IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 48 OF 2022

(C/F Economic Criminal Case No. 13 of 2021 of the District Court of Siha at Siha)

OTHMAN MTAWA MBILINYI..... APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

JUDGMENT

16/03/2023 & 22/03/2023

SIMFUKWE, J.

The appellant, Othman Mtawa Mbilinyi, was arraigned before the District Court of Siha vide Economic Case No. 13 of 2021 on four counts as follows:

The first count is in respect of unlawful possession of government Trophy contrary to **section 86(1)(2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009** read together with **paragraph 14 of the 1st Schedule** and **section 57(1)** and **60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2019.**

It was alleged that on 25th day of August, 2021 at Gerewali area in Kilimanjaro National Park within the district of Siha in Kilimanjaro Region, the appellant was found in unlawful possession of fresh meat and one head of Bushbuck which is equivalent to one killed Bushbuck valued 600

USD equivalent to one million three hundred eighty-six thousand Tanzanian shillings (1,386,000/-) only, the property of the United Republic of Tanzania.

On the second count, the appellant was charged with the offence of unlawful possession of government Trophy contrary to **section 86(1)(2)(c)(iii) of the Wildlife Conservation Act** (supra) as amended by **section 59 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016** read together with **paragraph 14 of the 1st Schedule** and **section 57(1)** and **60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2019.**

It was alleged that on the same date, time and place, the appellant was found in unlawful possession of fresh meat and one head of common duiker which is equivalent to one killed common duiker valued at 250 USD equivalent to five hundred seventy-seven thousand five hundred Tanzanian shillings (577,500/=) only.

The third count is in respect of entering in the National Park without a permit contrary to **section 21(1)(a)(2) of the National Parks Act, Cap 282 R.E 2002** as amended by the **Written Laws (Miscellaneous Amendments) Act No.11 of 2003.**

It was alleged that on the same date and place, the appellant did enter in Kilimanjaro National Park without a permit or written authority.

Lastly, on the fourth count the appellant was charged with an offence of unlawful possession of weapons into a conservation area contrary to **section 103 of the Wildlife Conservation Act** (supra) read together with **paragraph 14 of the 1st Schedule** and **section 57(1) and 60(2) of the Economic and Organised Crimes Control Act** (supra).

It was alleged that on the same date and place, the appellant was found in possession of one bush knife for the purpose of committing the offence therein without licence or written authority.

The trial court convicted the appellant as charged on the first, second and third counts and sentenced him as follows:

On the first count, the appellant was sentenced to serve twenty years imprisonment; on the second count the appellant was sentenced to serve twenty years imprisonment; while on the third count he was sentenced to serve one year imprisonment.

The appellant was aggrieved by the convictions and sentences meted out to him. He pursued the instant appeal on the following grounds:

1. *That, the trial court erred in law in relying solely on the certificate of seizure (Exh.P1) to convict the Appellant, despite the same being wrongly procured and tendered in evidence as exhibit.*
2. *That, the trial court erred in law in holding that the Appellant was found in possession of wild animals' meat and heads while there was no receipt issued, tendered and admitted in evidence as exhibits pursuant to section 38(3) of the CPA Cap 20 R.E 2019.*
3. *That, the learned trial magistrate grossly erred in both law and fact in relying upon an inventory form (Exh.P8), which was wrongly and unprocedurally acquired, tendered and admitted in evidence as exhibit.*
4. *That, the learned trial magistrate grossly erred in both law and fact in failing to consider the principles which have to*

be taken into account in respect to chain of custody and preservation of exhibits.

5. *That, the learned trial magistrate grossly erred in both law and fact in admitting in evidence the exhibits P2 and P3 respectively despite the same being not cleared for admission before being admitted.*
6. *That, the learned trial magistrate grossly erred both in law and fact in convicting the Appellant basing on contradictory and wholly unreliable prosecution evidence from prosecution witnesses.*
7. *That, the trial court erred in both law and fact in not drawing an adverse inference to the prosecution for failure to summon the very important witness (i.e the alleged DRMI/C one Jasmin Abdul) to testify, so as to lend credence to other prosecution witnesses' evidence on how he ordered and execute the disposition of the alleged wild animals' meat.*
8. *That, the trial court erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt and to the required standard by the law.*

Before summarizing the parties' submissions, I find it appropriate to summarise briefly the factual background leading to the arraignment and conviction of the appellant. The whole saga started from a Conservation Ranger (PW1) who alleged that they were on patrol at Gerewali area. That, they saw two males, one carrying a sulphate bag and a panga and another holding a panga. While trying to arrest them, one managed to

escape and so they managed to arrest the other man the appellant herein, who was carrying a sulphate and a machete. After searching him, it was alleged that in the sulphate bag there was fresh meat of Bushbuck together with its head and fresh meat of common duiker and its head. That, the appellant had no permit, thus, they filled the certificate of seizure which was signed by the appellant and other rangers.
Then, the appellant was taken to Sanya Juu police station together with the exhibits, where PW3 a wildlife officer was called to identify the trophies and he issued a trophy valuation certificate to that effect (exhibit P4). Thereafter, an inventory form was prepared for disposal of the seized government trophies which was alleged to had been done in the presence of the appellant. The appellant was then charged, convicted and sentenced as above.

During the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Ms. Grace Kabu, the learned State Attorney. The appellant prayed to argue the appeal by way of written submission, his prayer was granted.

On the first ground of appeal, the appellant faulted the trial magistrate for relying on exhibit P1 which was a certificate of seizure while the same was not cleared for admission as PW1 described Exhibit P1 but never identified the same before tendering it in evidence as exhibit. It was his argument that PW1 was supposed to identify the alleged document by showing the trial court the marks or features which he had earlier described. That, surprisingly, after PW1 had described the said document, he told the trial court at page 12 of the typed proceedings, that:

"Yes, this is the document I pray to tender it as exhibit…"

From the above quotation, the appellant was of the view that the said document was never cleared for admission as PW1 never identified the marks which he had earlier mentioned. Thus, it was wrong to rely on it.

It was explained further that it has been established that once a document is admitted in evidence without being cleared for admission, then the same should be expunged from the record. Reference was made to the case of **Said Kihedu Irira and Another vs Republic, Criminal Appeal No. 19 of 2022** where at page 9 of the judgment the Court cited the case of **Robinson Mwanjisi and Three Others vs Republic [2003] TLR 218** in which the Court held that:

> *"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out."*

On the strength of the above authority, the appellant prayed the court to expunge Exhibit P1 from the record as the noted omission is fatal.

On the second ground of appeal, the appellant faulted the whole exercise of search and seizure. He argued that the process contravened the mandatory provision of **section 38(3) of the Criminal Procedure Act, Cap 20 R.E 2019** as there was no receipt produced, issued and tendered in evidence to prove and substantiate the fact that the appellant was found in unlawful possession of government trophies and weapon. That, the prosecution produced and tendered certificate of seizure (exhibit P1) which the Court of Appeal had already emphasized that the same cannot be equated to a receipt. The appellant buttressed his argument with the

case of **Andrea Augustino @Msigara and Another vs R, Criminal Appeal No. 365 of 2018,** in which the Court held that:

> *"Following the above section and taking into account that in the case at hand there were no receipts issued by PW2 and PW3, there is no doubt that the procedure was flawed. Again, as rightly put by Mr. Kibaha, the interpretation of the receipt given by Mr. Mauggo is unfounded as there is no way the certificate of seizure or seizure form can be equated to a receipt."*

Also, the appellant cited the cases of **Said Kihedu Irira and Another vs Republic** (supra); **Selemani Abdallah and Others vs Republic, Criminal Appeal No. 384 of 2008** and the case of **Patrick Jeremiah vs Republic, Criminal Appeal No. 34 of 2006;** to cement his argument.

Guided by the above cited cases, it was argued that it cannot be said with certainty that **section 38(3) of the Criminal Procedure Act** was complied with by the arresting and seizing officer (PW1). The appellant prayed that this court should disregard exhibit P1 (certificate of seizure) for being unreliable.

In respect of the third and seventh grounds, the appellant faulted exhibit P8 the inventory form by stating that the same was wrongly and unprocedurally acquired, tendered and admitted in evidence as exhibit on the following reasons: *First,* that the appellant was not involved before and during the preparation of the same as a result it does not have/contain the appellant's signature. *Second,* the appellant was not availed with an opportunity to be heard by the alleged magistrate before or after the alleged disposition; *third,* there is no photos of the alleged government

trophy taken and subsequently tendered in evidence as enshrined in the **PGO No. 229(25)**. *Lastly*, the alleged magistrate who issued disposal order was not summoned by the prosecution and there is no reason stated on such failure. To support his points, the appellant referred to page 11 of the case of **Said Kihedu Irira and Another** (supra) which held that:

> *"… According to PW3, she was called by PW1 at Same Police Station for the purpose of identifying the seized trophies which she did. She filled the inventory as well as evaluation form thereat, she did not disclose whether or not the appellants were present when she was filling the inventory. According to her testimony the only time the appellants were involved was during disposing the alleged seized trophies. That explains why their signatures lack in the inventory forms. Since the government trophies allegedly found with the appellants were perishables, section 101 of the WCA and paragraph 25 of PGO No.229 give direction on how to dispose perishable Government trophies by the Director and by police during their investigations respectively."*

From the above quotation, the appellant argued that the same scenario happened in the instant matter since the only stage he was involved was during the disposition. That, he was neither involved during the preparation of the inventory form nor the preparation of the valuation form.

Further reference was made to the case of **Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017**

(unreported) which was cited in the case of **Said Kihedu Irira and Another vs Republic** (supra).

From the above authorities the appellant emphasized that he was not given an opportunity to be heard by the alleged magistrate as the requirement of the presence of the accused person during disposition of perishable exhibits is for the accused to be heard which was not done in the case at hand, hence miscarriage of justice to him.

The appellant pointed out another irregularity which is apparent on the face of the court record pertaining to exhibit P8, the way it was tendered and admitted in evidence as exhibit. He gave an example of when PW5 was under oath, at page 23 of the typed proceedings, he said:

> *"PW5: I can recognise the inventory via my handwriting and signature. I pray to tender it as exhibit."*

Then, the court admitted it as Exhibit P8. Thus, the court admitted the same without being cleared for admission. That, PW5 never identified those marks which he mentioned earlier rather he directly tendered the document in evidence as exhibit and the trial court without detecting the omission admitted the document in evidence. That, the learned trial magistrate failed to be a trustee in law and help the poor unrepresented and layman to ensure that the document is first cleared for admission before being admitted. Instead, the trial magistrate admitted the document in evidence and marked it as Exhibit P8. Worse enough, the records bear it that, what was read out aloud by PW5 was exhibit P9 and not exhibit P8. Thus, Exhibit P8 (Inventory form) was never at all read out aloud before the court hence, the appellant's attention was never drawn to the contents of Exhibit P8.

Having established the above irregularity in respect of exhibit P8, the appellant was of the view that since such exhibit was the subject matter of this case then, the same suffers the fate of being expunged from the record. Thus, there is no subject matter to warrant the conviction against the appellant.

On the fourth ground of appeal the appellant faulted the chain of custody to the effect that PW1 in his testimony, testified that after seizure of the alleged wild animals' meat and their heads he took the accused person (now the appellant) together with the exhibits to Sanya Juu police station and handed the same to one Sgt Benezeth (PW4) through what is termed as a special form (Exhibit P2). However, PW4 never identified the said Exhibit P2 before the court, that, he never said whether he labelled the exhibits before PW1 so as to distinguish them from other exhibits before storing them. Also, he never testified on the mark alleged put on the panga by PW1 and even PW1 never testified putting the mark on the panga as the same was given by PW2 that PW1 put GR1 mark on the machete (panga).

Furthermore, the appellant submitted that when PW3 was testifying he stated that on 26.08.2021 he went to the policestation where he was handed the wild animals' meat and their heads by one Sgt Benezeth (PW4) for identification and valuation. However, nowhere he stated whether the said handing over was documented. Worse enough, PW4 in his evidence stated that he received the exhibits on 25.08.2021 from PW1 and on the next date that is on 26.08.2021 he gave them to Sgt Shaban to take it to court. Nowhere this witness stated to had handed over the alleged exhibit to PW3 for further identification or valuation. It was the opinion of the

appellant that the way the alleged wild animals' meat and their heads were handled, the chain of custody was irretrievably broken.

On the fifth ground of appeal, pertaining admissibility of exhibit P2 and P3 respectively, the appellant averred that when PW1 was testifying among others, he described the forms which he alleged to be handing over certificate between him and PW4. However, the same were never cleared for admission because of the following reasons: *First;* PW1 in his evidence never distinguished between the two forms on which was used on 25.04.2021 and the one which was used on 25.08.2021. *Second*, the appellant argued that PW1 never identified the alleged documents before the court before tendering the same in evidence as exhibits.

From the above noted irregularity, the appellant opined that such exhibits deserve to be expunged from the record as they flouted the mandatory procedures of admitting documents in evidence.

On the sixth and eighth grounds of appeal; the appellant complained that the prosecution case was not proved beyond reasonable doubt against him. That, the prosecution gave improbable, contradictory and unreliable evidence the fact which was not detected by the trial magistrate.

It was submitted that when PW2 was testifying, he stated that they arrested the appellant and found him with fresh meat and head of common duiker and never mentioned the meat of bushbuck nor its head as alleged by PW1. That, PW2 alleged that he was at the scene of crime, apprehended and searched the appellant. Astonishingly, he testified contrary to what was said by his fellow witness particularly PW1. The appellant explained that this should have raised an alarm in the trial magistrate's mind and see that there was something fishy behind the case

against the appellant and that there is high possibility that the case was fabricated against the appellant.

In his final analysis, the appellant implored the court to allow the appeal, quash the conviction, set aside sentence and set him free.

In reply, Ms Grace Kabu the learned State Attorney for the respondent, on the outset supported the appeal basing on the third, fifth and eighth grounds of appeal.

On the third ground which concerns inventory form that the same was wrongly and unprocedural acquired, tendered and admitted in evidence as exhibit, Ms. Grace referred to **section 101 of the Wildlife Conservation Act, No. 5 of 2009** and **section 353(2) of the Criminal Procedure Act, Cap 20**, **R.E 2019** which govern the procedure of disposition of exhibits which are perishable and fast decay. That, the law establishes that the accused person should be given the opportunity to see the actual trophies on subject and given the rights to raise objection if any, before the said trophies are admitted as exhibits.

Forthwith, the court should consider the disposition of the said exhibits thus the items destroyed would be indicated on the filling inventory form which should be signed by the magistrate, accused and the officer who seeks the disposition order for proving that the exercise of disposition fully involved the accused person.

In the instant matter Ms. Grace was of the opinion that, evidence on record as testified by PW3 and PW5 is silent on whether before the trial court had ordered the disposition of the said trophies, the appellant was given his right to have a physical look by displaying or describe the

trophies on subject matter before it was admitted as exhibit, so as to allow the appellant to raise any concern if necessary.

Ms Grace explained that, the absence of concrete evidence to prove that the appellant was fully involved in the process of disposition of the exhibits is very fatal and rendered the said exhibit P8 (Inventory form) to be expunged. Reference was made to the case of **Mohamed Juma @ Mpakama vs Republic** (supra). `

It was further submitted that according to PW3 at page 23 of the trial court's typed proceedings the inventory form was filled at the police station. Thus, it is clear that the appellant was not availed with right to be heard before the order of disposing the alleged trophies was issued. She referred to the case of **Said Kihedu Irira and Another vs The Republic,** (supra) at page 12-13 where the Court held that:

> "*…To sum up, failure to comply with these necessary requirements especially in these offences of unlawful possession when dealing with wild meat, makes it unsafe to convict the accused persons with the offences*."

It was the argument of Ms. Grace that if exhibit P8 will be expunged from the record on the fact that its evidential probity is on question, hence, it would be not justice and fair to rely upon it to find conviction against the appellant. Whereby in such respect, we will be having no evidence remained to prove the offence of unlawful possession of government trophies.

On the fifth ground, Ms Grace referred to page 12 of the trial court typed proceedings when the appellant was asked whether he has objection on a prayer by PW1 to tender exhibit P2 and P3 the appellant replied that:

"Other exhibits are missing like the mobile phone; they didn't bring it."

However, the trial magistrate proceeded to admit the two exhibits without ascertaining whether the accused objected or not objected and require the prosecutor to answer his objection if any and give a ruling.

Regarding the eighth ground, Ms. Grace explained that due to the arguments established on the third and fifth grounds they concede that the charge against the appellant was not proved beyond reasonable doubt and to the required standard of the law.

Having summarized the submissions as above and considering the fact that the learned State Attorney for the respondent supported the appeal, my task is to consider whether what was conceded is fatal to the extent of allowing the appeal.

On the 1st ground of appeal, it has been alleged that the certificate of seizure (Exhibit P1) was wrongly procured and tendered. That, PW1 described the said exhibit but did not identify the same.

My thorough perusal of the proceedings particularly at page 12 of the typed proceedings made me to conclude that the procedures of tendering the said document was followed. The Court of Appeal in the case of **John Ngonda vs Republic, Criminal Appeal No. 45 of 2020,** at page 7, (CAT at Arusha) stated that:

"Admittedly, it is settled that after a document is cleared for admission and then admitted in evidence, its contents must be read out to apprise the accused of its nature and substance."

The above procedure is reflected during tendering of the exhibit at page 12 (supra). PW1 described the certificate of seizure, he identified the same and it was read out after being admitted as exhibit. Thus, the 1st ground of appeal has no merit.

On the second ground of appeal, the appellant faulted the whole exercise of search and seizure by arguing that it contravened **section 38(3) of the Criminal Procedure Act** (supra). That, no receipt was produced, issued and tendered in evidence as exhibit to substantiate the prosecution evidence that indeed the appellant was found in possession of the said government trophy. The learned State Attorney did not comment on that.

I appreciate the cited cases by the appellant. Indeed, they provide legal position in so far as issuing receipt after the process of seizure is concerned. As a matter of reference **section 38(3) of the CPA** provides that:

> *"38 (3) 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****, bearing 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*." Emphasis added

The purpose of issuing receipt is to ascertain that the thing seized come from the accused and not anyone else. The case of **Selemani Abdallah and Others V. R** (supra) is relevant.

In the instant matter, it is undisputed fact that while being arrested, the appellant was accompanied with another person whom the prosecution alleged that escaped. At page 12 of the typed proceedings, the appellant raised an objection that there was a phone which he claimed the prosecution did not bring. In his defence, the appellant claimed that the person whom he met had the said luggage and the alleged phone. From this piece of evidence, I am of considered opinion that it was necessary for the prosecution to issue receipt in respect of the alleged seized meat considering the fact that the certificate of search and seizure was not signed by independent witness. Thus, the second ground of appeal has merit.

On the 3rd ground of appeal which is in respect of the inventory form, it has been conceded by both parties that the same was wrongly and unprocedurally acquired, tendered and admitted as exhibit. The learned State Attorney argued that at page 23 of the proceedings, PW3 testified that the inventory form was filled at the police station.

The Court of Appeal in the case of **Mohamed Juma @ Mpakama vs Republic (Criminal Appeal 385 of 2017) [2019] TZCA 518** from page 20-23; which was cited by the parties explicitly discussed this issue in detail. I wish to state that in answering this ground of appeal, I will be guided by the cited case. At page 21, the Court stated that:

> *"The police, while carrying out investigations have a very different procedure for handling perishable Government trophies. This different procedure is provided for under the Police General Orders (PGOs)."*

At page 22 it was stated that:

"Concerning the way the Police are required to handle perishable exhibits when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states: 25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."

The Court of Appeal held further that:

"The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard."

In this case, with due respect, the accused conceded in his defence that he participated in disposing of the government trophies. At page 27 of the trial court typed proceedings he stated inter alia that:

"The next day, they brought me to the court with two heads of animals and we threw them away after court in the nearby farm."

Thus, the only problem with the inventory form is in respect of admission of the same of which I concur with both parties.

Following the anomaly in admission of the Inventory form (exhibit P8), it is hereby expunged from the record.

Again, on the 5th ground, the parties conceded that exhibit P2 and P3 suffered irregularity. The appellant argued that the same was not cleared for admission before being admitted. The learned State Attorney submitted that during tendering of exhibit P2 and P3 the appellant raised concern that there were other properties which were not brought. However, the trial magistrate did not pay a heed on such concern.

I examined the proceedings particularly at page 12 of the typed proceedings, it is true that the appellant raised an objection that there were other exhibits which were missing. The trial magistrate did not entertain the said objection and continued to admit the exhibits. This is fatal since the appellant was curtailed right to be heard on his objection. I am of considered opinion that the said denial prejudices the appellant on the reason that the appellant referred the said phone in his defence.

On the basis of the above findings, I join hands with both parties that the charges against the appellant were not proved beyond reasonable doubts. The noted irregularities particularly in respect of admission of exhibits as a matter of cardinal principle, I hereby resolve them in favour of the appellant.

In the upshot, I hereby quash the appellant's conviction and set aside the sentence imposed against him and allow the appeal accordingly. The appellant should be released from custody immediately, unless held for other lawful reasons.

It is ordered.

Dated and delivered at Moshi this 22nd day of March,2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

22/03/2023