

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL CASE NO. 14 OF 2022

(Originating from Tabora Resident Magistrate Court in

Economic Case No. 40/2019)

PASCHAL NZIBARA @ KAGOMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date:29/8/2022&2/9/2022

BAHATI SALEMA,J.:

The appellant herein, **PASCHAL NZIBARA @ KAGOMA** aggrieved by the decision of the Resident Magistrate's Court of Tabora where he was convicted for the offences of 1st Count: Unlawful possession of Government Trophy contrary to Section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act No. 5/2009 read together with paragraph 14 of the first schedule to and sections 57 (1) and 60 (2) of the Economic

and Organized Crime Control Act, Cap. 200 [R.E 2002] as amended by Act No. 3/2016, 2nd Count: Unlawful Possession of Firearm contrary to section 20 (1) and (2) of the Firearms and Ammunitions Control Act No. 2/2015 read together with Economic and Organized Crime Control Act, Cap. 200 [R.E 2002] as amended by Act No. 13/2016 and 3rd Count: Unlawful Possession of Ammunitions contrary to Section 21 (b) and 60 (1) of the Firearms and Ammunitions Control Act No. 2/2015 read together with paragraph 31 of the First Schedule to section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap.200 [R.E 2002] as amended by Act No. 3/2016.

The particulars of the offence as per the charge sheet were that on 18 June, 2019 during the evening hours at Kalubanzovu in Luganzo game control area within Kaliua District in Tabora region, the accused was unlawfully found in possession of government trophies, of which one eland tail and one hedge skin, all valued at TZS 4,140,000/=, also possession of one muzzleloader gun and possession of 221 pellets of muzzleloader gun, gun powder and 3 explosives without any permit. After a full trial, the trial court was convinced that the prosecution had proved the case and sentenced to serve a custodial sentence of twenty (20) years in jail for each count.

The appellant fronted five grounds of appeal with a view to faulting the decision of the trial court. The said grounds are reproduced hereunder;

1. *That, there was a break in the chain of custody of the items allegedly impounded from the appellant.*
2. *That, the learned trial magistrate did not consider the material discrepancy between PW1 on the one hand and PW2 and PW3 on the other as regards whether the appellant was found in possession of the errand tail and hedgehog skin whose material discrepancy goes to the root of possession and corrodes their credibility.*
3. *That, without prejudice to ground 2 of the complaint above, there was no trophy valuation certificate to cement the allegation that the appellant was found in possession of errand tail and hedgehog skin and established their values.*
4. *That, the defence of the appellant was never considered on its merit, rather the learned trial magistrate erred in law to capitalize on its weakness.*
5. *That, the appellant hereby takes issue with the propriety of the sentence meted in the minds of the fact that the appellant was charged under multiple enactments which, each provides for a different magnitude sentence.*

On the above-listed grounds, the appellant prays this court to allow the appeal and quash the conviction and sentence meted against him. He further prays for immediate release from custody.

At the hearing of this appeal, the appellant appeared in person, whereas the Republic was represented by Ms. Alice Thomas, learned State Attorney.

Upon being given a chance by the court to give her submission first, Ms. Alice Thomas, State Attorney, supported the appellant's grounds of appeal. She stated that the counts for unlawful possession of a government trophy, unlawful possession of a firearm, and unlawful possession of ammunition were not proved beyond reasonable doubt. She submitted that it is a settled principle of law that when the exhibits are produced in court. The witness is supposed to clear them and identify them before being tendered in court and after being received, and also, a witness should explain if the tendered exhibits are actual.

She further stated that in this matter at hand, the exhibits tendered were a muzzle gun, gunpowder, animal tail, and certificate of seizure. However, PW1 and PW3, who tendered the exhibits, failed to explain both before and after tendering in court.

As to the certificate of seizure, it was not read before to show its contents.

She also stated that the chain of custody was not elaborated upon from the place and the witnesses were not called as witnesses. The ones who testified were those who arrested the accused. Following this sloppiness, the prosecution case was not proved beyond reasonable doubt.

In his rejoinder, the appellant had nothing to rejoin. He prayed to the court to set him free.

Having considered the evidence on record, the petition of appeal, the issue for consideration is whether the present appeal has merit.

The law provides that a prosecution case must be proved beyond reasonable doubt, to put it simply, is that the prosecution evidence must be so strong as to leave the criminal liability of an accused person. Such evidence must irresistibly point to the accused person and not any other as the one who committed the offence in **Yusuph Abdallah Ally v Republic, Criminal Appeal No. 300 of 2009, (Unreported)**.

As submitted by the State Attorney that the witness is supposed to clear them and identify them before tendered in court and after being received, a witness should also explain if the tendered exhibits are actual.

Having traversed the courts' records, I noted such irregularities outlined by Ms. Alice that before admission of the document must be cleared out by the witness. The court in *Robinson Mwanjisi & Others vs. Republic [2003] TLR 218* made it clear that admission of documentary evidence involves three stages of clearance, admission and of being read out. In that respect, with regard to the exhibit which was relied upon by the prosecution, since the last stage of reading out its contents was not complied with, I agree the same ought to be expunged from the record, as I hereby do.

Likewise, the issue of chain of custody. I fully subscribe to Ms. Alice Thomas that this was not also complied with. In the case of *Swahibu Ally Bakari vs. R.*, Criminal Appeal No. 309 of 2010 (unreported), while restating the importance of the integrity of the chain of custody to eliminate the possibility of the exhibits being tampered with; the Court cited its earlier observation about what a chain of custody is in the often quoted case of *Paulo Maduka and Others vs. R.*, Criminal Appeal No. 110 of 2007 (unreported) that

"... The chain of custody is required that from one person to another must be documented and that it be provable that nobody else could have accessed it."

Unfortunately, this principle in a criminal investigation was not observed as noted from the records as well as conceded by the Republic. The idea behind recording the chain of custody is stressed to establish that the alleged evidence is related to the alleged crime rather than, for instance, having planted fraudulently to make someone appear guilty.

In the upshot, I find the appeal to have merit, and therefore, I agree with the learned State Attorney that the prosecution did not prove the case against the appellant beyond reasonable doubt. In light of the foregoing, I allow this appeal, quash the conviction, and set aside the sentence imposed on the appellant. I order the appellant immediate release from prison unless he is being held for another lawful cause.

Order accordingly.



A. BAHATI SALEMA

JUDGE

2/09/2022



Date: 02/09/2022

Coram: Hon. G.P. Ngaje, Ag DR

Appellant: Present

Respondent: Absent

B/C Omari Mkongo, RMA

Court: The matter comes for judgment.

Court: Judgment delivered this 02/09/2022 in presence of the Appellant in absence of the respondent in the open court, via virtual court.



G.P. NGAEJE

Ag. DEPUTY REGISTRAR

02/09/2022

Court: Right of appeal fully explained.



G.P. NGAEJE

Ag. DEPUTY REGISTRAR

02/09/2022

