IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 82 OF 2021

(Arising from the District Court of Bariadi Economic case no 48 of 2020 Hon. M. M. Nyangusi)

SAID S/O MASUNGA @ LIMBU ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order - 21st Sept 2022
Date of judgment - 3rd Oct. 2022

NONGWA, J.

The appellant SAID S/O MASUNGA@ LIMBU had been charged, convicted and sentenced to twenty years term of imprisonment after being found guilty with one count of Unlawful Possession of Government Trophies; contrary to Section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 05 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2019].

In a nutshell, the substance of the prosecution case as obtained from the record is to the effect that, on 20th day of August, 2020 at Lukungu village, within Busega District in Simiyu Region, the appellant was alleged to have been found in possession of one dry tail of wildebeest equivalent to one wildebeest killed valued at USD 650 equivalent to Tshs. 1,508,650/= the property of Tanzania Government without a written permission of the Director of wildlife previously sought and obtained. It was the police officer while in their routine road patrol along Mwanza-Musoma Road, stopped Zakaria bus with registration no. T. 107 DEL and

upon searching in the bus they found the appellant with a sulphate bag and a wildebeest tail and other items like clothes and traditional medicines in it, the driver named Omary and a nearby passenger named Mashaka witnessed the search and seizure and took the appellant to Lamadi police station.

At the trial court, the prosecution paraded four prosecution witnesses the fourth being recalled while the defence side was the appellant himself. PW1 F.5814 CPC Timoth told the trial court that on 20/8/2020 he was on patrol along Mwanza - Musoma road, together with PC Simon and PC Thomas. They then stopped Zakaria bus with registration no. T. 107 DEL searched the bus and found the appellant with a sulphate bag and a wildebeest tail in it, the driver named Omary and a nearby passanger named Mashaka witnessed the search and seizure (exhibit P1) and took the appellant to Lamadi police station. PW2 PC Simon, added that they also found other items like clothes and traditional medicines. He tendered the tail as exhibit (exhibit P2). Joshua Jeremiah as PW3, Wildlife Officer, testified to have been called to Lamadi police station on 28/8/2020 to identify and evaluate the trophies that had been found. He said he recognized the same to be the wildebeest tail due to its long and hard hair distinct from that of a cow, of which was equal to one wildebeest killed valued at USD 650 which is equivalent to Tshs. 1,508650/= he tendered the evaluation form (exhibit P3). PW4 WP 11099 Flora stated to have recorded statement of the witness named Mashaka Magembe on 22/8/2020, who witnessed as independent witness when the appellant was being searched. PW4 also tendered the statement of the said independent witness. (Exhibit P4) PW4 also tendered the clothes and other traditional medicines as exhibit (exhibit P5).

On his defence, the appellant denied to have been found with the wildebeest tail.

Upon being aggrieved, the appellant lodged three grounds of appeal so as to rescue himself from the prison where he was to suffer 20 years term of imprisonment or to pay fine of Tshs. 500,000/= I wish to reproduce the grounds of appeal as read from his appeal as follows;

i. *'The trial magistrate erred in law and fact to pass a sentence without calling a driver of Zacharia bus to come before the court to testify the allegation*

ii. *The trial court erred in law and in fact for not considering my defence that I was arrested without a dry tail of wildebeest but it was a cow tail.*

iii. *The trial magistrate erred in law to hold conviction on humiliative charge which makes me difficult to defend.'*

The appellant prayed for the court to quash the conviction, sentence and orders of the trial court and he be set at liberty.

When the appeal was placed for hearing before me, the appellant appeared in person, unrepresented. The Learned State Attorney Mr. Enosh Kigoryo, represented the respondent Republic. When called upon to argue his appeal, the appellant, standing for himself did no more than to request for the adoption of the four grounds in the petition of appeal earlier filed. He thereafter opted to hear the response of the Republic.

At the very outset of his response, the learned state attorney, Mr. Enoshi Kigoryo maturely supported the appeal. His concession to the appeal was not nailed exactly on the four grounds of appeal but on the 4th ground only of which was disposing all other grounds, that the case was not proved to the standard required by the law hence it left the shadow of doubt. The learned State Attorney submitted that after going through, the chargesheet and the proceedings, the Republic is hesitant in

convincing Court that the offence was proved beyond reasonable doubt, as such he found wise and prudent to concede with the appeal.

The state Attorney's doubt was on exhibit P2 as to whether was real a wildebeest tail and whether is the same they found in possession of the appellant. The evidence of PW1 and PW2 shows at page 12, 14 and 15 of typed proceedings that they inspected the bus and suspected the appellant and took him out to search him and found him with the tail of wildebeest. PW1 alleges to have filled the seizure certificate, Exhibit P1 but he did not tender the alleged items, including the said wildebeest tail nor did he identify the same in Court.

Again, PW2 tendered the said tail alleged to be of wildebeest however, according to the evidence, there were other items that were found in that sulphate bag, however at page 25 of proceedings PW4 tendered other items that were found together with the alleged tail while PW4 was not involved in the arrest and seizure, came to tender them while they were not identified by PW1 or PW2 being the items that were seized from the appellant. This creates doubts as to whether all these items real were seized from the appellant.

The items, according to the evidence they passed through several hands of people, because even PW4 did not state as to where he got them, nowhere shows that she found the items with either PW1 or PW2, or she got the items from another officer who did not participate in arrest.

The State Attorney, argued further that Exhibit P1, Seizure certificate is doubtful due to the fact that there is no evidence to show that PW1 and PW2 had authority to search and seize or they were authorized by a Police Officer in charge, as per S. 38 (1) of CPA R.E 2019.

It is also not clear on the presence of an independent witness who witnessed the search and seizure than what is stated by PW1 and PW2 that there was an independent witness, none of them appeared to testify

before the court. That what has been done, at page 23 of the typed proceeding is for PW4 tendering statement of one person who is alleged to have been passer bye during seizure. The prosecutor prayed to tender statement of the alleged person under S. 34B of the evidence Act, the statement that was tendered by PW4 the investigator while explaining how she recorded the statement and the court accepted and admitted it as exhibit 'P4'. Mr. Kigoryo made it clear that it was not proper procedure, Section 34B has the procedure which is very clear, from (a) –(f) of S.34B of the Tanzania Evidence Act. He referred position in the case of **Elias Melami Kivuyo Vs R. Criminal Appeal No. 40 of 2014** Court of Appeal Arusha, at page 16-17 where the court reiterated that the conditions under paragraph (a) – (f) applies cumulatively, therefore, there was no independent witness during search, therefore from the alleged search no proof that the search items were obtained from the appellant. For clarity, section 34B.-(1) and (2) provides as follows;

'S.34B - (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written or electronic statement may only be admissible under this section-

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or

he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence: Provided that, the court shall determine the relevance of any objection;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.'

Having heard the submission by the learned state Attorney in supporting the Appeal and upon going through the proceedings of the trial court, I am in consensus with the State Attorney that a lot of doubts circlet the conviction and sentence meted on the appellant by the lower court.

Law of Evidence Act [Cap 6 RE 2019] under section 111 puts a burden of proof in criminal cases to be on the shoulder of the prosecution and so is the authority in the cases of **Mwita & Others Vs Republic [1977] LRT 54** as well as **Jonas Nzike Vs Republic [1992] T.L.R 213 HC (Katiti, J)** (as he then was). There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities. Moreover, in discharging such a burden the prosecution is duty bound to attest the two important elements as directed in the case of **Maliki George Ngendakumana Vs Republic, Criminal Appeal No. 353 OF 2014** (CAT) BUKOBA (unreported) which held inter alia that;

> *'...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it'*

Furthermore, section 114 (1) of the Evidence Act (supra) sets a standard of proof of these two elements to be beyond reasonable doubts. It is trite law that, an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence as such the evidence must be so convincing that no reasonable person would ever question the accused's guilt.

As shown in the case at, the appellant is alleged to have been searched by a police officer and found with a wildebeest tail, that he was searched and seized off the search items in presence of the witness who is alleged to be a passenger in the bus the appellant was in.

The procedure of tendering the statement was contrary to the law. PW4, who claimed to have recorded the statement of the said witness was recalled and tendered the statement without the prosecution side laying the foundation to invoke section 34B of the Evidence Act as to why and

where is the said witness, and the evidence in respect of his inability to appear before the court. If at all the prosecution would have followed the procedure as stipulated under section 34B (1) (2) (a)- (f), then the appellant could have been accorded time to read the statement, as the law requires that notice be issued to the other side when the prosecution wishes to tender statement of the witness who is unable to appear as per reasons stipulated in that section.

The prosecution evidence has left a lot to be desired so as to say the appellant actually was found in possession of the said Wildebeest tail, as such the case was not proved beyond reasonable doubt as required by the law.

Not only that, PW2 came to tender the wildebeest tail without stating as to how he came in possession of the same as stated by State Attorney the chain of custody of the alleged tail is unclear hence doubts as to whether the appellant was real found with the Wildebeest tail or cow tail. All these doubts benefit the defence side.

As regards to sentence that was meted on the appellant, I agree with Mr. Kigoryo, State Attorney who argued that the two grounds of the case not being proved beyond reasonable doubt, the sentence meted, on the appellant was illegal. That, there is no fine for the offence he was charged with if at all it could have been proved beyond reasonable doubt. In the case of **Chande Zuberi Ngayaga and another Vs Republic, Criminal Appeal No. 258 Of 2020 Court of Appeal** at Mtwara (unreported) the court held that;

> *'...In this case, as indicated above, the appellant was convicted of an economic offence. As such, no option of fine is allowable and that the imprisonment cannot be levied in default of payment of a fine. Given this position, we set aside the order issued by the trial court that each appellant should*

pay a fine of TZS 63,000,000.00 or in default, serve twenty years imprisonment term...'

In that case the appellants were jointly and severally charged with the offence of unlawful possession of government trophy contrary to section 86 (1), (2), (c), (iii) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) as amended by section 61 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and Section 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002] (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. It was alleged that on 20th January, 2018 at Makata Village within Liwale District in Lindi Region, the appellants were found in possession of government trophy to wit, one piece of elephant tusk valued at TZS. 31,500,000,00 the property of the United Republic of Tanzania without permit, after a full trial, they were both found guilty, convicted and each sentenced to pay a fine at the tune of TZS. 63,000,000.00 or to serve a term of twenty years in prison in default.

Likewise in the appeal at hand, the trial court upon convicting the appellant, sentenced him by imposing a fine of Tshs. 500,000/= or to a term of 20 years imprisonment in default to pay fine. This sentence was contrary to the law as no option of fine is allowable and that the imprisonment cannot be levied in default of payment of a fine where the charges are economic offences.

In the finality, and for all those reasons, I allow the appeal, the judgment of the trial court is hereby quashed the conviction and sentence is set aside, and order that the appellant be set free unless held for some other lawful cause.

THE HIGH COURT OF TANZANIA

V.M. Nongwa
Judge
3/10/2022