

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT MOROGORO**

**CRIMINAL APPEAL NO. 123 OF 2021  
(Appeal from the Decision of the District Court Ulanga, at Mahenge)  
in  
Economic Case No. 13 of 2018**

**OMARY MAYOLELA .....APPELLANT  
VERSUS  
THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

20<sup>th</sup> June & 25<sup>th</sup> August, 2022

**M. J. CHABA, J.**

In the District Court of Ulanga at Mahenge, the appellant, Omary s/o Mayolela was charged with the offence of Unlawful Possession of Government Trophies Contrary to Section 86 (1), (2) (c) (iii) and (3) of the Wildlife Conservation Act No. 5 of 2009 as amended by Written Laws (Miscellaneous Amendment) Act No. 4 of 2016 read together with Paragraph 14 of the First Schedule and Sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act [Cap. 200 R. E. 2019] now (R. E. 2022) as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

It was alleged by the prosecution that the appellant on the 10<sup>th</sup> day of July, 2018 at Madibira Village, Mtimbira Ward within Malinyi District in Morogoro Region was found while in possession of Government Trophies to wit; 2 Kilograms of Puku worth USD 3200 equivalent to TSZ.

7,209,600/= only, the property of Government of the United Republic of Tanzania without permit from the Director of Wildlife. The appellant denied the allegation by pleading not guilty to the charge.

At the hearing of the appeal, Mr. Lordgud Eliamani, learned State Attorney who entered appearance for the Republic prayed the appeal be disposed of by way of written submissions. The appellant had no objection and this court granted the prayer advanced by the Republic. However, only the appellant filed his written submission in support of the appeal. For reasons better known by the learned State Attorney he did not comply to the agreed Court's schedule.

The appellant's written submission was drawn and filed by Mr. Paschal Paschal Luhengo, learned advocate from Paluhengo & Company Advocates who resides at Lupiro – Mission in the District of Ulanga. Basically, the appellant's grounds of appeal centered on the following grounds:

**One;** That, he was convicted basing on evidence which did not tally to the offence he stood charged,

**Two;** That, his conviction based on fatally defective charge,

**Three;** That, the trial court relied on some exhibits which were not read aloud in court when the witness tendered in Court,

**Fourth;** That, he was convicted in absence of sufficient evidence and

**Fifth;** That, the trial magistrate did not properly evaluate the evidence advanced by the prosecution witnesses to warrant or justify his conviction.



As noted above, the Republic did not file her written submission. It is trite law that failure to file written submissions when ordered to do so by the Court, constitutes a waiver of the party's right to be heard. On this facet, I am inspired and I beg to borrow wisdom of my learned Sister Mongolia, J., in the case of **Monica d/o Dickson v. Hussein J. (Kny Chama Cha Wafanyabiashara)**, PC Civil Appeal No. 04 of 2019; where she held that:

"It is a settled principle that failure to file written submission as ordered by the court is a manifestation of failure to prosecute the case. Failure to file written submission on the dates scheduled by the court is as good as non-appearing on the date fixed for hearing and need not be overemphasized. The applicant and his advocate failed to submit written submission on the date fixed, something which is tantamount to non-appearance on the date of hearing."

From the above, it is crystal clear that filing written submissions are tantamount to the hearing. Thus, failure to file the submission as ordered by the Court is equivalent to non-appearance at the hearing of the matter or want of prosecution. Since, in the present appeal the Respondent/Republic did abandon to file her written submission, no doubt that in the circumstance is synonymous to non-appearance at the hearing of this appeal.

After having heard the appellant's written submission as drawn and filed by Mr. Luhengo, learned advocate and upon keenly perused the trial court records, judgment of the District Court of Ulanga, at Mahenge

delivered on 16<sup>th</sup> day of December, 2020 and having considered all the circumstances of this case, I am satisfied that the appellant complaints are genuine. For instance, during scrutiny of the trial court records, I noted that at page 20 of the typed trial court proceedings the Public Prosecutor (PP) one Insp. Mgonja prayed to tender a cautioned statement of the accused person at trial and the court blessed his prayer by admitting the same and marked as Exhibit P2. At page 31 the Public Prosecutor (supra) once again prayed to tender in evidence a statement made by Surgent Omary and his prayer was accordingly granted. The said statement was admitted as Exhibit P4.

As I have demonstrated above, I am inclined that the appellant's grievances hold water. It is apparent on record that the trial court relied on some exhibits which were tendered in evidence by the Public Prosecutor (PP) who is not a witness. Among others, the appellant was convicted in absence of sufficient evidence, and that the trial magistrate did not properly evaluate the evidence before him to warrant conviction of the appellant.

In upshot, I allow the appeal, quash the conviction entered by the trial court and set aside the sentence imposed. I further order an immediate release from prison of the appellant, Omary Mayolela unless he is held therein for lawful cause. **I so order.**

**DATED at MOROGORO** this 25<sup>th</sup> day of August, 2022.



  
M. J. Chaba

**Judge**

**25/08/2022**