

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 28 OF 2022

(Original, Economic Case No. 03 of 2020 in the District Court of Simanjiro at Orkesmet)

1. HAMISI S/O MHEU.....1ST APPELLANT

2. IDDI S/O MSAFIRI.....2ND APPELLANT

VERSUS

THE DPP.....RESPONDENT

JUDGMENT

3/08/2022 & 28/09/2022

GWAE, J

In the District Court of Simanjiro at Orkesmet ("the trial Court"), the appellants, Hamis Mheu and Idd Msafiri together with one Juma s/o Mboga who were 3rd, 2nd and 1st accused respectively, stood charged of an offence of Unlawful Possession of Government Trophy contrary to section 86 (1), (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) (b) of the Written Laws (Miscellaneous Amendment) (No.2) read together with paragraph 14 of the 1st schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (Cap 200, Revised Edition, 2002) as amended by sections 16

(a) and 13 (b) respectively of the written laws (Miscellaneous Amendment) (No. 3) Act, 2016.

The substance of the prosecution evidence that led to the conviction and sentence of the appellant and that other person (Juma Mboga) is as follows; that on 15/02/2020 F. 5607 D/CPL Fredrick (PW1) together with Detective Best and PC Ayubu went to Songambe area where there were suspects allegedly selling wildlife meat. Upon their arrival, they managed to arrest the said Juma Mboga and the 2nd appellant. A meat of an eland animal was found in the room together with a weighing machine, three weighing stones, one panga and two knives. An independent witness one Ombeni Kimaro was called and a certificate of seizure was filled and signed. The suspects together with the seized items were taken to Mererani Police Station. This piece of evidence was supported by that of E. 7250 D/CPL Wito (PW2) who also testified to have participated in the arrest of the accused persons, investigate the case and duly recorded the accused persons' cautioned statements in which they are said to have admitted to have committed the offence.

PW2 also tendered the following exhibits; a certificate of seizure (P1), Trophy evaluation report (P2), Weighing Machine, three weighing stones, two knives and one panga collectively received marked as (PE3),

chain of custody form (PE4), 1st accused caution statement (PE5), 2nd and 3rd accused caution statements collectively marked as (PE6 & PE7).

Another piece of evidence is that of PW3 a Magistrate at Shambarai Primary Court who testified to have given an order for the disposal of the seized eland meat which by then it had already rotten. PW3 also filled an inventory form which was tendered and marked PE8.

In their sworn defence, the accused persons now appellants and that other person patently denied to have committed the offence. They only admitted to have been arrested and arraigned in court. Another defence evidence is that of Rajabu Idd (DW4) who testified that after the accused persons had been arrested, he went to the house of mama Juma who told him that, the seized meat was brought to her house on previous night by the 1st appellant and that she gave him a place to store the said meat. On cross examination by the Prosecutor, DW4 stated that he does not know whether the accused persons committed the offence and that, his testimony was hearsay.

Another defence witness was Omary Rajabu (DW5) testified for the 2nd appellant and it was to the effect that, he was the owner of the motorcycle which was driven by the 2nd appellant. That in the year 2020 he received a call from the 2nd appellant who was at the police station and

he was required to go to the Police Station with the motorcycle registration card. He went to the police station where he presented the motorcycle's registration card, he was then handed his motorcycle and left. On cross examination DW5 stated that he did not know the offence that the 2nd appellant was charged with because when the 2nd appellant called him, he only told him that he was arrested for the alleged stolen motorcycle.

After full trial, the trial court was convinced that, the charge against the appellants together with Juma Mboga was proved beyond reasonable doubt. Consequently, they were all convicted for the offence as charged and sentenced to twenty (20) years imprisonment. The appellants herein are aggrieved by both conviction and sentence imposed on them and therefore they have preferred this appeal on five (5) grounds of appeal and ten (10) additional grounds, however on hearing of this appeal the appellants abandoned the grounds of appeal and argued the additional grounds, the appellants' additional grounds of appeal are;

1. That, the trial court erred in law and in fact by convicting and sentencing the appellants while the witness who tendered the valuation report and certificate wrongly tendered the same as he was the person who made them

2. That, the trial court erred in law and in fact by convicting and sentencing relying on the search which was illegally conducted in that there was no search warrant that was issued
3. That, the trial court erred in law and in fact by convicting and sentencing while material witness (Ombei Kimaro) who signed the certificate of seizure was not called to testify
4. That, the trial court erred in law and in fact by convicting and sentencing without any receipt issued as per section 38 (3) of the Criminal Procedure Act, Cap 20, Revised Edition, 2019 (CPA)
5. That, the trial court erred in law and in fact by convicting and sentencing when PE8 (Inventory Form) was wrongly relied upon since it was prepared in contravention of P.G.O 25 Number 229, it should be expunged
6. That, the cautioned statements of the appellants and Juma Mboga were wrongly relied by the trial court magistrate in entering conviction against them as the same were recorded by the same person
7. That, the trial court had no jurisdiction as no certificate conferring power to entertain the case
8. That, the trial court erred in law and in fact by convicting and sentencing for the offence of unlawful possession of the Government Trophy while the same was never proved and identified to be the meat of eland
9. That, the case against the appellants was not proved beyond reasonable doubt

10. That, the appellants' defence was not considered during hearing of the appeal

Basing on the grounds of appeal, the appellants prays that the appeal be allowed by quashing the conviction and setting aside the sentence.

At the hearing of the appeal, the appellants appeared in person unrepresented, while the respondent was represented by Ms Alice C. Mtenga, the learned State Attorney. Expounding on the additional grounds the 1st appellant submitted on behalf of his fellow (2nd appellant) as follows;

Firstly, the 1st appellant submitted that the trial court had no jurisdiction to hear and determine the case against them by virtue of the provisions of section of 12 (3) & (4) of the EOCCA and section 26 (1) of the Act. According to him the said provisions of the law require the subordinate courts to obtain the requisite consent from the DPP. In their opinion, the trial court did not obtain such consent. To support his argument the 1st appellant cited the case of **Jumanne Leonard vs. Republic**, Criminal Appeal No. 515 of 2019 (unreported) at page 14 and 15.

Secondly, the 1st appellant argued grounds number 2 and 4 together where he faulted the whole process of search. He submitted that there ought to be a warrant of search and after search there ought to be a certificate of seizure. According to him, in the case at hand none has been complied with before and after search leading to illegality of the alleged search and seizure. He further contended that had the certificate of seizure been prepared and filled, he would have signed it. He therefore invited this court to make reference to the decision of the Court of Appeal of Tanzania in **Shabani Kidimba v. Republic**, Criminal Appeal No. 390 of 2019 (unreported).

Thirdly, as to the ground of an independent witness it is the submission of the 1st appellant that at page 41 & 43 of the proceedings there was an independent witness one Ombeni Kimaro but the same person was not summoned to appear to the trial court and give evidence. he stressed this ground by citing the decision in the case of **Aziz Abdallah v. Republic** (1991) TLR 7.

Fourthly; the 1st appellant submitted on ground 5 that, the trial court wrongly relied on the inventory form which was received as exhibit PE8 in violation of the PGO. He therefore prays it be expunged from the record since they were not involved.

Fifthly, on complaint 6 the 1st appellant faulted the recording of the cautioned statements by one police officer (PW2). According to him this is contrary to the law as discussed in the case of **Junguna Kimani v. Republic** (1954) AC 316

The 1st appellant went on to submit on **1st ground** of appeal and stated that the valuation report be expunged due to the reason that as reflected in the page 46 of the trial court typed proceedings, it was PW2 who tendered the valuation report (PE2) while the same was prepared by one Aloyce who was a game officer. In his opinion, the said Aloyce was to be summoned to tender the same as an expert.

Lastly, the 1st appellant submitted on grounds No.7 and 8 by stating that the case against them was not proved beyond reasonable doubt since there was no evidence which proved that the meat in question was the meat of Eland and above all the trial magistrate failed to consider their defence when composing his judgment as was emphasized in the cases of **Hussein Idd and another v. Republic** (1994) TLR and **Amiri Mohamed v. Republic** (1994) TLR 138.

Responding to the grounds of appeal, Ms. Mtenga supported both conviction and the imposed sentence meted against the appellants and submitted as follows;

Starting with the 1st ground, it was her submission that, the records are very clear that there was consent which was received by the trial magistrate and duly signed on 28th August 2020. Despite the fact that the records are silent, but it was the view of the counsel that it is not fatal taking into account that, the appellants pleaded to the charge.

In the 2nd and 4th grounds of appeal, it is the submission of Ms. Mtenga that there was a search order and seizure and the same was signed by the appellants and there was also an independent witness.

On the issue of absence of the appellants during destruction of the Eland Meat, Ms. Mtenga contended that the same is not true as page 43 of the typed proceedings reveals that the appellants were involved during destruction exercise.

Regarding the appellants' complaint that one police officer recorded the cautioned statements of more than one suspect. It was the view of the counsel that, in law that is improper but went on to state that there are still other independent pieces of evidence which are satisfactory and incriminatory to the appellants.

As to the appellants' complaint on valuation report, Ms. Mtenga submitted that tendering of a document does not mandate only a person who is an author but also a person who is in possession or with knowledge of the same. She added that, the appellants would have requested to have

appearance of the maker of the valuation report (PE2) which is indicative that the meat in question was of eland animal.

Lastly, as to the ground that the trial court did not consider the defence evidence adduced by the accused persons now appellants. Ms. Mtenga elaborated that the same is not true as the trial court made thorough analysis of the defence given by the appellants and that of their colleague. She went further to state that even if the trial court did not assess the defence yet this court may step into shoes of the trial court and re-assess the evidence adduced by the appellants.

Having briefly explained what transpired before the trial court as well as rival submissions of both parties to this appeal, I am now going to determine the grounds as herein under;

With regard to the first ground, the appellants are complaining that the witness who tendered the valuation report is not the person who made it and therefore it was tendered by a wrong person. This issue does not need to detain me as it is trite law that any person who is an author or maker or in possession of such exhibit, or with knowledge or owner of the same is a competent person to tender an exhibit as correctly argued by the learned counsel for the Republic. In the case of **The D.P.P vs Mirzai Pirbakhshi @ Hadji & 3 Others**, Criminal Appeal No. 493 of 2016 (Unreported) the Court of Appeal of Tanzania held as follows;

*"A person who at one point in time possesses anything, a subject matter of trial, as we said in **Kristina Case** is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

In our case, exhibit P2 was plainly tendered by PW2 who testified to be an investigator of the case. Guided by the above position of the law, since at the time of hearing of the case it was PW2 who was in possession of PE2 and much as he had knowledge of the said document, it is the firm view of this court that the said witness was competent and legally capable of tendering the said document. Therefore, the 1st ground is devoid of merit.

On the 2nd ground of appeal, the appellants allege that, search was illegally conducted. Going by the records, PW2 testified that upon reaching the scene of crime they entered into a room and found the 1st and 2nd accused person together with the meat in the sulphate sack. Section 38 (1) of CPA is very clear that, search warrant is a requirement

in a situation where it is not an emergency search. The Police General Order (PGO) 226 has also demonstrated the seriousness of a search warrant and it reads as follows;

'The entry and search of premises shall only be affected either: -

(a) on the authority of a warrant of search; or

(b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant

(c) Under no circumstances may police officer enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania."

My scrutiny of the trial court's records reveals that, the certificate of seizure was filled and the same was signed by the 1st and 2nd accused persons together with two other witnesses including an independent witness one Ombeni Kimaro. As the PW1 and PW2 were police officers who were at police station when they received information, they were therefore duty bound to have prepared and went with a search warrant as complained by the appellants nevertheless that omission is cured by use of certificate of seizure (PE1) made under section 38 of the CPA (supra) and section 35 of the Police and Auxiliary Service Act, Cap 322, Revised Edition, 2002. The second ground of the appeal therefore lacks any merit.

On the 3rd ground of appeal the appellants are complaining on the failure by the prosecution to call an independent witness one Ombeni Kimaro to testify. The records are such that, in the certificate of seizure (PE1) one Ombeni Kimaro signed as a witness however he was not called in court to testify. This court is aware of that the cherished principle the prosecution is not bound to summon witnesses in the case however failure to summon a vitally important witness without any assignment of any sufficient reason (s) might justify the court to draw an adverse inference to the prosecution case.

In this contentious case, the witnesses who appeared were police officers who did every action, namely; information so received, arresting, seizing, filling of the certificate of seizure and any act relating to the alleged offence, I am therefore of the firm view that, the testimony of an independent witness was of importance taking into account that, the accused persons had refuted to be involved in the offence levelled against them. The Court of Appeal of Tanzania when was faced with similar situation in the case of **Pascal Mwinuka vs. The Republic**, Criminal Appeal No. 258 of 2019 (Unreported) and had the following to say;

"Be that as it may, in the instant appeal, since the police officer in charge (PW1) issued the search order (exhibit P3) under the provisions of section 38 (1) of the CPA, we are settled that the procedure laid down under the

*provisions of section 38 (3) had to be complied with fully. Thus, since the credibility of PW2 is questionable because he did not sign exhibit P3, **if another independent witness, namely, Boniface Siame who allegedly signed it could have been summoned to testify he would have filled the gap caused by the unworthy evidence of PW2 emphasis supplied**".*

In the instant appeal, PW2 testified that search was conducted in the presence of an independent witness one Ombeni Kimaro a leader of that area who is alleged to have witnessed the search and seizure of the meat of an eland which was in a sulphate bag inside a room. However, DW1 when cross examined stated that when the police arrived at the scene of the crime, they were outside the house, he also stated that he signed the certificate of seizure at the scene of the crime but it is not the one tendered during trial. DW2 on his part when cross examined, he testified that he was arrested in suspicion of being in possession of a stolen motorcycle as vividly supported by DW5 and went further to state that he did not see anything seized from the scene of the crime except that he was forced to sign the certificate of seizure. In the circumstances of this case, the testimony of an independent witness was so important to clarify as to the search and seizure of the items allegedly found in the

said room. With the above explanations this court finds merit in this ground of appeal.

In 4th ground, the appellant challenges certificate of seizure under section 38 (3) of the CPA where they allege that there was no certificate of seizure. This ground has been answered in ground number two above and therefore I find no need to be unnecessarily curtailed. It is hereby dismissed.

Coming to 5th ground, the appellants complained that the inventory form (exhibit 8) was prepared in contravention to paragraph 25 of the PGO as they were not involved. Paragraph 25 reads as follows;

"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."

The above legal position was also thoughtfully stressed by the Court of Appeal of Tanzania in the case of **Michael Gabriel vs. The Republic**, Criminal Appeal No. 240 of 2017 (Unreported) where the court stated that;

"Normally, a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person."

In the instant case, it was Honourable Godfrey Haule, Magistrate at Shambarai Primary Court who appeared as PW3 testified to have given an order for the disposal of the seized meat while the names of three accused persons were already filled in the inventory form, for the sake of precision, parts of his testimony are reproduced herein under;

"On 17/02/2020 while at the office I remember an inventory form was brought by the Police Officer Wito and a Wildlife Officer. The inventory had three names thereon there was wildlife meat seized Eland meat which they needed an order to dispose of the meat. I was informed it had started to rot; hence, I endorsed an order for its disposal."

From the above testimony, from the outset, I am of the view that, the accused persons were not involved in the process of destroying the seized meat as even the witness testified that at the time the inventory form was brought to him and the same was presented to him with the names of the accused persons already filled therein. More so, PW3 never testified that, he made the disposal order in the presence of the appellants and that other person. Worse still PW3 testified that there were already

filled names of the accused persons but the Inventory Forma (PE8) does not exhibit or support such assertion as there are neither names of the accused persons in PE8 nor their signatures. I am also of the firm view that, with the growth of the use of modern technologies, the investigation is expected to have taken photos during disposal, if at all the appellants and another person, were incorporated in the destruction exercise of the alleged meat of Eland in order to form part of its evidence to rely upon in order to be in a safer side and therefore avoidance of unnecessary contentions which may raise doubts as the case here. In view of the above shortfalls the inventory form (PE8) is hereby expunged.

Before going to the 6th ground of appeal, I would wish to address ground number 7th, in this ground of appeal the appellants are alleging that, the trial court had no jurisdiction and certificate conferring power to entertain the matter. This ground of appeal is straight away meritless on the reason that, the records are very clear that consent and certificate conferring jurisdiction was issued on 4th August 2020 and the copies are duly attached in the case file and the trial court's record further reveals that the accused persons were duly arraigned on 24th August 2020 and they pleaded not guilty.

On the 6th ground, the appellants' complaint is on the cautioned statements which were all recorded by the same police officer (PW2). I have thoroughly read the proceedings of the trial court and the following are my observations, that D/CPL Wito testified to be not only the person who received information from his informer of the commission of the offence in question or one who involved in the arrest of the 1st and 2nd accused persons, but also the one who filled the certificate of seizure and the one who was assigned the duty by the CID i/c to investigate the case. In addition to that the one who took the caution statements of all accused persons.

In **Flano Alphonse Masalu & 4 others v. The Republic**, Criminal Appeal No. 240 of 2017 (Unreported), the Court of Appeal of Tanzania when faced with the same situation. In determining the issue as to whether the statement was unlawful on the ground that, the recording officer to whom it was made had conducted the investigation, the Appex Court of the land made reference to the case of **Shani Kapinga vs Republic**, Criminal Appeal No. 337 of 2007 (Unreported-CAT) where it was stated as follows;

"The Court deprecated the double roles played in the case by the recording officer, holding that the recording officer was not an impartial, objective witness and that it was a

fundamental irregularity that resulted into a miscarriage of justice to the appellant. The offending statement was ultimately discounted."

However, the court distinguished the above position with the decision in the case of **Tabu Nyanda @ Katwiga v. Republic**, Criminal Appeal No. 220 of 2004 (unreported), where the Court of Appeal stressed that there ought to be proof of prejudice against the appellant, it was held;

"...apart from the mere assertion by Mr. Magongo that PW1 in the trial within a trial having played both the role of an investigator, interrogator and recorder and interpreter of the statement (Exh. P3) was likely to be biased, it is not shown how the appellant was prejudiced. In the absence of evidence to this effect, it is a matter of conjecture that the appellant was prejudiced. In this case, it would be recalled that Mr. Magongo had no difficulty in conceding that the statement was voluntary."

Much as the police investigator is competent to record a cautioned statement of a suspect of a crime, see the decision in the case of **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported) but the circumstances of the case at hand are different and this court subscribes to the decision of **Shani Kapinga** (supra) that, the fact that PW2 received information from his informer, participated in the arrest of

the accused persons, investigated the case, interrogated the accused persons and then recorded the cautioned statements. In terms of principles of administration of criminal justice, PW2, cannot be said to have been impartial at the time of recording the statements of the accused persons as he was undoubtedly the facts of the case. Worse enough he also recorded cautioned statements of all accused persons. In the circumstances of the case aforementioned, I am of the increasingly view that, the appellants' contention before the trial court and this court raises serious doubts, the evidence of the cautioned statements is hereby discounted or discredited I am therefore constrained to discount the cautioned statements of the appellants which were admitted PE6 & PE7 as I hereby do.

Having discarded the appellants cautioned statements and in the absence of the evidence from an independent witness as well as valuation report, the prosecution side is thus left with insufficient evidence to support conviction.

For the foregoing reasons, I allow the appeal, consequently, the trial court's conviction is quashed and the sentence of twenty (20) years' imprisonment imposed to the appellants is set aside. The appellants are


to be immediately released from prison henceforth unless held therein for
other lawful cause

It is so ordered.



M. R. GWAE
JUDGE
28/09/2022

Court: Right of appeal fully explained



M. R. GWAE
JUDGE
28/09/2022