

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 31 OF 2022

(Arising from the district court of Bariadi in economic case no 109/2017)

MACHIBYA S/O SELEMANI@CHIKONYOLWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th February & 21st March, 2023

MASSAM, J.

The appellant one Machibya Selemani Chikonyolwa was charged before Bariadi District Court at Bariadi with two counts as follows, unlawful hunting a scheduled animal c/s 47 (a) 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] [3] of the economic and organized Crime Control Act Cap 200n R.E 2002] as amended by section 13 and 16 of the written laws [Miscellaneous Amendment Act] No. 3 of 2016 and unlawful dealing in Government Trophies c/s 84 (1) of wildlife Conservation Act no 5 of 2009 read together with paragraph 14 of the 1st schedule and section 57 (1) and 60 (2) (3) of the economic and organized crime control Act Cap 200 [R.E] 2002 as amended by section 13 and 16 of the written law Miscellaneous Amendment Act No 3 of 2016.

The case from the prosecution was that, on unknown dates but between the month of May and June 2017 at night hours at Mwauchumu village within Bariadi District in Simiyu Region accused person found hunting scheduled animal to wit one elephant valued at usd 15,000 equivalent to Tshs 33707,850/= by using rifle caliber 485 inches with serial No 41811 shotgun caliber 12 bore with serial No 521 9570 and two home made guns the property of Tanzania Government, Again in the same date, months, hours and place they were found unlawful dealing in government trophy to wit one elephant skull equal to one elephant unlawful killed valued at usd 15,000 equivalent to tshs 33,707,850 without dealers licence.

At the trial the 1st, 2nd 4th and 5th accused persons were acquitted after found not guilty to the charge and 3rd accused person was convicted and sentenced to serve 20 years imprisonment.

Dissatisfied the appellant (3rd accused person) lodged the present appeal appealing against conviction and sentence. He brought six grounds of appeal thus;

(1) That the trial magistrate erred in law and fact to pass a sentence in weak evidence adduced by the public witnesses that he hunted the said elephant once they satisfied before the court that the elephant was killed long time ago.

(2) That the trial magistrate erred in law and in fact while evaluating contradictory prosecution witnesses evidence adduced by Pw1 that a dead body of elephant were found at Mwauchuma village and not inside the game reserve as alleged by other witnesses.

(3) That the court erred in law and fact to hold conviction in insufficient evidences adduced by the public witnesses

because I was arrested at Mwauchuma village without any exhibits

(4) That the trial magistrate erred in law to hold conviction in hearsay evidence without proving the allegation which left the shadow of doubts.

(5) That the trial magistrate erred in law to pass a sentence and prosecution side failed to prove the allegation because in any witness who came to the court to testify that he seen killing animal or being found inside the game reserve.

(6) That the evidence adduced by the prosecution side was not to the standard required by the law.

When the matter was called for hearing the appellant was represented by Mr. Kaunda advocate while the respondent was represented by Ms. Glory Ndoni State Attorney. The appeal was urged orally.

Submitting in support of his appeal the advocate for appellant said that he will consolidate the ground No. 1 and two and urge them jointly, also the remaining grounds we remain the same. He stated that the charge

which appellant was charged with were under the Economic and Organized Crime under section 57 and 60 of the said Act, which require the consent of Director of Public Prosecution before hearing of the case.

He added by saying that on 29/9/2021 prosecution side did file a consent and certificate from the Director of Public Prosecution to give powers Bariadi District court to hear the case but in page 80 of the court proceedings show that prosecution substituted the charge and file a fresh charge which was filed on 8/12/2021 and later on 14/3/2022 the charge was substituted, so he said that the prosecution side was supposed to brought the new certificate and consent from Director of Public Prosecution but they failed to do so, according to that failure the trial court had no jurisdiction to hear the said case, as elaborated in the case of **Musa Walum Limbe vs. The Republic Dc Criminal Appeal No 103 of 2017** High court Shinyanga Makani J page 15 the court held that in this present case as urged by Mr. Kaunda there was no consent which was filed from Director of Public Prosecution, the old consent which was filed on 11th April 2011 was remained to the court while the new charge sheet was amended on 7th November 2016 because there was no consent of DPP sought in respect of the said amendment then the trial

court had no jurisdiction to entertain the case and the said ground dispose the appeal.

In alternative the prosecution side failed to prove its case beyond the reasonable doubt as the trial court relied to the caution statement of 1st and 2nd accused persons to convict him the said statement was recorded by Pw6 and Pw7 the 1st accused did object the tendering of the said statement as he was bitten but the court did not conduct the trial within the trial but it proceeded with the trial which was not a procedure, the said exhibits were supposed to be expunged and prosecution would remain with no exhibits to convict the accused persons.

Again he submitted that the evidence of Pw12 who was the exhibit keeper said that 4th and 5th accused persons were the ones who were using that fire arms but nowhere he mention 3rd accused person [appellant] in his testimony. Also he said that the 3rd accused was convicted by the contradictory evidence from Pw2, Pw5 and Pw11 by looking the evidence of Pw2 said that he went to arrest and search 2nd accused person and they were with Pw5 and Pw11 and Pw2 was a VEO but every witness mention different thing which was found with accused persons in that search that creates some doubts which properties were found with accused persons.

Lastly, he said that he prays this court to allow appellant appeal and left him free.

Responding to the appellant submission Ms. Glory Ndoni the State Attorney submitted that she is not supporting this appeal in ground no 1 to the issue of jurisdiction as the trial court had jurisdiction to entertain the case, even after the substitution of the charge sheet as the filed certificate and consent from DPP was enough as the amended charge sheet amended only particulars of the offence but the law remained as it was, and the appellants advocate did not tell the court in the mentioned case of **Musa Walum Limbe** which one was changed in the said charge sheet, so it is her view that there was no need of filing the new consent. So, she prayed to this court to find that ground un merited.

In replying to the 6th ground of appeal she stated that in their side they failed to bring the evidence which made the conviction against appellant as the evidence brought was weak. She added by stating that appellant was convicted by the caution statement of 2nd and 1st accused persons and exhibit P.3 and P.4, and in admitting the said exhibit the procedure was not followed, so the said exhibit was supposed to be expunged as elaborated to the case of **Rudi Andrew @ Kasonso vs**

Republic criminal appeal NO 16 of 2012 [unreported] in page 11 and 12 the court referred to the case of **Twaha Ally and 5 others vs Republic** in this case the court insisted the requirement of conducting trial within trial whenever there was objection in the issue of voluntariness in taking the accused persons statement. In this present case that failure is fatal and she supported the appellant's prayer that the said exhibits to be expunged, and after the said exhibits be expunged they will remain with no evidence to convict the appellant, so the appellant should be left free as prayed.

I have considered the submission from the both parties the central issue for determination is **whether the appeal has merit**

From record in this appeal this court finds out that the respondent supported the appeal that the appellant was wrongly convicted as prosecution side failed to bring the strong evidence to prove the charge against the appellant, also the respondent finds some irregularities which done by the court in tendering and admission of exhibit P.3 and P.4, the record shows that the said exhibits were the caution statements of 1st and 2nd accused persons, and are ones which used to convict 3rd accused person (appellant) the said exhibits was objected by the appellant but the court proceed to admit the same without conducting trial within the trial.

This court is supporting the submission of both sides that the law is very clear that whenever there was objection in admission of statement that alleged not acquired voluntarily the court required to conduct trial within the trial and failure of it is fatal as elaborated in the case of **Rudi Andrew @ Kasonso** (supra)so this court is in support that the said exhibits be expunged and its hereby expunged, this court after expunged the said exhibits finds out that no remaining evidence to convict the appellant, so its hereby support the submission from both sides that the appellant to be left free.

So according to the foregone reasons this court finds no reasons to deal with the appellants grounds of appeal which he complained that the trial court has no jurisdiction to entertain the case after finds out that the 6th ground of appeal also goes to the root of the case in the issue of evidence on which respondent supports the appellant's appeal that they failed to bring the evidence to prove the charge beyond reasonable doubt.

So according to the foregone reasons this court supports the submission from both sides that the respondent failed to prove their case beyond the reasonable doubt, as it failed to call those witnesses who from their connection with the transaction in question are able to testify on

material facts as the law requires that if witnesses are within reach but are not called without sufficient reasons being shown and the court may draw an adverse inference to the prosecution this was held in the case of **Aziz Abdalla vs. Republic** [1991] TLR 71. So failure of the prosecution side to call witness who were in connection in question these court finds out that what appellant informed the court are true.

Also prosecution relied in the exhibits which were admitted without following the procedure the act which is fatal, as it failed to conduct trial within the trial or give the court the reason why it failed to do so.

In upshot the evidence adduced by the prosecution side was not rooted on the offence which appellant was charged with as prosecution failed to prove its case beyond reasonable doubt, as it is common criminal jurisprudence that;

"In criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable doubt" the said principle is to clearly found in section 3 (2) of the evidence Act [CAP 6 R.E 2002], and the meaning of beyond reasonable doubt was well, elaborated in the case of **Samson Matiga vs Republic** in criminal appeal no 205 Of

2007 which define as follows that *"A prosecution case as the law provides must be proved beyond the reasonable doubt ,What this means to put it simply is that the prosecution evidence must be strong as to leave no and doubt to the criminal liability of an accused person and not any other as the one who committed the offence"* In this appeal prosecution side had a duty to prove its case beyond the reasonable doubt that the one who committed the alleged offences was appellant not otherwise.

Conclusively there being no evidence on offence charged against the appellant and according to the submission from respondent which supports appeal and his prayers and according to above findings the appellant cannot have a case against him hence the trial court was wrong to have convicted him.

In view thereof the conviction and sentence imposed on the appellant on the said offences are set aside. Consequently, the appellant is released forthwith from the prison. It follows the appeal is found to be meritorious and consequently upheld.

It so ordered.

DATED at **SHINYANGA** this 24th March, 2023.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B.Massam

JUDGE

24/3/2023