IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 81 OF 2021

(c/f. Economic Case No. 17 of 2017 of the District court of Siha at Sanya Juu)

LUKAS NYERENDA KARIKENE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

19/5/2022 & 04/7/2022

SIMFUKWE, J.

Before the District Court of Siha at Siha, Lukas Nyerenda Karikene, hereinafter referred to as the Appellant was charged and convicted with two counts of **Unlawful possession of Government Trophies C/S 86 (1) (2) (b) of the Wildlife Conservation Act No. 5/2009** as amended by **section 59 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016,** read together with paragraph 14 of the first schedule and **section 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 as amended by Act No. 3/2016**.

On the first count it was alleged that on 31st day of October, 2017 at Kijiweni Ngarenairobi area within Siha District in Kilimanjaro Region, the appellant was found in possession of Government Trophy to wit one dik dik valued at Tshs five hundred thousand (500,000) the property of the government of the United Republic of Tanzania.

On the second count, it was alleged that on 31st day of October, 2017 at Kijiweni Ngarenairobi area within Siha District in Kilimanjaro Region the appellant was found in possession of Government Trophy to wit one tree hyrax valued at Tshs two hundred thousand (200,000) the property of the government of the United Republic of Tanzania.

After a full trial, the trial court convicted the appellant on both counts and sentenced him to pay a fine of Tshs. 5,000,000/= in default to serve twenty (20) years in jail in respect of the 1st count, and to pay a fine of Tshs. 2,000,000/= in default to serve twenty (20) years in jail in respect of the 2nd count.

Aggrieved, the appellant preferred this appeal on the following grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant basing on the wrongly tendered and admitted prosecution's documentary exhibits, i.e., the certificate of seizure (exh. P1), certificate of valuation (exh. P3) and an inventory form (Exh.P4). As the above-mentioned Exhibits were not read out aloud before the court after being admitted in evidence as exhibits. Therefore, the appellant's attention was not drawn to the contents of those exhibits, as a result, he failed to fully cross-examine the witnesses.*

2. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the search and seizure of the alleged wild meat was illegally executed as there was no search warrant issued pursuant to section 106 of the Wildlife Conservation Act No. 5 of 2009. Since it was not an emergency search.*
3. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, there was no receipt issued after the completion of the said search and seizure of the alleged wild meat pursuant to the provisions of section 38 (3) of the CPA, Cap.20 R.E 2002. As the certificate of seizure (Exh.P1) tendered by PW1 cannot be equated to a receipt mentioned under the above cited section of law.*
4. *That, the learned trial magistrate grossly erred both in law and fact in holding that the said wildmeat real existed and she relied upon an inventory form (Exh.P4) despite the same being unprocedurally acquired, tendered and subsequently admitted in evidence as exhibit. Since the appellant was neither taken before the unknown magistrate who ordered the disposal of the alleged wildmeat, nor the photos of the same were taken as enshrined under the PGO.*
5. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the prosecution failed to take into account the principles which have to be taken into consideration on chain of custody and preservation of exhibits.*

6. *That, the learned trial magistrate grossly erred both in law and fact in using weak, tenuous, contradictory and wholly unreliable prosecution evidence from prosecution witnesses as a basis of the appellant's conviction.*
7. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.*

During the hearing, the appellant was unrepresented while the respondent was represented by Mr. Rweyemamu, Learned State Attorney.

On the first ground of appeal, the appellant faulted the trial magistrate for relying on the documentary exhibits to convict the appellant; exhibit P1 (the Certificate of Seizure), Exhibit, P4 (An Inventory Form) and Exhibit P3 (Certificate of Valuation) which were not read over aloud before the trial court after being admitted in evidence as Exhibits. The appellant stated that, the procedure is that when the document is intended to be introduced into evidence as exhibit, it must be cleared for admission, be actually admitted before it can be read out. That, the omission to read out the contents of the admitted document in evidence was wrong and prejudicial which deprived the appellant right to fully cross-examine the prosecution witnesses since he was not aware of the contents contained in the admitted documentary Exhibits. The appellant prayed the court to disregard the mentioned Exhibits and expunge the same from the record.

In respect of the second ground of appeal, the appellant alleged that there was no search warrant since the search was not emergency search. The appellant submitted to the effect that it trite law that, the arresting officers are obliged to abide by the law like everyone else. He referred to the Court of Appeal case of **Janta Joseph Komba and 3 Others vs R, Criminal Appeal No. 95 of 2006** at page 14 to support his argument. The appellant thus blamed the prosecution witnesses particularly the arresting officers for violating the mandatory provision of **section 106 of the Wildlife Conservation Act, No. 5 of 2009** which provides that there must be a search warrant before entering and conducting a search in a dwelling house. Basing on such provision, the appellant insisted that the arresting officers never adhered to the said provision. That, despite the fact that the alleged search being not an emergency one, as they alleged to have had prior information on the alleged existence of the said government trophies; still no one dared to seek the search warrant before executing the alleged search in the Appellant's house as per the above cited section. The appellant called upon the court to find that, the alleged search held in his house was illegal and therefore null and void.

Regarding the 3rd ground of appeal, the appellant blamed the trial magistrate for failure to note that there was no receipt issued after completion of the search and seizure. It was submitted that when PW1 was testifying, he alleged to have prepared, filled and signed the certificate of seizure (Exhibit P1). That, the trial magistrate relied upon the said Exhibit P1 which was admitted without complying to the procedures; and held that the appellant was found in unlawful possession of government trophies. The appellant was of the view that, it was a grave error in law as there was no receipt issued by the searching and

seizing officer, soon after the completion of alleged search as per **section 38 (3) of the C.P.A, Cap 20 R.E. 2002.** The appellant commented that, since the said Certificate of Seizure cannot be equated to a receipt mentioned under the above cited section of law, he prayed the court to disregard the Certificate of Seizure (Exhibit P1).

Submitting on the 4th ground of appeal in respect of the Inventory Form (Exhibit P4), the appellant argued that the trial magistrate erroneously relied upon the said exhibit and held that the alleged government trophies real existed and failed to detect the following anomalies:

First, that Exhibit P4 was procured without complying to the procedures, since the alleged Magistrate who is said to have ordered the disposition of the alleged seized government trophies was neither disclosed nor summoned before the court to testify. Thus, the omission of even mentioning the name of the magistrate who gave the disposal order and signed exhibit P4, suggests that may be the said magistrate neither existed nor performed the alleged duties and that, the said government trophies were not taken to the undisclosed and unknown magistrate.

The second anomaly noted by the appellant is that the appellant was never at all taken before the said undisclosed Magistrate who gave the alleged disposal order before the same being given. He stated that the requirement of taking the Accused persons before the Magistrates who are giving orders to dispose the perishable exhibits has been enshrined under the **P.G.O No. 229 (25).** The same has been insisted in numerous decisions of the Court of Appeal. In the case of **Mohamed Juma Mpakama vs R, Criminal Appeal No. 385 of 2017 at page 11** the Court insisted that, the purpose of arraigning the accused person before

the Magistrate who gives the disposal orders of perishable exhibits is for the Accused to be heard. The appellant emphasized that the omission of not taking him before unknown Magistrate who gave the disposal order of the alleged seized government trophies is fatal and prejudicial to the appellant.

The appellant raised another anomaly to the effect that, the prosecution never took the photos of the alleged seized government trophies as enshrined under the **P.G.O No. 229 (25).** Therefore, it cannot be said with certainty that, the alleged seized government trophies real existed.

The appellant submitted further that, basing on the above material discrepancies and unreliability of the prosecution evidence and witnesses, he prayed the court to vitiate the conviction entered by the trial court since the prosecution failed to discharge their duties vested to them by the law of critically proving the charged offence beyond any doubt against the appellant and to the standard required by the law.

Lastly, the appellant implored the court to find merits in his submission and allow the appeal by acquitting him.

In reply, the learned State Attorney on the outset supported the appeal.

In respect of the manner in which documentary evidence was tendered and received in court which are Certificate of Seizure (Exhibit P1), Certificate of Valuation (Exhibit P3) and an Inventory Form (Exhibit P4). The learned State Attorney conceded that the said documents were not read in court after their admission. He said that it is a well-established principle of law that when an exhibit is cleared for admission in court it must be read out in court for its contents to be known. If the same is not

read out then it must be expunged from the record.

Mr. Rweyemamu also argued that the subject matter of the case was destructed via an Inventory Form (Exhibit P4) which was admitted in evidence without following proper procedures. He opined that if the same suffers the fate of being expunged then there is no subject matter to warrant conviction. In addition, it was stated that, the appellant was not taken to court for destruction nor was the magistrate called to give evidence in court. This suffices to dispose this appeal as there is no subject matter of which the appellant was convicted of.

In conclusion, the learned State Attorney conceded the appeal to be allowed.

Having gone through the submissions of both parties, and considering the fact that the learned State Attorney for the respondent supported the appeal, the issue for determination basing on the noted irregularities is ***whether this appeal has merit.***

On the 1st ground of appeal, it has been conceded that the trial magistrate admitted Certificate of Seizure (exhibit P1), Certificate of Valuation (exhibit P3) and an Inventory Form (Exh.P4) without the same being read out aloud after being admitted into evidence as exhibits.

I have examined the trial court proceedings. Indeed, I found such irregularity. In the case of **Huang Qin and Another vs R, Criminal Appeal No. 173 of 2018,** the Court of Appeal while facing similar

circumstances of failure to read out the exhibits after being cleared for admission had this to say:

> *"On our part, we agree with both parties that, indeed, the said exhibits were not read out in court after their admission in evidence. Such documents, that is, the Search Order (Exh P1), the Certificate of Seizure (Exh. P2), the Handing over Certificate (Exh P3), the witness statement of D. 3746 D/S. Sgt Gerwin (Exh. P5), the Court Exhibit Registrar (Exh. P6) and the Trophy Valuation Certificate (Exh. P8) were crucial in the determination of the case. Failure to read them in court was a fatal omission because it offended the principle of fair trial as the appellants could not have known the contents of the exhibits tendered against them. In the case of Robinson Mwanjisi and 3 Others v. Republic, [2003] T.L.R 218 the Court emphasized the requirement of reading over the document after it has been cleared for admission and actually admitted. But again, in the case of Anania Clavery Beteia (supra) it was stated that failure to read over the exhibits after being*

cleared for admission and admitted in evidence was wrong and prejudicial."

I subscribe fully to the above authority. In the instant matter, like what happened in the above case all the exhibits were not read out after being cleared for admission in court. The said exhibits were crucial in proving the case beyond reasonable doubt. I am of considered view that the omission to read the content of the said exhibits is fatal, even **section 388 of the Criminal Procedure Act** (supra) cannot cure the same. I therefore expunge the Certificate of Seizure (exhibit P1), Certificate of Valuation (exhibit P3) and an Inventory Form (Exh.P4) from the records.

Having expunged the said exhibits, the issue which follows is ***whether the remaining evidence suffices to prove the case beyond reasonable doubt against the appellant.***

Evidence on record shows that the expunged exhibits among other things were for proving chain of custody of the alleged government trophies. Thus, in absence of exhibit P1, P3 and P4 the chain of custody has been broken. As rightly submitted by the learned State Attorney the subject matter was disposed of via an inventory form (Exhibit P4) which was admitted in evidence without adhering to procedures as demonstrated above. Moreover, the said exhibit P4 is wanting since the appellant was not taken to court for disposal of the alleged Exhibits. Worse enough, the alleged magistrate who ordered to destroy the said exhibit was not called to explain the content of the same.

Having found as such, there is no need of discussing other grounds of appeal since this ground suffices to dispose of the appeal. In the event, I

hereby quash the appellant's conviction and set aside the sentence. The appellant is set free forthwith unless otherwise lawfully held.

Order accordingly.

Dated and delivered at Moshi this 4th day of July, 2022.

S. H. SIMFUKWE.

JUDGE

4/7/2022