**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 08 OF 2021**

*(Originating from Economic Case No. 6 of 2018 from the District Court of Simanjiro at Orkesumet- Hon. O. I Nicodemo, esq, RM)*

**MIRAJI YAKOBO NYOKA..... 1ST APPELLANT**

**MMASA JUMA ..... 2ND APPELLANT**

**CHARLES SIMEO..... 3RD APPELLANT**

**Versus**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

*14th February & 01th April, 2022*

**MZUNA, J.:**

The above mentioned appellants stood jointly charged before Simanjiro District court for three counts of Unlawful possession of Government trophy. The first count was Contrary to Section 86(1), (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the 1st Schedule to and Sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [ Cap. 200 R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

The second count was contrary to Section 86(1), (2) (c) (iii) of the same law and same amendments read together with paragraph 14 of the 1st Schedule to and Sections 57(1) and 60(2) of Economic and Organized Crime Control Act, [Cap. 200 R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2016.

The third count was also contrary to Section 86(1), (2)(c)(ii) of the same law and same amendments (as in the first count), read together with paragraph 14 of the 1st Schedule to and Sections 57(1) and 60(2) of Economic and Organized Crime Control Act, [Cap. 200 R.E 2002] as amended by Sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2016.

Particulars for first, second and third counts read as follows:- In the first count it was alleged that on 10th day of December, 2018 at Ngage Village, within Simanjiro district in Manyara Region the said appellants were jointly and together found in possession of one Dikdik meat valued at USD 250.00 equivalent to Tshs. 572,500/=, and one Impala meat valued at USD 390.00 equivalent to Tshs 893,100/= all total valued at 1,465,600/= the property of Tanzania Government without permit from the Director of Wildlife.

Similarly, in the second count particulars alleged that on the same date time and place, the appellants were found in possession of one Red Duiker meat valued at USD 250.00 equivalent to Tshs. 572,500/= and one impala meat valued at USD 390.00 equivalent to Tshs 893,100/- all total valued Tshs 1,465,600/- the property of Tanzania Government without permit from the Director of Wildlife.

Lastly, in the third count it was alleged that on the same date time and place, the appellants were found in possession of one Red Duiker meat valued at USD 250.00 equivalent to Tshs. 572,500/= the property of Tanzania Government without permit from the Director of Wildlife.

A briefly background story as per the record is that:- On 10th December, 2018 through the informer a police officer with force number E 5114 CPL Robert was alerted on the availability of some people coming to the village of Ngage riding a motorcycle allegedly carrying illegal consignment. The communication between him and the Village Executive Office together with the sub-village chairperson was made. At 06:00 A.m, they met at the office and started making a follow up. They followed the tyre marks and traces of blood which led them to where the motorcycle was parked in front of an unfinished house. They entered into that house where they said found the appellants and one

disabled woman Monica, whose charges were later dropped by the Director of Public Prosecutions. Her connection to the charges was that she was employed by the appellants for skinning the animals illegally hunted by them. They met the appellants with the said animal's meat. Subsequently they were arrested and finally charges in court.

In their defence evidence, the appellants denied the charge(s) levelled against them. However, at the end of the day, all three appellants were finally convicted and sentenced to save twenty years' imprisonment term for each count. The sentences were ordered to run concurrently. Being aggrieved by such conviction and sentence the appellants preferred this appeal.

During hearing of this appeal which proceeded through written submission, the appellants appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Akisa Mhando, Learned State Attorney. She supported both the conviction and sentence.

In this appeal, the appellants preferred eleven grounds (six amended grounds and five further additional grounds of appeal). Out of the said grounds of appeal, one ground which alleged that the trial magistrate failed to comply with the provision of section 210(1)(a) of the

CPA, Cap 20 RE 2019 was dropped. I will deal with the remaining 10 ground in due course of this judgment through the framed up issues.

The main issue(s) for determination are:- 1. Whether the exhibits were properly tendered and admitted as per the law? 2. Was the procedure for chain of custody (paper trail/custodian) and certificate of seizure properly done? 3. Whether the appellants were accorded right to hearing? 4. Whether the charge was proved to the required standard of proof. The above issues bold down to two major issues:-

*The first question relevant for issues No.1,2 and 3 is; Are there any procedural defects on the admission, cross examination and tendering of exhibits, if so what is the effect?*

*The second question relevant for issue No. 4 is, are the charge(s) levelled against the appellants proved to the required standard of proof?*

Let me start with the issue of procedural defects. The appellants raised a point that Exhibits PE1 (trophy valuation certificate), PE2 (certificate of seizure), PE3 (the Inventory form), and PE5 (chain of custody), were not read over, the defect which in their view occasioned injustice.

Ms. Akisa Mhando the learned Senior State Attorney agree in principle on such defects and said that it offended the well-known

applicable procedure contrary to the directives given in the case of **Shaban Rulabisa vs The Republic**, Criminal Appeal No. 88 of 2018 TZCA at Shinyanga (Unreported). She was of the view that they are liable for being expunged. In any case she says even with such expungement, still the remaining evidence is watertight to ground a conviction.

This court agrees on such defects that it was improper for the admitted exhibits to be used in evidence without reading them for better understanding of its purpose. It was held in the case of **Shaban Rulabisa vs The Republic** (supra) at page 11 that:-

> *"It is settled that the omission to read over or explain the document properly tendered and admitted in evidence disables the accused to understand the contents and the purpose for which it is desired to achieve. Thus, the omission is fatal as it violates the right to fair trial of an accused person..."*

The Court of Appeal proceeded to expunge exhibit PE1, the PF3. The purpose of reading in court the admitted exhibit, if I may add, is also well stated in the case of **Jumanne Mohamed & 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015 CAT at Tanga (Unreported) that:-

> *"...The interest of justice and fair trial demands that be done. ...In all fairness an accused person is entitled to know the contents of any*

*document tendered as exhibit to enable him marshal a proper defence whenever they contain any information adversely affecting him."*

I would under the same principle, expunge exhibits PE1, PE2, PE3, PE5 because "*the omission is fatal as it violates the right to fair trial of an accused person."*

Another procedural defect which was raised by the appellants in their additional grounds of appeal is that it was the Public Prosecutor who tendered Exhibit PE4 instead of the witness contrary to the law. They referred this court to the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. R,** Criminal Appeal No. 78/2012 CAT (unreported).

Responding to this ground Ms. Mhando, the learned State Attorney said referring to page 29 of the trial court proceedings that the appellants raised objection on the tendering of Exhibit PE4. That, in submitting against such objection the prosecutor prayed to the court for the exhibit to be admitted. That it cannot be said that it was the prosecutor who promptly tendered Exhibit PE4.

My close reading of the record, after the witness had said the description of the intended exhibits, the appellants objected by saying never knew the exhibits. Then the Public Prosecutor prayed for the said exhibits to be tendered in the following words:-

*"I pray that, the motorcycle and other exhibits be admitted as exhibits because the registration number of the motorcycle. Is as the witness testified and identified and other exhibits as was testified constitutes what the witness told this court because they were found in the scene of incident."*

Relying on such prayer and overruling the objection raised by appellants the trial court in admitting the said Exhibits said;

*"Court: Subject to the objection of the accused persons on admisbilities (sic) of the exhibits and as to what was submitted by the prosecution, in this regards their(sic) court rule that the accused persons if afforded the right to defence will elaborated(sic) it follows (sic) that a motorcycle with registration No. MC 675 BWW, four pangas and four modified torches are collectively admitted as exhibit marked exhibit PE4."*

Reading between the lines of those transcripts from the record of the trial court, it is very apparent that the witness never said anything about tendering the exhibits. The position of the law is that the Prosecutor cannot act on two roles one as a witness and at the same time as the prosecutor. It was held in the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. R** (supra) that:-

*"Under the general scheme of the criminal procedure Act, particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort*

*of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness, he could not be examined or cross-examined on the report."*

The admission of exhibit PE4 so far as it relates to "a motorcycle with registration No. MC 675 BWW, four pangas and four modified torches" was improperly admitted for reasons above stated. I proceed to expunge it.

The chain of custody was admitted at page 30 of the proceedings. It did not fall under the procedure above challenged, instead, after the objection, the witness PW5 Walter Fatael Urio, the Wildlife Conservation Officer said that:-

*"I pray to show my witness chain of custody so as to identify it.*

***Court:-*** *Prayer granted.*

***Sgd .....(RM)***

***17/1/2020***

***XD by PP****: -*

*I pray to this court to admit both chain of custody as exhibit to this court (sic).*

*PP:- I pray to tender both chain of custody as exhibit to this case."*

The court then admitted both chain of custody as exhibits PE4 collectively. Ms. Mhando is of the view based on the case of **Director of Public Prosecution v. Kristina Biskasevskaja,** Criminal Appeal No.

76 of 2019 TZCA at Arusha (unreported) at page 4 that the admission was proper.

I would agree with the respondent/Republic that in view of the decision in the case of **Director of Public Prosecution v. Kristina Biskasevskaja** (unreported) t(supra) he court observed that:-

> ***"As we know, the basic prerequisite of admissibility of evidence in court of law are relevance, materiality and competence of the person to tender the exhibits."***
>
> (Underscoring mine).

Under such circumstance it cannot be said that it was the prosecutor who tendered it. The first request was done by the witness himself. PW5 is the one who filled the seizure certificate as well as the chain of custody which had the seized meet and other exhibits. He was the "*competent person to tender the exhibits."* The alleged defect that it was tendered by the prosecutor not a witness fails. Similarly, the argument by DW2 Mmasa Juma Ibrahim that chain of custody and inventory lacks his signature is irrelevant. The absence of their signature in the inventory is not fatal so long as it is shown in the seizure certificate.

Another defect which was raised is on the failure of the Magistrate to give chance to the appellants so as to cross examine each other

during their defence case. The learned State Attorney says the defect is not fatal because they have not shown how their rights were affected. That the appellants were arrested at the scene of crime in possession of government trophy.

This point takes me on the issue of proof of the charge. Reading the evidence, the appellants were found together at the unfinished house whose owner was not disclosed but had a common intention. They were arrested red-handed, so to speak. The arrest was done by prosecution witnesses. PW3 No.E 5114 CPL Robert was informed by the informer that there were some people who carried illegal consignment using a motor cycle. PW3 notified PW4 Kimath Saluni, a peasant and independent witness who took part during their arrest.

The skid marks of the motor cycle as well as some traces of blood led them to the scene where they arrested the appellants processing wildlife animal's meat without permit as per the story which they gave to PW5 after interrogating them. They were then taken at Police Olkesmet where PW6 No. W. 9347 D/C Mambazi works.

The defence by the first appellant Miraji Yakobo Nyoka that he was on the way heading to Same though admitted had the said motor cycle was not believed by the court. Similarly, the defence of the second

appellant Mmasa Juma Ibrahim that they were told to join Ibrahim at Monica's house where there erupted violence or that of third appellant Charles Simeyo, that he was told by Mmasa Juma to go in order to finish their job of planting rice and then told by Miraji to meet at Monica's house, failed to cast doubt on the prosecution case. Of course they raised their concern that why is it that Monica was discharged which was responded by the learned State Attorney that the appellants had chance to call her as their witness something which they never did. I agree, it is not for the defence to choose who to charge or call as a witness. The conviction of the appellants was not based on their evidence. The court relied on the prosecution evidence which is watertight.

The appellants during their submissions, attempted to challenge the prosecution evidence that there was no chronological of documentation from custody, control and transfer. That it is not shown how the exhibits were kept.

On the issue of chain of custody, it was held in the case of **Paulo Maduka and 4 others v. Republic,** Criminal Appeal No. 110 of 2007 that an exhibit must be proven by producing the chronological documentation and or paper trail showing the following:- 1. Seizure, 2.

Custody, 3. Control, 4. Transfer, 5. Analysis and 5. Disposition of the exhibit.

My close reading of exhibit PE4, it shows the said chronological documentation, from Walter Urio, Joseph Shamba, Stephen Mibeyazo, WP. 9347 D/C Mambazi and No. 3473 D/C Mussa. The dates as well as their respective signatures are clearly indicated thereon. The procedure was followed as per the law.

It should also be noted, as well submitted by the learned State Attorney citing the case of **Sophia Kingazi v. The Republic,** Criminal Appeal No. 273 of 2016 TZCA, at Arusha (unreported) at page 32 that:-

> *"...despite the lack of documentation in some cases, the evidence by the prosecution proved beyond reasonable doubt an unbroken chain in line with our previous decisions in* ***Vuyo Jack, Chacha Jeremiah Murimi and 3 Others and Kadiria Said kimaro*** *(supra) referred to us by...that the integrity of chain of custody cannot be solely determined by the documentation rather by the credibility of the evidence."*

It is therefore "*credibility of the evidence*" which matters most not necessarily presence of documentation. This complaint equally fails.

For the reasons above stated, this appeal is without merit. The conviction and sentence imposed against all three appellants cannot be interfered with. Appeal stands dismissed in its entirety.

Appeal dismissed.


**M. G. MZUNA,**
**JUDGE.**
**01/04/2022.**