IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL CASE 49 OF 2022

(Arising from Economic Case No.46 of 2019 at the Resident Magistrate's Court of Tabora at Tabora)

THADEO SHAHIBU @ MPOGOLO.....APPELLANT

REPUBLIC.....RESPONDENT

JUDGMENT

Date:27/03/2023 & 12/5/2023

BAHATI SALEMA,J.:

In this appeal, the appellant **THADEO S/O SHAHIBU @MPOGOLO** was aggrieved by the decision of the Resident Magistrates Court of Tabora at Tabora. In that decision, the appellant was convicted of the offence of unlawful possession of government trophy contrary to section 86(1) and (2) of **the Wildlife Conservation Act**, No 5 of 2009 read together with paragraph 14 of the First Schedule and section 57(1) of **the Economic and Organized Crime Control Act**, Cap.200 [R.E 2019].

The particulars of the offence were that on 15 July 2019 during night hours at Ziba village within Igunga District in Tabora Region, the

appellant was found in possession of a ground pangolin valued at TZS 2,208,000/= the property of the United Republic of Tanzania without a lawful permit from the Director of Wildlife.

The accused person pleaded not guilty to the count, consequent to which the prosecution paraded four witnesses. After trial, the accused was found guilty and sentenced to serve a custodial sentence of twenty years in jail.

Discontented by the impugned decision, he has knocked on the doors of this court armed with five grounds of appeal namely;

1. *That, the learned trial magistrate erred when failed to consider the effect of non-production of the chain of custody of the carcass ground Pangolin (Formerly Ground Pangolin) to wit (Exhibit P2 respectively) and see* ***ILUMINATUS MKOKA V REPUBLIC*** *(2003) TLR 245.*
2. *That, the trial magistrate erred in failing to note due regard for the seized article/and or otherwise items (Exhibit P1) was (sic) procured totally against the law as the seizing officer never issued the receipt after the search, hence arrived at the wrong findings.*
3. *That, the absence of scientific analysis or chemist report to confirm the identification of the Carcass Ground Pangolin while the charge sheet alleged it to be a living ground Pangolin, the subject matter of the case it was wrong for the trial magistrate to hold with*

certainty that the items allegedly found in possession of the appellant admitted in court were identified satisfactory to be the Carcass Ground Pangolin.

4. *That, trial court grossly erred in law by convicting the appellant on the evidence of the relied exhibit P3 (<u>Caution Statement of Appellant) that was improperly admitted in court</u> during the trial court proceedings, hence arriving at the wrong conclusion.*
5. *That, trial court grossly in law and fact (s) to convict and sentence the Appellant while the charge against him was not proved beyond reasonable doubt.*

For these grounds, the appellants urged this court to allow the appeal, quash the conviction and set aside the sentence.

The facts of the case that brought about this appeal are not intricate. They can simply be recapped. On 15/7/2019, one police officer E.1421 DT CPL Eliud was informed that at Ziba there were persons possessing a ground pangolin. On the same day, with the assistance of the Anti-poaching Unit Tabora, the police went to Ziba and met the accused with other persons selling the ground pangolin. They succeeded to arrest the accused while others fled away. The accused admitted to selling a ground pangolin that he found at Mapera Mengi in Iringa.

During the trial, the accused pleaded not guilty to the charge which led the prosecution to prove the charge against him. PW1, Khatib Athuman Mwangela from the Western Zone – Tabora Anti-poaching unit stated that on 13/7/2019 with one Senya and CPL Eliud after setting a trap with the chairman of Ziba village, found the accused selling the ground pangolin at Ziba in Igunga. The said animal was being carried in a bag by two persons who were selling it for TZS 15,000,000/=. The police and his team pretended to be buyers. One of the sellers fled and the accused was solely arrested. A certificate of seizure was prepared and was admitted in court as "P1". PW1 further testified in court that the ground pangolin was kept at the Tabora Wildlife Office where it died, but the carcass remained so he tendered it only to be admitted as exhibit "P2".

PW2, E. 1421 Detective CPL Eliud Mwansansu testified that he was the one who communicated with Khatib Mwangela, a Zonal Officer of Wildlife with whom they arrested the accused at Ziba while in possession of the ground pangolin. He then recorded the statement of the accused through a cautioned statement which was admitted as exhibit "P3".

Next was PW3 Majid Seleman Lalu, a supervisor at the wildlife protection section of TAWA Tabora. He testified that; on 16/7/2019 he prepared a trophy valuation certificate but he directed another officer

Beatus Maganga to make such a valuation. He then tendered the certificate which was admitted as exhibit "P4".

The last prosecution witness was Mihayo Humbi, PW4 who was the Chairman of Ziba village. Mr. Humbi testified that on 15/7/2019 after being called by the police of Ziba to go to Usongo hamlet where the accused had been arrested selling ground pangolin. He signed the paper.

In his defence, the appellant having denied the charge explained that, on 12/7/2019 he received a call from one Shija Kasoni to go to Usongo where he found Isack Dai Shuli, VEO who asked him to go to Itigi for a parcel. He added further that he would be paid after selling the parcel, so he used Shuli's motorcycle when he met Maganga's brother who gave him a parcel of the ground pangolin and left on 14/7/2019. He further added that on 15/7/2019 while at Ziba they had communicated with one Amos to buy the animal, and he was arrested. DW1 admitted that he was found with the luggage which was then seized. The trial court determined the matter and was fully convinced that the prosecution had proved its case beyond reasonable doubt.

During the hearing of the appeal, the appellant was represented by Mr. Hassan Kilingo, learned counsel, whereas the respondent Republic had the services of Mr. Robert Kumwembe, learned State Attorney.

Submitting on the first ground of appeal, the learned counsel for the appellant faulted the trial court that he failed to consider the effect of non-production of the chain of custody of the carcass ground pangolin. He further stated that exhibit "P2" was not produced according to the procedure. He added that in the charge sheet, the prosecution stated that the accused-appellant was found with ground pangolin while what was presented before the court was not the ground pangolin but the remains of carcass ground pangolin. He further argued that PW1, Khatibu Mwangela contradicted himself in his testimony that on 15/07/2019 he found people selling a live porcupine (*nungunungu*) and live pangolin(Kakakuona).

He further claims that these were two different creatures that were admitted as carcasses of pangolin. Later on, they brought the remains of the carcass. He strongly argued that there is nowhere they marked it. Supporting his stance; he submitted further that the exhibit must be marked. He contended that there is no documentary evidence revealing how they received the exhibit from Ziba, and who took it until it was handled to the right person. He submitted that this court was never informed of the store room. He contended that PW1, Khatibu Mwangela was the only witness. While he was asked, he said the creature died. There is no inventory or record to show how it reached in court. He further contended that the chain of custody was broken from Ziba. To

bolster his position, he cited the governing law of Police General Orders (PGO) No. 229 on Handling of exhibits from seizure to tendering in evidence before the court of law.

He further insisted on the provisions of paragraph 8 of PGO 229, which requires labeling of the exhibit. The Court had several times cemented on the requirement of labeling is inescapable. Paragraph 8 of PGO 229 provides:

> *"The investigating officer shall attach an exhibit label (PF 145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the extent which requires examination."*

Also, to strengthen his argument he referred this court to the cases of **Iluminata Mkoka V Republic**, 2003 TLR, and **Paulo Maduka V Republic**, Criminal Appeal, 2007 (unreported). He finalized that, since their paper trail was lacking, the omission contravene the PGO 229 in respect of the chain of custody. Also, to the contrary, he argued that although the prosecution had not given the paper trail, they would come with oral evidence from the prosecution witnesses which was sufficient to prove it. Furthermore, he cited the case of **Mussa Hatibu Sembe**,

Criminal Appeal No. 130 of 2021 (unreported). He doubted if admitted exhibit of the carcass was the real exhibit given.

As to the second ground of appeal, he faulted the trial court for failure to note due regard for the seized article/and otherwise items Exhibit P1 was procured contrary to the law. He submitted that PW1, Khatibu Mwangela, game warden; and PW2, DC CPL Eliud Mwansansu had the information. PW1 tendered a certificate of seizure which was received in contravention of Section 38 (3) of **the Criminal Procedure Act**, Cap.20 [R.E. 2022]. He further submitted that PW1 or PW2 never gave a receipt on the certificate of seizure as the law prescribes. He also cemented that there was non– production of receipt to see whether it was a pangolin or porcupine. He prayed to this court to expunge it from the proceedings.

He added that PW4, Mihayo Humbi, Chairman in Ziba who was said to be an independent witness was not free, what he testified was ground pangolin. He prayed to the court to see that there was inconsistency.

Coming to the third ground of appeal, he submitted on the absence of scientific analysis or chemist report to confirm the identification of the carcass ground pangolin while the charge sheet alleged it to be a living ground pangolin. The counsel for the appellant argued that identification of carcass Ground Pangolin while the charge sheet was a living ground

Pangolin. To bolster his stance in the case of **Makame Junedi Mwinyi V Serikali ya Mapinduzi ya Zanzibar**, 2000 TLR, 455. It is a position of law that, expert evidence is admissible. He contended that not everyone knows there were remains of carcasses. There was no report of ground pangolin and given the fact that even the exhibits had no number. The absence of it leaves a lot to be desired.

On the fourth ground of appeal, the counsel for the appellant faulted the trial court in respect of cautioned statement admitted. The counsel for the appellant faulted the trial court that the relied exhibit P3 (Caution statement) was improperly admitted in court. He contended that PW2, G. 1421 DC Cpl Eliud Mwansansu in his record was very clear. He submitted that on 16/7/2019 the caution statement of the accused was taken while the appellant was arrested on 15/7/2019. He doubted the police's delay in taking the statement without giving any reason at all, while at Ziba there was a police station where PW4, the village chairman was called at the office of OCS. He argued that it is a law that the statement should be taken within 4 hours instead it was taken a day over time. He submitted that this was contrary to section 50 (1) of **the Criminal Procedure Act**, Cap. 20 [R.E. 2022]. He further insisted that the reasons for the delay were never stated by the prosecution. He prayed to this court to expunge the caution statement from the record.

On the last ground of appeal, he faulted the trial court that the offence was not proved beyond reasonable doubt. To substantiate his argument, he cited the case of **Ndege Malagwa V Republic**, [1956] EACA on page 152. Mr. Kilingo submitted that the court has to evaluate and come up with a decision. The live porcupine and the ground pangolin should be resolved in the favour of the appellant. Therefore, the appeal is with merit. He prayed to this court to allow the appeal and quash the conviction and sentence.

Opposing the appeal, the learned State Attorney, Mr. Robert Kumwembe submitted on the chain of custody that the ground has no merit since the appellant confessed that he was found with the exhibit hence there was no need for accounting. Also, PW4, Mihayo Humbi, village chairman witnessed the arrest of the accused person. In respect of "*Nungunungu*" (live porcupine), he stated that in the typed judgment on page 2, there was an error since the magistrate was not an expert.

As to the second ground of appeal on the certificate of seizure. Mr. Kumwembe submitted that this ground has no merit too. A certificate of seizure was there and the counsel has not disputed that. To bolster his stance, he referred this court to the case of **Papaa Olesikala Dai Lendimu & Another**, Criminal Appeal No. 47 (unreported) at Pg. 13 Para 2. He added that non-adherence to the certificate is curable under section 388 of **the Criminal Procedure Act**.

On the third ground of appeal, he submitted that PW1 and PW3 by being officers of the wildlife unit knew the type of animal found.

As to the fourth ground of appeal, the learned State Attorney admitted that the caution statement was taken after the prescribed time. However, he contended that this is curable since the accused confessed during the defence. Therefore, it was enough to convict him even though there was no caution statement.

On the fifth ground of appeal, he submitted that the magistrate might have erred, PW1, Khatib Mwangela in his evidence confused the live porcupine and live ground pangolin but the accused confessed on the found exhibit. He beseeched to this court that the case was proved beyond reasonable doubt and prayed to the court to uphold the conviction.

In his short rejoinder, Mr. Kilingo reiterated his submissions in chief and further stated that the Republic has conceded, but the only difference is on admission by the accused.

Having considered the ground of appeal, the submissions by both parties, and going through the trial court record the issue is whether the grounds are meritorious.

Starting off, is the first ground of appeal, (chain of custody). It is well recognized that, handling of exhibits from seizure to tendering in

evidence before the court of law is governed by Police General Orders (PGO) No. 229. Clarifying the requirement under PGO 229, the CAT in the case of **Alberto Mendes v. The Republic**, Criminal Appeal No. 473 of 2017 (CAT at DSM, unreported) stated;

> *"...In a nutshell, requires that a police officer who moves the exhibit from the scene of the crime has to record the particulars of the exhibit, the reason why he moves the exhibit from the scene and if he hands over the exhibit from the scene to another officer, he has to insert his name and signature. Particulars of the exhibit to be put in his notebook, the exhibit has to be entered in an exhibit register, paragraph 31 stresses recording of the movement of the exhibit, and that the exhibit has to be conveyed to the office of the Chief Government Chemist through a special form PF. 180."*

The Court further maintained the provisions of paragraph 8 of PGO 229, requires labeling of the exhibit. The Court cemented that the requirement of labeling is inescapable. Paragraph 8 of PGO 229 provides:

> *"The investigating officer shall attach an exhibit label (PF 145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no*

interference with any portion of the extent which requires examination."

In this instant matter, having considered the evidence of PW1, Khatibu Mwangela the game warden, and PW2, CPL Eliud Mwansansu, the investigation officer who testified that they were the ones who arrested the appellant and found him with the exhibit. PW1 did not testify about how he handled the exhibit from the scene of the crime to the police office and the Wildlife office for storage and finally to the trial court. He did not testify on how the exhibits were stored in custody.

As I have stated above, PGO 229 requires the movement of the exhibit to be recorded and entered in the exhibit register. When transferred to any place it has to be through PF 180. Further, the exhibits have to be labeled through PF 145. Noted from the testimony of PW1, PW2, and PW3 it is clear that the procedure was not adhered to. The exhibit was not labeled. PW1 did not testify as to who handed over the exhibits to him. No exhibit register was tendered in court to show the movement of such exhibit either.

The Court in numerous cases has stated the purpose of recording the chain of custody. In the case of **Paulo Maduka & 4 Others v. Republic**, Criminal Appeal No. 110 of 2007 (CAT) (unreported) the Court stated that;

"By a chain of custody, we have in mind the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty. The chain of custody requires from the moment the evidence is collected, its every transfer from one person to another must be documented and it is probable that nobody else could have access to it."

Guided by the above decision, I agree with Mr. Kilingo that by not having evidence on the detailed account of how the exhibit forming the charge against the appellant was handled from the scene of the crime to the trial court, it is hard to rule that the appellant was charged with the ground pangolin or porcupine brought in court as evidence.

However, there are circumstances where an exhibit can be admitted in evidence despite the chain of custody being broken. See holdings in the cases of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015; **Deus Josias Kilala @ Deo v. The Republic**, CAT Criminal Appeal No. 191 of 2018; and **Julius Mtama @ Babu @ Mzee**

Mzima v. Republic, CAT Criminal Appeal No. 137 of 2015; (all unreported).

Still, each case has to be considered in accordance with its own peculiar circumstances. The court has to consider the nature of the exhibit involved. That is, whether the exhibit is among the items that could easily change hands or be tampered with. In the matter at hand, I find the exhibit; that is, the carcass of the ground pangolin, being an item that can easily exchange hands or be tampered with. It was thus imperative for the prosecution to show the chain of custody in handling the exhibit before it reached the trial court as evidence. This doubt, significant as it looks, in my view, ought to be resolved in favour of the appellant.

The second ground of appeal is that, the trial magistrate erred in failing to note due regard for the seized article/and or otherwise items (Exhibit P1) was procured totally against the law. According to the appellant, the seizing officer never issued the receipt after the search, hence arrived at the wrong findings.

I find this ground has no merit. As rightly stated by the learned counsel and in support of the case of **Papaa Olesikadai @ Lendemu and Another v R** (*supra)*, that issuing a receipt is not necessary when a certificate of seizure is issued. This position is fairly settled in our

jurisdiction. In the cases of **Abdalah Said Mwingereza v R**, Criminal Appeal No. 258 of 2013 and **Ramadhani Iddy Mchafu v R**, Criminal Appeal No. 328 of 2019 (both unreported) it was held that, where/when a certificate of seizure is issued and is signed by the accused person, the same constitutes evidence even without a receipt. Therefore, as stated above, the omission to issue a receipt in terms of section 38(3) of **the Criminal Procedure Act**, or section 22 of **the Economic and Organized Crime Control Act**, Cap. 200 was not fatal. The ailment is curable under the provisions of section 388 of **the Criminal Procedure Act, Cap.20**.

On the fourth ground of appeal, the appellant faulted the trial court by convicting the appellant on the evidence of the relied exhibit P3 (Caution Statement of Appellant) that was improperly admitted in court during the trial court proceedings, hence arriving at the wrong conclusion.

As rightly conceded by the learned State Attorney, the counsel claimed that the caution statement admitted was improper since PW2, G. 1421 DC Cpl Eliud Mwansansu in the record stated that they arrested the appellant on 15/7/2019. The caution statement of the accused was taken on 16/7/2019.

The law requires the police officer who is responsible for taking a cautioned statement of the accused person to state the time he started

taking the statements and the time he finished taking the statements to be clear as to how long the interrogation was taken.

The law under section 50 (1) (a) of **the Criminal Procedure Act**, provides the period available for interviewing the person, that is to say, the period of four (4) hours commencing at the time when he was taken under restraint in respect of the offence. In the instant matter, the court has noted that although there was a delay there is nowhere the prosecution stated. I hereby expunge this as I hereby do.

In the end, I am of the view that the prosecution case was not proved beyond reasonable doubt against the appellant and, thus, I allow the appeal. Consequently, the trial court conviction is quashed and the sentence thereof set aside. The appellant should be released from prison unless held for lawful cause.

Order accordingly.

A.BAHATI SALEMA

JUDGE

12.5.2023

Court: Judgment delivered in presence of both parties.

A.BAHATI SALEMA

JUDGE

12/5/2023

Right of Appeal fully explained.

A.BAHATI SALEMA

JUDGE

12/5/2023