IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 49 OF 2022

(Originating from the District Court of Mlele at Mlele in Economic Case No. 16/2020)

JANUARY LUDOVICK.....APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

02/01/2023 & 29/03/2023

MWENEMPAZI, J.

Before the District Court of Mlele, the appellant was arraigned for four counts; **first** is Unlawful possession of firearm contrary to Section 20 (1) (b) and (2) of the Firearms and Ammunition Control Act No. 02 of 2015, read together with paragraph 31 of the First Schedule to, Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act Cap 200 R. E. 2019. **Second** is Unlawful possession of ammunitions contrary to Section 21 (a) and (b) of the Firearms and Ammunition Control Act No. 02 of 2015, read together with paragraph 31 of the First Schedule to, Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act Cap 200 R. E. 2019. **Third** is Unlawful possession of Government

Trophy contrary to Section 86 (1) and (2) (ii) of the Wildlife Conservation Act No. 05 of 2009, as amended by Section 59 (a) of the Written Laws (Miscellaneous Amendment NO. 2) Act No. 04 of 2016, read together with paragraph 14 of the First Schedule to, Sections 57 (1) and 60 (2) of the Economic and Organized Control Act Cap 200 R. E. 2019. **Fourth**, Unlawful possession of weapons in a game reserve contrary to Section 17 (1) and (2) of the Wildlife Conservation Act No. 05 of 2009.

It was alleged that, on the 30th day of July, 2020 in Rukwa/Lwafi game reserve within Mlele District in Katavi Region, the appellant herein was found in possession of a firearm commonly known as 'Gobore' and 16 ammunitions used in a muzzle loader gun without authorisation.

That, the appellant was also found in possession of eight (8) Kilograms of Reedbuck meat, the property of the Government of the United Republic of Tanzania without the permit from the Director of Wildlife. The appellant was also found in possession of weapons which were one machete, one axe and one knife without a permit.

As the charges were read to the appellant, he denied all the charges and hence a full trial was inevitable whereas at the end, he was found guilty and was convicted and sentenced to serve jail time of twenty (20) years in each count, meaning, first, second and the third count, while he

was ordered to pay the fine of Tsh. 200,000/= or serve the term in prison of three (3) years.

The appellant was not impressed with both the conviction and sentences meted against him and hence decided to appeal to this court by filing a petition consisting of three (3) grounds which are as here under;

1. That, the Trial Court erred at law by convicting the Appellant with the offence of unlawful possession of fire arm, ammunition and reedbuck meat which were seized in contraction of the law governing the same as no receipt were issued nor production of copy of the report to a Magistrate after the conduction search and seizure.
2. That, the Trial Court erred at law by admitting and working upon it, the seizure certificates which its contents were not read before the Appellant before the same was called to sign it.
3. That, the Trial Court erred at law and fact by convicting the Appellant on a case not proved beyond reasonable doubt.

Whereas, the appellant herein prays for judgement in his favour and that he be released from prison and be set free.

As the scheduled date for hearing arrived, the appellant had no any legal representation meaning he fended for himself while the respondent enjoyed the legal services of Mr. John Kabengula learned State Attorney.

Nevertheless, both sides agreed on battling out this appeal by way of written submissions, an option which was gladly granted by this court.

The appellant submitted first that, the trial court erred in law and fact by convicting and sentencing him for the case which was not proved beyond all reasonable doubt as required by the law. He added that, he was not afforded the chance to cross examine on the legality of the documentary evidences tendered in court, whereas it is well known that the failure to cross examine a witness on a particular important point or document may lead the court to infer admission of such fact and it will be difficult to suggest that the evidence should be rejected. On this ground, the appellant insisted that the trial court flawed his rights as he was not given the chance to shake the stability of the documentary evidences tendered in court by the prosecution side.

The appellant then cited Section 206 (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 which states that;

> *"Whenever in the course of any proceeding under this Act, the High Court or a district magistrate is satisfied that the examination of a witness is necessary for the ends of justice....."*

He then cited the case of **Bhatt vs Republic (1957) E.A 332**, where the court held that;

"Remembering that legal onus is the prosecution to prove its case beyond the reasonable doubt, we cannot agree that a prema facie case is made if at the closure the prosecution is merely one which on full contradiction might possibly be though sufficient to sustain a conviction."

He submitted further that, the trial court erred in law, point and fact by admitting and working upon it, the seizure certificate in which its contents were not read in court before he was called to sign the same, that it is clear he was searched and was not found in possession of any exhibit. It is trite that the document should be read in court and the appellant has to sign it upon its admission contrary to the seizure certificate tendered before the court during the trial which it did bare his sign which implicates that the said exhibits were not found with him. Whereas, he prays for this court to allow his appeal and that he be released from prison.

Responding to the submission made by the appellant, Mr. Kabengula learned State Attorney submitted that, the District Court of Mlele found the appellant guilty on four counts as drafted in the charge sheet. In response to the claim of the appellant that he was not issued with a receipt nor a copy of a report of a magistrate, his side submits that the omission is minor and does not vitiate the prosecution evidence. He added that, such omission is cured by the oral testimonies of PW1, PW2, PW3 and PW5 who witnessed

the seizure and after he had confessed to possess the seized items hence their evidence should not be disregarded.

Mr. Kabengula referred this court to the case of Nyerere Nyague vs Republic, Criminal Appeal No. 67 of 2010 CAT (unreported), where it was held that, not every apparent contravention of the CPA leads to automatic exclusion of evidence in question. He again invited this court to adopt the same position which prevailed in Jibril Okash Ahmed vs Republic, Criminal Appeal No. 331 of 2017 CAT Arusha (unreported) pg. 40, and Jumanne Mpini @ Kambilombilo and Another vs Republic, Criminal Appeal No. 195 of 2020 CAT Kigoma (unreported) pg. 13.

Mr. Kabengula proceeded that his side insists that, since oral testimony by such witnesses is too strong to establish that the appellant himself confessed before then to possess the seized items and he also confessed that he had no permit to possess the same in his oral testimony, the omission to tender receipt is very minor and cannot vitiate the evidence of certificate of seizure.

However, Mr. Kabengula argues further that the appellant was afforded the chance to question or rather challenge about the seizure certificate and its anomaly during the trial as it was read in court by PW1 Omary s/o Sayi during his testimony. That, the appellant never crossed examined the witness

about the document, and so his claims that he said document was not read in court is baseless.

Arguing further, the learned State Attorney submitted that, with respect to the third ground of appeal of which in the written submission of the appellant appears as the first ground, the appellant challenges the findings of the trial court on the ground that the prosecution did not prove its case beyond reasonable doubt as he was not given the chance to cross-examine the witnesses and their testimonies. Mr. Kabengula submitted that his side does not support this ground and that they maintain there stand that the evidence adduced by all the four witnesses from PW1 to PW6 were enough to ground conviction upon all the four counts against the appellant.

Mr. Kabengula did not end there, he submitted further that, on further perusal of the court records, the testimonies of PW1 who was the one who conducted the search and seized the items which were found in the possession of the appellant and the witness was never even cross examined which means the appellant agreed with what was testified. He insisted that, the same applied to other testimonies made by other witnesses. That, the appellant was afforded the chance to cross examine the witnesses as he did so to PW5 as seen at page 32 and PW6 at page 36 and the appellant opted not to cross examine PW1-PW4 but he was afforded the chance to cross examine them, therefore their statements should be believed. The learned

State Attorney cited the case of **Goodluck Kyando vs Republic [2006] TLR 363** where it was held that;

> *"Every witness is entitled to credence unless there are good and cogent reasons to the contrary."*

He then added that, reasons adduced above to the effect that the appellant was found in possession of the seized items without a permit , all proves beyond reasonable doubt the offences that the appellant was charged with. And therefore, his side humbly prays this court to dismiss this appeal on the reasons that all the grounds as filed by the appellant are out weighed by the prosecution evidence.

After I have gone through the submissions from both camps, and keenly reading between the lines all the records of the trial court, I am fortified that the only issue to be dealt with in disposing of this appeal is **whether the prosecution side had proved their charges against the appellant beyond reasonable doubts.**

In answering the issue above, I will condense the grounds of appeal as filed by the appellant into one ground that the appellant was convicted over the charges which were not proved to the required standard of the law as they all suggest the same. This ground will tally the raised issue to be dealt by this court in order to reach a justifiable conclusion.

As it was stated by the learned State Attorney that PW1 was the key witness as he was the arresting officer and he seized the items found in possession of the appellant. It was this witness (PW1) who tendered the seizure certificate in court and was admitted in evidence as Exhibit P1.

It is my understanding that, all the witnesses summoned by the prosecution side at the trial court were testifying against the appellant relying on Exhibit P1 since it is the document that initiated the counts charged against the appellant. This document listed all the items that made the appellant be answerable as he did not possess any permit to own any and at the particular area where he was arrested.

However, when one reads the names of the person apprehended in Exhibit P1, it is quite different to the names of the person being displayed on the charge sheet. In addition to that, the testimonies of the summoned witnesses all referred to the names appearing on the charge sheet and not on Exhibit P1, not forgetting the testimony of the appellant himself during his defence, when mentioning his name, he matched the names appearing on the charge sheet and not the names appearing in Exhibit P1. The names that appear on the Charge Sheet are JANUARY S/O LUDOVICK meanwhile, the names appearing in Exhibit P1 is JANUARY MILAMBO MBALAMWEZI. It is evident that these are two distinct people.

Surprisingly, how did the trial court reach conviction relying on this exhibit as if it was not read in court wherefore it could have been noticed that the names on Exhibit P1 do not match the names on the charge sheet. It is understandable that, the trial court should have proceeded under Section 234 of the Criminal Procedure Act, (Cap 20 R. E. 2022, CPA) and ordered alteration through amendment or substitution or addition of a new charge and then comply with the procedural requirements as outlined in Sub-Sections (2), (3) (4) and (5) of Section 234 of CPA. See, **1. Masasi Mathias vs Republic, Criminal Appeal No.274 of 2009** (Unreported) **2. Vumilia Penda Mushi vs Republic, Criminal Appeal No.327 of 2016** (Unreported) **3. Ryoba Mariba @ Mungare vs Republic, Criminal Appeal No.74 of 2003** (Unreported) **and Anania Turian vs Republic, Criminal Appeal No.195 of 2009** (Unreported).

It is my strong holding that the variance is not curable under Section 388 of the CPA, because as the names appear in the two documents, belong to two different people, and that, JANUARY MILEMBE MBALAMWEZI was the one who was arrested by PW1 and had the items found in his possession seized. Meanwhile, the charge sheet and the evidence adduced by the witnesses is against JANUARY S/O LUDOVICK who was not found in possession in any item illegally since there was no any document tendered

in court that proved JANUARY S/O LUDOVICK was found being in the Game Reserve illegally and that he possessed the items seized without permit.

For the foregoing reasons, it is my holding that the charge against the appellant was not sufficiently proved before the trial court. Consequently, the appellant's conviction is hereby quashed. The sentence and orders earlier imposed upon the appellant are set aside. This court orders immediate release of the appellant unless he is held in custody for other lawful cause.

Dated at **SUMBAWANGA** this 29TH day of March, 2023.

T. M. MWENEMPAZI

JUDGE