

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 30 OF 2021

(Originating from Bariadi District Court in Economic Case No. 38 of 2019)

NGODA MANONGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last Order: 02/06/2022

Date of Judgment: 02/06/2022

JUDGMENT

MATUMA, J;

The Appellant was charged and convicted by the District Court of Bariadi at Bariadi for Unlawful Possession of Government Trophies contrary to section 86(1) (2) (b) of the Wildlife Conservation Act No. 5 of 2019 read together with paragraph 14 of the First Schedule to and section 57(1) and 60(2) of the Economic and organized Crimes Control Act.

He was alleged to have on the 27th day of July, 2019 at Somanda village found in possession of seven pieces of dry Zebra meat valued at Tshs. 2,300,300/= and one Thomson gazelle horn valued at Tshs. 1,150,000/= the properties of Tanzania Government without any Written permit from the Director of Wildlife. The charge constituted two counts

and upon conviction on both counts, the Appellant was sentenced to twenty years custodial term for each count but the sentences were ordered to run concurrently. The Appellant was aggrieved with the conviction and sentence hence this appeal with four grounds of appeal.

At the hearing of this appeal the Appellant was present in person while the Respondent was represented by M/s. Edith Tuka learned State Attorney.

The Appellant did not have anything to elaborate his grounds of appeal. He merely adopted them and prayed his appeal to be allowed. The Learned State Attorney on the other hand supported this appeal on three grounds;

- i. That search and seizure was done in contravention of section 106(1)(b) of the Wildlife Conservation Act, No. 5 of 2009.
- ii. That documentary exhibits particularly the inventory exhibit P2 was not read to the accused after its admission in evidence.
- iii. That there was change of trial magistrates without complying to section 214 of the CPA.

The Learned State Attorney explained each of the grounds supra and I fully subscribe to her arguments as they reflect the true stance of the law in practice. Section 106(1)(b) of the Wildlife Conservation Act supra

which confers power to authorized officers to enter into any place in occupation or use of any person and search that place and seize any trophy restricts that if the place to be entered is a dwelling house, no one shall enter and search unless he has a warrant to that effect or atleast there is an independent witness.

In this case, PW1 Papenye Roymen a Game Warden, PW2 James Ruge a game Ranger, and PW5 Jacob M. Safari a game Warden testified that on 27/7/2019 when they were on their normal duties got informed that at the home of the Appellant there was government trophies.

They thus went at the home of the Appellant and searched his house in the presence of Ntene Magembe the street Chairman. In their search they seized the herein named trophies. With their evidence they suggested that Ntene Magembe was an independent witness. The said Ntene was not called as a witness but PW6 H. 8859 DC Riziki tendered his statement as exhibit P4 without any explanation as to why such statement was tendered in lieu of physical presence of the witness. PW6 merely stated in evidence that he recorded the statement of Ntene Magembe and prayed to tender it in evidence. There is no explanation as to why such witness was not called himself to testify and be subjected to cross examination.

Under section 34B(2)(a) of the Evidence Act, Cap. 6 R. E 2019 a written statement of a witness would only be admissible in evidence if its maker is dead, or unfit by reason of bodily or mental condition to attend as a witness, or if he is far to reach and cannot be procured without undue delay, or if he is nowhere to be seen and all reasonable steps have been taken to procure him but it ended unsuccessful, or where the witness by operation of law cannot attend. In this case, we are not told why didn't Ntene come by himself. I find that the prosecutor in this case and the trial magistrate did not bother with a fair trial and dragged the Appellant into unfair trial.

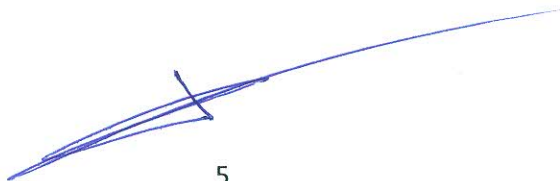
In the case of ***Mohamed Bakari and 7 others versus Republic (1989) TLR 134*** it was held that, Magistrates and Judges have a duty of ensuring that even undefended accused persons gets a fair hearing. It is not the matter that the accused did not object the illegal process. It is for the judicial officer to ensure that the due process is fully complied for the better end of justice. With these observations, I do hereby expunge exhibit P4 from the records for having been received in contravention of section 34B(2)(a) of the Evidence Act (Supra).

Now back to the evidence of those arresting officers who seized the alleged trophies, their evidence that Ntene Magembe was present as an

independent witness to the search is inconsistent with the Certificate of Seizure itself exhibit P3. The same was not signed by any independent witness. Had Ntene Magemembe witnessed the search and seizure he would have been caused to sign such exhibit.

I therefore rule out that there was independent witness to the search and seizure and therefore the provisions supra contravened as rightly argued by the learned State Attorney. I declare the search and seizure illegal and thus could not lead to the conviction of the Appellant. But also, it is unfortunate that the alleged trophies were not tendered in evidence as exhibits. An inventory was tendered on the pretext that the trophies were destroyed because they could not stay for long. According to the Certificate of Seizure the seized meat was dry and another trophy was a horn.

There is no explanation on how could the horn decay or decompose before trial. No explanation of a dry meat for how long the same could survive. Without such explanation, I find the purported search and seizure a cooked story to incriminate the Appellant. That is why there is no evidence whether the Appellant was in any way involved in the whole process of the inventory. In the case ***Matheo Ngua and 3 others***



5

versus DPP, Criminal Appeal No. 452 of 2017, the Court of Appeal held that;

"none involvement of the appellant to the inventory process is fatal."

Not only that but also documentary exhibits were not read to the Appellant and therefore denied him to prepare a focused defence.

With all these anomalies there is no need to discuss the procedural irregularity for none compliance to section 214 of the CPA Supra.

I allow the appeal, quash the Appellant's conviction and set aside the sentence of twenty years meted to him. I order his immediate release from custody unless he is held for some other lawful cause.

It is so ordered.




A. MATUMA
JUDGE
02/06/2022