IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 3 OF 2021

MOSES S/O KAUZEN @ SIMBEYE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Mpanda at Mpanda)
(F. U. Shayo, RM)
Dated 22nd day of December 2020
In
Economic Crimes Case No. 16 of 2020

JUDGMENT

06/04 & 18/05/2022

NKWABI, J.:

In this appeal, the appellant is challenging his being convicted and sentenced for unlawful possession of Government trophies which offence is contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, [Cap. 200 R.E. 2002] as amended by section 16(a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. Notably, he was sentenced to serve 20 years imprisonment. According to exhibit P1, the Government Trophy was 26 kgs of buffalo meat valued at T.shs 4,406,100/=

The respondent alleged through its charge sheet that was duly filed in the District Court, that on 25th day of October, 2020 at Uwanja wa Ndege area within Mpanda district in Katavi region, the appellant was found in possession of twenty-six (26 kgs) kilograms of buffalo meat valued at USD 1900 which is equivalent to T.shs 4,406,100/= only, the property of the Government of United Republic of Tanzania without a permit from the Director of Wildlife. The appellant, who was the accused person, in the trial court disputed the allegations. The trial ensued which ended in his conviction and sentence.

Indeed, the prosecution had paraded four witnesses and tendered five exhibits which landed it the conviction and sentence. The appellant was unhappy with the decision of the trial court since in his defence said that the prosecution witnesses had testified false evidence and his bicycle was white in colour rather than that was tendered in court which was blue colour. In the premises he lodged with this court a petition of appeal which has two grounds of appeal which are:

1. That the trial court erred at law and fact by believing and working upon the prosecution evidence which showed that the Appellant was found

carrying meat without any evidence of a receipt issued evidencing the confiscation.

2. That the trial court erred at law and fact by convicting the appellant depending on very weak and doubtful prosecution evidence which resulted into failure by the prosecution to prove its case beyond reasonable doubt as required by law.

During the hearing of this appeal, Mr. James Lubus, learned advocate appeared for the appellant and the appellant entered appearance in court in person. The Respondent was represented by Mr. Simon Peres, learned Senior State Attorney.

When Mr. Lubus took up the stage to advance the appellant's appeal, he argued that the charge was not proved beyond reasonable doubt. One of the weaknesses of the evidence of the prosecution is failure on issuance of a receipt of confiscation of exhibit. He referred me to the case of **Joseph John Mahare V. Republic [1986] TLR 44**. The appellant was not required to prove his innocence, he added and cited **Millar V. Minister of Precisions,** reported in the All-England Law Report.

Mr. Lubus further asserted that the prosecution witnesses were not credible and not reliable. To fortify his argument, he referred this court to **Nathamel Mapunda V. Republic [2006] TLR 395**. There should be a link between the charge and the evidence, he stressed.

Mr. Lubus also contended that the pieces of documentary evidence were not procedurally received. He referred me to **Aneth Fraha and 3 Others V. DPP, Criminal Appeal No. 160/2018.** He noted that the pieces of documentary evidence were not read over in the trial court. That argument of his was backed by **Criminal Appeal No. 205/2007, Simon Mafiga V. Republic** at page 11 of Tino's case which he supplied to the court. He then prayed that the appeal be allowed, conviction be quashed and sentence be set aside as well as release of the appellant from prison.

Reacting to the submissions of Mr. Lubus, Mr. Peres started by resisting the appeal. He argued that they proved their case beyond reasonable doubt.

They had 4 witnesses, PW1 identified the trophy (Buffalo meat) and valuation report while PW2 is the arresting officer, he remarked.

He also contended that the seizure certificate was tendered and the appellant did not object it and did not cross examine on the exhibits. He had signed on the seizure certificate. Mr. Peres added that PW3 corroborates the evidence of PW2 and was also not cross examined. It is trite law that failure to cross examined on a matter that is deemed to have been admitted.

Commenting on the evidence of PW4, the investigator who took the pieces of meat and an inventory tendered in court, Mr. Peres argued that the appellant did not cross-examine of the same that is tantamount to admission of the facts. He is also of the view that their case was corroborated by the defence of the appellant corroborates who admitted where he was arrested and the time he was arrested.

He urged all their witnesses are credible, citing **Goodluck Kyando V. Republic** [2006] TLR 363. He also backed his submissions with **Mawazo**

Andandwile Mwikwaja V. DPP, Criminal Appeal No. 455/2017 and maintained that they proved the case beyond reasonable doubt. He asked this court to dismiss the appeal.

In rejoinder Mr. Lubus observed that the appellant had no advocate in the trial court, he could not know his right to cross-examine. He further maintained that the appellant in his defence disputed committing the offence. He urged to reiterate his submission in chief. Lastly, he prayed that the appeal be allowed.

On my part, I will begin my discussion with the claim that the pieces of documentary evidence were not read over in court after they were admitted hence procedural irregularity which makes them subject to expungement off the court record. Exhibit P1 which is the trophy valuation certificate was read over and explained. The appellant did not cross-examine the witness who tendered it. The seizure certificate was admitted as exhibit P2 and the same was read over and explained in court. The chain of custody was admitted as exhibit P4 and the same was accordingly read over and explained. The last documentary evidence is the inventory form which is exhibit P5, it was also

read over and its contents explained. Prior to the admission of the said documentary evidence, the appellant was given a chance to comment on the same, he replied he had no objection. In the circumstances the lamentation that the pieces of documentary evidence were not read over and explained to the accused person after they were admitted is lame and dismissed.

The next complaint for my consideration and determination is the claim that the respondent's case is weak for non-tendering and admission of a receipt of confiscation of exhibit. I was referred to the case of **Joseph John Mahare V. Republic [1986] TLR 44**.

The reply of Mr. Peres for the respondent was that the seizure certificate was tendered and the appellant did not object it and did not cross examine on the exhibits. He had signed on the seizure certificate. Mr. Peres added that PW3 corroborates the evidence of PW2 and was also not cross examined. It is trite law that failure to cross examined on a matter that is deemed to have been admitted.

In rejoinder, Mr. Lubus reiterated his submission in chief and advanced that the appellant had no legal representation therefore he could have not appreciated the legal implications of failure to cross examine a witness on a matter.

On my view, where there is a certificate of seizure which was admitted in court as exhibit P2 without objection by PW2 Inspector Ndangala, without cross-examination on the same, the appellant is precluded from making a complaint against that document. Lack of issuing a receipt, in the circumstances of this case does not affect the prosecution case in respect of the seizure of the trophy. I accept the contention of Mr. Peres in this regard.

While I accept that, in our jurisdiction, failure to cross-examine a witness on a matter one is deemed to have admitted that fact as per **Mawazo Anyandwile Mwaikwaja v D.P.P,** Criminal Appeal No. 455 of 2017, CAT (unreported), I am aware that in **Mohamed Katindi & Another v R. [1986] TLR 134** (HC) Lugakingira, J. observed:

I think it can still be said that although it is undesirable to permit a party to canvass a point not raised in cross-examination, the court should not thereby be precluded from disbelieving a witness on a particular point merely because he was not cross-examined on that point. This proposition appears to accord with the realities of our own environment where, in Magistrate's courts most accused persons do not have access to professional representation nor do they have the skill to conduct their cases. Not infrequently cases come up where there has been no cross-examination, at all, or, there has been poor and irrelevant cross-examination, but then the accused comes up with a defence which could possibly be true.

Having in mind the view of Lugakingira, J. as he then was, the pertinent question here is whether the appellant gave a plausible defence in this case. The mere defence that the prosecution witnesses had not testified the truth does not qualify a plausible defence where the appellant did not cross-examine the prosecution witness on the certificate of seizure. I take into account, just as I have been invited by Mr. Peres to consider the admission of the appellant that he was arrested at the material place with a bicycle to

have corroborated the prosecution case on material particular. What remains as to whether the appellant was arrested in possession of government trophy that is 26 kilograms of buffalo meat depends on the credibility of the witnesses be it the prosecution and defence. That I embark to determine here below.

The determination of the question whether the prosecution case (evidence) is weak to base/support conviction of the appellant will also entail determination of the question whether the prosecution's case is weak. I have already determined that all the pieces of documentary evidence are intact, undisturbed by the complaint by the appellant in respect of them. They are therefore credible and sound to be used to convict/support conviction of the appellant.

I am fully aware of the law that an accused person is under no obligation to prove his defence, see **Elias Kigadye and Others v R. [1981] TLR 355** (C.A). Further, conviction cannot be based on the weaknesses of the defence as per **Christian s/o Kale and Rwekaza s/o Bernard v R. [1992] TLR 302** (CA).

Further, I am aware that it is better to release 100 guilty men than conviction one innocent person wrongly, see **Nathaniel Alphonce Mapunda & Another v Republic,** [2006] TLR 395 (CAT). Despite my awareness of the above positions of law, I am satisfied that the prosecution case was and is very clear and strong that the appellant was arrested in possession of the buffalo meat. That is why he even attempted to flee only to be arrested. He did not cross-examine PW1 the Game Officer, PW3 the arresting officer and PW4 who investigated the case. The evidence of PW2 and PW3 the officers who arrested the appellant in possession of the government trophy is cogent and coherent. His defence that the respondent's evidence is false is just a clumsy defence which deserves to be dismissed. I dismiss it.

In the premises, I dismiss the appeal. The conviction and the sentence imposed on the appellant are upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 18th day of May 2022.

J. F. NKWABI

JUDGE