THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 19 OF 2023

(Originating from Economic Case No. 82 of 2019 in the District Court of Morogoro)

JULIUS MKUDE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Last order on: 09/06/2023

Judgement on: 14/06/2023

NGWEMBE, J.

The appellant Julius Mkude is endeavored to challenge his conviction and sentence entered by the District Court of Morogoro on 26/05/2021. The conviction and sentence arose from criminal case No. 82 of 2019, which involved two counts related Unlawful Possession of Government Trophies contrary to section 86 (1)(2)(c)(i) and (3) of **the Wildlife Conservation Act, No. 5 of 2009** read together with paragraph 14 of the Schedule to and section 57 (1) and 60 (2) of **the Economic and Organized Crime Control Act [Cap 200 R.E 2002], Now R.E 2022.**

The particulars of offence are detailed that, the appellant, on the 2nd day of December, 2019 at Dumila Village, Bwakila Ward within the District and Region of Morogoro, he was found in possession of Government trophies to wit; 8 pieces of wild beast meat and one tail of wild beast, all worth USD 1300 equivalent to Tshs. 2,960,000/= the property of the United Republic of Tanzania without a licence from the Director of Wildlife. The particulars of the second court, indicated the

same place and time, the appellant was found in possession of Government trophies, to wit one zebra tail valued at USD 1200 equivalent to Tsh. 2,732,400, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

Having been sufficiently informed of the charges facing him in the language he understood, the accused denied the two offences. Hence the Republic was compelled to procure seven (7) prosecution witnesses together with four exhibits out of which, three were documentary exhibits and one being physical exhibit. In turn, the appellant stood alone to defend with no exhibit. He advanced a total denial to both counts and partly came up with a defence of alibi.

Having considered the whole evidence in its peculiar style, the trial magistrate found much reliance on the prosecution witnesses, while hesitating to accept the accused side of the story. Consequently, the trial court ended up convicting the appellant in both counts.

Since this is a court of first appeal, I am obliged to reproduce the main part of evidences and its analysis as was made by the trial court. Interestingly the trial magistrate's judgement in pages 4 – 5 proceeded as I hereby quote: -

> *"Whether accused was found in possession of Government Trophies as alleged!*
>
> *We have these pieces of evidence which shows that PW2 and PW7 soon after they received information that there were people at the boundaries cooking meat, they went and found people doing so, accused was arrested and other process were followed. Accused denied all and in his defence he alleged that they were playing pool table with his fellows about seven (7), but he failed to call others who were playing with him just to testify for him. In so abstain from calling his fellow though he*

was given a chance to call the negates his defence, he could even mention their names so that this court will give weight his evidence that he was in company with others. This court throw out his defence and finds him guilty."

After such a conviction the appellant was sentenced to 20 years imprisonment for each count, running concurrently. On 1st day of June 2021, the appellant filed his notice of appeal. It seems he did not receive copies of judgment until 20/02/2023 and the appellant duly filed his appeal on 10th day of March, 2023. Hereunder I quote those grounds of appeal as they appear in the petition of appeal: -

1) *That the trial magistrate erred in law for failure to take into consideration the defense evidence.e.i*
   (i) *Appellant were beaten severely at the police station,*
   (ii) *Confession were taken contrary to the law.*
2) *That I was not found in the scene of the crime either by police officers or the wildlife officers concern the case to be answered I had been caught due to the report of an informer who gave them information about the incidence.*
3) *That within the litigation procedure there was no any cross examination made against me from the public prosecution while I pleaded not guilty so I wonder how the lower court satisfies itself that I am the one who deal with the issue of unlawful possession of government trophies.*
4) *That when they have come to catch me there was no any leader from the area where I dwell including ten cell leader or village chairman and other members whom they could have help them to know the truth and reality about the incidence also they were not called before the court of law as witness to prove about the evidence hence contrary to laws.*

5) *That when I was sent to the police station I did not inform of the crime I committed rather than beaten by police officers in order to confess and admit the crime.*

6) *That, the evidence adduced before the court of law given by police officers and the wildlife officers were not direct that they both failed to prove beyond reasonable.*

7) *That, the prosecution evidence failed to prove the case beyond reasonable doubt.*

In arguing this appeal, unfortunate the appellant was not represented by an advocate, while the Republic was represented by Josbert Kitale, learned State Attorney.

The appellant, narrated what he stated in his defence during trial; that he was arrested when he was playing pool with his fellows who were released by the efforts of their relatives. The appellant had no relatives to rescue him, that is why, he was not released and thereafter charged for the offence of being found with Government trophy. Rested by a prayer that his grounds of appeal be considered and this court may find him not guilty, thus allow his appeal and set him free.

In turn the learned State Attorney stood up firmly by opposing the appeal as lacking merits. Jointly argued grounds 1 and 5 together. Submitted that the confession was not extracted by torture, even the appellant in his defence did not disclose the issue of torture and the trial Magistrate did not base his decision on the said confession. Thus, the issue of confession or torture do not arise.

Submitting on ground 2 which is related to being not found at the crime scene, the learned State Attorney pointed out the testimonies of PW2 and PW7 who proved that the accused was found in the crime scene within the boundaries of Mwalimu Nyerere National Park. Proceeded to challenge the allegations of alibi as raised by the appellant.

That the appellant failed to comply with section 194 (4) of **The Criminal Procedure Act**. Reliance on alibi is regulated by the above section, since the appellant failed to comply with it, then same should be disregarded.

Arguing on ground 3, Mr. Kitale dismissed it outright that it lacks merits. He referred this court to section 147 (3) of the **Evidence Act** and pointed out that, it is not necessary for the Republic to cross examine the accused. Alternatively submitted that, the Republic cross examined the appellant as shown at page 39 of the proceeding.

Ground 4, related to arresting the appellant, he responded that, the arrest was proper even without the said village/street leaders being present yet the appellant could be arrested lawfully. Insisted that the arresting of the appellant followed the letters of section 106 (1)(a)(b)(c) of **The Wildlife Conservation Act,** thus prayed this court to dismiss this ground as lacking legal basis.

Lastly the learned State Attorney joined grounds 6 and 7 and argued them together. The two grounds are related to failure of the prosecution to prove the offence beyond reasonable doubt. Mr. Kitale argued it generally that the case was proved beyond reasonable doubt and the arrest was properly done. Rested by a prayer that the appeal be dismissed forthwith.

After such glance to this appeal, it is time for this court to determine its merit and demerits. Being aware that the matter is a first appeal, the court takes note of the rule that first appeal is in the form of re-hearing. The first appellate court is mandated to revisit the whole evidence from both sides and when possible, come out with its own findings. The principle has been embraced by the Courts in various decisions including in the cases of **Nicholaus Mgonja @ Makaa Vs. R, Criminal Appeal No. 85 of 2020**; **Marceline Koivogui Vs. R**

(Criminal Appeal No. 469 of 2017) [2020] TZCA 252, where it has been maintained that: -

> *"First appeal is in the form of a re-hearing and as such, this being the first appellate court, it is duty bound to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact"*

The court will therefore deal with the evidence in the course of determining the merit of this appeal in order to see if the finding of the trial court was justified by the evidence laid before it.

In determining this appeal, I will dispose grounds number 1, 2, 4 and 5 jointly followed with grounds 3, 6 and 7 together. From the first cluster of grounds, I find the main issue to be considered is whether the trial court considered the appellant's defence. And the last group raises the question of whether the prosecution had proved the offence beyond reasonable doubt. From the facts, the two issues are interlinked, therefore some questions will be discussed in a crosscutting way.

Relevant to the first issue, the appellant claims that the confession admitted in court was extracted after he was beaten by police. That he was not found in the scene of crime but at Bwakila playing pool with his friends. Also, he raised the issue that no leader from his area was called when he was arrested and that his defence evidence was not cross examined by the prosecution. Finally, that the trial court did not consider all the above strength of the defence case thus arrived into a wrong verdict.

In respect to confession, I will accept what the learned State Attorney submitted. Throughout the proceedings I find nowhere such confession was presented or admitted. Even the judgment by the trial court did not take any cognizance of its presence. As such, even if the

appellant may have confessed as he states, at this stage, propriety of the said confession cannot be opened because it was not admitted in the trial court and it does not feature anywhere in the trial court's judgment. Regarding the need for an independent witness, the law is settled that, strictly when search is conducted in a dwelling house or a premise an independent witness must be present. But if search and seizure is conducted outdoor or in the wild as most of wildlife cases, consideration will be on the prevailing circumstance.

We have seen the truth in this case that the appellant was not arrested at the pool table as he tries to make this court believe. To the contrary, he was arrested at the scene of crime and actually in the act of roasting the said wild beast meat. Mr. Kitale was correct on this point when he argued that, the arrest was proper, he made reference to section 106 of **the Wildlife Conservation Act.** Under the proviso to subsection 1, it is provided that no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness. In this case arrest and seizure were made in the park as earlier pointed, when the Wildlife Conservation Officers were in normal patrol. In this point I have sought assistance from the case of **Emmanuel Lyabonga Vs. R, Criminal Appeal 257 of 2019,** which is similar to this at hand where the court considered the circumstances of arrest, search and seizure and held *inter alia* that: -

> *"Since the appellant's polythene bag was searched and seized in a remote bushland at Kitandililo, not at his dwelling house, in circumstances that no independent witness could be found, we are in agreement with the learned State Attorney that the operation was properly conducted"*

In our case, though no independent witness or village leader was present as the appellant laments, we understand that owing to the

circumstances it was impracticable to the arresting officers to secure the said leaders or independent witness. On top of that, the prosecution evidence established a proper chain of custody, which was intact and unbroken from the crime scene up to tendering them before trial court.

The paramount factor for ensuring chain of custody is known, to eliminate the possibility of planting exhibits on innocent persons so that they appear guilty. Thus, to be sure that the item presented before the court is the same which the accused person was found in possession or in connection to the offence charged. Therefore, chain of custody will be tested against the prevailing circumstance of the case. In the case of **Director of Public Prosecutions Vs. Stephen Gerald Sipuka, Criminal Appeal 373 of 2019,** the Court of Appeal held: -

> *"In all circumstances, the underlying rationale for ascertaining a chain of custody, is to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court."*

Another complaint by the appellant is that the trial court did not consider his defence and that his evidence was not cross examined. I accept the rule that failure to cross examine on material point, entitles the court to draw an inference. The reason is well settled that, if one does not cross examine on a relevant and important point of law, implies acceptance of the truth of that fact testified. This point has legal history tracing from the English case of **Browne Vs. Dunn [1893] 6 R. 67** which among others, the Court held: -

> *"A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the*

witness is incredible or there has been a clear prior notice of intention to impeach the relevant testimony"

For the purpose of expounding the rule, this court is aware that where the adverse party's evidence is incredible that failure to cross examine will yield into nothing. Also, drawing an adverse inference under the rule is not an absolute requirement of the rule, but such inference is on the courts' discretion having considered the circumstance of the case. That is why in our jurisdiction, the case of **Kwiga Masa Vs. Samweli Mtubatwa [1989] T.L.R. 103** the court observed: -

"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true."

This position which qualifies the rule on failure to cross examine has been adopted by our apex court in its various decisions, including in the case of **Zakaria Jackson Magayo Vs. R, (Criminal Appeal No. 411 of 2018) [2021] TZCA 207.**

However, the trial court's proceedings reveal clearly that, the respondent actually cross examined the appellant on all aspects of his defence. Rightly as Mr. Kitale observed in his submissions, at page 39 of

the proceedings, the appellant was cross examined on his names, how and who arrested him. Also, he was questioned about the people with whom he was playing pool when he was arrested, according to his story, surprisingly he answered that he did not know any of them. Almost all parts of his defence were cross examined. His complaint that the trial court did not consider the fact that he was not cross examined is premised on misled facts on what transpired at the trial court.

Considering all facts as above, I am settled in my mind that the trial court dutifully considered properly the defence evidence. Thus, grounds 1, 2, 4 and 5 are collectively dismissed.

The second bunch grounds of appeal are as premised in grounds 3, 6 and 7 on failure of the prosecution to prove the offence against the appellant beyond reasonable doubt. The appellant is of the position that, the prosecution did not prove the offences against him beyond reasonable doubt. The trial court therefore erred in convicting him.

In turn the learned State Attorney contradicted it by pointing clearly that the prosecution proved the case against the appellant as required by law, that is beyond reasonable doubt.

Where the question as to whether the offence is proved arises, the rule on burden and standard of proof in criminal trials, must always take lead. The trite law is that the prosecution is bound to prove the offence beyond reasonable doubt. This is what the law demands in sections 3 (2)(a), 110 and 112 **of the Evidence Act, Cap 6 R.E 2019 (now R.E 2022).**

The courts in our jurisdiction have devotedly interpreted every unit of the law illustratively. There is no uncertainty therefore as to how the burden of proof is performed. Likewise, it is clearly known what proof beyond reasonable doubt means.

Actually, in the case of **Tino s/o John Mahundi Vs. R, Criminal Appeal No. 21 of 2020,** this court sitting at Mtwara sufficiently explained the principle. Equally, noted that, not every doubt can weaken the prosecution case, while warning that if courts will be fancied by every doubt, then justice is at risk of deflection. This is generally what was held in the case of **Magendo Paul & Another Vs. R, [1993] T.L.R. 220**, by the Court of Appeal: -

> *"As it was held by Lord Denning in Miller v Minister of Pensions: `The law would fail to protect the community if it admitted fanciful possibilities to deflect the Court of Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favour ... the case is proved beyond reasonable doubt."*

Other cases on the burden of proof and standard of proof are that of **Nathaniel Alphonce Mapunda and Another Vs. R, [2006] T.L.R. 395** and **William Ntumbi Vs. Director of Public Prosecutions Criminal Appeal No. 320 of 2019** among others.

In resolving that question, I revert back to the duty of the first appellate court. I have paid a serious consideration on the evidence laid before the trial court, which I will briefly state here as whole. An analysis to it is intended to find out if the verdict entered by the trial court was supported by the evidence.

According to the prosecution evidence, it is established that, the Wildlife Officers of Mwalimu Nyerere National Park, while on patrol as Park Rangers; Loivile Moses (PW2) and Songe Mashine (PW7), on 02/12/2019 got information that, there are people around the park roasting wild meat. They went at Bwakila Chini and found the accused in the act, roasting some 8 pieces of meat. Beside him, the appellant had two wild animal tails whose one was of Zebra and the other of a mule.

The meat on roasting was of a wild beast also and the accused confirmed it. Seizure of the meat and tails was made, a seizure certificate was duly filled wherein the appellant and officers signed.

The accused was taken to Gomero Police Post on the same date. F3195, Corporal Jovinson (PW1) received them and prepared an inventory (PF12). The exhibits were registered as KIR560/2019, later valued by PW3 one Joseph Chengula, a park ranger to be worth Tshs. 5,692,500/=. PW1 took the appellant along with the meat to Kisaki Primary Court. The magistrate, Mr. Deogratius Ntamatungiro (PW4) made a disposal order. On 03/12/2019 the appellant along with two tails were taken to Morogoro Police Central by PW5, G1424 PC Emmanuel of Kisaki Police Post. There at Police Central, E 8949 DCpl Acquilinus received them as an exhibit keeper, labelled the two tails as exhibit Reg 528/2019. The inventory was admitted before the trial court as exhibit P1, certificate of seizure was admitted as exhibit P2, valuation certificate as exhibit P3 and the two tails admitted as P3 mistakenly for P4.

The appellant's defence was just that, on 02/12/2019 he was at Bwakila Chini village playing pool with his fellows. Then a militia in uniform emerged and arrest him with the fellows around six of them. The fellows were released, but he was interrogated, later taken to court and charged with the offence which he did not know.

The trial court was of the view that the defence was not plausible. It was the magistrate's reasoning that if really the appellant was at Bwakila Chini playing pool with his friends and not at the crime scene, the said friends would have come to court for testimony.

This court has deeply analyzed the evidence from both sides, and find that there are no any other reliable evidences contrary to the fact that those pieces of meat and tails were seized from the appellant. The evidence adduced by PW2 and PW7 is watertight that the appellant was

found at the crime scene, which is a reserved area where no human activities are allowed.

I have equally considered the appellant's defence that he was not arrested at the scene of crime. I understand that the trial magistrate considered the defence of alibi as raised by the appellant, but found the same to be invalid. Also as rightly pointed out by the learned State Attorney, that the alibi was raised without prior notice. However, section 194 (6) of **The Criminal Procedure Act** the issue of alibi as defence if raised without prior notice may be considered, but the court will exercise its discretion whether to accord any weighT or otherwise. The subsection is quoted hereunder: -

> *"Where the accused person raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may, in its discretion, accord no weight of any kind to the defence."*

Same position was held in the cases of **Mwita s/o Mhere and Ibrahim Mhere Vs. R [2005] T.L.R. 107 and also Sijali Juma Kocho Vs. R, [1994] T.L.R. 206**. In another case of **Mohamed Hussein Pagweje Vs. R, Criminal Appeal No. 556 of 2017** the Court of Appeal sitting at Arusha, in respect of alibi defence held: -

> *"It is on record that the appellant raised this defence at the stage when the prosecution case had been closed hence in contravention of section 194 (4) and (5) of the CPA. In such circumstances and in terms of section 194 (6) of the CPA the trial court had to consider it, but it had the discretion to accord it no weight or lesser weight"*

The appellant therefore was right to raise the defence of alibi and same was considered at least as the trial magistrate did. However even in this courts' analysis, the said alibi defence was not probable. It raised

no doubt against the prosecution's case. The law is settled, although the accused does not bear any burden to proof his innocence or any fact in his defence, on probability standard, he is bound to establish some facts which he asserts in order to attain the establishment of reasonable doubt. Section 114 (1) of **The Evidence Act** provides as hereunder: -

> **Section 114 (1)** *"When a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within his knowledge is upon him."*

With the evidence laid before the trial court, I am satisfied that the offence against the appellant was proved beyond reasonable doubt and the appellant did not adduce any evidence to raise reasonable doubts against it.

This court would have reached to the same conclusion of the accused being guilty of the offences charged. I therefore, join hands with the trial magistrate on the conclusive verdict.

Before resting this appeal, I find compelled to comment on the Style adopted by the trial magistrate in writing his judgment. First the judgement lacked completeness of analysis of evidence, and its clarity. Equally the elements of the offence were not discussed as required by law. Second the strength of the prosecution evidence was not discussed or tested properly. Even the conviction was not elaborate to its clarity. I am not setting a class for judgment writing, but I will not accept a suggestion that narration of the prosecution's evidence without analyses of same was sufficient.

Much as I agree that there is no perfect judgment and that each judge and magistrate have their own style, I know there are basics of

court judgment writing. For instance in the case of **Lutter Symphorian Nelson Vs. The Attorney General & Another [2000] T.L.R. 419** and **Hamisi Rajabu Dibagula Vs. R [2004] T.L.R. 181** where the case of **Amirali Ismail Vs. Regina 1 T.L.R. 370** has been followed on qualities of a good judgment, that: -

> *"A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding"*

These are not exhaustive, but at least, what is provided in section 312 (1)(2) of **The Criminal Procedure Act** which provide minimum contents must be complied with whenever the judge or magistrate prepares a valid court judgment. That section provides that: -

> **Section 312 (1)** *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
>
> *(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

The above observations are instructive to the extent demonstrated, but do not fault the verdict arrived by the trial court. Under section 388

of **The Criminal Procedure Act**, only material defects may alter the finding, this one although important, do not affect the finding. The weaknesses are curable under the Act. It has been stated in the case of **Wily John Vs. R, (1956) 23 E.A.C.A. 509** and later maintained in **Hamisi Rajabu Dibagula's** case and that of **Seleman Nassoro Mpeli Vs. R, (Criminal Appeal No. 3 of 2018) [2020] TZCA 366,** among others that: -

> *"Failure to comply with the relevant statutory provisions as to the preparation of a judgment will be fatal to a conviction only where there is insufficient material on the record to enable the appeal court to consider the appeal on its merits"*

Thus, as earlier demonstrated, the weaknesses in the trial court's judgment did not impede this court from determining the appeal on merit. Save for the observations offered in respect of the style employed by the trial court in writing its judgment, I find no merit in this appeal. I proceed to dismiss it entirely.

Order accordingly.

Dated at Morogoro this 14th day of June, 2023

P. J. NGWEMBE

JUDGE

14/06/2023

Court: Judgment delivered in chambers this 14th day of June, 2023 in the presence of the appellant and Mr. Josberth kitale, Learned State Attorney for the respondent Republic.

Sgd: A. W. Mmbando

14/06/2023

Court: Right to appeal fully explained.

Sgd: A. W. Mmbando

14/06/2023