IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 07 OF 2022

(C/f Economic Case No. 04 of 2019 District Court of Siha at Siha)

WILSON ABRAHAM MASSAWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

25th July & 24th August, 2022

JUDGEMENT

MWENEMPAZI, J.

The appellant Wilson Abraham @Massawe was arraigned before the District Court of Siha at Siha on three counts as follow:

1. Unlawful possession of Government trophies contrary to section 86(1) and 2(b) of the **Wildlife Conservation Act No. 5 of 2009** read together with paragraph 14(d) of the First Schedule and section 57(1) and 60(2) of the **Economic and Organised Crime Act**, Cap 200 R.E. 2002.
2. Unlawful entry to the National Park contrary to section 21 (1) (a) of the **National Parks Act** Cap 282 R. E. 2002 as amended by Act No. 11 of 2003.
3. Unlawful possession of weapon into the conserved area contrary to section 103 of the **Wildlife Conservation Act No. 5 of 2009**.

According to the prosecution, on 13/11/2019 the appellant was found at Lukani-Namwi River area inside Kilimanjaro National Park possessing government trophies to wit; fifteen tree hyrax each valued at TZS 220,000/= totaling TZS 3,300,000/= properties of the Government of United Republic of Tanzania. He was also found in possession of 21 animal traps, an axe and a knife for the commission of an offence therein. He denied all counts against him claiming that he was arrested in his farm after he refused to carry park rangers' luggage. They took him inside the forest kept him for a day and took him to the police station and opened this case against him.

At the end of the trial the court was satisfied that the prosecution proved their case against the appellant to the required standard. He was thus convicted and sentenced to serve 20 years imprisonment for the 1st count and to pay TZS 300,000/= or serve 1 year imprisonment for the second count. Aggrieved with the decision he has filed this appeal advancing nine detailed grounds which I have partially summarized as follows:

1. That, the trial magistrate grossly erred in law and fact in presiding over and conducting a trial without the court being furnished with certificate conferring jurisdiction to do so.
2. That, the trial magistrate erred both in law and fact in giving an equivocal decision since during ruling on a case to answer he stated that the appellant has to enter defence on the 1st and 3rd count only whereas in the judgment he convicted and sentenced the accused on the 1st and 2nd counts.
3. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant without noting that no receipt was issued

after search and seizure was conducted in respect of the said government trophies.

4. That, the trial court erred in law and fact in failing to note that the prosecution failed to take into account the principles of chain of custody and preservation of exhibits.
5. That, the trial magistrate erred in law and fact in failing to note that the prosecution never rendered exhibit register showing movements of the alleged trophies.
6. That the trial magistrate erred in law and fact in relying upon unprocedural acquired, tendered and admitted inventory form to hold that the alleged trophies real existed despite there being no photos tendered as per PGO No. 229 (25).
7. That, the trial magistrate erred both in law and fact in shifting the burden of proof to the appellant by stating that the appellant did not adduce any evidence to substantiate his claims.
8. That, the trial magistrate erred in law and fact in convicting the appellant basing on the weak, tenuous and wholly unreliable prosecution evidence.
9. That, the trial magistrate erred in law and fact in convicting the appellant despite the charge being not proved beyond reasonable doubt as required by the law.

During hearing of the appeal, the appellant appeared in person and unrepresented whereas the respondent was represented by Ms. Mary Lucas, learned state attorney.

Supporting the appeal, the appellant prayed that this court go through his grounds of appeal and allow the appeal as he has nothing else to add.

Disputing the appeal Ms. Lucas challenged the appeal on the ground that, the conviction was rightly entered against the appellant after the trial court was satisfied that the case against him was proved to the required standard. She submitted that, in order to prove the offence the prosecution managed to establish that **first**, the suspect has been found with animal and **second**, he did not have permit. She averred that, section 100 of The Wildlife Act shifts the burden to the person found with the animal to prove if he possess the said animal lawfully. That, PW2 testified of how he found the appellant within the National Park when he was doing patrol and that he was in possession of 15 tree hyrax 13 of which were dead whereas two were still alive. Moreso, when he was asked if he had any permit, he didn't have any.

Learned state attorney further submitted that PW2's evidence was supported with that of PW1 who described how he found the appellant and filled search and seizure which the appellant signed. Regarding chain of custody, Ms. Lucas submitted that, there was no chronological documentation however, evaluation was done as soon as the appellant was arrested. Further that, although there might be breach of chain of custody but this kind of trophy cannot easily be tempered with. To support his argument, she cited the case of **Petro Kilo Kinanganye Vs. Republic**, Criminal Appeal No. 565 of 2017, CAT at Arusha (unreported).

She also argued that the seized trophies were disposed by way of inventory which was tendered in curt as Exhibit P thus, complied with PGO No. 229.

She finally submitted that, the case against the accused was proved to the required standard thus this appeal should be dismissed.

In rejoinder, the appellant maintained that, this case was fabricated against him as he was just arrested cultivating his farm which is adjacent to the National Park.

After hearing the appeal the question for determination is whether the case against the appellant was proved to the required standard to warrant his conviction. In doing so I will deal with grounds of appeal as they appear bearing in mind that this being the first appeal I am duty bound to re-assess and re-evaluate the entire evidence on record and arrive at a just conclusion: (See **D.R.Pandya (1957) EA 336** and **Iddi Dhaban Amasi Vs. Republic,** Criminal Appeal No 111 of 2006 (unreported)).

Starting with the 1st ground, the appellant claimed that, the trial magistrate erred in conducting a trial without the court being furnished with certificate conferring jurisdiction to do so. However, looking to the court's typed proceedings the same was filed on 24/08/2020 after prosecution prayed for the same to be filed. I also took the liberty of perusing the file records and found one copy with two titles on the same page filed on the same day i.e. 24/08/2020. One title read CONSENT OF THE PROSECUTING ATTORNEY INCHARGE and another read CERTIFICATE OF ORDER FOR TRIAL OF AN ECONOMIC OFFENCE IN DISTRICT COURT. This clearly show that the trial court had jurisdiction to determine this matter. This ground fails and the same is dismissed.

On the 2nd ground of appeal, the appellant claimed that, during ruling on a case to answer the trial magistrate stated that the appellant has to enter defence on the 1st and 3rd count only whereas in the judgment he convicted and sentenced the accused on the 1st and 2nd counts. I agree with the appellant that a ruling on no case to answer shows that the appellant was told to defend himself on the 1st and 3rd counts only. However, in the judgment he was convicted and sentenced on the 1st and 2nd counts which clearly portrays that he was convicted and sentenced unheard on the 2nd count. Right to be heard is so fundamental that any decisions reached without it is considered as breach of natural justice. The same has been emphasised in a number of Court of Appeal decisions including that of **Abbas Sherally and Another Vs. Abdul Fazalboy,** Civil Application No. 33 of 2002(unreported) where the Court observed;

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

The fact that the appellant was convicted on the 2nd count which he did not defend himself against curtailed him his fundamental right to be heard. More so, since I have the duty to reassess the evidence on record, the following is my observation on this. In his ruling of no case to answer in respect of the 2nd count, the trial magistrate observed;

> *"As to the second count of entry the section sited (sic) in the charge gives a general punishment when non (sic) is*

specifically provided for in that act, it does not establish or provide for the particular offence. To be specifically the offence of entry is not provided or established by section 21(1)(a) of the National Parks act (sic). Accused has a case to answer in relation to the first count and third count only"

From his evaluation it is safe to conclude that, since unlawfully entry to Kilimanjaro National Park was never tried and proved, the 3rd count cannot hold water. I say so because one cannot be held accountable if he has an axe, knife and animal traps outside the park. He might have been using them for his other personal activities in his farm. In that regard, even if it was a typing error as the trial court implied to have convicted the appellant on the 3rd count and not the 2nd, the same was not proved to the required standard. This ground has merit and the same is allowed.

As to the 3rd ground the appellant claims that no receipt was issued after search and seizure was conducted in respect of the said government trophies. I also join hands with the appellant that there was no receipt issued as there is no evidence on record proving the same. On top of that, whether or not the appellant was caught red-handed in possession of the alleged government trophies, would have been cleared with the presence of credible independent witness. Facing almost similar circumstances in the case of **Shabani Said Kindamba Vs. The Republic**, Criminal Appeal No. 390 of 2019 CAT at Mtwara (unreported) the Court held *inter-alia*;

"... We are inclined to take it as a logical that an independent witness to a search must be credible, or a whole exercise would be rendered suspect. In Malik Hassan Suleiman v. S.M.Z. [2005] T.L.R 236 while applying the Criminal Procedure Decree Cap 14 of Zanzibar, the Court held that a

Apart from that, since the government trophies allegedly found with the appellant were perishables, **section 101 of the WCA** and **paragraph 25 of PGO No. 229** give direction on how to dispose perishable Government trophies by the Director and by police during their investigations respectively. The latter provision reads;

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible,* ***such exhibits should be photographed before disposal.*** *[Emphasis added]."*

Emphasizing on such procedure, the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama Vs. Republic, Criminal Appeal No. 385 of 2017, CAT** at Mtwara (unreported) Juma, C.J, held *inter alia*;

> *"... While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the Primary Court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by a primary court magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."*

In the appeal at hand although PW4 testified to have taken the appellant to court on a different date from that in the Inventory form it is not clear if the

appellant was heard before the order of disposing the same is issued. In the said inventory, exhibit P7, it is written;

"Accused present when court pronounce the order"

That comment is followed by a signature dated 13/11/2019 and a stamp written Hakimu Mkazi Mfawidhi Siha. The above provision gives mandate to any nearby court to issue disposal order, but in doing so, the accused person has to be present so that he cannot be curtailed their right to be heard on the matter, more so, photographs have to be taken. Since exhibit P7 is a Police Document and the magistrate who gave the disposal order was not summoned in court, absence of a hearing proceeding as stated in the case above with at least a magistrate's name on record leaves a lot to be desired. All these create a doubt which benefits the appellant. To sum up, failure to comply with these necessary requirements especially in these offences of unlawful possession when dealing with wild meat, makes it unsafe to convict the accused persons with the offences. This was similarly observed in **Mohamed Juma @ Mpakama Vs Republic** (supra) at page 18 that;

> *"With regard to the first count of unlawful possession of government trophies mentioned in the particulars of charge, we agree with the learned counsel that for the respondent Republic that "unlawful possession of Government trophy" which is a salient ingredient of this offence, was not proved, not at least because the Government trophies allegedly found in possession of the appellant's possession were not physically tendered as evidence and the appellant had no opportunity to object if he needed to."*

Thus, for an exception to the general rule (that meat should physically be seen by a trial court) to apply, that is, reliance on an inventory, the relevant procedure for extracting an inventory should have been complied with. In the circumstances, exhibit P7, the inventory, would not have been relied to prove the offence against the appellant.

Based on the above analysis and reasoning, I find that, the case against the appellant was not proved at the required standard to warrant his conviction. Consequently, I hereby allow the appeal, conviction entered against the appellant is quashed and sentence is set aside. The appellant is to be released from custody forthwith unless therein held for lawful cause.

It is so ordered.

Dated and delivered at Moshi this 24th day of August, 2022.

T.M. MWENEMPAZI

JUDGE

Judgment delivered in the court in presence of the Appellant and in absence of the respondent.

T.M. MWENEMPAZI

JUDGE