IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 46 OF 2022

(Originating from Arusha Resident magistrate Court pf Arusha Economic Case No. 19/2020)

RAMADHANI ABRAHAMAN @ KITINA.....1ST APPELLANT

MOHAMED HAMZA NTUKO.....2ND APPELLANT

NURUANA HUSSEIN @ MWAJUMA HUSSEIN @MWAKU.....3RD APPELLANT

SALUM JUMA @ GUMBERI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

20 September & 06 October 2022

KOMBA, J.

The Apepllants Ramadhani Abrahaman, Mohamed Hamza Ntuko, Nuruana Huseein And Salum Juma were charged with the offence of unlawful possession of Government trophy contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (then the WCA) 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] (the EOCCA) as amended by Sections 16(a) and 13(b) respectively of the Written Law Miscellaneous Amendment Act No.3 of 2016.

To appreciate the circumstances surrounding the appellant's arraignment and conviction, understanding the factual background of the case albeit in brief is important. On 13th July 2018 at Misohaa area within Ikungi District in Singida Region all accused persons jointly and together were found in possession of three (3) Leopard skins valued at equivalent to Tanzania Shillings Twenty-Three Million Nine Hundred and Eighty Thousand five Hundred (23,908,500) the Property of the Government of United Republic of Tanzania without a permit from the Director of wildlife.

Rajabu Nyoni (PW1) together with other two fellows informed the trial court that, they went to Singida on 13th July, 2018 near a forest at msohaa village and posed as customers for the Government Trophy. They meet Mohamed Hamza Ntuko (DW2) with other three people where, after a short introduction among themselves, they showed PW1 and his fellow a leopard skin and started to negotiate price and were arrested. One of the accused managed to run away whose name was revealed later to be Ramadhani Abrahman. PW1 said they filled certificate of seizure (Exh P1) which was signed by him, Solomon Jeremia and Zainab Rajabu as well accused persons. They went back to Arusha where they handed over the seized leopard skin (Exh P3) to store keeper, Elidaima Akyoo and filled in handing over form

(Exh P2). Furthermore, PW1 informed the court that it was the 3rd accused who volunteer to assist the arrest of one accused who runaway and that on 14th July 2018 they managed to arrest 1st accused.

Solomon Jeremiah (PW2) had the same story of going to Msohaa village as narrated by PW1 but he further told the trial court that he negotiated the price of Government trophy to the tune of Tsh 300,000 and then they arrested. Then the seized skin was evaluated by Evelyn Molel (PW3) and prepared the report which was tendered in court as (exhibit P5) together with those she tender exhibit (P4) and (P 6) being handing over forms before and after evaluation. Alidaima Akyoo (PW4) is a store keeper who received the skin (Exhibit P3) from PW1. Later on, on 15/7/2018 for the purpose of evaluation he said exhibit P3 was handled to PW3 and were returned through filling proper forms.

It was their defense that appellants did not commit such offense. They defended the case separately without representation. DW 1 informed the court that he was at *mnadani* and went to the nearest bar when he saw the motor vehicle, stopped him and the police officer arrested him on the ground that he wanted to cause an accident. He was taken to Arusha Police Central

without being informed of his accusation. He said all what is presented by prosecution is not true and prayed to be found not guilty.

DW2, Mohamed Hamza Ntuko, he said on 11/7/2018 he was at Bolisa village where he had grievances with fellow village man (Hassan Omary) where he was taken to village council latter on to ward tribunal and that the matter was ended in his favor. There after he was arrested and taken to unknown place which later, he knows to Engutoto police station where he was bitten and taken to a room, he was ordered to remove his clothes, he was tortured and given a document to sign, he has no option rather than to sign while connecting the torture with ongoing conflict with Hassan Omary. He said he was taken to central police with the document with offence which he did not commit. During cross examination he said he has never been to Ikungi village and the during his arrest he prayed that ten cell reader or any local leader to be called but the arresting officer refused.

DW3, Nuruana Hussein who defended herself informed the court that on 13/7/2018 she was at Singida from Katesh to collect stuff for business. She was at the guest house with other many people watching soccer, when the soccer came to an end few people remained and sudden, they start lamenting they have lost wallet. They suspected where she was slapped and

beaten so as to give back wallet which she was not in a possession. They decided to take her in a bajaj and later in a vehicle where she saw other 5 men and took her to Arusha. She said she is not a poacher the offence she is charged off was noticed when the charge was read out, she further prays the court to do justice as she did not commit the offence at hand.

Salum Juma Gambi, (DW4), the last defense witness informed the court that on 13/7/2018 was at home while William Godwin with another person visited him and sked DW4 to go with to ten cell le

ader so that he can pay his money. On the way he saw motor vehicle and he was asked to enter in, while on journey he asked to be dropped off where he was informed that he was the one they were after and they were taking him to the Police station. Upon inquiring, he was told that on 16/6/2018 he threatened William and he was taken long journey to police station. According to him was surprisingly to see charged with a woman and other men which he did not know them and prayed for the court to set him free for he has never committed any offence.

After a full trial, being satisfied that the evidence of the prosecution witnesses and the admitted exhibits sufficiently proved the offence charged

against the appellant, the trial court convicted and sentenced the appellants as charged. Aggrieved, the appellant filed an appeal to this Court with the following grounds;-

1. *That, the trial Court erred in law and fact by relying on the evidence of the prosecution which was not proved beyond reasonable doubts.*
2. *That, the trial court erred in law and fact by proceeding with the case, convict and sentence the Appellants without having jurisdiction to entertain the same contrary to the law.*
3. *That, the trial Court erred in law and fact by ignoring the evidence of the Appellants, and make a general decision that both the Appellants were carrying the sulphate bag while it was impossible to do the same.*
4. *That, the trial Court erred in law and fact by joined the 1st Accused to the offence of unlawful possession of the government trophy without any prove of his participation.*
5. *That, the whole process of conducting the case was full of irregularities and contrary to the law.*

These grounds were to be proved or otherwise by this court. During hearing of appeal, appellants were represented by Advocate Julius Lucumay while respondent was represented by Charles Kagirwa.

Mr. Lucumay informed the court that he will join ground number 1, 2, 3 and 4 and argue them together. He contended that Trial court had no tortional jurisdiction to entertain the matter and refer the court to the law regulates

economic crime which is the EOCCA that section 3 (1) established of the economic court. As appellants were arrest at Ikungi Singida and they were supposed to be arraigned in District Court or RM Court in Singida. More over Section 113 (2) of the WCA confer jurisdiction to any district Court in Tanzania mainland. He lamented why prosecutors provision to transfer appellants to Arusha while the word used is 'may try' that is, it is option but the issue is, who will decide 'may try'. He referred this court to the CAT Judgment **DPP V. Pirbaksh and 10 others CAT, Cr. Appeal No. 345 of 2017**. In the cited case respondents were from Chunya and were arraigned in Manyoni. Appellant was asked to explain whether the trial court had jurisdiction and the appellant explained that because section 113 (2) of WCA were not cited in statement of Offence in respect to several counts, then District Court had no jurisdiction. Mr Lucumay read the charge sheet and informed the court that the charge was defective as it did not mention Section 113 (2) which give the jurisdiction to Resident Magistrate Court. He refer this court to another case of **DPP V. Masunga Mhamali & another Misc. Cr. Appeal No. 2/2020 Shinyanga** Mdemu J. where the Court was of the question that;

"Does the quoted provision (section 113(2)) mean the precession may be at liberty to file charges in any party of the main land .... he ensured that, 'that was not the intension of legislature that every District court in mainland Tanzania be clothed with jurisdiction of Wildlife offences regardless of their territorial jurisdiction..... The word used in the section in my considered view, gave the prosecution discretion to prosecute a criminal of wildlife cases in any District Court where the suspect has been arrested in a different district and bringing him to the jurisdiction of the court where offence was committed. Had the parliament intended any district court as observed by state Attorney then it could have impose mandatory term, perhaps by suing the word 'shall'.

In this case prosecution join hands with Mdemu, J that Resident Magistrates lacks jurisdiction. Mr. Lucumay further refer this court to rule 4(1) of EOCCA Procedural Rules of 2016 where registries were established. He said, according to rules appellants before this court were supposed to be tried in Singida or Dodoma and not Arusha.

He directed his argument on the issue of search warrant at the time of arrest, that there was seizure receipt but there was no independent witness contrary to Section 38 (3) of CPA and Section 22 (3) (b) of the EOCCA. The certificate of seizure used was under Section 42 of CPA which is used when the arrest is emergence and it was his submission that the process contravenes relevant section of law and raise case of **Shabani Said Kindamba V. R.** Criminal Appeal No. 390 of 319 **CAT** where the court said 'since the general rule under CPA is that search of a suspect shall be authorized by a search warrant unless it falls under the exceptions provided under Section 42 of CPA'. The instant case does not fall under any exception. He narrated that before arrest, PW1 informed the court they had information about the appellant since 11/7/2018, that by the time that appellants were arrested on 13/07/2018, they had a time to prepare search warrant and independent witness(es). The counsel was indifference on the use of section 106(1) of WCA as the seme was meant to be used during emergency. He cements his argument by the case of **Mbaruku Hamis and 4 others V.R,** Criminal Appeal No. 141, 143 and 145 of 2016 where it cited **Selemani Abdala and Others V. Republic** Criminal Appeal No. 354 of 2008 and it was said; -

'We emphasized on the importance of issuance of receipt and signature of independent witness. We say the whole purpose of issuing receipt to the seized items and obtained signature of the witness is to make sure that the property seized come from no place other than the one showed therein....He said if the procedure was observed or followed the complains normally expressed by suspects that evidence arrived from such search is fabricated will to the great extent be minimized.'

He finalize this issue by saying issuance of receipt is important and for that reason they pray exhibit P3 be expunged from record as it was improperly procured. About independent witness the counsel said respondent did not have any reason to fail to have independent witness. Prosecution witnesses PW1 and PW2, were arresting officer, they produce certificate of seizure, they testify in court. There will be no justice and rises assumption that possibly the trophy was not with appellants.

Counsel for the appellants contended on the issue of chain custody and throw the burden of verifying compliance of the law to this court. In blending this issue, Mr Lucumay had a question to be addressed by this court as at what time PW1 get the exhibit P3 and make him tender in court.

While arguing in the consolidated first ground, counsel complained of defectiveness of the charge by inclusion of 1st appellant as he was not among the person arrested on the 1st day. How did prosecutor included 1st appellant in the list of accused now appellant without any evidence of him being in possession of Government trophy this is according to exhibits tendered in court and for the second time he requested this court to cross check exhibit P1,P2,P4,P5 and P6 if name of 1st appellant is featured therein especially exhibit P1. The counsel was inquisitive as to how they know that the one who run away on 13 July 2018 is a person whom they charge as a 1st accused now appellant. He had a question as to what unique features did they use to recognize him and he came to conclusion that, the fact that 1st appellant is included in charge sheet renders charge defective.

Last argument in his submission was that the whole process of conducting the case, he said it was full of irregularities and contrary to the law. Basing on section 32 (1) of CPA he said it is the legal requirement that when accused are arrest be brought before the court within 24 hours. From the court record they were arrested on 13/7/2018 and they were remanded up to 30/7/2018 when they were taken to court for the first time. It is 13 days spent without

being taken to court the trial court ought to know this irregularity which in contrary to section 29 (1) of the EOCCA which provides for only 48 hours. Mr. Charles Kagirwa, a State Attorney supports the conviction of appellants and address that no doubt that they were arrested in Ikungi Singida and Economic Case No .19 of 2018 was opened and convicted but disputing interpretation of the section 113 of WCA, and Section 29 (1) of the WCA while agreeing in that appellants (accused) has to send to the court of nearest but their enquiry is how do they affected by trial court jurisdiction. To him that this was not fatal relying on section 387of CPA to the effect that there is no revision of order or findings unless such error in fact occasioned a failure of justice. Appellants were arraigned in Arusha but this did not affect their right as they defended themselves. On the issue of receipt, seizure and independent witness State Attorney was in agreement Mr. Lucumay on the requirement of law but due to circumstance of this case, he said, it was not possible to get proper warrant due to emergence relying testament of PW1 and PW2 that it was night time when they communicate with informer it was too late for preparation to get proper search warrant and independent witness and explain how arrest was conducted in the bush.

Respondents relied on page 14 of the proceedings that appellants (accused) signed in the certificate without objecting it so certificate was proper while account for section 16 of CPA that if there in objection during admission of evidence the court shall not accept evidence unless a person is deciding its right or justice infringed. He was of the contradicting view and a question that if the court will discover that the process was in contravention of the law will the court be able to reject the search warrant. If the answer is in affirmative, he submitted that prosecution will rely on the testimony of PW1 in court to be enough to convict the appellants as it was in the case of **Simon Shauri Awaki @ Dawi V. R.** Criminal Appeal No 62 of 2020 CAT (Un reported) at Arusha at page 26 where the court observed that;

> *'Oral evidence can prove the case in the absence of documentary evidence provided that said oral evidence is credible and sufficient to prove the case concerted'.*

Generally, his submission State Attorney was admitting on irregulates and rest their case to oral evidence. He said **chain of custody** was instant while relying in testimony of PW1 during trial. That exhibits were taken to Arusha and handled over to store keeper (PW4) where then it was taken by PW1 and tendered to court as an exhibit P3 and refer this court to the case of

Paulo Maduka and 4 others Vs. R. Criminal Appeal No. 110 of 2007 Dodoma CAT (unreported) and affirmed that the chain of custody was intact and that there was no fabrication.

About the inclusion of 1st appellant in the charge, it was his submission that he was not present at the time they sign exhibits, and that, it was the 3rd appellant who directed PW1 and PW2 the place he was hiding and he was arrested. according to him, it's the stand of law that one who fail to cross examine agrees with the issue as it was in the case of **Nyerere Nyague V. R.** Criminal Appeal No. 67 of 2010 that if one fail to cross examine is stopped from asking the trial court to disbelieve what the witness said. 1st appellant did not sign but no appellant objected.

Concerning the issue of delay to accused/appellants to court, he conceded by asking whether there was any harm suffered by appellants, to him, he said, there wasn't as they had all rights, their right was not prejudice as they were given time to defend themselves. He further said committal was conducted to RM Arusha and appellant were convicted 5/10/2021 by the Resident Magistrate court, besides, all the time they were represented by Advocate who could address the court on issue like this if at all this happen.

His final submission was Republics proved their case beyond doubt that's why appellants were convicted and pray the appeal to be dismissed and retain conviction and sentence.

Having considered the evidence on record and the submission by the counsel for the appellants its high time now to analyze grounds of appeal. I will start with the first and second grounds of appeal which is about admissibility of some exhibits and their evidential value; and jurisdiction of the trial court. The reasons for starting with the said grounds will be divulged in the process.

On the first ground it is worthwhile to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2002], in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact does exists. See the case of **Nathaniel Alphonce Mapunda & Benjamini Alphonce Mapunda vs Republic** [2006] TLR 395. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except where any other law expressly provides otherwise. One of such exceptions is in section 100 (3) (a) of the WCA. The provisions of this section are very clear that, the accused person has the duty to prove that the possession of government trophy is lawful.

However, it is a settled principle that, when the burden proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. This was stated by the Court of Appeal of Tanzania in the case of **Said Hemed v. Republic, [1987] TLR 117**, thus:

> *"In criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."*

In the light of the principles underscored above, and considering the ingredients of offence under the charging section, it is the duty of the prosecution to prove beyond reasonable doubt that that trophy in question is the government trophy and it was the appellants found in possession of that government trophy.

In the instant appeal, search and seizure was done in contravening relevant provisions of law although respondents use the umbrella of emergency, there was no emergency as they had two days for preparation. This goes together with the absence of independent witness which is very important in the case at hand. Prosecutions were to keep proper record of Government trophy seized by keeping certificate signed by independent witness in line with section 38(3) of CPA. If these mandatory requirements would have been

complied with, of necessity, appellant and independent witness would have put their signature. About the chain of custody, this court has examined the manner in which the said exhibit was tendered and admitted by the trial court and confirmed the argument made by the Appellants. It was not appropriate for the exhibit to be tendered without maintaining the chain custody. The guiding principle was not observed, as a result there is no linkage between the skin seized from appellants and one tendered in court. I am aware of the development made by Court of Appeal in the **Chacha Jeremia Murimi & 3 Others V. Republic,** Criminal Appeal No. 551 of 2015 while citing the case of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (both unreported), Court stated;

> *". .. 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 the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite*

the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case.

The case at hand is has different circumstance that there are many animal skins in the store were the Exhibit P3 was store but again animal skin is everywhere and that if the chain of custody is maintained helps to establish that the alleged evidence (exhibits) is in fact related to the alleged crime. In this appeal I will subscribe to **Paul Madukas' case (supra)**. Reading from record there is no connection that P3 which was seized in Misohaa are the one which was tendered in court by PW1. There is no evidence that those skin are coming from store.

Having faulted the manner in which the exhibit P3 was tendered and admitted in court, I find that the said exhibit P3 could not be relied on by the court to prove the offence charged and must be expunged from the court records, as I did.

Second ground was about jurisdiction of the Trial court. It is no doubt that Appellants were charged and convicted at Resident Magistrate Court in

Arusha. Respondent relied on Section 113 (2) of Wildlife Conservation Act provides 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."*

This provision has been analyzed by different scholars and courts. Mdemu J, in the case of **DPP V Masunga (supra)** was of the view that if that was not the intension of legislature that every District court in Mainland Tanzania be clothed with jurisdiction of Wildlife offences regardless of their territorial jurisdiction..... Had the parliament intended any district court to have such jurisdiction could have impose mandatory term, perhaps by suing the word 'shall'. He concluded that Parliament did not intend so and refused to grand leave to DPP to appeal to higher court as among the grounds of appeal was one of jurisdiction of district court.

This position was rooted by Court of Appeal in **DPP V. Pirbaksh and 10 others (supra)** where it was decided that failure to cite s. 113(2) of the

WCA ousted the trial court jurisdiction to adjudicate on the said counts of the charge. At the instant appeal, Section 113(2) was not cited in particulars of offence in charge sheet and that was not disputed by Counsel of the respondent. He challenged its interpretation and directed this court to section 387of CPA. Apart from the fact that charge sheet is important document in evidencing the commission of an offence, in cases like one at hand, citing the section confers jurisdiction to allow the offence be tried to a particular court. Bearing in mind existence of this section 387 of CPA together with other provisions relating to charge sheet, as was held **DPP V. Pirbaksh (supra)** non citation of Section 113(2) of WCA ousted the trial court jurisdiction to adjudicate the offence hence the trial in respect of the only count in charge sheet was a nullity.

Wherefore, in the absence of exhibits P3 which was expunged by this court in the deliberations of the first ground above, there is no other evidence to establish the offence preferred against the Appellants. That said, I find no pressing need to deliberate on the remaining grounds raised by the Appellants.

I allow this appeal for the reasons given, I quash the conviction and set aside the sentence and orders of the trial court. The Appellants should be released

forthwith from prison unless they are otherwise lawfully held in connection to other matters.

It is so ordered.

Right of Appeal explained.

M. L. KOMBA

JUDGE

07/10/2022

Judgement Delivered on 07th October, 2022 in chamber before all appellants and respondent.

M. L. KOMBA

JUDGE

07/10/2022