IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 55 OF 2021

(C/F Economic Case No. 12 of 2017at the District Court of Babati at Babati)

SELEMANI ABDALLA.....APPELLANT

Vs

THE D.P.P.....RESPONDENT

JUDGMENT

Date of last Order: 2-5-2022

Date of Judgment: 6-6-2022

B.K.PHILLIP,J

In the District Court of Babati at Babati the appellant herein was charged with two counts, to wit; 1st count: Unlawful possession of Government trophy contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by Section 59 (a) (b) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016, read together with paragraph 14 of the 1st schedule 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. It was alleged in the particulars of the offence that, on 22/6/2017 at Maholey Area, Kisangaji Village within Babati District in Manyara Region, the

appellant was found in possession of one spotted hyena skin valued at Tanzanian shillings one million two hundred sixty-five thousand (Tshs.1,265,000/=) the property of Tanzania Government without a permit from the director of wildlife.

2nd count: Unlawful possession of Government Trophy, 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 section 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. In the particulars of offence, it was alleged that on 22/6/2017 at Majengo 'A' Area, Magugu Village within Babati District in Manyara Region, the appellant was found in possession of one lion claw and lion oil valued at Tanzanian shillings fourteen million thirty thousand (Tshs14, 030,000/=) the properties of Tanzania Government, without a permit from the Director of Wildlife.

The Appellant denied the charge. To prove its case the prosecution paraded seven witnesses and tendered seven exhibits. The appellant and his wife testified as DW1 and DW2 respectively.

The prosecution case was as follows; That on 22/6/2017 about 17:00 hrs PW1, a Park Ranger received information from his informer that there were two people in a motor cycle on the road from Magala Village to Mbuyu wa Mjerumani transporting Government Trophy . PW1 together with three other Park Rangers arranged how to catch them. At about 19:00hrs along the aforesaid road they saw a motorcycle coming with two people, that is, a driver and passenger.

They stopped the motorcycle but to their surprise the passenger jumped from motorcycle with a sulphate bag and driver turned back, and run away with motorcycle. They managed to arrest the passenger who is the appellant herein. After arresting him they took the sulphate bag and opened it, only to find that it had one hyena skin which had black dots and greyish colour (Exhibit P1). They took the appellant to Magugu Police station and handed over him to a police at Magugu police station (PW4) together with the hyena skin in white sulphate bag. At around 21.05 hrs PW1, PW2 (a police officer at Magugu police station) together with PW3 (street chairperson) went to the appellant's residence to conduct a search where they found black plastic bag hanged on the wall. It had zebra hoof, lion claws, lion hair, lion oil and local medicines with directions on how to use it before entering into reserved area (Exhibit P3 collectively). After the search PW2 filled in a certificate of seizure. PW5 , a police officer at Babati police central station testified that on 23/6/2017 PW7, a police officer in investigation department, handed over to him animal oil, zebra hoof, claws, local medicines, hair and hyena skin. He recorded them in register No. 70/2017. PW6, a game officer responsible for identification and evaluation of Government trophies told the Court that she identified the hyena skin, zebra hoof, lion claws and lion oil which were all worth Tshs. 1, 260,000/=. Moreover, PW7 testified that on 26/6/2017 about 22:15 hrs he did interrogate the appellant who was suspected of being found with Government trophies. The appellant denied to have been found with the Government trophies but admitted that he was found with local medicine and hyena skin.

After analysis of the prosecution evidence the trial magistrate found the appellant with case to answer. In his defence the appellant alleged that he was arrested on his way back home from his farm. Further, he stated that the sulphate bag which had hyena skin belonged to motorcycle driver who was released after bribing the Park Rangers. His only witness, DW2, testified that she was present when search was conducted in their residence and nothing was found therein.

In determination of the case, the magistrate framed two issues; one, whether the accused person was unlawfully found in possession of government trophies and two, whether the accused person is guilty. In his findings he answered both issues in the affirmative and convicted appellant. He sentenced him for twenty years in prison.

The appellant appealed to this Court on both conviction and sentence, on the following grounds;

(1) *That, the learned trial magistrate grossly erred both in law and in fact in basing conviction on irregular proceedings i.e., the amended charge sheet which was read over to the appellant on 25/09/2018 did not specify which count the appellant pleaded thereto.*

(2) *That, the learned trial magistrate grossly erred both in law and fact when he failed to note that the search and alleged seizure of exhibit P1 and P3 was not done properly conducted in accordance with P.G.O No. 226 and section 38 (1) (2) and (3) of CPA by police officer and park rangers, so as to show the same had been recovered from the appellant. All this made the search and seizure of the alleged Exhibits to be null and void*

and normally the complaints express that the evidence arising from such search is fabricated.

(3) *That, the learned trial magistrate grossly erred both in law and fact in failing to note that Exhibit P1 (hyena skin) was not among of the intended prosecution Exhibits listed/ mentioned in the preliminary hearing (P.H) read on 1/8/2018. Therefore, it was wrongly tendered and subsequently being admitted in evidence as exhibits.*

(4) *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the charge sheet and the evidence on record were at variance. Since the items mentioned by the prosecution witnesses that were found in possession of the appellant, were not mentioned/ indicated in the charge sheet. Hence the above shown variance rendered the charge sheet to be fatally and incurably defective.*

(5) *That, the learned trial magistrate grossly erred in law and fact in convicting and sentencing the appellant basing on poor investigation case, since the wife of the appellant (DW2) was said to be present during alleged search and alleged seizure of exhibit P3 but she did not sign any of the documents so as to prove that it is true her house was searched.*

(6) *That the learned trial magistrate grossly erred both in law and fact when he failed to note that, the public prosecutor (PP) prayed to tender the Exhibit P3 in evidence. Yet the key duty of the PP is to prosecute hence in tendering the exhibit she was*

assuming the role of a witness and she is not the type of a witness who can be cross examined upon oath or affirmation.

(7) *That, the learned trial magistrate grossly erred both in law and fact when he shifted the burden of proof to the appellant by stating that, the accused (now appellant) failed to call any witness on the land dispute. Yet the burden of proof never shifts, it remains through out on the prosecution.*

(8) *That, the learned trial magistrate grossly erred both in law and fact when he misdirected himself and used weak, tenuous, contradictory, incredible and wholly unreliable prosecution evidence as basis of convicting the appellant.*

(9) *That, the learned trial magistrate grossly erred both in law and fact by being adamant that the appellants strong and well corroborated defence evidence did not raise any shadow of doubts on the prosecution's case.*

The appellant was unrepresented, thus he appeared in person. On the hearing date the learned State Attorney did not enter appearance, hence this appeal was heard ex-parte, in the absence of the learned State Attorney for the Republic.

The appellant opted to submit on grounds number 2, 4, 6 and 7 only. On 2nd ground, the appellant submitted that according to PW1's testimony , the search at appellant's residence was conducted at night, at 22:00 hours and no evidence was adduced to show that there was Court's leave to conduct the search at night. Under the circumstances, he contended that the search at his residence was

conducted in contravention of the provision of Section 40 of Criminal Procedure Act, (" CPA") and there was no evidence to show that they had search warrant as required in the provisions of Section 38 (1) CPA. To cement his argument, he cited the case of **Ayubu Mafume Kiboko and another Vs Republic (CAT), Criminal Appeal No. 694 of 2020**, (unreported). Furthermore, he argued that after illegal search was conducted there is no evidence in the Court's record to show that he was issued with a receipt in respect that search which is contrary to section 38 (3) of CPA. To bolster his argument, he cited the case of **Shaban Said Kindamba vs Republic CAT No. 390 of 2019** (ureported) and prayed P3 collectively be expunged from the Court's records.

On 4th ground, the appellant referred this Court to page 24 of the typed proceedings and went on submitting that the charge sheet states that he was found in possession of hyena skin at Maholey Area while the evidence adduced by PW1 is to the effect that on 22/6/2017 about 17:00 hrs he received information that there were people transporting Government trophy through the road from Magala Village to Mbuyu wa Mjerumani. And upon being cross examined, PW7 said that he was arrested at Corner Mbaya. The appellant contended that there is a variance between the charge sheet and evidence adduced. The charge sheet was supposed to be amended. To bolster his argument he cited Section 234 (1) of CPA and the case of **Noel Gurth @ Bainth and another vs Republic CAT No. 339 of 2013**, in which the Court held that *"where there is variation in the places where the alleged armed robbery took place then the charge must be amended forthwith. If no amendment is effected, the charge will*

remain unproved and the accused shall be entitled to an acquittal as a matter of right . Short of that a failure of justice will occur".

On the 6th ground, he submitted that the prosecutor tendered the exhibits contrary to the acceptable legal procedures. He contended that a prosecutor is not a witness and a competent person to tender exhibits since he/ she is not in position to be cross examined on the exhibits tendered. He is not sworn under oath or affirmed to testify in Court. To cement his arguments he referred this Court to pages 26, 29 and 30 of the typed proceedings which indicates how the certificates of seizure (Exhibit P2 & P4) and lion nail, zebra hoof, lion oil, lion hair and two packet of traditional herbs (Exhibit P3 collectively) were tendered in Court and admitted. He argued that it was a gross error in law for the trial Court to rely on Exhibits P2, P3 and P4 to convict and sentence him. To support his stance, he cited the case of **Thomas Ernest Msungu @Nyoka Mkenya vs Republic CAT No. 78 of 2012**, (unreported).

On 7th ground he submitted that the trial Court did not take into consideration his defence in which he alleged that there is a dispute between him and the Park Ranger, who arrested him. The Park Ranger wanted to buy the appellant's house but the appellant refused to sell the house to him (the Park Ranger) because he had no enough money to pay for the house. Moreover, the appellant alleged that the Park Rangers were bribed by the driver of the motor cycle that is why they allowed him to go freely. He argued that the trial Court ignored the defence case completely which a fatal irregularity.

To bolster his arguments, he cited the case of **Farida Abdul Ismail vs Republic, Criminal Appeal No.83 of 2017,** (unreported)

I have given due consideration to the submission made by the appellant as well as perused the Court's record. I will start dealing with the 4th ground of appeal because it is concern with the charge sheet which is the basis of the case since all evidences adduced are geared at proving the charge against the accused person at it appears in the charge sheet. So, the charge sheet is the bedrock of the case.

With regard to the 4th ground of appeal, it is true that charge sheet indicates that that the appellant was arrested at Maholey Area. PW1 testified that he received information about people transporting Government trophy through the road from Magala Village to Mbuyu wa Mjerumani whereas PW7 testified that appellant was arrested at Kona Mbaya. In this case a variance between charge sheet and the evidence adduced by the prosecution witnesses in respect of the area where the appellant was arrested is not such material as it did not prejudice the appellant in any way since he did not deny that he was arrested. What he denied is the allegation that he was in possession of sulphate bag having a hyena skin . He claimed that the same belonged to the driver of the motorcycle. Therefore, the case **Noel Gurth @ Bainth and another** (supra) **,** cited by the appellant is distinguishable from this matter. So, this ground has no merit.

With regard to the 2nd ground of appeal, it is on record that the search at the appellant's residence was conducted during night hours (21.00 hrs).This is per PW1's testimony and Exhibit P7.No evidence was tendered to prove that there was a search warrant issued to conduct

the search or leave of the Court to conduct the search at night as required under Section 40 of CPA. There is no any evidence on the Court's records to suggest that the police officer who accompanied PW1 at appellant's residence during the search was officer in charge of police station or he was acting in his position so exempted from having search warrant. In the case of **Ayubu Mfaume Kiboko (Supra)** the Court said the following;

"... the question of illegality of the warrantless search executed during forbidden hours of the day was so apparent that no Court of justice should have acted on such illegally obtained evidence without ensuring that the requirements of section 169 (1) and (2) of CPA were complied with".

In addition, there is no evidence on record suggesting that after the search and seizure of the said exhibits there was any receipt issued to the appellant, his wife or his relative or other person who was in control of the premises acknowledging such seizure as required under section 38 (3) of CPA.

From the forgoing, exhibits P3 collectively which were obtained during search at appellant's residence at forbidden hours and without search warrant are hereby expunged from Court's records. Consequently, the valuation certificates in respect of exhibits P3 collectively are rendered useless.

Having expunged from the Court's record exhibits P2, P3 and P4, what has remained in the Court's record is exhibit P1 (hyena skin). However, the Court's record shows that the hyena skin (exhibit P1) was not in the list of the prosecution exhibits during the preliminary hearing. Thus, it is the finding of this Court that the same was tendered in

evidence wrongly. Under the circumstances, I am compelled to expunge it from the Court's records as I hereby do. Exhibit P1 is hereby expunged from the Court's records.

From the foregoing, since I have expunged from the Court's records all the exhibits which were the basis of the appellant's conviction, the remaining evidence is very weak to prove the offences charged against the appellant. Thus, I do not see any plausible reasons to determine the 6th and 7th grounds of Appeal.

In the final analysis I allow the appeal, quash the conviction and set aside the sentence against the appellant. Accordingly, I order that the appellant be released from prison unless he is held there for any other lawful cause.

Dated this 6th day of May 2022

B.K.PHILLIP

JUDGE.