IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB- REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO 66 OF 2022

(Original Economic Case No. 09 of 2019 in the Resident Magistrates' Court of Arusha at Arusha)

OMARY AMIRI @ MKOMWA @ OMARI AMIRI @ MKOMWA

VERSUS

THE REPUBLIC

JUDGMENT

09/11/2022 & 15/12/2022

KAMUZORA. J,

The Appellant Omary Amiri Mkomwa was arraigned before the Resident Magistrates' Court of Arusha for two counts of unlawful possession of government trophy contrary to section 86 (1), (2)(c)(iii) if 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 section 57 (1) and 60 (2) of the Economic and Organised Crimes Control Act, Cap 200 [RE 2002], as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

The facts of the case albeit briefly is that, on 13/12/2018 at Kitwai area within Simanjiro District in Manyara Region, the accused was allegedly found in possession of warthog meat and lesser kudu meat which are government trophies without permit. The prosecution side presented three witnesses for their case and after analysing their evidence, the trial court was satisfied that the case was proved beyond reasonable doubt against the Appellant. The Appellant was convicted and sentenced to twenty years imprisonment for each count. The sentence was ordered to run concurrently. Aggrieved by the trial court's decision, the Appellant preferred this appeal raising 10 grounds of appeal and three more additional grounds.

In the course of arguing the appeal, the Appellant started with additional grounds of appeal and while submitting on the original grounds, he abandoned the first, third and sixth grounds of appeal and consolidated grounds 4, 7 and 8. Other grounds were argued separately. In reply to the Appellant's submission, Ms. Riziki Mahanyu, learned State Attorney supported the conviction and sentence passed against the Appellant.

From the trial court record, grounds of appeal and the parties' submissions the following are considered relevant issues for court's determination;

1. *Whether the trial court was seized with jurisdiction to try the case.*
2. *Whether there was non-compliance of the legal requirement during search and seizure of the exhibits.*
3. *Whether there was material difference between the charge sheet and the evidence.*
4. *Whether investigation procedures contravened the law.*
5. *Whether defence evidence was not considered.*
6. *Whether there was material contradiction in prosecution evidence.*
7. *Whether the offence of unlawful possession of government trophies was proved beyond reasonable doubt against the Appellant.*

The first ground on whether the trial court was seized with jurisdiction to try the case cover additional ground one in which the Appellant claimed that the lower court erred in fact and in law in convicting and sentencing him without considering that the court which heard the case had no jurisdiction to hear an economic case. Referring Section 26 (1) and Section 12 (3)(4) of the EOCCA the Appellant argued that there are no records showing that the court received the certificate and consent to deal with an economic case. He referred the case **Leonard Nagana Vs. Republic**, Criminal Appeal No. 515 of 2019, page 14 where the Court of Appeal nullified the proceedings and the decision for want of jurisdiction. He insisted that in this case, the court violated section 12 (3)(4) of the EOCCA and section 26 (1) of the EOCCA thus, the proceedings is a nullity and no evidence which could stand to convict him.

Responding to this ground, the learned State Attorney submitted that the consent and certificate were filed in court on 21/01/2019 thus, the court had jurisdiction to hear the case.

Going through the trial court record I discovered that the consent and certificate of the DPP were filed and are in court record. The charge sheet shows that it was accompanied by the DPP consent to prosecute the case that was signed on 21st January 2019. The record also shows that a certificate conferring jurisdiction to the Resident Magistrate Court to try the matter was filed in court on 20th May 2019. With this record, I agree with the leaned State Attorney that the trial court had jurisdiction to hear and determine the case. This ground is therefore baseless.

The second issue is whether there was non-compliance of the legal requirement during search and seizure of the exhibits. This covers the second additional ground where the Appellant claimed that the lower court erred in law and in fact in convicting and sentencing him without considering that section 38 (3) of the CPA was not complied with. The Appellant submitted that the said section requires the police officer arresting and searching the accused to issue a receipt after seizing exhibit from the accused. He pointed out that no receipt was tendered in this case showing that it was issued after the search was conducted. He was

of the view that failure to issue a receipt after arrest and search contravenes the law. He referred the case of **Andrea Agustino @ Msigara Vs the Republic**, Criminal Appeal No. 365 of 2018, page 23 which held that search warrant is not similar to the receipt.

The learned State Attorney submitted that failure to issue receipt does not mean that what was recorded in the search warrant was not found with the Appellant. She contended that failure to issue receipt is minor defect that does not affect the search and seizure certificate. She referred the case of **Jibril Okash Ahmed Vs. the Republic**, Criminal Appal No. 231 of 2017 page 40 where it was held that, failure to issue receipt does not affect what is recorded in the certificate of seizure.

Section 38 (3) of the CPA reads;

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

The above provision clearly requires issuance of receipt by officer seizing the exhibit. There is no dispute that no receipt was issued in this matter. The effect of non-issuance of the receipt was well discussed in

number of cases in which the Court of Appeal maintained that receipt is important where there is need to justify that certain properties were real received from the suspect. See, Consolidated Criminal Appeals No. 141, 143 & 145 of 2016 & 391 of 2018, **Mbaruku S/O Hamisi and 4 others Vs. Republic** where the Court of Appeal of Tanzania cited with approval its decision in **Selemani Abdallah and Others v. Republic**, Criminal Appeal No. 354 of 2008 where it was held;

> *"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized."*

The learned State Attorney referred the case of **Jibril Okash** to insist that such failure was just a minor defect and does not affect the certificate of seizure. I agree that failure to issue a receipt does not affect material contents of the certificate of seizure but only if the court is satisfied that the seizure of exhibits followed the legal procedures. The above referred case of **Jibril Okash** categorically distinguished the situation where the seizure is conducted under the the Drugs Control and Enforcement Act, No. 5 of 2015 (DCEA) as opposed to the seizure conducted under section 38 of the CPA.

In my view, in some cases, receipt serve different purpose from certificate of seizure and some circumstances it will be necessary that the two run parrel to justify the seizure of exhibits. For instance, where the certificate of seizure is not signed by an independent witness, a need for a receipt may arise to justify the seizure and minimise the complaint over fabrication of exhibits. The circumstance in this case where no independent witness was present at the time of seizure, the receipt was necessary to justify the seizure. I therefore find merit in this ground.

The third issue is whether there was material difference between the charge sheet and the evidence. This covers additional ground three where the Appellant claimed that the trial court erred in law and in fact in convicting him on the defective charge. The Appellant submitted that the charge sheet indicated that the offence was committed at Kitwai, Simanjiro within Manyara but at page 19 of the proceedings, PW2 Anthony claimed that the incident occurred at Gitwai Game control within Simanjiro District. To him, the evidence contradicts the charge sheet thus the prosecution was responsible to amend the charge as per section 134 (1) of the CPA. He also referred the case of **Noel Kijaz @ Baz and another Vs. the Republic**, Criminal Appeal No. 339 of 2013. He insisted that where there is variance between the evidence and the charge, the charge

sheet must be amended and if not, the offence will be considered not proved and the accused ought to be acquitted.

Responding to this ground Ms. Riziki argued that the variance is minor as PW2 mentioned Gitwai while the charge sheet indicates Kitwai. That, the incident took place at Simanjiro Kitwai area and there is a difference of only one letter meaning that it was typing error or pronunciation error. She insisted that there is no any variance as suggested by the Appellant.

I agree with the learned State Attorney that the difference as to the name of the place of the alleged offence is a minor one and does not go to the root of the case. The evidence does not suggest that Kitwai was a different place from Gitwai thus, I do not see how this affected prosecution evidence. This ground is therefore meritless.

The fourth issue is whether investigation procedures contravened the law. This covers original grounds 2 and 5. The Appellant submitted that the conviction contravened section 21 (1) of the EOCCA because the investigation was not conducted by the police officer. The Appellant further submitted that the valuation was conducted by PW3 Jonson Kadegere who is a game warden contrary to section 84 (4) and 113 (3) of the Wildlife Conservation Act which requires the valuation officer to be

the Wildlife Officer. He thus prayed this court to expunge the evidence of PW3 and exhibit P5 from the record.

On the argument that PW3 was not authorised officer to conduct the valuation of the trophy, it is my view that the referred provisions of sections 84 (4) and 113 (3) of the Wildlife Conservation Act are irrelevant in this matter. Section 84 is related to unlawful dealing in trophies while section 113 is related to the jurisdiction of the court. The relevant provision for valuation of trophies is section 114. The said provision requires the certificate as to the value of the trophy to be signed by the wildlife officer. The interpretation section under the Wildlife Conservation Act, section 3 defines wildlife officer to include wildlife warden and wildlife ranger. In this mater PW3 testified as game warden hence an authorised officer to conduct valuation within the meaning of the law.

The Appellant further submitted that he was not involved during the disposal of the exhibit as no evidence proving that he was sent to the magistrate during the issuance of the order for disposal of exhibit. That, this is contrary to PGO No. 229 paragraph 25 which require the accused to be present during the disposal of exhibit and the taking of the photos as part of evidence.

The learned State Attorney submitted that the wildlife officers are also investigators for purposes of wildlife crimes. That, subsection 2 of section 21 of the EOCCA define the police officer to include public official in the discharge of the functions of the Act. On the argument that the Appellant was not sent to the magistrate during order for disposal, Ms. Riziki referred the evidence by PW3 Johnson at page 27 of the proceedings and argued that the Appellant was present during disposal of exhibit. That, the fact that the magistrate was not called as witness is baseless because under Section 143 of the TEA, no specific number of witnesses needed to prove the offence. That, the evidence by PW3 and inventory form, exhibit P6 signed by the magistrate are satisfactory in proving that the magistrate was involved in disposing the exhibit.

While I agree with the learned State Attorney that under section 21 (2) of the EOCCA wildlife officers are also investigators for purposes of wildlife crimes, there is no evidence showing the investigator in this case. Among the prosecution witnesses who testified in court no one mentioned to be responsible for investigating the case. The role of PW1 was to receive and keep some of the exhibits, PW2 played the role of arresting officer and PW3 was just responsible to identify, evaluate the trophy and process disposal of perishable exhibits. There is no evidence by the

investigator as what was further done to come to the conclusion of charging the Appellant with the offence. In this, I agree that some important investigation links were missing in this matter.

On the argument that the Appellant was not involved during the disposal of exhibit contrary to PGO No. 229, I find this to be baseless. As well pointed out by the learned State Attorney, PW3 clearly testified under page 27 that while taking the exhibit to the magistrate for disposal, the Appellant was also present. The accused cross examined on that fact and the witness insisted that the accused was present at the time of disposal of exhibit. In his defence the Appellant never raised a defence to negate the fact that he was present at the time of disposal of exhibit. That being the case, I find no merit in this argument.

The fifth issue is whether defence evidence was not considered. This covers grounds 9 and 10 of appeal. The Appellant submitted that the defence evidence was not considered by the trial magistrate and no reason was given as to why the defence was not be considered. He was of the view that if considered, the magistrate could have arrived to a different decision. He contended that failure to consider the defence evidence is contrary to law and the constitution of the United Republic of Tanzania Article 13.

Responding to this issue, the learned State Attorney argued that section 231 (1) of the CPA gives the right for defence. That, the Appellant was informed of his right for defence and he defended himself but she conceded that the Appellant's defence was not considered in the decision by the trial magistrate. Referring the decision in **Bashani Haruna** (supra) page 20 Ms. Riziki was of the view that the defect is curable as this court can step into the shoes of the trial magistrate and consider the defence evidence and make a decision.

Going through the trial court decision it is clear as well pointed out by both the Appellant and learned State Attorney that the trial court never bothered to assess the defence evidence. Failure to consider the defence evidence does not vitiate the case but the appellate court can re-evaluate the evidence and come up with the decision as suggested by the learned State Attorney. I will therefore take that course by evaluating the defence evidence in course of determining the last two issues in this matter.

The last two issues are based on whether there was material contradiction in prosecution evidence and whether the offence of unlawful possession of government trophies was proved beyond reasonable doubt against the Appellant. This covers for grounds 4, 7 and 8. In determining these two issues, I will take the liberty to assess the evidence as a whole

to see if there are material inconsistencies in prosecution evidence and whether the available evidence real proved the case beyond reasonable doubt.

It is the Appellant's submission that the case was not proved beyond reasonable doubt as the evidence by the prosecution witnesses contradicts each other. That, at page 17 of the proceedings PW1 testified in court that the exhibits which were handled to him are 4 arrows, 2 knives, two motorcycles but PW2 claimed that he handled two bicycles, one axe, two knives and 4 arrows for custody at page 22 of the proceedings. That, PW2 also claimed at page 23 that he handled two bicycles and 4 arrows. To him there were contradictions which shows that the case framed against him. He added that there was no independent witness who testified in court to prove that he was found in possession of those properties.

The learned State Attorney submitted that the case was proved beyond reasonable doubts. She referred the evidence by PW2 and insisted that the same proves that he was arrested in the camp and when searched he was found possessing warthog meat with its skin and lesser kudu meat with its skin and hons, 4 arrows, two bicycles, two machetes and one axe. That, the Appellant was interrogated if he had permit to possess the

trophies but he had none. She insisted that there was no contradiction in evidence between PW1 and PW2 because mentioning motorcycles instead of bicycle was just typing error.

On the argument that there was no independent witness when the Appellant was arrested, the counsel submitted that the evidence of PW2, Antony Pelia shows that on the date of incident they were on patrol at 20:00hrs in the Game control at Kitwai Simanjiro. That, logically it was in the forest and at night thus, it was not easy for them to find an independent witness before they conducted the search.

From the trial court's record three witnesses testified for the prosecution case; arresting officer (PW2), exhibit keeper (PW1) and trophy valuer (PW3). On the defence side, only the accused testified. In his evidence at page 17, PW1 James Kagisa who was exhibit keeper testified that the exhibits he received from Antony Pelia (PW2) for custody were 4 arrows, two bush knives and two motorcycles. At page 18 he corrected and claimed that he received from PW2; two bush knives, 4 arrows, an axe and two bicycles. They signed the handing over form (exhibit P1) which indicates that what was handled to PW1 were four spears, one axe, two bush knives and two bicycles. The following were

received by court as exhibit P2 collectively; two bicycles, four arrows, two bush knives and one axe.

In his evidence PW2 claimed that they found the Appellant with warthog meat, its skin and 4 turshes, lesser kudu meat with skin and two hons, four arrows, two bicycles, two machetes and one hoe. He prepared a certificate of seizure, exhibit P3 which indicates the following as seized exhibits from the Appellant; warthog meat cuts with skin and 4 turshes, lesser kudu meat cuts with skin and two hons, four maasai spear, one axe, two pangas and two bicycles. PW2 claims that he handled to PW1 James Kagusa, two bicycles, one axe, two bush knives and four arrows for custody and handled to John Kidengele (PW3) the warthog meat with its turshes and hons and lesser kudu meat with two hons. They signed handover form that was admitted as exhibit P4. PW3 was responsible for identification and valuation of the meat. He prepared the trophy valuation form that was admitted as exhibit P5. He also applied for disposal of the meat and inventory form was admitted as exhibit P6. To him the disposal order was issued in the presence of the Appellant and the said meat was disposed in his presence.

In his defence the Appellant denied being found in the camp and in possession of meat. He claimed that on 13/12/2018 he met the game

officers on his way from the mining area and they sent him to their camp. The next day he was sent to Arusha central police station and stayed there until 23/01/2019 when he was brought to court and charged for the offence.

From the evidence on record, it is evidence by PW2 that they arrested the Appellant at about 20:00hrs at Gitwai Game control area. In that regard I agree with the reasoning by the learned State Attorney that since the arrest was at night and within the game-controlled area, there was no possibility of obtaining an independent witness. However, I agree with the Appellant's argument that there were contradictions on what exactly were seized from him. What is indicated in the certificate of seizure differ somehow with what was mentioned by witnesses and what was brought to court as exhibits. While the certificate of seizure mention among others, **four maasai spear**, one axe, two pangas and two bicycles, what was admitted in court as exhibits are two bicycles, **four arrows**, two bush knives and **one axe**. This is different from what PW1 claimed to have received from PW2 as per handover form (exhibit P1) which indicates that what was handled to PW1 were **four spears**, **one axe**, two bush knives and two bicycles. It similarly differs from the evidence of PW2 who claimed that he handled to PW1 four arrows, two

bicycles, two machetes and **one hoe.** The contradiction on the items that were seized from the Appellant and which passed into different hands in this case is material as they create doubt on whether the Appellant was found in possession of the said properties or the case was framed against him as he seems to suggest in his defence. These doubts in my conclusion, ought to have been resolved in the Appellant's favour. That being the case, it cannot be said that the offence against the Appellant was proved beyond reasonable doubt.

In the event, and for reasons stated above, I allow the appeal, quash the conviction and set aside the sentence. I further order the Appellant to be released from prison forthwith unless otherwise lawfully detained.

DATED at **ARUSHA** this 15th Day of December 2022

D.C. KAMUZORA

JUDGE