IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Economic Crimes Case No. 13 of 2018 of Same District Court at Same)

CHIKILA YUSUPH @ MCHAGA.....APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

13/06/2022 & 20/7/2022

SIMFUKWE, J.

The appellant Chikila Yusuph @ Mchaga was charged before the District Court of Same on three counts:

1st Count: Unlawful dealing in Government trophies contrary to **section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** read together with paragraph 14 of the First Schedule and **section 60 (1) (2) of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002** as amended by **section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016** and **section 57 (1) of Economic and Organized Crimes Control Act** (supra).

It was alleged by the prosecution that on 13th day of December, 2018 at Pangao village within Same District in Kilimanjaro Region, the appellant was found transporting one killed Lesser Kudu valued at USD 2600 which is equivalent to Five million seven hundred and twenty thousand shillings. (5, 720,000/= only) without trophy dealers licence.

2nd Count: Unlawful possession of Government Trophies contrary to **section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** read together with paragraph 14 of the First Schedule and **section 60 (1) (2) of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002** as amended by **section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016** and **section 57 (1) of Economic and Organized Crimes Control Act** (supra).

It was alleged by the prosecution that on the same date, time and place, the appellant herein was found in possession of one killed Lesser Kudu valued at USD 2600 which is equivalent to Five million seven hundred and twenty thousand shillings. (5, 720,000/= only) without trophy dealers licence.

3rd Count: Unlawful possession of Arms without licence contrary to **section 20 (1) of the Fire Arms and Ammunition Control Act, No. 5 of 2015 and section 57 (1) of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002,** read together with **Paragraph 32 of the First Schedule as amended by section 16 of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016.**

It was alleged by the prosecution that on the same date, time and place, the appellant herein was found in possession of one firearm make

shortgun berreta No. D172976 with registration No. TZ CAR No. 45057 without any firearms licence.

The trial court convicted the appellant on the 1st and 2nd counts and sentenced him to pay a fine of Tshs Fifty million seven hundred and twenty thousand shillings. (50,720,000/= only) or serve twenty years imprisonment in default on the 1st and 2nd counts each.The appellant had pleaded guility on the 3rd count and sentenced to 5 years imprisonmet. Aggrieved by the decision of the trial court, the appellant lodged this appeal against conviction and sentence in respect of the 1st and 2nd counts on the following grounds:

1. *That the learned successor magistrate grossly misdirected herself and used speculative ideas when composing her judgment as she said that when she presided over and took over the case from her predecessor she addressed the accused (now appellant) in terms of section 214 of the CPA Cap 20 R.E 2019 while in the typed court proceedings nowhere it has been indicated that the above section of law was complied. Therefore no reasons were assigned for failure by the predecessor magistrate to complete the trial of this case.*
2. *That the learned successor magistrate grossly erred both in law and fact in failing to note that, the persons who were said to have arrested the appellant and seize (sic) the said exhibits i e the motorcycle, the shortgun and the killed wild animal, none of them signed the certificate of seizure (Exh PE1). Astonishingly it was signed by those who re-arrested the appellant.*
3. *That the learned successor magistrate grossly erred both in law and fact in failing to note that, there were no receipt issued pursuant to section 38 (3) of the CPA Cap 20 R.E 2019 instead the searching and*

seizing officers issued a certificate of seizure which cannot be equitted to a receipt mentioned under the above mentioned section of law.

4. *That, the learned successor magistrate grossly erred both in law and fact in relying upon an unprocedurally acquired, tendered and admitted inventory form (exh PE4) as the appellant was neither taken before the magistrate who gave a disposal order nor signed the said form.*
5. *That, the learned successor magistrate grossly erred both in law and fact in failing to draw and (sic) adverse inference to the prosecution for failure to summon the alleged magistrate who is said to have ordered the disposition of the alleged seized wild animal so as to prove that the same real existed. Further, there were no photos of the said wild animal taken pursuant to the PGO No. 229 (25). Therefore it cannot be said with certainty that the said wild animal existed.*
6. *That, the learned successor trial magistrate grossly erred both in law and fact in failing to note that the prosecution failed to prove beyond reasonable doubt that the alleged seized short gun (exh PE2) which was said to have had killed the wild animal that it really works and that the same used to kill the said seized killed wild animal. In doing that they were suppose (sic) to summon the ballistic expert so as to assist the trial court in reaching at the fair and just decisions.*
7. *That, the learned successor trial magistrate grossly erred both in law and fact in using weak tenuous contradictory, inconsistency, incredible, uncorroborated and wholly unreliable, prosecution evidence from prosecution witnesses as a basis of the appellant's conviction and sentence.*
8. *That, the learned successor trial magistrate grossly erred both in law and fact by being adamant that the strong and unchallenged*

appellant's defence evidence did not raise reasonable doubt on the prosecution's case.

9. *That, the learned successor 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.*

The appellant prayed that this appeal be allowed by quashing the conviction and set aside the sentence and let him at liberty. He prayed to argue his appeal by way of written submissions and his prayer was granted.

In support of the grounds of appeal, the appellant submitted among other things that when the learned successor Magistrate was composing her judgment she stated that the case at hand was re-assigned before her after the learned trial Magistrate Hon. J.J Kamala being transferred to another jurisdiction and that she addressed the parties in terms of **section 214 (1) of the CPA, Cap 20 R.E 2019.** The appellant referred to page 21 of the trial court proceedings where the first appearance of the successor Magistrate is displayed. That parties were not addressed at all in terms of the above section of the law as alleged by the successor Magistrate. There were no reasons assigned on the trial court's proceedings concerning failure by the predecessor magistrate to complete the trial of this case before the successor magistrate presided and took over the case.

The appellant prayed that the proceedings of the trial court should be nullified.

It was also submitted for the appellant that the certificate of seizure was signed by those who re-arrested the appellant. That failure by game

officers (PW5 ansd PW6) who arrested the appellant to sign exh PE1 rendered the prosecution case to flop.

The appellant submitted further that the learned trial Magistrate failed to note that there was no receipt issued by PW1 the alleged seizing officer as enshrined under **section 38 (3) of the CPA.** That, the said receipt must be signed by the occupier or owner of the premises and the witnesses around if any. The appellant cited the case of **Selemani Abdallah and Others v. R,** Criminal Appeal No. 384 of the Court of Appeal in which it was held that:

> *"The above cited section of Law is coached in mandatory terms and the whole purpose of issuing the receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed the complaints normally expressed by suspect than evidence arising from such search is fabricated will to a great extent be minimized...."*

The appellant also cited the case of **Patrick Jeremiah v. R, Criminal Appeal No. 34 of 2006**, (CAT) in which the Court held that:

> *"Failure to comply with section 38 (3) of the CPA is a fatal omission."*

It was insisted that a seizure certificate cannot be considered as a receipt as it was held in the case of **Andrea Augustino @ Msigara and Another v. R, Criminal Appeal No. 365 of 2018** at page 22.

Concerning exhibit PE4, the inventory Form, the appellant averred that the said exhibit was unprocedurally acquired, tendered and subsequently admitted in evidence as exhibit. He said that he was never taken before the alleged unsummoned Magistrate who is said to have ordered the

destruction of the alleged seized wild meat. Otherwise, the said inventory form could have displayed the signature of the appellant.

It was contended further by the appellant that there were no photos taken of the said seized government trophy pursuant to **PGO No. 229 (25)** which provides that upon the seizure of perishable exhibit, the photograph of it should be taken. That, in this case nothing like that was done by the prosecution witnesses. Reference was made to the case of **Mohamed Juma @ Mpakama v. R, Criminal Appeal No. 385 of 2017,** (unreported) where the Court of Appeal underscored the importance of taking the accused persons before the Magistrate who is ordering the disposition of perishable exhibits and the need of taking photos of the same.

On the basis of the above cited case, the appellant contended further that it was wrong and prejudicial for the learned successor Magistrate to rely on Exhibit PE4 which was the crux of the case at hand to convict the appellant. He prayed this Court to amplify the above findings in resolving this case. In addition, the appellant stated inter alia that, the prosecution is required to call all material witnesses to testify before the court and failure to do so a negative inference should be drawn against such an act. He cemented his argument by citing the case of **Boniface Kundakile Tarimo v. R, Criminal Appeal No. 350 of 2008** (unreported) in which it was held that:

"It is thus now settled that, where witness who is in better position to explain some missing links in the party's case is not called without sufficient reasons being shown by the party, an adverse inference may be drawn against that party even if such inference is only permissible one."

Regarding exhibit PE2 the alleged seized short gun, the appellant faulted the successor trial Magistrate for relying on it as the same was not taken to the Ballistic Expert who could have examined it and find out if it really works and whether it was the weapon used to kill the alleged wild animal. That the said expert could have testified before the court. On this, the appellant subscribed to the Court of Appeal decision in the case of **Aziz Abdallah v. R, [1991] TLR 75** where it was held that:

> *"As earlier on pointed out that the government chemist who examined the exhibit was not called and there is no explaination as to why they did not call him. The only inference adverse which can be made is that probably he did not do the job thus why they did not call."*

The appellant pointed out another weakness of prosecution case to the effect that the exhibit register (PF 16) was not tendered before the court to prove their case beyond reasonable doubts in respect of the seized exhibit which were under police custody.

In her reply, Ms Grace Kabu learned State Attorney supported this appeal basing on ground number one (1) and six (6).

On the first ground of appeal the learned State Attorney conceded that there was non-compliance of **section 214 (1) of the CPA.** Explaining the rationale of **section 214 (1) of the CPA**, she referred to the case of **Priscus Kimario vs the Republic, Criminal Appeal No. 301 of 2013;** CAT (unreported) at page 10 where the Court stated that:

> *"....we are of the settled mind that where it is necessary to re-assign a partly heard matter, to another magistrate the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done, it may lead to chaos in the*

administration of justice. Anyone, for personal reasons could just pick up file and deal with it to the detriment of justice. This must not be allowed...."

The learned State Attorney also quoted **section 214 (2) of the CPA** which provides that:

"Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial."

In addition to the above cited case Ms Kabu also referred the case of **Godfrey Ambros Ngowi vs The Republic, Criminal Appeal No. 420 of 2016,** CAT, (unreported) at page 10 where the Court held *that a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill gaps in its evidence at the first trial.*

Apart from the above submission, Ms Kabu also pointed out that in this case there is variance between the evidence adduced before the trial court and the charge sheet. While the particulars of the offence state that the value of the subject matter that is one killed Lesser Kudu was USD 2600 which was equivalent to Five million seven hundred and twenty thousand shillings (5,720,000/= only); exhibit P5 the trophy valuation certificate shows that the value of the trophy was Tshs 6,110,000/=. The learned State Attorney submitted further that PW2 testified before the trial court at page 35 of the trial court typed proceedings that Lesser Kudu valued at USD 2600 equivalent to Tshs 6,110,000/=. The appellant was sentenced to pay a fine of Tshs 50, 720,00/= which is ten times the value

of the trophy stated in the charge sheet which was not proved in the evidence adduced before the trial court.

Ms Kabu concluded that since there are non-compliance of **section 214 (1) of the CPA, Cap 20 R.E 2019** and evidence adduced before the trial court did not prove the charge beyond reasonable doubts, they support the appeal on the noted grounds raised by the appellant.

I have carefully gone through the trial court's record the grounds of appeal and considered the parties' submissions. The issue is ***whether the appeal has merit as contended by the appellant and supported by the learned State Attorney for the respondent.***

The learned State Attorney supported the appeal on the first and sixth grounds of appeal. The learned State Attorney noted that the learned successor trial Magistrate did not comply to **section 214 (1) of the CPA** and that the same was fatal to the proceedings. She cemented his argument by citing the cases of **Priscus Kimario** (supra), **Godfrey Ambros Ngowi** (supra) and **section 214 (2) of the CPA.**

On the sixth ground of appeal, Ms Kabu submitted that there was variance between the charge sheet and evidence adduced by the prosecution in respect of the value of the government trophy, the subject of the charges against the appellant.

Starting with the first ground of appeal; as far as the 1st and 2nd counts are concerned,the proceedings of the trial court show that evidence of all prosecution witnesses was heard and recorded by the learned successor Magistrate who presided over the matter to the end. **Section 214 (2)** (supra) cited by the learned State Attorney herein above is coached in a language which is optional. I am of settled view that the wording of the said section is to the effect that the section will be applied according to

the circumstances of each case. **Section 214 (1) of the CPA** provides inter alia that witnesses may be resummoned if parties so wishes. In this case, I am strongly convinced that since the learned successor Magistrate heard all the witnesses of both parties, then the appellant was not prejudiced by non-compliance of **section 214 (1) of the CPA.** With due respect to the appellant and the learned State Attorney, I find the first ground of appeal to have no merit on the reasons I have stated. I therefore dismiss it accordingly.

Concerning the sixth ground of appeal which is in respect of variance between the charge sheet and evidence adduced by the prosecution, in law, there is material and normal discrepancies. Material discrepancies are not excusable because the same touch the root of the case, while normal discrepancies are excusable since they don't touch the root of the case. In the case of **Alex Ndendya vs R, Criminal Appeal No.207 of 2018,** the Court of Appeal cited with approval the case of **Dickson Elia Nsamba Shapwata v. Republic, Criminal Appeal No. 92 of 2007** which cited page 48 of **Sarkar, the Law of Evidence, 16th Edition,** which provides that:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While*

normal discrepancies do not corrode the credibility of a party's case material discrepancies do."

The issue for determination in this case is whether the noted discrepancy goes to the root of the case. The trial court record's clearly show that the value of the government trophy as indicated in the charge sheet is Tshs 5,720,000/= while evidence of PW2 and exhibit PE5 show that the value of the same trophy is Tshs. 6,110,000/=. As rightly submitted by Ms Kabu, sentences of the offences charged on the 1st and 2nd count is determined on the basis of the value of the government trophy. On the face of it, I am convinced to conclude that the noted discrepancy touches the root of the case since the same touches the sentences of the offences charged. The appellant appeals against both conviction and sentence. There is no shadow of doubt that conviction cannot be safely entered in this case in the presence of the discrepancy in respect of the value of the trophy. The same applies to the sentence, no reasonable court can sentence the accused on the basis of uncertain value of the government trophy.
I will not deal with the rest of the grounds of appeal as the same will amount to a mere academic excercise since the 6th ground of appeal crumbles the rest of the prosecution case. The subject of the case is the government trophy whose value was not established by the prosecution beyond reasonable doubts.

That said and done, I am satisfied that this appeal has merit. It is on the basis of the above reasons that I allow this appeal. Conviction against the appellant on the first and second count is hereby quashed and sentence set aside. I hereby order the immediate release of the appellant from custody, unless held for other lawful reasons.

It is so ordered.

Dated and delivered at Moshi this 20th day of July, 2022.

S. H. SIMFUKWE

JUDGE

20/7/2022