IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

CRIMINAL APPEAL NO. 06 OF 2022

(Originating from Economic case No. 29 of 2017) in the Resident Magistrate's Court of Arusha at Arusha)

IKONYO KASHUMA @ NOAH .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

03/08/2022 & 28/09/2022

KAMUZORA, J.

Ikonyo Kashuma @ Noah, the Appellant herein is challenging the conviction and sentence of 20 years imprisonment or payment of fine of Tshs. 330,000,000/= imposed on him by the Resident Magistrate's Court of Arusha at Arusha (the trial court). The Appellant stood charged for the offence of unlawful possession of government trophy contrary to section 86 (1), (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the 1st Schedule to and section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap

200 R.E 2002] as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

Briefly, the Appellant and another person were arrested on 16/06/2017 at Miti Mirefu area within Siha District in Kilimanjaro Region and charged for unlawfully possession of one elephant tusk equivalent to one killed elephant valued at USD 15,000/= equivalent to Tshs. 32,626,250/= the properties of Tanzanian Government without the permit from the Director of Wildlife. In his defence the Appellant denied to have been found in possession of the government trophy. The trial court was satisfied with the prosecution evidence and found the Appellant guilty, convicted and sentences him as above stated. Aggrieved, the Appellant is now challenging the conviction and sentence and he raised 6 grounds of appeal and 2 additional ground of appeal which are reproduced hereunder: -

1) That, the trial magistrate erred in convicting and sentencing the Appellant of the offence charged without considering that there was failure by the prosecution side to comply with s. 29(1) of the Economic and Organised Control Act (Cap 200 R.E 2019).

2) That, the conviction of the Appellant offends s. 21 (1) of the Economic and Organised Crime Control Act as the case was not investigated by a police officer and no police officer also testified in support of the accusation against the Appellant.

3) That, exhibit P4 (Handle over certificate from James Kugusa (PW2) to Gabriel Charles (PW3) improperly and unprocedural found its way in evidence as it was not read out after admission.

4) That, the Honorable Magistrate erred in law and fact in holding by not considering the contradiction between PW1 and PW4 on where the alleged trophies were found.

5) That, the trial Magistrate grossly misdirected herself for failure to evaluate and consider the Appellants defence before finding him guilty.

6) That, the charge against the Appellant was not proved beyond reasonable doubt.

The Appellant also with the leave of the court raised additional grounds of appeal as follows:

1) *That, the trial court erred in law and fact to convict the Appellant based on a defective charge as it failed to cite s. 113 (2) of the Wildlife Conservation Act No. 5 of 2009 in the statement of the offence.*
2) *That, the Honourable magistrate erred in law and fact for holding that the prosecution has proved the charge despite clear variation between the charge and the evidence on the value of the trophy allegedly seized.*

When the matter was called for hearing, the Appellant appeared in person with no any legal representation, while Riziki Mahanyu, learned

State Attorney appeared for the Respondent. The appeal was argued by way of written submissions.

The Appellant argued jointly the 1st and 6th grounds of appeal together with the 1st and 2nd additional ground of appeal. The basis of Appellant's argument is that the charge was defective hence could not support evidence against the Appellant for the case to be proved beyond reasonable doubt. The defects referred here are four;

From the above grounds the following can be drawn as important matters for determination; **one**, whether section 29 (1) of the EOCCA was offended by failure to refer section 113 (2) of the Wildlife Conservation Act in the charge sheet and its consequence, this cover for ground 1 of appeal and additional ground 1, **two**, whether the section 21 (1) of the EOCCA was offended, this covers for ground 2, **three**, whether there was variation of the value of the trophy in the charge sheet and prosecution evidence, this cover for ground additional ground 2, **four**, whether there was failure to comply with section 22 (3) (b) of the Economic and Organised Control Act Cap 200 R.E 2009 and this cover for ground 3, **five,** whether there was contradiction in prosecution evidence, this cover for ground 4, **six**, whether there was proper

evaluation of evidence and showing that the case proved beyond reasonable doubt, this cover for ground 5 and 6

Starting with the issue regarding **section 113(2) of the Wildlife Conservation Act No. 5 of 2009**, the Appellant argued that, the said section was not referred to in the statement of the offence thus contravening the law and making the charge to be defective. To him, since the charge states that the Appellant was arrested in Siha Kilimanjaro and was tried before the Resident Magistrates Court of Arusha then, it was expected for the charge to cite the provision of section 113(2) of Act No. 5 of 2009 so as to confer jurisdiction to the court to try the case. He was of the view that, failure to cite that provision rendered the trial nullity for want of jurisdiction. In support of his argument the Appellant cited the case of **Pirbaksh Ashraf and 10 others Vs. Republic**, Criminal Appeal No. 345 of 2017 CAT at Dodoma (Unreported), **Jumanne Leonard Nangana @ Azori Leonard Nagana and another Vs. Republic,** CAT 515 of 2019.

Responding to this issue the counsel for the Respondent argued that, non-citation of section 113(2) of Act No. 5 of 2009 is not defective as it did not prejudice any part to the case. Referring section 387 of the CPA she insisted that, the law is clear that no proceedings, sentence or

other proceedings in criminal court shall be set aside merely on the ground that the same was done in another region, district or local area unless, it appears that, that error occasioned a failure of justice. That, the fact that the Appellant was arrested at Kilimanjaro and prosecuted in Arusha did not occasion any failure of justice to the Appellant.

Reading through the charge sheet, it is clear that the offences to which the Appellant was charged are found under the provisions of section 86 (1), (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the 1st Schedule to and section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap 200 R.E 2002] as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. The said provisions are well captured in the charge sheet.

While I agree that section 113 (2) is the provision which confers jurisdiction to determine wildlife cases in any other district or region, it is not the requirement of the law that the section conferring jurisdiction must be cited in the charge sheet. The Criminal Procedure Act governing framing of charges. While Section 132 of the CPA requires offences to be specified in the charge with necessary particulars, Section 135 specifies the mode under which offences are to be charged. Under the

later section, several matters are mentioned as important to be considered and included while framing the charge and these include among others; a statement of the offence charged, the section of the law creating the offence and particulars of such offence. The section requires the provision of the law creating the offence to be mentioned in the charge and not the section conferring jurisdiction to the court. I thus agree with the Respondent's argument that non-citation of section 132 (2) did not in any way prejudice the Appellant as it is not a mandatory requirement. The said section 113(2) states that: -

> *"Notwithstanding the provisions of other written law, a court established for a District or area of Mainland Tanzania may try, convict and punish or acquit a person charged with an offence committed in any other District or area of Mainland Tanzania."*

The purpose of the above provision is to bring convenience by allowing offences charged under the Wildlife Conservation Act to be tried in any District court or resident magistrate court within the mainland Tanzania. Thus, the fact that the said provision of law was not mentioned in the charge sheet does not make the charge to be defective hence the ground falls short of merit.

It was also argued by the Appellant that, he was kept in custody for 20 days before being sent to court a fact which is contrary to section

32(1) of the Criminal Procedure Act Cap 20 R.E 2002, section 29(1) of the Economic and Organised Control Act Cap 200 R.E 2019 and Article 13(6) (e) of the Constitution of the United Republic of Tanzania. He also referred the case of **Meshaki Abel Ezekiel Vs Republic,** Criminal Appeal No 297 of 2013 CAT at Arusha (Unreported).

The Respondent argued that, under section 29(1) of the Economic and Organised Control Act, the law requires the accused to be sent to court not only after the arrest but after the completion of the investigation. She insisted that, the Appellant in this case was sent to court after the completion of the investigation.

I have revisited section 29(1) of the Economic and Organised Control Act and for easy of reference the same is reproduced here under: -

> *29.-(1) After a person is arrested,* ***or upon the completion of investigations*** *and the arrest of any person or persons, in respect of the commission of an economic offence, the person arrested shall as soon as practicable, and in any case within not more than forty-eight hours after his arrest, be taken before the District Court and the Resident Magistrate Court within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.*

The above provision does not limit the detention of the accused after arrest before being brought to court. It requires the accused to be sent to court as soon as practicable and if possible, within not more than forty-eight hours after his arrest. The Appellant did not state if by being detained more than 48 hours, he was prejudiced when the matter went to court for hearing. We expected the Appellant to state how the detention affected his trial before the court which could lead to unjust decision. Much as he was sent to court, charged, given chance to cross examine witnesses and defend his case, his long detention cannot invalidate the charges against him.

The second point is **whether the section 21 (1) of the EOCCA was offended**. It was raised as the ground of appeal that the case was not investigated by the police officer as required under section 21 (1) above. The counsel responded that subsection 2 of the same 21 of EOCCA allows investigation of economic cases by public officials. She was of the view that, the Wildlife officers who investigated the matter are public officials hence covered under the law. Reading the referred section 21 (1) and (2) of the EOCCA, I agree with the Respondent's argument that term "police officer" was defined to include any public officials in the discharge of functions. Thus, for purpose of investigating

economic cases, the wildlife officers are public officials covered under the Act.

On the third point on **the variation of the value of the trophy in the charge sheet and prosecution evidence**, it the Appellant's argument that, the value started in the charge is Tshs. 32,626,150/= while in the evidence at page 54 of the trial court proceedings reveals the value to be Tsh 33,626,250/=. That, the said variance could only be cured by amendment as per section 234(1) of the CPA but the same was not done thus makes the charge to be defective. To support his argument, he cited the case of **Killian Peter Vs. Republic,** Criminal Appeal No 508 of 2016 (Unreported). The Respondent termed this as minor variation which do not go to the root of the matter.

Looking into the records, I found that the charge sheet indicates the value of the trophy to be USD 15,000 equivalent to Tshs. 32,626,250/=. When PW3 Gabriel Charles was testifying he mentioned the value of the trophy as USD 15,000. He explained that by converting the USD currency to Tanzanian Shillings at the rate of 2241.75, the value was Tshs. 33,626,250/=. The Trophy valuation certificate Exhibit P5 indicate the value of the trophy to be USD 15,000. Thus, the difference was brought by the computation based on the exchange rate

of the currency. To me much as both evidence and the charge sheet mentioned the same USD, the difference obtained based on the exchange rape is minor and does not affect the prosecution evidence. I maintain that, the evidence still supports the charge on the value of the trophy hence the defect found in the rate used to compute the USD to Tanzanian Shillings become immaterial. That is why even the Appellant never bothered to cross examine on the same when he was given the chance for cross examination. I therefore find this point meritless.

On the fourth point it was argued that, there was **non-compliance to section 22 (3) (b) of the Economic and Organised Control Act Cap 200 R.E 2009.** The Appellant submitted that, exhibit P3 was obtained illegally because, after the alleged seizure of exhibits no any receipt was issued to the Appellant a fact which is in contravention of section 22 (3) (b) of the Economic and Organised Control Act Cap 200 R.E 2009. The Appellant cited the case of **Andrea Augstino @ Msinara and another Vs. Republic,** Criminal Appeal No 365 of 2018 CAT at Tanga (Unreported). This however was not among the grounds of appeal raised by the Appellant but was raised in cause of arguing that the charge was not proved. It was not even not an issue before the trial court. It was not raised during cross examination nor

during defence. Thus, raising the same at this stage is considered as an an afterthought.

Despite that, I opted to respond to that issue and started by looking into the provision of section 22 (3)(b) of the EOCCA. The provision reads: -

> *"22 (3) Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall-*
>
> > *(b) issue an official receipt evidencing such seizure and on which the value of the property as ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search."*

It clear that the law requires the issuance of a document evidencing the seizure and the same is to be signed by the person issuing it, the person searched or the owner of the premises searched and at least one independent person who witnessed the search. I visited the record and found that exhibit P3 is the elephant tusk allegedly found with the Appellant. The record also shows that a certificate of seizure was issued and signed by the Appellant showing that the elephant tusk was found in possession of the Appellant. The same is part of evidence

as it was admitted as exhibit P1. That being the case, it serves the purpose of the provision and I thus, find this point meritless.

The fifth point that there was **contradiction in the prosecution evidence** which the trial court could have considered as not proving the charge. The Appellant argued that, the evidence by PW1 and PW4 was contradictory because, the evidence by PW4 suggests that the Appellant was found with several elephant tusks while evidence by PW1 suggests that it was only one elephant tusks. Another contradiction is that, PW1 testified that the trophy was found in a small bag which was in a black coat, PW4 testified that the trophy was in a black bag which the Appellant carried hence contradictory. To buttress his submission, he cited the case of **Paul Jacob Vs. Republic,** Criminal Appeal No 213 of 2010.

The Respondent's counsel argued that, there is no any major contradiction as the said contradiction pointed out by the Appellant are minor and do not go to the root of the case. To cement on this the counsel cited the case of **Emmanue Lybonga Vs. Republic**, Criminal Appeal No 257 of 2019 (Unreported). She insisted that, the charge was proved beyond reasonable doubt as it was the duty of the Appellant

pursuant to section 85, 86 and 100 (3) of the Wildlife Conservation Act No 5 of 2009 to prove that he had in possession of the trophies legally.

I have revisited the evidence by PW1 and PW4 and find no merit in this ground. The reason for saying so is that, both PW1 and PW4 mentioned that they found the Appellant with government trophy. No one mentioned the number of trophies discovered thus it cannot be said that evidence of one witness was suggesting many trophies. They also both mentioned that the trophy was found with the Appellant except that PW1 mentioned that it was in a small bag which was kept in the black coat worn by the Appellant while PW4 testified that the Appellant was carrying the black bag with trophy on his back. That indifference does not invalidate the evidence as both witnesses testified to the effect that the elephant tusk was being carried by the Appellant.

The last point is whether there was proper evaluation of evidence and showing that the case proved beyond reasonable doubt. I agree with the Appellant's submission that, it is a mandatory requirement for the prosecution to prove its case beyond reasonable doubt. For the court to be satisfied that the case was proved in the required standards there is a need to clearly analyse relevant evidence in records.

It is the Appellant's argument that, there was no proper evaluation of evidence as his defence was not considered by the trial court in reaching its decision. He cited the case of **Hussein Idd and another V R** [1986] TLR 167 A, **Farida Abdul Ismail Vs. R,** Criminal Appeal No 83 of 2017 CAT at Arusha, **Alfeo Valentino V R**, Criminal Appeal No 92 of 2006 (Unreported), **Smith V United Republic** [1965] 1 ES 211 to support the argument on the consequence of not considering accused's defence.

The Respondent supported the argument that the judgment of the trial court did not consider the Appellant's defence. She also acknowledges the fact that, the accused's defence must be considered even if it is weak or it does not relate to the fact in issue. She however referred the case of **Athuman Musa V Republic**, Criminal Appeal No 4 of 2020 CAT at Kigoma and argued that, this court can step into the shoes of the trial court and evaluate the defence evidence.

While there is no dispute that the Appellant's defence was ignored by the trial court, the question is what is the consequence of it. I agree with the argument by the Learned state attorney that this court being the first appellate court can step into the shoes of the trial court and evaluate the evidence. The Court of Appeal siting at Dar es salaam in

Criminal Appeal No. 122 of 2020, **Abdallah Seif Vs. The Republic** being guide by its decision in **Director of Public Prosecutions Vs. Jaffari Mfaume Kawawa** [1981] TLR 149 decided to step into the shoes of the first appellate court and do what it omitted to do by evaluating the defence evidence that was not considered. In that case, the trial court did not consider the Appellant's defence as it should have done, neither did the first appellate court play its role as a first appellate court by evaluating the evidence on record afresh and arriving at its own conclusions thus, the Court of Appeal decided to take that role. Being guided by that spirit, I also decided to step into the shoes of the trial court by looking into the defence evidence.

In his defence, the Appellant claimed that he was arrested by six people on his way from the market going home. That, he was brought to Arusha and sent to the police station. He contended that, the rangers intentionally arrested him as their leader gave him work of taking the cow to them but they were not happy hence, framed him for the case.

To my evaluation, the above evidence does not in any way shake the prosecution evidence which shows how the Appellant was arrested and how the trophy was seized from him. In other words, the defence evidence does not raise any doubt to the prosecution case.

Another argument on the evaluation of evidence is that, exhibit P4, the handing over form was not read out after its admission. The Respondent's counsel concedes to the argument that the trial court received and admitted exhibit P4 but the same was not read out hence the counsel prays that the said exhibit be expunged from the record. She however argued that, even if the same is expunged there are still evidence to prove on the chain of custody from PW1, the arresting officer who after the arrest took the small bag to PW2, the store keeper whom upon receiving the same labelled it and on 19/06/2017 he handled it to PW3 to examine the value of the trophy and after the examination, the same was returned to PW2 for storage until it was tendered before the court by PW2. To buttress his submission the counsel cited the case of **Anania Clavery Betela Vs. the Republic**, Criminal Appeal No 355 of 2017.

While I agree with the prayer to expunge exhibit P4 from the records, my concern is whether the rest of the evidence can stand to prove the case against the Appellant. The evidence reveals that the Appellant while in a company of his fellow who was acquitted by the trial court were arrested by the wildlife officers. Upon conducting search to them, they found the Appellant carrying a bag with one elephant tusk

that was kept inside a black bag. The officers prepared a certificate of seizure that was signed by the maker of the document, the Appellant, his fellow and two more witnesses. They were sent to Arusha where they were interrogated. The elephant tusk was also identified by the expert and evaluated and valuation certificate is part of evidence. The evidence also reveal that the Appellant was arrested in the forest thus only game wardens were present and thus there could not be an issue of independent witness. The evidence of PW1, PW2 and PW3 are direct explaining all events from the time they received information to the time the Appellant was arrested. In my view the above evidence creates unbroken chain of event proving that the Appellant was arrested while in possession of government trophy.

This court is also aware of the principle that, in determining whether chain of custody is intact it is important to look into the existing circumstance if they form an assurance that there was no tempering of an exhibit at any given time. In the case of **Joseph Leonard Manyota Vs. Republic,** Criminal Appeal No. 485 of 2015 CAT (Unreported) 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 a case say, where the potential evidence is not in the danger of being destroyed or polluted and or in any way tempered with. Where the circumstance may reasonable show the absence of such danger, the court may safely receive such evidence despite the fact the chain of custody may have been broken, of course this may depend on the prevailing circumstance in every particular case."

After expunging exhibit P4 from the record, still it is the finding of this court that the remaining oral evidence of the witnesses in record is intact and valid and the said evidence clearly proves on the issue of chain of custody of the government trophy. I say so because, prosecution witnesses adduced evidence of movement of the trophy after being seized until when it was tendered in court. With their evidence, I did not find any possibility that the same might have been tempered with in any way.

To my conclusion, I am satisfied that the case against the Appellant was proved beyond reasonable doubt. In light of the case of **Saganda Saganda Kasanzu Vs. Republic,** Criminal Appeal No. 53 of 2019 CAT (Unreported) where it was held that the issue as to whether or not the case was proved beyond reasonable doubt depends on the totality of the evidence adduced before the trial court, it is my finding

that, the case was proved in the required standards. All what was raised by the Appellant as inconsistencies and doubts having been responded to, the evidence by the prosecution witnesses was water tight proving that the Appellant was found in unlawful possession of government trophy.

That being said, the appeal is devoid of merit and its hereby dismissed. The conviction and sentence imposed to the Appellant by the trial court are hereby upheld.

DATED at **ARUSHA,** this 28th day of September, 2022.

D.C. KAMUZORA

JUDGE