THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 70 OF 2022

(Originating from Economic Case No. 74 of 2019 in the Resident Magistrates Court of Arusha at Arusha)

JOSEPH KIHULA ....APPELLANT

VERSUS

THE D. P. P..... RESPONDENT

JUDGMENT

22rd August & 27th September, 2022

TIGANGA, J.

The appellant was aggrieved by the decision, conviction and sentence meted out by the Resident Magistrates Court of Arusha in Economic Case No. 74 of 2019. He therefore, decided to file this appeal challenging the said decision. In his petition of appeal, the appellant fronted five grounds which are reduced down hereunder as follows:

1. That the Trial Magistrate erred to convict the appellant basing on a defective charge which is at variance with the evidence given in respect of the place where the appellant was allegedly arrested committing the crime. This is fatal. (sic)

2. That the whole proceeding leading to the appellant's conviction is marred with grave procedural irregularities which led to an (sic) unwanted judgment and order of the Court.

3. That the trial magistrate erred in law and in fact in (sic) convicting the appellant basing on a trophy valuation report (Exhibit P1) which was unlawfully prepared by (sic) unauthorized person. Exhibit P1 was prepared by PW2 who presented himself as (sic) GAME WARDEN thus (sic) offends section 86(4) of the Wildlife Conservation Act. This is fatal. (sic)

4. That the Learned Magistrate erred in law and (sic) fact when she convicted and sentence(sic) the appellant by basing on exhibits tendered by PW2 George Mwanejo without asking herself where did PW2 get the exhibits from (sic) so as to (sic)tender them in court.

5. That the Honourable Magistrate erred in law and (sic) fact in believing that the appellant committed the charged offence and proceeded to convict despite the grave contradictions and inconsistencies between the evidence of PW1, PW2, PW3 and PW4;(sic) the same casting doubt on the prosecution case and on the guilt (sic)of the appellant.

However, at the hearing the appellant raised other three grounds of appeal to wit;

6. That, the trial court erred in law and in fact in holding that, the prosecution side proved their case beyond reasonable doubts.
7. That, the trial court erred in law and in fact by admitting exhibit P2 without considering the objection raised by the appellant on the irregularities involved with the destruction of the decaying trophy
8. That, the trial court erred in law and in fact in not considering the evidence given by the defence side and termed it from the beginning as a mere story.

The factual background of this appeal is summarized as follows: the appellant was charged with two counts. The first count was for unlawfully possession of government trophy contrary to Section 86(1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the 1st schedule to, and Sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, [Cap. 200 R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The second count was for unlawfully possession of weapons in certain circumstances contrary to section 103 of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the 1st schedule to, and Sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, [Cap. 200 R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars of the offence in respect of the first count are that, the appellant on 06th day of March, 2019 at Meroti Wild area within Siha District in Kilimanjaro Region was found in unlawful possession of Zebra meat with skin equivalent to one killed Zebra valued at USD 1200 equivalent to Tanzanian Shillings Two Million Seven Hundred Sixty Thousand (Tshs. 2,760,000/=) only, the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

Also, particulars of the second count read as; the appellant on 6th March, 2019 at Meroti Wild area within Siha District in Kilimanjaro Region, was found in unlawful possession of one (1) Machete, one (1) knife and one (1) snare in the circumstances which raised reasonable presumption that the appellant had intended to use them in commission of the offences under the Wildlife Conservation Act, No. 5 of 2009.

In order to prove their case before the trial court, the prosecution paraded four witnesses namely; Elidaima Akyoo (PW1), George Mwango (PW2), Antony Ntosi Peria (PW3) and James Kugusu (PW4) and exhibits (Evaluation Report-Exh P1, an Inventory-Exh P2, Seizure Certificate- Exh P3, handing over form- Exh P4, Animal Trapping Wire-Exh P5, and a Motorcycle- exh P6). The appellant fended himself.

After full trial, the trial court found the prosecution to have established the case beyond reasonable doubt, found the appellant guilty on both counts and convicted him accordingly. In the event, the appellant was sentenced to serve twenty years' imprisonment for the first count and to pay a fine at the tune of four million (4,000,000/=) Tanzanian shillings or in default serve three years in jail.

In this appeal, the appellant had the legal service of Mr. Deogratius Njau, Learned Advocate whereas the respondent Republic was represented by Ms. Akisa Mhando, Learned Senior State Attorney. The appeal was argued orally.

During hearing, grounds 2, 3 and 8 were abandoned by Mr. Mjau, only to remain with grounds; 1, 4, 5, 6 and 7 as the arguable ones. Also Mr. Mjau argued grounds 1, 5 and 6 jointly and together.

The learned Advocate argued this court to re-evaluate the evidence on record and also attentively consider the charge as being in variance with the evidence adduced. To fortify on the point, he cited the case of **Yusuph Aman versus The Republic**, Criminal Appeal No. 255 of 2014.

Furthermore, Mr. Njau depicted the alleged variances he considers fatal likely to vitiate the conviction and sentence of the trial court. He said, according to the facts of the first count in the charge, it appears that, the appellant was arrested with the Zebra Meat with skin while Exhibit P1, trophy evaluation certificate shows that, there was also the head of Zebra and so in exhibits P2 and P3. Mr. Njau went on submitting that, according to the evidence of PW2 and PW3 alleges that, the appellant was arrested with the Zebra meat with skin together with the head. To him the head of zebra was the most important component to be recorded in the evaluation certificate.

Mr. Mjau showed another variance of evidence and the charge to be the place at which the offence was committed. That, while the charge indicates that the appellant was arrested in Miroti reserve in Siha District in Kilimanjaro Region, PW2 at page 19 of the impugned typed proceedings said it was at NARCO Ranch where the informer directed

them and PW3 testified that it was their leader who told them that, there were people hunting at Niroti using Wire. And that, PW3 testified that, the appellant was found at Siha as per page 37 of the challenged proceedings. Mr. Njau said, the above contradictory evidence and more others just to mention a few raises doubt to the extent of finding the case to have not been proved beyond reasonable doubt.

To cement on such alleged un proved the case beyond reasonable doubt, he cited the case of **Kaimu Said versus The Republic**, Criminal appeal No. 391 of 2019 and **Paulo Magandi versus The Republic**, Criminal Appeal No. 244 of 2019 (Both unreported).

On ground 7, Mr. Mjau submitted that, the appellant did not participate in the destruction of the said trophies, he said, at page 16 of the impugned types proceedings the appellant raised objection of not being involved in the destruction of the said trophies and that PW1 when cross examined conceded to such fact. Because of that, the appellant's right to be head was violated. Also that, the appellant was supposed to sign to the inventory after the order signed by the magistrate. In that effect, Mr. Njau cited the cases of **Ngassa Tambi Versus The Republic,** Criminal Appeal no. 168 of 2019 whereby the Court of Appeal insisted on the need for the accused person to sign on

the inventory form. He also cited the Police General Order No. 229 paragraph 25 requiring the accused person to be present when disposal of exhibit is done.

Because of that, Mr. Njau prayed this Court to expunge exhibit P2 because it was procured illegally. That if exhibit P2 will be expunged from the record there remains nothing to warrant conviction to the appellant and thus, let him be acquitted and set free.

In rebuttal, Ms. Mhando agued that, they do not oppose the prayer that, the evidence should be re-evaluated as per section 366 of the Criminal Procedure Act, [Cap. 20 R.E 2022] which gives such power to this Court. But she argued that, at page 19 of the trial court judgment the appellant's defence was considered.

On the issue of variance of evidence and charge, she said, despite the fact that, the charge did not mention the head of Zebra, it was clearly stated in the evidence by the witnesses and the exhibit. Also, that, according to page 45 of the impugned proceedings the appellant understood the evidence and managed to defend himself, lastly that, the defect is curable under section 388 of the CPA.

On the differences of the place of arrest and commission of offence, Ms. Mhando contended that there is a typing error to the charge which talks about Niroti Siha whereas during preliminary hearing it was written Miroti and it is mentioned Miroti and Niroti which shows that it was a typing error. Also, that the appellant was supposed to cross examine the arresting officer. Failure to do so, does not mean that he was not arrested, she said.

Regarding the evidence of PW2 and PW3 on skin and head Ms. Mhando argued that, it is a style of writing of the trial magistrate. That, in the evidence of PW2, PW3 and exhibit P3 it is evident that, there was a skin of that animal. Ms. Mhando, SSA proceeded to dispute all alleged contradictions on the prosecution evidence and asked this court to consider the contention valueless and non-meritorious.

On the issue of the presence of the appellant during disposal of the alleged decomposing trophies, Ms Mhando conceded to be fatal and illegal. To support her contention, she cited the case of **Michael Gabriel versus The Republic**, Criminal Appeal No. 240 of 2019 CAT at Arusha (unreported) which discuss the PGO No. 229 paragraph 25 that the accused must be present at the disposal of the exhibit. Also, that there must be photo pictures taken to justify the said disposal. To her,

noncompliance of the said procedure vitiates the conviction and sentence. Therefore, she asked exhibit P2 to be expunged from the records and that, if the said exhibit is expunged, they will remain with no evidence to prove that the appellant was arrested with such trophies. Lastly, she argued this court under section 366 of the CPA to return the case to the trial court for retrial under section 388 of the said CPA.

In rejoinder Mr. Mjau thanked Ms. Mhando for conceding with the said irregularity of not involving the appellant at the time of disposing off the trophies. However, he declined the payer for remitting back the case for retrial because there will be no evidence to prove the case against the appellant.

After going through submissions of both sides, I think, the issue for determination is whether, this appeal is meritorious. In answering this issue, I will first consider ground 7 of the additional grounds of appeal. This ground was agued and conceded by Ms. Mhando as being strong enough to vitiate conviction and sentence. The only point of divergence between Mr. Njau and Ms. Mhado is on the finality of it. However, before venturing to the finality, I will deliberate on the proof and or disproof of the tantamount alleged irregularity.

In the cited case of **Michael Gabriel versus The Republic** (supra) the Court of Appeal of Tanzania on the same confrontational issue observed as:-

> *"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. That is in accordance with paragraph 25 of the Police General Order No. 229 which provides as follows:-*
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> > *"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."*

It is vividly proved that this procedure was not complied with. There was the mandatory requirement of involving the appellant during disposal of the exhibits. Failure to do so puts the inventory (Exhibit P2) at risk of being ineffectual and of no evidential value. In the resultant therefore, exhibit P2 is hereby expunged from the record due to the

above mentioned irregularity. That being so, there remains nothing in the record which could tightly be referred to uphold the conviction entered against and sentence meted to the appellant. This is because the inventory stands for the physical exhibit, the trophy for which the accused person stood charged and is the foundation of the whole case with the rest of the exhibits tendered herein depending on it, to gather strength of evidential value in law.

Before I pen down, I would like also to consider the ground of contradiction of evidence in the charge sheet and the evidence of prosecution. In both counts as per the charge sheet, it is alleged that, the appellant was found in possession of the trophies and weapons in certain circumstances at Meroti Wild area within Siha District in Kilimanjaro. George Mwango (PW2) at page 19 of the typed impugned proceeding testified that, on 06th March, 2019 while in patrol at west Kilimanjaro Siha with fellows Antony Peria, Naftal Gift and Jumanne they got information from the informer that there were people hunting at NARCO Ranch. The seizure certificate (Exhibit P4) indicates that, the appellant together with the said trophies were arrested at Meroti area on 6th March, 2019. PW3, Antony Ntorosi Peria at page 27 said, the appellant was arrested at Nirot area upon being set a trap to him.

This contradiction of the place between the prosecution witnesses and the charge is not a minor to be neglected. It goes to the root of the case to the extend of watering down the evidence of the prosecution nearly to make the case not to be found to have been proved beyond reasonable doubt.

In the same case of **Michael Gabriel versus The Republic (supra)** there was variance of evidence of PW1 and PW4 together with the charge in regard to where the offence was committed and where the appellant was arrested. The Court of Appeal held:

> *"In the particular circumstances of this case, it was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of omission was to water down the prosecution evidence. Where as a result of the variance between the charge and the evidence, it is necessary to amend the charge but such amendment was not made, the offence will remain unproved".*

Guided by that settled position of the law therefore, I also find that, the variance of the place at which the offence was committed ensued in the evidence and the charge, the offences charged with which the appellant was charged, stands unproved beyond reasonable doubts.

The deliberated and analysed grounds 1 and 7 which encompass the more remaining grounds in my view suffice to dispose this appeal in favour of the appellant.

Owing to that proved irregularity, I subscribe to the argument by Mr. Njau that, this in not a fit case to be remitted back to the trial court for retrial because the nitty gritty will be less or more the same. There shall be no evidential value which the prosecution shall rely upon to ground conviction of the appellant. I hold so because in the decision of **Rashid Kazimoto and Masudi Hamisi vrs The Republic**, Criminal Appeal No. 458 of 2016 CAT (unreported) in which the principle of retrial was formulated. This authority quoted with approval the authority in the case of **Sultan Mohamed Vs Republic,** Criminal Appeal No. 176 of 2003 (unreported) which also quoted with approval the decision in **Fatehali Manji vs The Republic** (1966) E.A 343 which stated that: -

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of in sufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it."*

Also see **Paschal Clement Braganza versus Republic** (1957) EA 152. From the above quoted authority, it is instructive that, retrial should be ordered if the following conditions exist: -

i) When the original trial was illegal or defective.

ii) Where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.

iii) Where the circumstances so demand

iv) Where the interest of Justice requires it"

In this case, the trophy has already been destroyed, it was so destroyed without involving the appellant, who was the accused person in the case before the trial court. Returning the case for re-trial will not change anything in the state of affairs. This is therefore not a fit case for retrial.

For the foregoing reasons therefore, I allow this appeal for being meritorious. Consequently, I hereby quash the appellant's conviction and set aside the sentence imposed on him by the trial court. The appellant should be released from prison forthwith unless legally held for any other cause.

It is accordingly ordered.

DATED at **ARUSHA**, this 27th day of September, 2022.

J. C. TIGANGA

JUDGE