IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 19 OF 2022

(C/f Economic Case No. 03 of 2019 District Court of Same at Same)

SAID KIHEDU IRIRA ..... 1ST APPELLANT

JOHNSON EZEKIEL NGWIJO ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

25th August & 12th October, 2022

JUDGEMENT

MWENEMPAZI, J.

Appellants Said Kihedu Irira & Johnson Ezekiel Ngwijo were arraigned before the District Court of Same at Same on three counts as follow:

1. Unlawful possession of Government trophies contrary to section 86(1) and 2(c) (ii) of the **Wildlife Conservation Act No. 5 of 2009** read together with paragraph 14(d) of the First Schedule and section 60(1) and (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 and as amended by section 57(1) of the **Economic and Organised Crime Control Act**, Cap 200 R.E. 2002.

2. Unlawful possession of weapon into the conserved area contrary to section 103 of the **Wildlife Conservation Act No. 5 of 2009** read together with read together with paragraph 14(b) of the First Schedule and section 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 and as amended by section 57(1) of the **Economic and Organised Crime Control Act**, Cap 200 R.E. 2002.
3. Unlawful entry to the National Park contrary to section 21 (1) (a) of the **National Parks Act** Cap 282 R.E. 2002.

According to the prosecution evidence, it was alleged that on 15th April, 2019, appellants were found at Nzara in Mkomazi National Park within Same District in Kilimanjaro Region possessing eighteen Dik Dik fresh skin valued at USD 4500 which is equivalent to TZS 10,350,000/= properties of the Government of United Republic of Tanzania. They were also allegedly found in possession of two bush knives (panga) and a knife for the commission of an offence therein. They denied all counts against them claiming that they were arrested near the park grazing their herds of cattle, forced to sign some documents, put under police custody for weeks and later taken to the court for these offences.

At the end of the trial the court was satisfied that the prosecution proved their case against both appellants to the required standard. They were thus convicted and sentenced to pay Tshs. 100,350,000/= or serve twenty years imprisonment for the 1st and 2nd counts and to pay Tshs. 10,000/= or serve

one year imprisonment for the 3rd count. The sentences were ordered to run concurrently. Aggrieved with the decision they have jointly filed this appeal advancing nine grounds as follows:

1. That, the trial magistrate erred in law and in fact in holding that the prosecution proved positively that the appellants were found in unlawful possession of government trophies despite there being no receipt under section 38 (3) of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E. 2019).

2. That, the trial magistrate erred in law and fact in relying upon exhibit P1, certificate of search and seizure which was unprocedurally admitted.

3. That, the trial magistrate erred in law and fact in failing to take into account the principles which have to be taken into account in respect of to the chain of custody and preservation of exhibits.

4. That, the trial magistrate erred in law and fact in relying upon unprocedurally acquired, tendered and admitted inventory form, exhibit P7, to hold that the alleged 18 Dik Dik skins really existed.

5. That, the trial magistrate erred in law and fact in convicting the appellants basing on exhibit P7, inventory form despite there being no pictures taken.

6. That, the trial magistrate erred in law and fact in failing to note that exhibit P9, Handing Over Form between PW4 and PW4 was not read aloud before the court after being admitted in evidence.

7. That, the trial magistrate erred in law and fact in convicting the appellants basing on weak, tenuous contradictory, inconsistent incredible and wholly unreliable prosecution evidence.

8. That, the trial magistrate erred in law and fact in failing to note that the strong, undisputed, unchallenged defence evidence given by the appellants raised doubt to the prosecution case.

9. That, the trial magistrate erred in law and fact in convicting and sentencing the appellants despite the charge not being proved beyond reasonable doubt.

Hearing of this appeal was by way of written submission, appellants appeared in person whereas the Respondent Republic appellants were represented by Ms. Mary Lucas, learned state attorney.

Appellants submitted that, the trial magistrate convicted and sentenced them by relying on exhibit P1, the certificate of seizure while the same was issued without following procedures. Also, no receipt was issued by the arresting and seizing officers as required under section 38 (8) of the Criminal Procedure Act. He referred the Court to the cases of **Seleman Abdallah and Others Vs. R**, Criminal Appeal No. 384 of 2008 and **Patrick Jeremiah Vs. R**, Criminal Appeal No. 34 of 2006 where the Court of Appeal emphasized that failure to comply to section 38 (3) of the Criminal Procedure Act is a fatal omission.

Still on exhibit P1, appellants submitted that, while PW1 was still identifying the exhibit, the trial magistrate went on and admit it despite there be no

prayers for tendering it. According to them, this violated the legal procedure of tendering and admitting exhibits.

It was appellants' further submission that, according to prosecution evidence, they were found in possession of fresh Dik Dik skin but the same was never tendered in court. What was tendered was exhibit P7, inventory form which was taken in their absence. That, they were allegedly taken to the magistrate who issued disposal order of the seized items on 16th April, 2019 which clearly demonstrate that they were not present during inventory taking. More so, there were no photographs of the said seized fresh Dik Dik skins pursuant to **Police General Order No. 229 (25)** which required protographs be taken in respect of perishable exhibits. They referred the Court to the case of **Mohamed Juma @ Mpakama Vs. R**, Criminal Appeal No. 385 of 2017 (unreported) where the same stance was emphasized.

Appellants further submitted that, exhibit P9, hand over note, was never read out aloud after being admitted into evidence as a result, they failed to grasp its contents hence did not thoroughly cross examine the relevant witnesses as well as advance their defence. They prayed the same be expunged from the records. On top of that, chronological chain of custody in respect of the said 18 skins of Dik Dik was not properly established from the day they were seized to the day they were disposed. In the circumstances, they argued that, the respondent failed to prove the case against them at the required standard as a result they prayed that this court finds merit in this appeal, quash the conviction and sentence and set them free.

Disputing the appeal Ms. Lucas challenged the appeal on the ground that, the conviction was rightly entered against the appellants after the trial court was satisfied that the case against them was proved to the required standard. She submitted that, although it is the duty of the prosecution to prove the offence beyond reasonable doubt but section 100 of The Wildlife Act shifts the burden to the person found with the possession of any animal trophy to prove if he possesses it lawfully. That, PW1 and PW2 testified on how they found the appellants within the National Park when they were doing patrol and that they were in possession of 18 fresh skin of Dik Dik. More so, the said witnesses showed how they handled the said trophies from the date of arrest and seizure to the day they were disposed of. This shows that the chain of custody was thoroughly established through proper documentation as provided under Police Order 229 Paragraph 25. That, this was done to remove mishandling of exhibits as laid out in the case of **Paul Maduka and Others Vs. Republic**, Criminal Appeal No. 110 of 2007.

As to lack of photographs, she argued that, there is no requirement of taking photographs in respect to perishable exhibits under the Police General Order No. 229 Paragraph 25. She finally submitted that, the case against the accused was proved to the required standard thus this appeal should be dismissed.

In rejoinder, appellants maintained their innocence that, this case was never proved beyond reasonable doubt against them. They prayed that this court allow the appeal and set them free.

Having gone through trial court's records and each parties' submissions while having in mind as a first appellate court I am duty bound to assess and reevaluate the evidence, the only question for determination is whether the case against the appellants was proved to the required standard to warrant their conviction. (See **D.R.Pandya (1957) EA 336** and **Iddi Dhaban Amasi Vs. Republic,** Criminal Appeal No 111 of 2006 (unreported)). Starting with the first and second grounds of appeal which are in respect of the certificate of seizure, exhibit P1. According to the appellants, the same was taken without following procedures contrary to section 38 (3) of the Criminal Procedure Act also it was not tendered in court.

It is noteworthy pointing out that, rationale behind controls on powers of search and seizure was well laid down by the Court of Appeal in the case of **Badiru Mussa Hanogi Vs. Republic,** Criminal Appeal No. 118 of 2020 (unreported) that;

> *"In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies, seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in people's private premises in fulfilling their undisclosed ill-motives."*

According to the appellants the same was ***first,*** admitted before being tendered into evidence and ***second***, no receipt was issued. Starting with

the first limb, I took the liberty of perusing the trial court's typed proceeding and on page 36 it is vivid that, prosecutor prayed to show PW1 the Certificate of search and seizure for identification but the trial magistrate admitted it into evidence before the same was tendered. For avoidance of doubt the proceeding went as follows;

> ***PP:*** *Your honor I pray to show my witness a certificate of search and seizure for him to identify.*
>
> ***Court:*** *Prayer granted*
>
> ***J.J. KAMALA - RM***
> ***23/2/2021***
>
> ***PW1 CONTINUES***
>
> *This is the document I filled on 15/04/2019, has my names KANAEL NKO, the accused person names are also here my fellow rangers also signed here. The seized 18 were dickdick (sic) animal skin, the weapons are also listed here.*
>
> *Advocate Isack: No objection.*
>
> ***Court****: Certificate of search and seizure is admitted as prosecution exhibit and marked.*
>
> ***J.J. KAMALA - RM***
> ***23/2/2021***
>
> *Court: Exhibit P1 read aloud.*
>
> ***J.J. KAMALA - RM***
> ***23/2/2021***

From the above quoted piece of proceeding, it is clear that the said Certificate of search and seizure was never tendered into evidence and it was not given an exhibit number. In the circumstances, it is safe to say it

was not properly cleared for admission. In the case of **Robinson Mwanjisi and Three others Vs. Republic**, [2003] T.L.R. 218 the court held that;

> "*Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out".*

On the second limb appellants claimed that no receipt was issued after search and seizure was conducted in respect of the said government trophies. I join hands with them as there was no receipt issued as there is no evidence on record proving the same. On top of that, since the appellants on their defence claimed that they were arrested out of the park grazing cattle, whether or not they were caught red-handed in possession of the alleged government trophies, would have been cleared with the presence of credible independent witness. Facing almost similar circumstances in the case of **Shabani Said Kindamba Vs. The Republic**, Criminal Appeal No. 390 of 2019 CAT at Mtwara (unreported) the Court held *inter-alia*;

> *"... We are inclined to take it as a logical that an independent witness to a search must be credible, or a whole exercise would be rendered suspect. In Malik Hassan Suleiman v. S.M.Z. [2005] T.L.R 236 while applying the Criminal Procedure Decree Cap 14 of Zanzibar, the Court held that a witness to a search must be a respectable person of that locality. That person's credibility is critical, in our view."*

In the appeal at hand, the Exhibit P1, the search and seizure certificate was witnessed by Medadi Andrea, Tumaini Laizer and Nyabirumo Marco who were all patrolling officers/wildlife rangers, thus there was no independent

witness as they had interest to the whole procedure. An Independent witness was important so as to verify what was seized was indeed what was found at the crime scene failure of which leaves a room for a reasonable doubt. In the light of the above, the Certificate of search and seizure is hereby expunged from the records. The question now is whether the remaining prosecution evidence can stand without it which takes me to other grounds as these two grounds have merit and are allowed.

On the third and sixth grounds, the appellants challenged the fact that there was no proper chain of custody established. It is a trite principle that, for an exhibit to be relied in court to ground conviction against an accused, its chain of custody from the time of its seizure to when it is tendered in Court as exhibit, has to be satisfactorily established. The rationale behind this is to eliminate the possibility of the exhibit to be tampered with and to establish that, the alleged evidence is related to none but the alleged crime in which it is being tendered. Chain of custody can be established by having a chronological documentation or paper trail as established in the case of **Paul Maduka Vs. R,** (supra) or by parading witnesses as fortified in the case of **Chalo Saidi Kimilu & Others Vs. R,** Criminal Appeal No. 11 of 2015, CAT Tanga (unreported).

In the present appeal it is clear that the chain of custody was established through both parading witness as well as paper trail documentation. PW1 and PW2 were the arresting and seizing officers who after arresting the appellants took them to Same Police Station. He handled everything to PW4, Cpl Richard, Exhibit keeper. On the following day he handled the exhibits to

Sgt Mohamed, an Investigation officers through a Handling Certificate admitted as Exhibit PE9. PW3 Prisca Sima, Game Officer identified the seized trophies, valued them and filled an Inventory which was admitted as PE8 while at the police premises under guidance of PW1 and the said Sgt Mohamed. The skins were later ordered to be disposed through a court order and the remaining were tendered in court as evidence. Although PE9 was never read out loud after its admission hence lacks its authenticity, I still find that the chain of custody was not broken at any point. These grounds have no merit and are disallowed.

As to the fourth and fifth grounds of appeal regarding the Inventory Form, exhibit PE7, it was appellants' assertion that the same were not taken by following right procedures as they were not involved. According to PW3, she was called by PW1 at Same Police Station for the purpose of identifying the seized trophies which she did. She filled the inventory as well as the evaluation form thereat, she did not disclose whether or not the appellant were present when she was filling the inventory. According to her testimony the only time the appellants were involved was during disposing the alleged seized trophies. That explains why their signatures lack in the inventory forms. Since the government trophies allegedly found with the appellants were perishables, **section 101 of the WCA** and **paragraph 25 of PGO No. 229** give direction on how to dispose perishable Government trophies by the Director and by police during their investigations respectively. The latter provision reads;

> *"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.*** *[Emphasis added]."*

Emphasizing on such procedure, the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama Vs. Republic,** (supra) Juma, C.J, held *inter alia*;

"... While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the Primary Court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by a primary court magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."

In the appeal at hand, according to PW3 the inventory form was filled at the police station thus it is clear that the appellants were not availed with right to be heard before the order of disposing the alleged trophies was issued. More so, no photographs were taken. Since exhibit P7 is a Police Document and the magistrate who gave the disposal order was not summoned in court, absence of a hearing proceeding as stated in the case above with at least a magistrate's name on record leaves a lot to be desired. All these create a doubt which benefits the appellants. To sum up, failure to comply with these

necessary requirements especially in these offences of unlawful possession when dealing with wild meat, makes it unsafe to convict the accused persons with the offences. This was similarly observed in **Mohamed Juma @ Mpakama Vs Republic** (supra) at page 18 that;

> *"With regard to the first count of unlawful possession of government trophies mentioned in the particulars of charge, we agree with the learned counsel that for the respondent Republic that "unlawful possession of Government trophy" which is a salient ingredient of this offence, was not proved, not at least because the Government trophies allegedly found in possession of the appellant's possession were not physically tendered as evidence and the appellant had no opportunity to object if he needed to."*

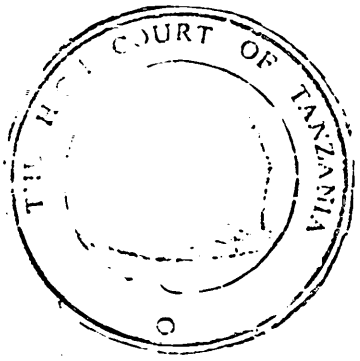
Thus, for an exception to the general rule (that trophies should physically be seen by a trial court) to apply, that is, reliance on an inventory, the relevant procedure for extracting an inventory should have been complied with. In the circumstances, exhibit PE7, the inventory, would not have been relied to prove the offence against the appellants as it was not properly procured.

Based on the above analysis and reasoning having in mind that the Certificate of search and seizure was expunged one cannot say for sure that the appellants were arrested with the alleged seized 18 fresh Dik Dik skins. With all other doubts as explained hereinabove, I find that, the case against the appellants was not proved at the required standard to warrant their conviction. Consequently, I hereby allow the appeal, conviction entered against the appellants is quashed and sentence is set aside. The appellants

are to be released from custody forthwith unless therein held for lawful cause.

It is so ordered.

Dated and delivered at Moshi this 12th day of October, 2022.



T.M. MWENEMPAZI

JUDGE

12/10/2022