IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 03 OF 2022

(Appeal from the Decision of the District Court of Morogoro at Morogoro before Hon. Hamduni-SRM dated on 28th June, 2021 in Economic Case No. 58 of 2019)

MGWENO MNYAGATO.....1ST APPELLANT

SAMSON NGALEMBULA.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 11/11/2022

Date of Judgment: 30/11/2022

MALATA, J.

The appellants herein Mgweno Mnyagato and Samson Ngalembula were arraigned before the District Court of Morogoro at Morogoro (the trial court) in Economic Case No. 58 of 2019 charged for unlawful possession of Government Trophies contrary to section 86(1), (2), (b) and (3) of the Wildlife Conservation Act, No.5 of 2009 [Cap. 283] as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 read together with paragraph 14 of the First Schedule and section 57(1) and (60) (2) of the Economic and Organized Crime Control Act, [Cap.200 R.E. 2002] as amended by (Written Laws Miscellaneous Amendments) Act No. 3 of 2016. The particulars of the offence against

the accused persons (appellants) were to the effect that; on 27th July, 2019 at Kihonda kwa Chambo area within Morogoro Municipality in Morogoro Region were found in possession of government trophies to wit; two leopards' skins worth 7000 USD equivalent to Tshs.16,103,290/= the property of the Government of United Republic of Tanzania without permit or license from the Director of Wildlife. The charge sheet also included one Bebedict Michael @Damas Mahungo who was the 3rd accused person but acquitted in the trial court.

To prove the case, the Republic paraded 8 witnesses who also tendered in court documentary exhibits. The appellants defended themselves and had no witness while the 3rd accused person was represented by Mr. Ignas Punge, learned advocate. After a full trial, the Senior Resident Magistrate believed that the prosecution proved the case against 1st and 2nd accused persons (1st and 2nd appellants herein) beyond reasonable doubt. On 28th June, 2021, the trial Magistrate having so satisfied, convicted the appellants and sentenced serve a term of twenty (20) years imprisonment.

Aggrieved thereof, the appellants preferred an appeal to this Court contesting for their innocence with ten grounds of appeal. The appellants' complain in ten grounds of appeal, can mainly be singled;

> *"That, the trial Senior Resident Magistrate erred in law and fact for convicting and sentencing the appellants based on the prosecution's weak evidence which did not prove the case beyond reasonable doubt".*

This case came for hearing on 11th November, 2022. At the hearing of the appeal, the appellants appeared in person, unrepresented whereas the Respondent (Republic) was represented by Mr. Edgar

Bantulaki, learned State Attorney. The appellants were invited by the court to elaborate the grounds of appeal, and they jointly prayed in this Court to adopt the grounds of appeal as part of their oral submissions. However, the appeal was not resisted by the Republic.

At the onset, the 1st appellant informed this Court that since the joint grounds of appeal have been accepted as oral submissions, he will leave the floor to the Respondent to respond first and revert back by rejoinder if the needs arise. The 2nd appellant twisted on the floor, submitted in general but briefly and consciencely that the trial court illegally convicted and sentenced them while the prosecution's evidence was weak and tainted with contradictions. He pointed out that, the three witnesses who testified in trial court as arresting officers on the material day, their evidences do not corroborate each other. He also submitted that, PW1 and PW6, testified that he arrested them (appellants) when they were on their normal daily patrol. PW2, testified that they arrested them after having organized a trap with their secret informer who assisted the arrester to meet with the appellants at the scene of the crime.

The appellants submitted on other contradictions of the prosecution's evidence was that, PW1 alleged that he used a motorcycle to arrive at the place where leopard skins were stored and then proceeded to the scene of the crime where they arrested the appellants. He submitted that PW1, PW2 and PW6 failed to mention a phone number used to trap. Also failed to point out who among between 1st and 2nd appellants communicated with. They further failed to point, who among the appellants was arrested with the leopard skins.

The appellants continued to submit that while Pw1, PW2 and PW6 alleges to be the arresting officer, at page 75 of the typed copy of proceedings, PW6 told the trial court that he doesn't remember who was found in possession with the leopard skins. At the same time PW1 and PW2 said that they arrested DW2 (2nd appellant) with the leopard skins. Also, PW6 testified that they arrested other exhibits which includes note book and mobile phone make Itel. The appellant submitted that neither PW6 nor tendered in court the said items as exhibits.

The appellant further challenged the prosecution case by submitting that, the two tendered leopard skins as exhibits had no register number from the officer in charge who were custodian of the exhibits. The evidence that was tendered in court was just a sulphate basket which was labeled outside and numbered as an exhibit and not the two leopard skins themselves. The appellant referred this court at page 70 of the typed copy of proceedings. The appellant submitted that such variances are material and proves that the evidences used to warrant conviction against them was unreliable and fatal incurably. The appellant submitted that the trial Resident Magistrate relied heavily on the evidences adduced by PW1, PW2 and PW6 to ground her conviction and sentence while the same was full of weakness. The appellant strongly submitted that had the trial court considered their defence and take into considerations the discrepancies of the prosecution's evidence could have found them not guilty.

Finally, the appellants prayed this Court to evaluate the evidence on records and acquit them for weak evidence which failed to prove case beyond reasonable doubt.

On the other hand, Mr. Edgar Bantulaki, learned State Attoney for the respondent-Republic supported the appellants' appeal against conviction and sentence. Supporting the appeal Mr. Bantulaki conceded that as correctly submitted by the 2nd appellant, the prosecution failed to prove its case beyond reasonable doubt. Mr. Bantulaki supported the appeal premising his reasons on; ***first,*** he submitted that PW1, PW2 and PW6 arrested the appellant on 27th July, 2019 with the sulphate basket and invited PW7 to search what was in. It was found to have two leopard skins and PW6 handled that exhibit to PW5 for storage. Mr. Bantulaki argued that at the time PW6 was handling PW5 a sulphate (exhibit-P1) the two leopards' skins were not marked or labeled; rather as PW5 testified, the mark only put on the sulphate basket, as Exhibit ER 357/2019. He continued to submit that as per the trial court records, on 29th July, 2019, exhibit P1 was handled over by Pw5 to Pw4 who identified exhibit P1 as two leopard skins. Therefore, Mr. Bantulaki submitted that, it is the Respondent's submission that chain of custody of exhibit P1 has doubt from the date of seizure to the date of identification by Pw4. He concluded that the absence of a clear mark on the leopard skins as exhibit P1 disconnects the chain of custody and identification by Pw7 of the said leopard skins.

Second, Mr. Bantulaki submitted that PW5 did not testify in court that, he sealed the sulphate after being marked for avoidance possibilities for being tempered with before being identified by PW4.

Third, the learned state Attorney submitted that, PW1, PW2, PW6 and PW7 testified that they identified exhibit P1 based on colour and it had a hole. Mr. Bantulaki challenged that this was not enough evidence because all leopard has similar unique features of skin colour, therefore

there was a need on the part of the prosecution to have a peculiar feature that could differentiate from other leopard skins. Commenting on the certificate of seizure, Exhibit P2; Mr. Bantulaki submitted that the certificate indicates other things like note book and mobile phone make Itel as submitted by the appellant and submitted that the hole is note mentioned in exhibit P2. He cited the case of **Robison Mwanjisi and 3 Others Vs. Republic [2003] TLR 218** where the court held that "document must speak by itself". He submitted that exhibit P2 negates the evidence adduced by PW1, PW2, PW3, PW6 and PW7 and the trial court should have been taken seriously the evidence on record, it would have drawn an adverse inference against the respondent as to why did they failed to bring in court the handset and number used to communicate with the appellants to link the commission of the offence.

Fourth, Mr. Bantulaki submitted that according to the evidence by PW6 who was a Police Officer after receiving the information from PW1 and PW2 accompanied them to arrest. He argued that PW6 together with other officers participated in arresting the appellants were conduct search in compliance with **section 38 (1) of the Criminal Procedure Code [Cap. 20 R. E. 2022].** It was the respondent's learned state attorney submission that since there was no search order issued as per the requirement of the law, the whole process is defeated and become illegal. Mr. Bantulaki cited also the case of **Shaban Kandamba Vs. Republic**; *Criminal Appeal No. 390 of 2019 CAT at Mtwara Unreported]* Conclusively, Mr. Bantulaki submitted that the evidence on record do not suffice to warrant the conviction against the appellants. He thus; prayed for this appeal be allowed, set aside the conviction and sentence imposed by the trial court. By way of rejoinder, the appellants had none.

From the above submissions advanced by both parties this court has gathered two areas of contentious; ***one*** is based on the contradictions and inconsistences of the prosecution's evidences and the ***two,*** is on identity, validity and chain of custody of the two leopard skins, exhibit P1. There are two issues, whether the prosecution side successfully proved the offence against the appellants beyond reasonable doubt and if the answer in issue is affirmative, then whether this appeal has merits?

This being the first appellate court, the appellants moved this court to re-evaluate the evidence and arrival on its own conclusions as decided in **Juma Kilimo Vs. Republic,** *Criminal Appeal No. 70 of 2012 [CAT-Unreported]*

The appellants have challenged the conviction and sentence of the trial court and the respondent through Mr. Edgar Bantulaki, state attorney supported the appeal. I have gone through the complained illegalities and errors of the trial court that were pointed by the appellants and Mr. Edgar Bantulaki.

This court has examined and scrutinized the evidence on record and noted that, PW1, PW2 and PW6 testified to have arrested the appellants on the 27th July, 2019 at Kihonda kwa Chambo areas and found them in possessions with Government Trophies the two leopard skins. While PW1 and PW6 testified that they arrested the appellants when they were on daily routine patrol. on the other hand, PW2 testified that the appellants were arrested following receipt of information from a secret informer and arranged a trap pretending to be a client (purchaser) of the said trophies. Therefore, the story by the PW1, PW2 and PW6 who together participated in arrest do contradict. This court is

placed in doubt as to their reliability bearing in mind that, these witnesses were all together. It is in my opinion that, observed contradiction is fatal as touches the fundamental matters which prosecution was to prove without any shadow of doubt.

The existence of contradictions and inconsistencies in the evidence of a PW1, PW2 and PW6 is a basis for a finding of lack of credibility.

The existence of contradictions and inconsistencies in the evidence has been resolved by the court of appeal that, it is fatal to the case. This court is guided by the principles on the same propounded in the case of **Mohamed Said Matula v. Republic [1995] TLR 3** where, the Court of Appeal held that;

> *"Where the testimony by witness 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 m atter."*

On the issue of chain of custody, Mr. Bantulaki submitted that the chain of custody in handling exhibit P1 was not maintained by the prosecution side. He pointed out that PW1, PW2 and PW6 arrested the appellants on 27th July, 2019 with the sulphate basket and invited PW7 to search what was in. PW7 found the two leopard skins. PW6 handled that exhibit to PW5 for storage. Mr. Bantulaki argues that at the time PW6 was handling to PW5 a sulphate (exhibit-P1) the sulphate bag, there were no mark or labels of the said skin rather PW5 put a mark on the sulphate bag as Exhibit ER 357/2019. On 29th July, 2019, exhibit P1 was handled over by PW5 to Pw4 who identified exhibit P1 as two

leopard skins. Basically, what was marked is the sulphate bag and not leopard skins. As such, the skins had no mark but the basket. It is therefore not clear if what was seizure is the skins or basket. This is fatal in my view as also commented by Mr.Bantulaki. Exhibit P1 in fact is the sulphate bag and not the two leopard skins. The handling of exhibit P1 from one officer to another was not documented and that the two leopard skins had never have mark of any kind. This is a fatal irregularity which goes to the root of the prosecution side.

To arrive to decision of the same this court was guided by numerous court of appeal decisions referred hereunder. In the case of **Zainabu Nassoro @Zena Vs. Republic**, ***Criminal Appeal No. 348 of 2015 [CAT-at Arusha Unreported]*** where it was held that at page 14;

> *"There are considerable number of weight of precedents of the Court which are settled on the proposition that as to custody of the evidence of exhibits move from one chain of custody to the next, the exhibits concerned must not only be properly handled, but each such stage of custody through which the exhibits pass, must be documented till they are tendered in courts.*

The court of Appeal in Zainabu also quoted "**A Handbook for The Police Officers, 2010** (hereinafter referred to as "the Police Handbook") which contains similar provisions on chain of custody of exhibits by the police under the PGO Order (40) of the Police General Orders that directs documentation of chain of custody:

> ***"Whenever an exhibit is passed away from the custody of one officer to that of another, the officer who hands***

over the exhibit must record in the presence of the later officer the name, rank and number of the officer to whom he hands over the exhibit and the date and time of the handling over on the back of exhibit label." [Emphasis added]

In the case of **Paulo Maduka and Others *Vs.* R.,** *Criminal Appeal No. 110 of 2007 (Unreported),* Court of appeal had these to say;

"The chronological documentation and/or paper trail, showing the size, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chains of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it." [Emphasis added].

Going with the above passion of the law this court ventured on page 16 -18 of the typed copy of proceedings of the trial court where PW1 testified in relation to the certificate of Seizure as follows;

"PW1; GODFREY MAGOMA,

a wildlife officer and Christian who swears and states as follows....

I filled certificate of seizure. I signed and the rest also signed including the 1st and 2nd accused persons. Many people gathered at the crime. I pray to tender exhibit.

***Court**: Since no objection, the certificate of seizure is admitted and marked as exhibit P1 collectively".*

This court also noted at **page 74-75** of the typed copy of proceedings of the trial court where PW6 testified in relation to the certificate of Seizure as follows;

"PW6, E5260 D/CPL RICHARD

***...** Thereafter I fill the certificate of Seizure and I fill it before the 1st and 2nd accused, Degratious independent witness and two wildlife officers.*

Prosecutor: *I pray my witness to identify the exhibit (certificate of seizure)*

***Court:** The witness identifies the certificate of seizure by his handwriting, his signature, force No and also the names of witnesses.*

***Prosecutor:** I pray my witness to identify the exhibits.*

***Court:** The witness identifies the green sulphate, two skins of leopard. One had a hole another skins had nails.*

***PW6:** I can identify the court exhibit register by my signature and the signature of D/CPL Kwilinus.*

Court: *The witness identified the entry 357 by his signature and signature of D/CPL Kwilinus*

That's all"

From the proceedings above I am satisfied beyond all shadows of doubt that there was no proper handling of the exhibits from the date of seizure to the date of production in court. The records also shows that PW1 and PW6 all produced a Certificate of seizure as evidence in Court. The question that rings the mind is how can this happen? Be it what it may, the exhibit P1 passed away from the custody of one officer to the other officer without being recorded in the in the presence of the later officer, no evidence was given during the trial that the names of the receiving officers were recorded, no rank were recorded to prove in court. Further, in certificate, there was no number of the officer to whom he handled over the exhibit and the date and time of the handling over on the back of exhibit label.

Nevertheless, this court's concern remains on how the chain of custody was handled and documented, from the time PW6, PW5 and PW7, how he sealed the same, before he transferred it the police. Was it stored and kept to the strong room in the RCO's Office? My concern is also how the suspected leopard skins left the strong room if I may to guess and handed over to PW6 who tendered it in court. In so far as I am concerned, it is here where the links in the chain of custody were broken irretrievably. Had the trial court evaluated the evidence on chain of custody, it could not have come to an unhesitating conclusion it did. In light of the doubt created by the broken chain of custody, we shall resolve the doubt in the appellants' favour.

This court finds the principles and procedures in handling exhibits and chain of custody and in particular to exhibit P1 was violated from the date of seizure to the date of production in court as exhibit. This was fatal and touched the root as narrated herein above.

Consequently, this court finds merits in the appellants' appeal and holds that offences against the appellants were not proven beyond sane of doubt as required by law. This court, therefore, is inclined with the appellants and hereby allow the appeal, set aside conviction and quashed sentence both imposed by the trial court. The appellants are henceforth set free unless otherwise lawfully held.

It is so ordered.

DATED at MOROGORO this 30th day of November, 2022.

G.P. MALATA

JUDGE

30/11/2022

Court: Judgement delivered at my Hand and Seal of this Court in Chambers this 30th day of November, 2022 in the presence of the appellants who appeared in person and Mr. Emmanuel Kahigi for the Respondent.

THE HIGH COURT OF TANZANIA

G.P. MALATA

JUDGE

30/11/2022