IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 69 OF 2021

(Originating from Tabora District Court in Criminal Case No. 7 of 2020)

YUSUPH S/O JUMA ....APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

Date: 13/6/2022& 29/7/2022

BAHATI SALEMA, J.:

The Resident Magistrate Court of Tabora convicted **Yusuph s/o Juma** the appellant herein and Haruna Hamis who is not a party to this appeal, for the offence of unlawful possession of: 1st Count, unlawful possession of government trophy contrary to Section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5/2009 read together with paragraph 14 of the first schedule to and sections 57 and 60 (2) of the Economic and Organized Crime Control Act, Cap.200 [R.E 2019] as amended; and 2nd Count, Unlawful Possession of Firearm contrary to Section 20 (1) and (2) of the Firearm and Ammunition Control Act, No.2/2015 as amended and sentenced to serve a custodial sentence of twenty years in jail.

The material background leading to the appellant's arrest, as stated by the prosecution, is simple and not difficult to comprehend as it can be narrated as follows: the offence was committed on 8th January, 2020 during the night hours at Nsogoro village within Urambo District in Tabora region. Hatibu Mwangera, wildlife officer received tips from the informer that Haruna Hamis, the first accused had killed a common duiker and possessed a muzzle load gun. After receiving tips from the informer, they went to Izimbili village and arrived there during the night and went directly to the second accused person, Yusuph Juma who opened the door. After an interview and search they did not find any items. The second accused, Yusuph Juma, directed them to the first accused, Haruna Hamis where they searched and found four pieces of common duiker's meat and filled out the certificate of seizure, which was signed by the second accused. Afterward, they arrested the accused and sent the common duiker's meat and muzzleloader gun to the storekeeper of anti-poaching.

After being bailed out, the accused never appeared in court and the case was heard *ex parte. After* a full trial from the prosecution side, the court convicted them in *absentia*. The appellant was aggrieved by the decision of the trial court and marshaled ten grounds of appeal that;

i. *That, the trial court erred in law and facts by convicting the appellant with the offence he did not commit (see page 6 of the typed copy of the judgment);*

ii. *That, the evidence on record is weak to sustain the conviction;*

iii. *That, the trial court erred in law and facts by convicting the appellant based on the sole evidence of PW1 Hatibu Mwangera, the wildlife officer.*

iv. *That, Exhibits P1, P2 and P3 were given weight without collaborative evidence;*

v. *That, the trial court erred in law and facts by concluding that the case against the appellant was proved beyond reasonable doubt;*

vi. *That, the trial court accorded weight to the admitted exhibits of which no chain of custody was shown by the prosecution side;*

vii. *That, no valuation report tendered in respect of the alleged government trophy to with four (4) pieces of common duiker's meat worth Tshs. 673,250/=;*

viii. *That, the trial court gave weight to the certificate of seizure without tendering the receipt of the same and without independent witness to the seizure;*

ix. *That, the trial court erred in law and facts by according weight the evidence of PW1 HATIBU MWANGERA who did not explain in detail the way they reached the home of the appellant and if at all they did not have the exhibit which alleged to connect the appellant with the case which leads to this appeal; and*

x. *That, the trial court erred in law for not affording the appellant his statutory rights as per section 226 of the Criminal Procedure Act, Cap 20 [R.E 2019].*

When called upon to argue his appeal on 13/6/2022, the appellant was represented by Mr. Hashim Mziray, learned counsel, and Mr. Tito Mwakalinga, learned State Attorney for the Republic.

The counsel for the appellant adopted his grounds of appeal to form part of his submission to support his appeal. With the leave of the court, he consolidated grounds 1, 2, 3, 5, 7, 8, and 9 as they were interrelated.

He briefly submitted that the evidence given by the prosecution was not sufficient for conviction. He stated that the accused person did not commit any offence, he referred the court at page 12 of the proceedings, PW1, Hatibu Mwangera's evidence, who was the wildlife officer, revealed that on 8/1/2020 with other people he went to Izimbili, Urambo and they went to two places, to the first accused and then to the second accused. The record reveals that the 2nd accused, Yusuph Juma was not

found with any items. Mr. Mziray asserted that PW1 was told by the 2nd accused, but there was no evidence to suggest that allegation as to the caution statement of the accused person. He stated further that there was also no independent witness. Exhibits P1, P2, and P3 were not found in the appellant's house. Hence, it was not proved beyond reasonable doubt.

As to the fourth ground of appeal in respect of corroboration, he submitted on exhibits P1, P2, and P3. Mr. Mziray argued that according to PW1, the wildlife officer in his evidence submitted that they were with other officers until the preparation of the certificate of seizure but were never mentioned. The counsel also challenged that the incident happened during the night hours, but there was no independent witness. He disputed that this contrary to the law. He strongly stated that the evidence leveled against the appellant needed corroboration.

In respect of the sixth ground of appeal, the counsel for the appellant further submitted that the chain of custody was broken since the storekeeper did not come to testify although the certificate of seizure was tendered; the chain of custody was not elaborated. PW1 testified that he took the exhibits to the anti-poaching unit.

As to the seventh issue, the valuation report tendered in respect of the alleged government trophy. He submitted that it was four pieces of common duiker's meat worth TZS. 673,250/=. He submitted that what

was the charge sheet was not proved since PW1 did not establish the value while giving evidence.

On the ninth ground of appeal, he submitted that there was no wildlife scientific evidence on it, and finally the appellant was not given the right to be heard for absconding bail. He beckoned the court to allow the appeal.

Replying to the grounds of appeal, the learned State Attorney opposed the appeal. He submitted that the prosecution proved the offences charged against the appellant beyond reasonable doubt.

Mr.Mwakalinga submitted that PW1, Hatibu Mwangera was the only witness as reflected in the proceedings. His evidence revealed how the appellant committed the two offences. He submitted that the only disputed argument is the fact that although the weapons and the government trophy were not found in his house, the accused was hiding the property. This was confirmed by PW1 who informed them that the first accused, Haruna and Yusuph, the second accused killed the duiker and possessed muzzle loads. That was the reason PW1 and his company went directly to Izimbili and knocked the door. According to PW1, he said that the items were at Haruna's house. The presence of a muzzle gun shows they both work together, and that is the reason they jumped the bail. The accused person had common knowledge, and this does not exempt him from liability.

As to the issue of prove by having only one witness. Mr. Mwakalinga submitted that in the law of evidence, no law requires how many witnesses there should be but only the weight of the evidence. In this case, PW1 was the only witness and proved that beyond reasonable doubt.

On the issue of the value, that it was not proved, he admitted that although the value was not proved, it did not prejudice on the part of the appellant. What matters was to prove that it was a government trophy and that the punishment was recognized.

On the 6th ground of appeal in respect of the chain of custody. The learned State Attorney referred case of Paul Maduka **Vs. Republic** [2007] in which the Court of Appeal had given such circumstances and also in **Ernest Jackson Mwandika** Vs Republic [2019] (unreported). He submitted that PW1 explained it orally and presented it to the storekeeper. Also to bolster his stance in the case of **Joseph Leonard Manyota** 485 [2015], it was held that;

> *" ... It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in danger of being destroyed or polluted, and /or in any way tempered with. Where the circumstances may reasonably show*

the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken of course; this will depend on the prevailing circumstances in every particular case."

The discrepancy does not prejudice the appellant in any way since the muzzleloader could be tempered.

As for the right to be heard, he submitted that, according to section 226 of the Criminal Procedure Act, Cap. 20 since the appellants jumped bail, the case was heard *ex-parte* and ended.

He stated that on his arrest, he was given the right to explain why the court should enter a sentence against him. However, the reasons given by the appellant did not satisfy the court since he jumped for one year and a half and one of his sureties was the residence of Mwinyi Tabora. According to section 266 (4) Criminal Procedure Act, Cap.20 the court convicted. He prayed the appeal to be dismissed.

In his short rejoinder, Mr. Ma[illegible]ay reiterated his submission in chief, and he submitted that on pages 23 and 24 there is nowhere the appellant lied, he was absent, and he concluded with justifiable cause. He asserted that the purpose of section 266 (2) of the Criminal Procedure Act, Cap.20 is to explain his possible defence

After considering the grounds of appeal and submissions made by the parties, the major point that needs determination is whether the case was proved to the required standard.

In the course of determining these grounds, I will be guided by the canon of criminal cases that the onus of proof in criminal cases lies with the prosecution to prove beyond reasonable doubt.

It is a principle of the law that every criminal case must be proved beyond reasonable doubt. The standard of proof in criminal law is stated under Section 3 (2) (a) of the Evidence Act, Cap 6 [R.E 2019], which provides that;

> *"The fact is said to be proved when (a) in criminal matters/ except where any statute or other law provides otherwise/ the court is satisfied by the prosecution beyond reasonable doubt that the fact exists".*

The above principle of law has been reiterated in several cases including the case of **Hemed v. Republic** [1987] TLR 117, where the Court stated that:

> *" ..In criminal cases, the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused, it is on a balance of probabilities.*

Starting with ground number [illegible], 5, [illegible] and 9 as consolidated. As correctly submitted by the counsel for the appellant that the evidence of PW1, the wildlife officer was not corroborated since there was no independent witness.

According to the case of Shabani Saidi Kindamba **vs The Republic,** Criminal Appeal No. 390 of 2019 CAT at Mtwara, the facts of the case in Shabani Saidi which is similar to this case, reveal that the Court of Appeal of Tanzania announced it to be illegal for a hamlet leader from another village to witness the search; this shows the importance of having an independent witness in a search, but in this case, neither the hamlet leader nor a normal village member was called to witness the search as the law requires.

In this matter at hand, as revealed in the proceedings, there was no independent witness, the evidence shows that the muzzleloader gun and the duiker's meat were found in the possession of the first accused person, who is not subject to this appeal, where PW1 filled out the certificate of seizure and the [illegible] accused signed it. However, the presence of the independent witness was of importance in the sense that PW1 never mentioned the one who witnessed except for the 2nd accused who signed the certificate. In the absence of the evidence to show another independent witness, it is doubtful that there were

independent witnesses during [illegible] seizure which under section 38(3) of the Criminal Procedure Act, Cap. [illegible], is a [illegible]al requirement.

Having perused through the evidence given by the prosecution, there is nowhere the appellant was found in possession of the said items, nor was there any caution statement in which the appellant admitted to committing the offence. PW1, Hatibu Mwangera's evidence, who was the wildlife officer, revealed that on [illegible]2020 with other people, he went to Izimbili, Urambo and went to the two places, to the first accused and then the second accused. The records reveal that the 2nd accused, Yusuph Juma was not found with any items. Hence, it was not proved beyond reasonable doubt.

Therefore, from my analysis of the submission and court records, I have noted that no independent witness was called and there was no caution statement to support the allegation that the second accused admitted to having committed the offence. Although the certificate of seizure was admitted in court, the chain of custody in respect of keeping those exhibits was never tendered and there was no mark from the storekeeper to verify the custody. Worse still, the alleged independent witness who is claimed to have witnessed the seizure was not called to testify.

As to the chain of custody, having perused through the court records, I noted that; PW1, Hatibu Mwa[illegible] in his evidence testified to the court that;

> *"Also we arrested the accused person with one muzzleloader gun. Then we arrested the accused and we took him to our officer in Tabora for further interrogation we sent the common duiker meat and muzzleloader gun to the storekeeper of the anti-poaching unit."*

PW1 in this case only testified that they took the appellant to their office in Tabora for further interrogation and took the exhibits to the storekeeper without any further detail. However, it is shown nowhere in evidence if the storekeeper testified where the exhibit was kept and when the same was handed over to PW1. Also when PW1 tendered the exhibit P2 in court on 2/11/20[illegible] without any scintilla of detail on where he got it or whether it was under his custody. The witness does not come out clearly how the exhibit was [illegible]. Therefore, as rightly submitted by the appellant's counsel, the chain of custody of Exhibit P1 was not at all observed. On the premises, it is doubtful if the exhibit that was found in the possession of the first accused's house at the time of arrest was the one that was tendered in court as exhibit P1.

It is a trite law that the chain of custody is established where there is proper documentation of the chronology of events in the handling of

the exhibit from seizure, [illegible] until tendering in court at the trial. That was held in Paul [illegible] and Four **Others v. R,** (supra). I find this to have merit.

Having evaluated the evidence I am left with a doubt in answering the conduct of this case by the trial court, which, in my view, occasioned a miscarriage of justice. The trial magistrate relied on the testimony of PW1, which was not corroborated by any evidence, in convicting the appellant. Since PW1 evidence has doubts, the uncorroborated evidence loses weight. Another doubt [illegible] the PW1 evidence on the alleged confession that he confessed to [illegible] the item was hidden in the first accused house but never confessed to having committed the offence. However, there is no caution statement to lead evidence in respect of his confession.

On the last issue, the prosecution must always prove the case beyond reasonable doubt and the defence has no duty to prove its innocence except to raise doubts as to the prosecution's evidence. This court, being the first appellate court, has to ascertain if the charge against the appellant was proved to the standard required by the law.

In the upshot, I find merit in this appeal, which is thus allowed. Consequently, the conviction and sentence meted against the appellant are set aside. The appellant should be released from prison forthwith unless he is held for another lawful cause.

Order accordingly.

A. BAHATI SALEMA

JUDGE

29/07/2022

Judgment delivered in chamber of this 29th July, 2022 in the presence of both parties via virtual court link.

A. BAHATI SALEMA

JUDGE

29/07/2022

Right of Appeal fully explained.

A. BAHATI SALEMA

JUDGE

29/07/2022