IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO 44 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Economic Case No 26 of 2020)

THOMAS SYLVESTER AMAS ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

07/09/2022 & 16/11/2022

KAMUZORA, J.

The Appellant **Thomas Sylvester Amas,** was charged before the Resident Magistrates' Court of Arusha (the trial court) for the offence of unlawful possession of Ggovernment trophy contrary to section 86 (1), (2) (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) and (b) of the Written Laws (Miscellaneous Amendment) No. 2 Act No 4 of 2016 read together with Paragraph 14 of the 1st schedule to and sections 57 (1) and 60 (1) of the Economic and Organised Crimes Control Act [Cap 200 R.E 2002] as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. He was convicted and sentenced to pay a fine of TZS 39,100,000/= or serve 20 years imprisonment.

Brief facts of the matter are that, on 3rd day of March 2020 at Matindi area within Siha area in Kilimanjaro region the Appellant was found in unlawful possession of Government Trophy to wit, one Eland meat equivalent to one killed Eland valued at USD 1700 which is equivalent to TZS 3,910,000/=, property of Tanzanian Government without the permit from the Director of Wildlife.

In his defence the Appellant denied the charges stating that he was arrested because he had quarrels with the wildlife officers. The trial court was satisfied with the prosecution evidence and found the Appellant guilty, convicted and sentenced him as above stated. Aggrieved, the Appellant is now challenging both conviction and sentence on the following grounds:

1. *That, the trial Magistrate erred in law and fact in convicting the Appellant when actually the case against him had not been proved beyond reasonable doubt;*
2. *That, the trial Magistrate erred in law and fact in not giving the Appellant benefit of doubt against the contradictory testimony of the prosecution witnesses and yet some of it were pointed out by the trial magistrate at page 12 and 13 of the judgment;*
3. *That, the trial Magistrate erred in law and fact for failure to understand that important and material witnesses were not called to testify;*

4. *That, the trial Magistrate erred in law and fact by failing to understand that the seizure of Eland meat was conducted by unqualified person (PW2) who was not a police officer thus rendering the whole exercise null and void;*
5. *That, the trial Magistrate erred in law and fact for failure to understand that there was no search warrant to conduct search at the premises;*
6. *That, the trial Magistrate erred in law and fact for failure to understand that the authorised person (PW3) who certified it as eland meat was not present during its seizure but he had just found the same at the police station a day after, which raises doubt whether he certified the actual exhibit seized; and*
7. *That, the trial Magistrate erred in law and fact in not giving weight to the accused's defence which was very strong.*

When the matter was called on for hearing, the Appellant was represented by Mr. Kapimpiti Mgalula, learned advocate while Ms. Riziki Mahanyu, learned State Attorney appeared for the Respondent. The appeal was argued orally.

Submitting in support of the 1st ground of appeal, counsel for the Appellant argued that the trial magistrate erred in law and in fact in convicting the Appellant while the case was not proved beyond reasonable doubt. He contended that it is the requirement of the law under section 3(2) of the Tanzania Evidence Act Cap. 6 [R.E 2019] that a criminal charge must be proved beyond reasonable doubt. He pointed

out that there were several doubts in this case. The first doubt according to Mr. Mgalula is that there was non- compliance of the law in arrest and seizure of the alleged government trophy. That, the evidence by PW2 showed that they went to the house, but before they knew the owner of the house, they started to conduct search in the said house. To him, the search was in violation of the law which requires the owner of the house to be present before the search is conducted.

The second doubt pointed out is the number of people who witnessed the search. That, while at page 17, PW2 testified that four people witnessed the search, at page 19 when cross examined, he stated that they were six wildlife officers and 2 police officers meaning that they were 8 people. Again, exhibit P2 which is a certificate of seizure shows different number of witnesses as 3 witnesses were listed but 6 witnesses signed to be present. He added that PW5 mentioned four officers to have signed the certificate but he did not to remember the number of police officers who were there.

The third doubt pointed out is linked to the identification of the eland meat seized. Counsel for the Appellant contended that PW2 and PW4 who were at the crime scene identified the meat as it had skin on it. But PW3 who is an expert in trophy identification and evaluation,

when cross-examined he testified that the meat had no skin on it. Again, exhibit P2 which is a certificate of seizure indicates that the meat had skin and it was in one bucket but exhibit P1 which is handover report shows that what was handled were 4 kilograms of eland meat but did not state if it was skinned or not. Mr. Mgalula insisted that there was variance creating doubt, referring this Court to the case of **Thomas Kimaro @ Mngoni vs. Republic**, Criminal Appeal No. 45 of 2018 (unreported), at pg.7.

Arguing in support of the 2nd ground of appeal, the Appellant's counsel submitted that the trial magistrate discovered the contradictions but proceeded on giving decision while knowing that there were clear contradictions. That, the trial magistrate also acknowledged the inconsistencies in the certificate of seizure but did not discuss how it affected the Appellant. The learned counsel insisted that the inconsistencies were material because there was non- compliance of the law. Reference was made in the case of **Silvester Stephano Vs. the Republic**, Criminal Appeal No. 527 of 2016 (unreported), pg. 14 to reinforce his argument.

On the 3rd ground of appeal, it was submission by the counsel for the Appellant that material witnesses were not called to testify in court.

He was of the view that if search was conducted at the bar and PW2 claimed that there were people arrested at that area, those people were material witnesses in the search and seizure but, for unknown reasons they were not brought to testify in court. That, the police officer, Inspector Adili who was picked from Ngarenairobi police station to conduct arrest and search and the local street leader who witnessed the search and seizure did not testy in court. He added that most of the witnesses were wildlife officers defending their interests and no independent witness who proved the case.

On the 4th ground Appellant's counsel submitted that the seizure of eland meat was conducted by unqualified person (PW2) who was not a police officer. Referring exhibit P2 which is the certificate of seizure, the counsel stated that the form shows that PW2 was the one who conducted the search but it does not show if PW2 was a police officer who could supervise the search. Reference was made in the case of **Badilu Musa Hanogi Vs. Republic**, Criminal Appeal No. 118 of 2020 (unreported) pg. 10 and 11.

On the fifth ground, it was submission by Mr. Mgalula that there was no search warrant that was issued to authorise the search at the premise. That, the witnesses knew that it was not an emergency search

under section 42 of the CPA and when going to the scene they passed at the police station thus, they could have obtained the search warrant.

On the sixth ground, the Appellant's advocate submitted that as per the evidence of PW2 the accused was sent to Arusha police station and the exhibits were handled to CPL Evance through the handover certificate but, no evidence showing how PW3 obtained the said exhibits for identification and evaluation. Regarding the 7th ground, it was submission by the Appellant that the trial magistrate failed to accord weight to the Appellant's evidence which was very strong. That the Appellant explained the circumstances of his arrest but the same was not considered by the trial court. The Appellant's counsel prays for this court to allow the appeal and quash the conviction, set aside the sentence and acquit the Appellant.

Responding to the Appellant's counsel submission for the 1st ground the Respondent's counsel submitted that the search was conducted in the presence of the street chairman. Regarding the number of people who witnessed the search she submitted that they were mentioned in the certificate of seizure and one among them is PW5 who is an independent witness.

Responding to the issue of identification of the trophy, Ms. Riziki asserted that exhibit P1 was filled in by PW3 who is an expert in identifying the trophies. That, the difference between this witness and other witnesses is that, those other witnesses were not experts as they identified the meat through the skin but PW3 is an expert thus, he had no need to refer the skin criteria in identification of the meat. To her, failure to mention the skin in exhibit P1 did not affect the identification of the trophy. As for the 3rd ground of Appeal, Ms. Riziki submitted that the trial magistrate saw the contradiction and clarified them. That, she considered the contradiction to be minor not affecting the evidence of the prosecution side.

On the argument that material witnesses did not testify, the Respondent's counsel referred section 143 of the TEA and submitted that the law does not require specific number of witnesses to prove the case. She insisted that the prosecution side presented a total number of 5 witnesses including the arresting officer and independent witness therefore, those witnesses were able to prove the prosecution case.

On the fourth ground that the search was conducted by unqualified person, counsel for the Respondent submitted that the search was conducted by PW2 who is the wildlife ranger and he has

power to search under section 3 of the Wildlife Conservation Act. Responding to the issue that there was no search warrant when conducting search, the learned counsel submitted that search was conducted under section 106 of the Wildlife conservation Act and not section 38 of the Criminal Procedure Act. That, pursuant to Section 106 (1)(b) of the Wildlife Conservation Act, search can be conducted by any authorised officer who can even search without warrant. She insisted that search warrant was not necessary in this matter as an independent witness was also involved.

On the sixth ground that PW3 valuated of the trophy which he did not witness its seizure, the counsel for the Respondent submitted that after its seizure the trophy was handled to the exhibit keeper, PW1. That, PW3 collected the exhibit from PW1 for purposes of identification and valuation as indicated in the handover certificate thus, PW3 identified the exhibit that was seized from the Appellant.

On the last ground the Respondent's counsel submitted that it is not true that the trial magistrate did not consider the Appellant's defence. She referred page 10 and 12 of the trial court judgement insisting that the Appellant's defence was considered. She added that if this Court concludes that the trial magistrate did not evaluate defence

evidence, it was the Respondent's prayer for this Court to step into the shoes of the trial court and evaluate the defence evidence and give decision. The learned State Attorney referred this court in the case of **Athuman Musa Vs. Republic**, Criminal Appeal No. 4 of 2020 (unreported), at pg. 17.

In rejoinder submission the Appellant's counsel reiterated his submission in chief maintaining that the Appellant was not present during search, there was contradiction in evidence concerning the skin and meat and that, material witnesses were not paraded in court to testify. He insisted on his prayer to have the appeal allowed.

I have thoroughly gone through the grounds of appeal, the trial court records and the submissions by counsel for both parties. Since the first ground intends to assess if the case was proved beyond reasonable doubt, I undertake to discuss it after the rest of grounds. I will therefore start deliberating on the 2nd ground of appeal regarding the contradictions on the prosecution evidence.

It is clear from the trial court judgment that contradiction on the number of people who were present during search was pointed out by the trial court itself. It however made a conclusion that such contradiction did not contain major defect which goes to the root of the

case. The record shows that when he was cross examined PW2 specifically stated that they were 6 wildlife officers and 2 police officers. The certificate of seizure indicates a total number of 9 people who witnessed the search. In that exhibit, the name of PW5 referred as independent witness was also listed who in fact was not mentioned among the list of police officers and 6 wildlife officers who were mentioned by PW2. I therefore find the inconsistencies in the number of witnesses immaterial.

Regarding the inconsistencies on the evidence of PW2 and PW4 on the title of witnesses, it is my considered view that the fact that one witness mentioned that among the independent witnesses there was a ten-cell leader and another mentioned the street chairman, to me is not a material defect as it depends on whether the witnesses were knowledgeable of the title of the independent witnesses. This is also cleared by the evidence that the said leader whose name was confused was not the only independent witness at the crime scene. Other witness was mentioned and he appeared and testified as PW5. It is a settled position that where the evidence of witnesses contain inconsistencies or contradictions, duty is upon the court to address and resolve those contradictions and/or inconsistencies. In this respect, I find support in

the reported case of **Mohamed Said Matula Vs. Republic** [1995] TLR 3, where the Court held:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the Court* ***has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter"*** (Emphasis added)

I therefore agree with the Respondent's counsel that the contradiction on the number witnesses and title of independent witness were well resolved by the trial court. This ground is therefore devoid of merits.

Regarding the 3rd ground, it was argued that some of the material witnesses were not summoned to testify before the trial court. Those witnesses were referred as the street leader who witnessed the search, the police officer, Inspector Adili who participated in the arrest and search and the customers who were present at the bar. At the outset, it is a settled principle of law that no particular number of witnesses is required to prove a particular fact, what matters is credibility of the

witness who appears to testify in court. Section 143 of the Evidence Act Cap 6 [R.E 2019] in clear terms provides:

> *"Subject to the provisions of any other written law,* ***no particular number of witnesses shall in any case be required for the proof of any fact.*** *"*(Emphasis added)

The Appellant was unable to explain the facts that were left unproved which needed those witnesses to appear and prove. There are witnesses who testified on the arrest and seizure of the exhibit undoubtedly, failure to call Inspector Adili to testify was not fatal. Similarly, there is independent witness who testified in court and who was present at the crime scene, thus I do not see anything fatal for not parading the other customers at the bar or the local leader to testify in court. I therefore find no merit in this ground.

I will determine the 4th and 5th grounds jointly as they are interrelated touching the search and seizure process. The Appellant's counsel argued on the fourth ground that the seizure of Eland meat was conducted by unqualified person (PW2) who was not a police officer thus rendering the whole exercise null and void. On the fifth ground it was argued that no search warrant was issued. It was argued by the counsel for the Respondent that PW2 was the wildlife ranger who has

power to conduct search under section 3 of the Wildlife Conservation Act. Referring section 106(1) (b) of the Wildlife Conservation Act No. 5 of 2009 she insisted that the law authorises any officer to conduct a search without search warrant. The said sections 106 (1)(b) reads: -

> *"106 (1) Without prejudice to any other law, where any **authorised officer** has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act he may-*
> *(a) N/A*
> *(b) enter and **search without warrant** any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession: Provided that, no dwelling house shall be entered into without a warrant except in the presence of at least **one independent witness**" [emphasis provided].*

From the above position of the law, any authorised officer who has reasonable grounds to believe that any person has committed or is about to commit an offence may conduct search without warrant. The question here is whether PW2 was an authorised officer within the meaning of the law who could conduct search and seizure of exhibits.

Section 3 of the Wildlife Conservation Act defines authorised officer to include; wildlife officer, wildlife warden, wildlife ranger or police officer, and other officers listed under paragraph **a** to **i** of that section.

The record shows that Ahmed Jacob Tarimo (PW2) is a wildlife ranger hence an authorised officer within the meaning of the law. Thus, PW2 had powers under section 106 of the Act to conduct search and seize exhibits in matters related to wildlife offences. The case of **Badilu Musa Hanogi Vs. Republic** cited by counsel for the Appellant is distinguishable to the present case because in that case the search was conducted by a police officer who seized the motorcycle but was unable to produce evidence to show that a written authority to conduct search was issued to him by the officer in charge of a police station or by the court as required under section 38 of the Criminal Procedure Act.

In the matter at hand, the search was conducted by authorised officer who is the wildlife ranger under the provision of section 106 of the Wildlife Conservation Act. The said provision mandates the authorised officer to conduct search without warrant thus, the argument that the seizure of Eland meat was conducted by unqualified person (PW2) who was not a police officer is baseless. Similarly, the argument that no search warrant was issued is baseless. PW2 being the authorised officer by searching the Appellant's bar without a warrant did not contravene the law.

On the 6th ground it was argued that PW3 gave valuation of the eland meat while he was not present during its seizure, casting doubt on whether he certified the actual exhibit seized. I find this ground baseless as the law does not require the valuer to be present during seizure for him to have authority to ascertain the value of the seized exhibit. If the doubt is on chain of custody, the evidence is clear on the handover of the exhibit before it was handed for valuation to the valuer. The evidence on record shows that after its seizure the trophy was handled to the exhibit keeper PW1 and PW3 collected the exhibit from PW1 for purpose of identification and valuation. This was well evidenced by the handover certificate thus, there is no doubt that PW3 identified the seized exhibit.

On the 7th ground, it was contended that defence evidence was not considered by the trial court in its decision. Reading the trial court's judgment, the trial magistrate pointed out briefly the defence evidence but did not evaluate its weight against the prosecution evidence. In those circumstances, I agree with the Appellant's ground of appeal that the defence evidence was not considered. Since this is the first appellate court, I undertake to step into the shoes of the trial court and re-evaluate the evidence while determining the 1st ground of appeal.

Turning to the 1st ground of appeal, this court is called upon to determine whether the case was proved beyond reasonable doubt. In doing so, I will assess the evidence of both the prosecution and the defence side and the inconsistencies pointed out by the counsel for the Appellant. From the record, PW2 and PW4 are wildlife rangers who went at the scene after they received information that there was wild animal meat being sold at Mataji B area. They were also accompanied by their fellows and they passed at Ngaranairobi police station where they picked Inspector Adili and headed to the scene. They conducted search in the presence of an independent witness, PW5 and were able to seize eland meat. They filled in the certificate of seizure that was signed by the officers present, independent witness as well as the Appellant himself.

In his defence, the Appellant categorically denied being arrested on the date of incident. He came with a different story that, on 15/02/2020 he was coming from the farm and was looking for petrol for his motorcycle. He decided to go to the bar and ordered a drink. One, Lomayan went there asking him about Dullar and Joseph Sylvester who are Appellant's relatives. He answered them but they were not satisfied thus, they continued bothering him. He decided to leave but they did hold his motorcycle and in defence the Appellant attacked one of them

with a machete which he had on his motorcycle and managed to leave. That he was arrested on 02/03/2020 and sent and sent to Ngasorai camp and on 03/03/2020 he was sent to the police station at Ngarenairobi. It was the Appellant's claim that his arrest was implicated as he had previously injured a person.

From the defence evidence the Appellant claimed that he was arrested on 02/03/2020 but the record shows that the Appellant was arrested at the crime scene 03/03/2020 and search was conducted as evidenced by the certificate of seizure showing the seized exhibit. The same was also signed by the Appellant and the independent witness PW5. The Appellant was sent to the police station together with the exhibit seized on the same date and the exhibit was handled to CPL Evance (PW1) through a handing over certificate (exhibit P1). In his testimony PW1 acknowledged to have received the said exhibit from PW2 and kept it in exhibit room before he handled the same to PW3 for valuation and identification. To me the Appellant's evidence did not in any way cast doubt on the prosecution evidence.

In considering the totality of evidence before the trial court and in light of the case of **Saganda Saganda Kasanzu Vs. Republic,** Criminal Appeal No. 53 of 2019 (unreported), I find that the offence

against the Appellant was proved beyond reasonable doubt. There is unbroken chain of events proving that the Appellant was arrested at his bar and was found in possession of Eland meat. Having addressed what was considered by the Appellant as inconsistencies and doubts, it is my settled view that the prosecution evidence was water tight proving that the Appellant was found in unlawful possession of government trophy.

That said, the appeal is devoid of merits and it is hereby dismissed in its entirety. The conviction and sentence imposed on the Appellant by the trial court are hereby upheld.

DATED at **ARUSHA**, this 16th day of November, 2022.

D.C. KAMUZORA

JUDGE;