IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 131 OF 2022

(Original Criminal Case No. 36 of 2020 in the Resident Magistrate's Court of Arusha at Arusha)

LOITORE LEBANGUTI LAIZER @ JULIUS LEBANGUTI LAIZER.... APPELLANT

VERSUS

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

JUDGMENT

2rd November & 28th February 2023

GWAE, J.

The Resident Magistrate's Court of Arusha (trial court) through Economic Case No. 36 of 2020 found the appellant, Thomas Kerato Loitore Lebanguti Laizer @ Julius Lebanguti Laizer and another person, Amani Thomas Kerato guilty. Aggrieved by the both conviction and the sentence meted out by the trial court. The appellant therefore, decided to file this appeal. In his petition of appeal, the appellant fronted eight (8) grounds of appeal as follows:

1. That, the Trial Court erred and fact in convicting and sentencing the appellant based on a defective charge sheet

2. That, the Trial Court erred as it failed that the appellant case was never investigated by the police as there was no investigator of the case offending section 21 (1) the Economic and Organized Crime Control Act, Cap 200 Revised Edition, 2019 (EOCCA)

3. That, the Trial Magistrate erred as she failed to comply with section 210 (3), Criminal Procedure Act, Cap 20 Revised Edition, 2019 (Act)

4. That, the Trial Court Magistrate tried the case, convicted the appellant and his co-accused and sentenced them without jurisdiction

5. That, the Trial Court erred and fact when she failed to analyse the disposal order issued by the Resident Magistrate in the purported trophy contravening the law

6. That, the Trial Court erred and fact for failure to draw an adverse inference against the prosecution for its failure to call the magistrate who is alleged to have ordered the disposal of the exhibits

7. That, the Trial Court erred and fact in convicting and sentencing the appellant while the respondent did not prove her case beyond reasonable doubt

8. That, the Trial Court grossly misdirected itself for failure to properly discuss, evaluate and consider the appellant's defence

On 12th October 2022, the appellant through his advocate, Mr. Dickson sought and obtained leave to file his additional grounds of appeal, these are;

1. That, the trial magistrate erred in law and fact when she convicted and sentenced the appellant herein based on certificate of seizure which was not signed by independent witness and no receipt was issued on the items found
2. That, the trial magistrate erred in law and fact when she convicted and sentenced the appellant without observing that, the principles underlying the chain of custody observed and complied with.

The factual background of this appeal is as follows: the appellant and that other person were charged with criminal offences in three (3) counts. The 1st and 2nd count were on the same offence of unlawfully possession

of government trophy c/s 86 (1) and (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) both of the Economic and Organized Crimes 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 third count was unlawfully possession of weapons in certain circumstances contrary to section 103 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) both of the Economic and Organized Crimes 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.

Particulars of the offence in the 1st and 2nd count are to the effect that, the appellant and that other person on the 4th day of April, 2020 at Engorika area, Meserani Village in Monduli District in Arusha Region were found in unlawful possession of Zebra meat equivalent to two killed Zebra valued at USD 2400 equivalent to Tshs. 5,520,000/= (1st count). Also, on the material date and place aforementioned were found in unlawful possession of Grant Gazelle meat equivalent to five killed gazelles valued

at USD 220 equivalent to Tshs. 5,175,000/=(2nd count), the properties of the United Republic of Tanzania without a permit from the Director of Wildlife.

Particulars of the 3rd read as; the appellant and his co-accused person on the date and places mentioned in the 1st and 2nd count were found in unlawful possession of weapons namely; machetes, three knives two horns and two torches in circumstances which raised reasonable presumption that, they had used the same in commission of the offence under the Wildlife Conservation Act No. 5 of 2009

In proving the charge against the appellant and another person, the prosecution paraded three witnesses namely; CPL. Evance (PW1), Rajabu Nyoni (PW2) and Emmanuel D. Pius (PW3). there were also six (8) exhibits in support of the charge, these are, exhibits handing over forms (PE1 & PE2), two motorcycles (PE3), four machetes and three knives (PE4 collectively). Other prosecution exhibits tendered and received by the trial court were, a certificate of seizure (PE6), Valuation Report (PE7), and Inventory Form PE8.

The appellant when given an opportunity to enter his defence, he patently denied to have committed the offence save that, he was arrested

on the 4th day of April 2020 day of while with a gallon of water, which the arresting officers suspected to have contained illicit liquor.

After full trial, the trial court found the prosecution side to have established the charge beyond reasonable doubt. Hence, it found the appellant and another guilty on the 1st and 2nd count unlike to the 3rd count. Eventually, the appellant and his co-accused were sentenced to pay a fine of Tshs. 50,000,000/= in each count and for each accused person or serve the term of twenty years jail in default of the imposed fines for each count however it was ordered that the imposed custodial sentences should be served concurrently.

In this appeal, the appellant had the legal service of Mr. Hamisi Mkindi, the learned advocate whereas Ms. Alice Mtenga, learned State Attorney, represented the Republic. However, the appellant's advocate when this appeal was called on for hearing, abandoned ground of Appeal Na. 3, 5 and No. 6.

In determining this appeal, I shall consider the parties' written submissions while determining the grounds of appeal herein as filed and argued excluding the abandoned grounds of appeal (Complaint No. 3, 5 and 6).

In the first ground, *that, the Trial Court erred and fact in convicting and sentencing the appellant based on a defective charge sheet*

It is the submission by the counsel for the appellant that, the trial court wrongly convicted the appellant as there was variance between the evidence and charge sheet. He cemented his argument that the charge reads that on 4th April 2020 at Engorika area, Meserani village in Monduli District whilst PW2 testified that the appellant and another were arrested at Lokisare village and not Meserani village.

He went on arguing that the certificate of seizure,PE6 shows that the appellant was arrested and found in unlawful possession of the government trophy at "Meserani ya Chini area Ngorika". Hence, oral evidence and documentary evidence so received by the trial court are in contravention with section 234 (1) of CPA. According to Mr. Mkindi, the charge against the appellant was therefore left unproven. He then invited this court to the decision in **Godfrey and another vs. The Republic**, Criminal Appeal No. 296 of 2018 (unreported), where the Court of Appeal sitting at Arusha emphasized the way forward when the charge sheet and evidence in variance.

Attacking the appellant's submission to the 1st ground, Ms. Mtenga argued that the evidence adduced by PW2 does not make any fatal irregularity since the particulars of the offence are very clear.

Moreover, the respondent's counsel argued that the appellant ought to have cross- examined if at all there were such variance regarding the scene of crime. Hence, he is deemed to have admitted those facts. She urged this court to refer to **Jamal Salum vs. The Republic**, Criminal Appeal No. 52 of 2017 and section 388 (1) of the CPA.

In determining the first issue, I have carefully look at the testimony as well as the charge leveled against the appellant. PW2's testimony is to the effect that on the material date there was an information that at **"Lokusale** area in **Engondea"** bush there were people who were unlawfully hunting whereas the areas indicated the charge sheet in which the appellant and his colleague were arrested are said to be **"Engorika area, Meserani"** Village as complained by the appellant.

More so, the seizure certificate, PE6 indicates that the search and seizure of government trophies as well as weapons mentioned therein were found with the appellant and another person at Meserani Chini area where they were apprehended as correctly argued by the counsel for the appellant. Section 234 (1) of the Criminal Procedure Act (supra) cited by the appellant's counsel reads;

"(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just".

According to the above statutory provision, the trial court is mandated to order an amendment of the charge or substitution thereof when it is discovered that the charge whose trial is taking place is defective in either substance or form or both. However, the trial court in the course of doing so shall ensure that injustice is not caused by an order of amendment.

Mentioning of Lokusale area in Engondea by PW2 as places where the appellant was allegedly found in unlawful possession of Government trophies. Equally, an indication of the areas where the appellant and his co-accused allegedly arrested in the charge sheet to be Engorika area, Meserani Village constitute not only variance and thereby making a charge defective but also contradictions creating apprehension of doubts.

I am holding so merely because Lokusale area in Engondea and Engorika area, Meserani Village must be different places. It is therefore my considered view that, the trial court during trial and immediately after appearance and recording of the testimony of PW2 ought to have noticed such defect. Thereafter being aware with the defect in the charge or variance in the charge and evidence had to order an amendment of the charge or the prosecution ought to have noticed such variance during examination in chief with PW2 and see how the same could be cured for the ends of justice.

Ordinarily, when an error or defect appearing in the charge which does not go to the root of the case, a decision emanating from such charge cannot be reversed as provided under section 388 (1) of the CPA. The Court of Appeal of Tanzania has consistently applied section 388 (1) of CPA in curing such defects in the charges whose errors do not occasion injustice. For example in **Deus Kayola vs. Republic**, Criminal Appeal No. 142 of 2012 (unreported) the charge of rape was challenged for being preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1) of the same law. The Court of Appeal held, among other things, that:

> *"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131*

of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old."

In this case the age of the victim was plainly indicated in the charge as required under section 130 (2) (e) of the Code (supra) and the same was subsequently substantiated by the prosecution evidence. Hence, the Court of Appeal found no prejudice that was caused on the part of the accused person during trial.

In our instant criminal matter, the testimony of PW2 mentioning different areas of arrest from that appearing in the charge followed by an indication of **Meserani chini-Engorika** in the certificate of search, PE6 and not **Engorika area -Meserani Village** as appearing in the charge is an error causing the charge to be defective. The error, which in my view, occasioned a failure of justice especially the appellant's defence unless the evidence adduced by PW2 would have been cured by any other independent pieces of evidence relating to the area of arrest and seizure of the government trophies, which is not the case here. In the case of **Michael Gabriel versus The Republic,** Criminal Appeal No. 240 of 2017 (unreported) where there was variance of evidence adduced by PW1

and PW4 together with the charge relating to the place where the offence was committed and where the appellant was arrested, the Court of Appeal of Tanzania held:

> *"In the particular circumstances of this case, it was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of omission was to water down the prosecution evidence. Where as a result of the variance between the charge and the evidence, it is necessary to amend the charge but such amendment was not made, the offence will remain unproved".*

In law, an accused person must be made aware of the nature of the offence, which he stands, charged with and clear place where the offence was committed. How can a charge reflect the place other than the place indicated in certificate of seizure where accused person is alleged to have been arrested and found in unlawful possession of Government Trophies? The answer is to the negative unless sufficient explanation is given. And, how could the arresting officer, PW2 mention place other than where the appellant and another person were arrested? I find the error or variance goes to the root of the case taking into account that, area (s) where appellant was arrested and where the government trophies were found in

possession of the appellant and that other person and apprehended were necessary.

> *Regarding 2nd and 7th ground which read, that, the Trial Court erred as it failed that the appellant case was never investigated by the police as there was no investigator of the case offending section 21 (1) the Economic and Organized Crime Control Act, Cap 200 Revised Edition, 2019 (EOCCA) and that, the Trial Court erred and fact in convicting and sentencing the appellant while the respondent did not prove her case beyond reasonable doubt.*

Submitting on these two grounds of appeal together with the 1st additional ground of appeal herein above, Mr. Mkindi stated that, the charge against the appellant was not proved beyond reasonable ground. He expounded his stance by stating that, the evidence adduced by the PW2 leaves serious doubts since he was the one who apprehended and searched the appellant, worse still there was no evidence of an independent witness to corroborate his evidence. He added that, according to the certificate of seizure there were persons who witnessed the search but were not called by the prosecution for testimonial purposes and that the case at hand had no investigator. He went on challenging non-compliance with section 38 of CPA.

In her reply submission relating to 2nd, 7th grounds of appeal as well as 1st additional ground of appeal, Ms. Mtenga argued inter alia that, there

is no particular number of witnesses that is required to prove or disprove a case but the weight of evidence. She was therefore of the opinion that since the ones who arrested the appellant were public officers and since; there was no independent witness at the place where the arrest, search and seizure were effected, independent witness was of no value. She further argued that, the testimony given by PW2, arresting officer was satisfactory to establish the appellant's guilt and that, calling other arresting persons was nothing save a repetition of evidence. She argued this court to refer to section 143 of the Tanzania Evidence Act, Chapter 6, Revised Edition, 2019 (TEA).

At the outset, I am increasingly of the considered view that, the testimony of PW2 relating to the place of arrest and seizure left a lot to be desired as earlier explained. For that reason, it was necessary for PW2's testimony to be corroborated by other pieces of evidence. More so, the names of persons said to have witnessed the search (Seraphino Mawanja and Jonas Nyange are not indicative if they were civilians or public officers. Above all, the search, PE6 ought to have indicated if it was in the reserve/ bush or not or village or hamlet since issue of independent witnesses in searches and seizures is always questionable in cases of this nature. It is therefore necessary to indicate the place where a certain

article was seized if there were people or where no citizen could be easily procured so that the search itself be explanatory in order to minimize unnecessary complaints.

On the complaint of failure to issue a receipt as required under section 38 (3) of CPA, I am of the view as correctly argued by the learned counsel for the Republic that omission to issue the same not necessarily go to the root of the case as the same may be replaced by certificate of seizure and oral evidence. I wholly subscribe my holding with decision cited by Ms. Mtenga in **Gibril Okash Ahmed vs. Republic**, Criminal Appeal No.131 of 2017 (unreported-CAT). However, as explained above the search and seizure is not indicative if the same was in the appellant's premises or bush

Having answered the above grounds of appeal, I am not therefore bound to proceed determining other grounds of appeal since the court's determination in 1st, 2nd and 7th ground suffices to dispose of this appeal. I am however reluctant to order retrial after since I have considered the fact that, the retrial of the case shall not be ordered where there is insufficient evidence and taking into account the period spent in prison custody by the appellant (See the judicial precedent in **Fatehali Manji vs. The Republic** (1966) E.A 343

Consequently, the appellant's appeal is found laudable and I proceed allowing it. The trial court's convictions are quashed and sentences meted out to the appellant are hereby set aside. The appellant shall be realised from prison forthwith unless held therein for any other lawful cause. The trial court's ancillary orders as to the trophies and two motorcycles are left undisturbed since the appellant did not claim ownership

It is so ordered

DATED at **ARUSHA** this 28th February 2023

MOHAMED RASHID GWAE

JUDGE