW3, the valuer who proved that the alleged meat was the meat of impala as he tendered in Court trophy valuation form. She therefore, prayed this Court to dismiss the appeal and uphold both conviction and sentence meted out by the trial District Court.

On rejoinder, the 2<sup>nd</sup> appellant had nothing to rejoin while the 1<sup>st</sup> appellant insisted that PW4, a Primary Court Magistrate testified that he did not find any exhibit.

Having read the submissions of both sides, the main issue is whether the case against the appellants was proved beyond reasonable doubts.

The trial Court in its judgment has clearly stated that the conviction has to largest extent based on the evidence of PW2 Martin Kidule.

This Court is of the view that for the case to be proved beyond reasonable doubt it is important to establish among other things, that the appellants were arrested within the game reserve and also, they were arrested with impala meat as alleged.

Since it is the evidence of PW2 that was key to the conviction, the same need to be closely examined with reference to place of arrest and type of meat the appellants are alleged to have possessed. Place of arrest is very significant because a mere possession of a gun outside the game reserve could not constitute an offence under the Wildlife Conservation Act.

With regard to the place of arresting, PW2 on page 45 of proceedings stated that; he saw the signs of people entering in and out of the game reserve. There were foot prints and prints of bicycle tire. He made follow up on them while in a company of one Shukuru s/o Mwinyi. By this statement it means they were two people in the pursuit. He also testifies that when they entered inside the game reserve, they met one accused person (who was not specified from among the two accused persons) who was carrying meat. After interrogating the said accused person he told him (not them) that he had his friend who has run away.

PW2 further testifies that the accused person who ran away was in possession of one locally made muzzle loader ("gobore"), one axe and one knife. It is not clear about how he came across with this fact. He adds that they also managed to arrest him. Here again it is not clear who of the two accused person was arrested later and where was he arrested having

attempted to run away. It is also not clear whether PW2 was alone or Mwinyi participated in the arrest.

From the above testimony, the pertinent question is; if Shukuru Mwinyi was the other person who arrested the accused by assisting PW2, why didn't he testify as a key witness to corroborate the testimony of PW2 which was not corroborated in this key element of arresting.

In his further testimony PW2 says; the accused person told them that they entered illegally in the game reserve. Again, it is not stated as to who of the two appellants confessed by saying that they entered illegally; and if Mwinyi was around when that accused person so confessed, why he was not called to testify.

Thereafter PW2 testified about the meat and how he identified it to be impala meat. He also testified on how he filled the certificate of seizure whose admission was objected by both appellants. The appellants said that they were made to sign it without knowing what was written therein.

On page 47 of the proceedings PW2 further testified that, we arrested the accused, sent them to our office located at Chisingisa. He then filled in the inventory form and tendered it.

When cross examined by the 1<sup>st</sup> accused, on page 49 of proceedings, PW2 said, "my testimony shows that I arrested you". Here PW2 shows that he arrested the accused person without Mwinyi being around. The pronoun



'I' is used instead of 'we'. He also replied that in the game reserve there is no human settlement. He also replied that he doesn't remember to be asked a question by a person when arresting 1<sup>st</sup> accused (Thomas Simon Mkwavi). He said he doesn't know Martin Madinda. (See a link with Thomas 3<sup>rd</sup> ground of appeal).

The PW2 testimony leave the following doubts;

1. Whether he was with Shukuru Mwinyi during the entire pursuit.
2. Which of the two appellants was arrested inside the game reserve first? And who attempted to run away among them?
3. What is the reason for the appellant who had run away to stop and be caught?
4. Who exactly ran after the appellant who had escaped? (Was it PW2 or Shukuru Mwinyi or both?)
5. In running after the appellant who had escaped where was the first appellant left? Or did they run with him to chase the 2<sup>nd</sup> escaped appellant?
6. Where exactly did the escaped appellant got arrested.
7. Why PW2 talks of "me and us" and "I and we" in the same transaction where he said he was accompanied by Shukuru Mwinyi?
8. If Shukuru Mwinyi was with PW2 in the entire exercise of arresting/pursuit of the appellant who escaped why wasn't he called to testify?

The Court finds that Shukuru Mwinyi was a very key witness. By prosecution not lining him up a witness a negative inference is drawn that if

he were to testify, he would give negative testimony against the prosecution. This inference is further solidified by the fact that even the cautioned statements of the accused/appellants were not tendered in evidence.

On the issue of identification of meat to be impala meat, PW2 on page 45 of the proceedings said; he was trained to identify different types of meat. He said he identified the said meat to belong to impala because impala fall under category of goats. The Court finds this evidence to be weak to prove that the meat was impala meat. The witness ought to give peculiar characteristics of impala meat, in exclusion of all other types of meat such as goat gazelle, beef etc.

The learned State Attorney has submitted that PW3 Paulo Lunimba, the valuer tendered exhibit P5 a Certificate of Trophy Valuation to show that the meat was dry impala meat. With due respect to the learned State Attorney, a Certificate of Trophy Valuation is not the basic evidence for proving the type of meat which the appellants are alleged to be found in possession. Its main purpose is to show the value of the meat.

On page 50 of proceeding, PW3 stated that he made valuation of the said meet by following the provisions of GN No. 207/2012 and Wildlife Conservation Act No. 05 of 2009 then he said;

*"As per the GN 207 of 2012 swala impala is valued at USD 390 and as per the BOT statistics on 16/10/2018; 1 USD was equal to Tsh. 2,267 and therefore the total value of Swala Impala in Tsh. Was valued at Tsh. 884, 130/=)."*

Earlier on in page 50 of the proceedings, PW3 testified that he met with the store keeper and requested to see the exhibit which was dried meat of impala. This testimony does not say if it is PW3 who identified the meat to be "dried meat of impala" or it is the name that was given to the exhibit by the store keeper.

In any event, PW3 did not show the peculiar feature of "dried meat of impala" which differentiate it from "dried goat meat" or any other meat for that matter.

With doubts about the place of arrest of the appellants and the way the testimony of PW2 left gaps, compounded with the weak proof of the meat to be dried Impala meat, I am of a firm mind that key elements of all the counts facing the appellants were not proved beyond reasonable doubt.

For the above reasons, the prosecution did not prove their case against the appellants beyond reasonable doubts. As such I find merit in the appeal and the same is allowed.

Consequently, the conviction entered by the trial Court is quashed as well as the sentences imposed. The appellants are set free forthwith, unless held for other lawful purpose. Ordered accordingly.

**Dated at Dodoma this 15<sup>th</sup> day of June, 2022**



  
**ABDI S. KAGOMBA**  
**JUDGE**