IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 135 OF 2022

(Arising from Economic Crimes Case No. 21 of 2020 at Resident Magistrate's Court of Arusha at Arusha.)

SOLOMON SAMSON MGANGA.....APPELLANT

Vs

THE D.P.P..... .....RESPONDENT

JUDGMENT

Date of last order: 25-5-2023

Date of judgment: 20-6-2023

B.K.PHILLIP, J.

The appellant herein was arraigned at Resident Magistrate's Court of Arusha at Arusha on the two count, to wit; 1st count:-Unlawful Possession of Government Trophy Contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act, No.5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments) (No.2) Act No.4 of 2016 read together with paragraph 14 of the 1st Schedule to and Sections 57 (1) and (60) (2) both of Economic and Organized Crimes Control Act ("the Economic Act") (Cap 200 R.E 2002) as amended by sections 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act No.3 of 2016. 2nd count:- Unlawful Possession of Weapons in Certain Circumstance, Contrary to Section 103 of the Conservation Act, read together with Paragraph 14 of the 1st schedule thereto and section 57 (1) and 60 (2) both of the Economic

and Organized Crimes Control Act, as amended by Section 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act No.3 of 2016. The trial court found him guilty of both counts. He was sentenced to 20 years imprisonment for the 1st count and for the 2nd count he ordered to pay fine to tune of Tshs. 200,000/= or in default to serve 1 year imprisonment

Aggrieved by the aforesaid conviction and sentence, the appellant lodged this appeal on twelve (12) grounds of appeal contained in two memoranda of appeal. The first memorandum of appeal was filed on 9th September 2022 and the second one was filed on 28th February 2023 upon obtaining the leave of this court to file additional grounds of appeal. I have carefully examined the twelve (12) grounds of appeal and found out that the same can conveniently be paraphrased to the following eight (8) grounds of appeal;

i) *That, the appellant's conviction offended Article 13 (6) (a) of the Constitution of United Republic of Tanzania, ("the Constitution") as he was subjected to torture for being kept in police custody almost two months. The appellant was arrested on 23rd December 2019 but he was arraigned on 13th February 2020, hence constitution right not to be subjected to torture was violated, thereby rendering the conviction illegal.*

ii) *That, the charge against the appellant was not proved beyond the reasonable doubt.*

iii) *That, the trial magistrate erred in law and fact to believe that the appellant was found in possession of Government trophy ,*

2 bush knives, 1 knife and a torch since no proper chain of custody of the same was demonstrated by the prosecution witnesses.

iv) *That, the trial magistrate erred in law and fact to believe that the value of the trophy was ascertained since the valuation was made by an unauthorized person, thus offending the provision of section 86 (4) of the Conservation Act.*

v) *That, the trial magistrate erred in law and fact to believe that the appellant was found with government trophy and some items used in the commission of the offence since no receipt was issued contrary to section 38 (3) of Criminal Procedure Act ("the CPA").*

vi) *That, the trial magistrate grossly erred for entering an omnibus conviction to the appellant without stating specifically the count for which the appellant was found guilty of.*

vii) *That, the trial magistrate misdirected himself for failure to give proper and due consideration to the appellant's defence evidence.*

viii) *That the trial magistrate erred for failure to see that the appellant was tried and convicted without requisite jurisdiction as there is no record that consent of the DPP and certificate conferring jurisdiction were endorsed by trial court, thus offending section 12 (3) (4) of the Economic Act. This is fatal.*

At the trial court the prosecution's case was as follows; that on 23rd December, 2019 at Enduimet Wildlife Management Area within Longido District in Arusha Region, the appellant was found in unlawful possession of bushbuck meat, one head and four hooves of bushbuck (Henceforth "Government Trophy") valued at USD 600 which is equivalent to Tanzanian Shillings one million three hundred seventy-nine thousand four hundred (Tshs. 1,379,400/=) only, the property of the Government of the United Republic of Tanzania without a permit/license from director of the wildlife. That on the same date the appellant was also found in unlawful possession of weapons to wit; two bush knives and one knife in circumstances which raised reasonable presumption that he had used them in commission of offences under the Wildlife Conservation Act. In proving its case, the prosecution paraded four witnesses, namely Jehovanes Raphael Sarakikya (PW1), Stephano Sweliane Mwegete (PW2), Baraka Lavidalama Mollel (PW3) and F7335 CPL, Evance (PW4).

On the other hand, the appellant was a sole witness for the defence. He denied to have committed the offences charged against him. His testimony was to the effect that the case against him was framed by his former employer who employed him to work in his farm for a monthly salary of Tshs. 400,000/=.He worked for him for four months and he was not pay his salary as agreed thus, he decided to sell 15 bags of potatoes without his employer's permission so as to compensate his unpaid salaries. His employer was furious, consequently he to frame a case against him as a revenge.

In its judgment the trial court pointed out that the prosecution elaborated well how the appellant was found in wildlife management authority area with bushbuck meat. They followed all required procedures in handling the accused and exhibits which were found in his possession. Thus, the trial court was satisfied that the prosecution proved its case against the appellant beyond reasonable doubts and that the appellant failed to cast doubts on the prosecution case.

In this appeal the appellant appeared in person, unrepresented whereas the learned state attorneys Lyidia Miyaye and Daudi Basaya appeared for the respondent.

With regard to the 1st ground of appeal, the appellant submitted that his conviction was unfair and in contravention of Article 13 (6) (e) of the Constitution of the United Republic of Tanzania (Henceforth " the Constitution") because he was put in a lockup and tortured for a long time from on 23rd December 2019 when he was arrested to 13th February 2020 when he was arraigned in court. He contended that his right to be free from torture as guaranteed in the Constitution was violated. He further contended that section 29 (1) of the Economic and Organized Crimes Control Act (Henceforth "EOCA") and section 32 (1) of the Criminal Procedure Act (Henceforth " the CPA") were violated as the law requires an accused person to be arraigned in court with 48 hours from the time of his/her arrest. He was emphatic that prosecution failed to explain why he was not arraigned in court in time as required by the law.

With regard to the 2nd ground of appeal, the appellant submitted that the prosecution failed prove the case against him beyond the

reasonable doubts as required by the law on the following reasons; **one,** the charge sheet indicates that he is charged under section of 81 (1) (2) (c) (iii) of Conservation Act, as it was amended by Act No. 2 GN No. 4 of 2016. He contended that provisions of the law indicated in the charge sheet is about transfer of Government trophy by way of gift, sell or exchange without obtaining permit. Moreover, he contended that there is no a single witness of prosecution who adduced evidence in support of the charge sheet as it is. He referred this court at page 19 of the trial court proceedings, to bolster his argument. It is appellant's assertion that the arresting officers led by PW2 failed to explain before the trial court how he used the weapons allegedly found in his possession for hunting the bushbuck as alleged in the charge sheet.

Two, the prosecution did not bring in court the investigator of the case because there was none. The case was not investigated by any police officer as required under the law. To support his argument, he cited section 21 (1) of the EOCA. He insisted that there is nowhere in the proceedings showing that there was a police officer who conducted the investigation of the case.

Three, the prosecution failed to bring in court key witnesses, like Corporal Lodige who was required to explain why he kept him at Police Station for so long time without arraigning him in court. He was of the view that failure to brought such key witnesses creates doubts in prosecution and weakens it.

On the 3rd ground of appeal, the appellant submitted that PW2, the arresting officer did not explain before the court where did he keep the meat he claimed that he found it in his possession on 23rd

December 2019 when he took the appellant to Olmolo Police Station. The appellant also contended that like PW2, PW3 also did not explain in court where was the said Government Trophy kept when he was taken to Olmolo Police Station.He insisted that there is no clear chain of custody of the said Government Trophy from the date it was allegedly found in his possession to 27th December 2019 when the same was handed over to PW1 who identified it as Bushbuck meat and finally destroyed it. He went on submitting that the fact the PW2 did not explain where he kept the alleged Government Trophy raises doubt if the said Government trophy which was purported to be found in his possession is real the one which was handed over to PW1. Moreover, the appellant argue that PW2 did not explain if after arresting him he marked the said exhibits (Government trophy and weapons) purported to be found in his possession or who was given the said exhibits when he was sent to Central Police Station in Arusha.

Further, he submitted that PW1 and PW2 testified that they handed over the said exhibits to PW4 but there is no where in the proceedings showing that PW4 marked the said exhibits as required in PGO No. 229. He insisted that the failure to mark the exhibits and lack of sufficient explanations pertaining to their custody breaks the chain of custody and raises doubts on the prosecution case if the government trophy tendered in court as exhibit was the one found in possession of the appellant on when he was arrested.

With regard with the 4th ground of appeal, the appellant submitted that the evaluation of the Government Trophy in question was done by unauthorized person contrary to section 86 (4) of the Wildlife

Conservation Act. That PW1 who conducted the valuation was a Game Warden Officer not Wildlife Officer contrary to part 3 of the Wildlife Conservation Act. He referred this court to page 13 and 14 of the proceedings, to bolster his arguments. He insisted that the director of wildlife or wildlife officer are the ones mandated under the law to identify and conduct valuation of government trophies. To support his position, he cited section 114 (3) of Wildlife Conservation Act.

With regard to the 5th ground of appeal , the appellant submitted that upon the alleged seizure of the government trophy there was no receipt issued contrary to section 38 (3) of the CPA. He was emphatic that the receipt and certificate of seizure are two different things. To buttress his argument cited the case of **Baraka Ismail Maulid and another Vs Republic, Criminal Appeal No.90 of 2021,** (unreported).

On the 6th ground of appeal, the appellant submitted that the trial magistrate erred in convicting him generally without specifying which count he was found guilty of and convicted. He referred this court to page 10 and 11 of the judgment. To cement his position, he cited the case of **Theobald Charles Kessy and another Vs Republic, (2000) TLR 186.** He contended that the said mistake is fatal.

With regard to the 7th ground of appeal the appellant submitted that the trial magistrate did not consider his defence in contravention of section 312 (1) of the CPA and erred for not reminding him the offences he was facing before convicting him. He referred this court to page 10 and 11 of the proceedings, to cement his arguments.

With regard to the 8th ground of appeal the appellant submitted that the trial court had no jurisdiction to adjudicate the case because there

was no consent and certificate from the DPP that was presented in court and indorsed as required by the law in order to confer jurisdiction to the trial court to try the case against him. To support his arguments, he cited section 12 (3) of the EOCA. He maintained that any proceedings conducted by the court without jurisdiction is null and void. To cement his argument, he cited the cases of **John Julius Martin and another Vs Republic, Criminal Appeal No.212 of 2020 and Omary Bakari @ Daud vs Republic, Criminal Appeal No.52 of 2020.**

In rebuttal, responding to the 8th ground of appeal Ms. Miyaye submitted on that there is a consent and certificate from the DPP conferring jurisdiction to the trial court to adjudicate the case against the appellant and the same is in the court's file thus, section 14 (4) and 26 of the EOCA were complied with.

With regard to the 1st ground of appeal she submitted that this ground has no merit since the appellant was given his right to have police bail but he did not meet the conditions for the bail. She added that the appellant's constitutional rights were not violated. Moreover, she pointed out that the concerns raised by appellant are covered under section 388 of the CPA and cannot vitiate the proceedings in which the appellant was found guilty after a full hearing of the case. That the fact that appellant was under custody does not mean that he did not commit the offence he was charged with, contended Ms. Miyaye.

On the 2nd grounds of appeal Ms. Miyaye argued that the prosecution witnesses proved beyond reasonable doubts that the appellant was found in possession government trophy without hunting license. She contended that section 100 (1) of the Wildlife Conservation Act provides

that the accused person has a burden of proving that he had a license to hunt, but the appellant failed to do so. Referring this court to page 11 of the proceedings Ms. Miyaye pointed out that PW1 testified that he identified the government trophy in question. She further submitted that PW2 testified that he arrested the appellant while he was in possession of the government trophy. He referred this court to page 19 of the proceedings. She admitted that no police investigator was summoned to appear in court because the prosecution called witnesses who were crucial in proving its case. She added that the game warden was called to testify in court since pursuant to section 21 (2) of the EOCA a game warden acts as a police officer.

Mr. Daud responded to the 3rd ground of appeal. He argued that the prosecution side demonstrated very well the chain of custody of the government trophy. He was emphatic that the chain of custody was not broken since PW2 explained very well how the appellant was apprehended and signed the certificate of seizure and then taken to police station. He further argued that the government trophy in question was handed over to the exhibit keeper (PW4) who filled in handling form in the presence of appellant. Mr. Daud was of the view that the testimony of PW1,PW2 and PW4 gives sufficient explanations on how the appellant was apprehended and finally arraigned in court as well as how the exhibits were handled. He was emphatic that the chain of custody was not broken since the prosecution tendered in court handing over forms and certificate of seizure as exhibits .

With respect to the 4th ground of appeal Mr. Daud argued that the game warden officer is an authorized officer with power to conduct

valuation of government trophy and fill in valuation report/form. To support his argument, he cited the case of **Jamal Msambe and another Vs Republic, Criminal Appeal No.28 of 2020,** (unreported) which made interpretation of section 3 of the Wildlife Conservation Act , in which it held as follows;

"it is our considered view, from the above discussion and definition of who is a "game ranger", that a game warden , wildlife officer, wildlife ranger and game ranger are same persons whose main task is to protest wildlife. We find that, in substance, there is no difference between a "wildlife officer " a wildlife ranger" a "game ranger" or "wildlife ranger". In our view , the use of these terms is a matter of semantics".

In response to the 5th ground of appeal, Mr. Daud submitted that the same has no merit. He contended that since the appellant signed the inventory form, it is a proof that he was found in possession of the government trophy. The fact that he was not given receipt is not fatal. To cement his argument, he cited the case of **Ramadhan Idd Mchafu Vs Republic, Criminal Appeal No.328 of 2019** (unreported) in which the court held that;

"Like in Abdalah Said Mwingereza Vs Republic (supra), absence of the official receipt is inconsequential in establishing that the appellant was found in possession of the Government trophy. The omission to issue a receipt was not therefore fatal....."

With regard to the 6th ground of appeal Mr.Daudi argued that the same lacks merit because the offences were read over to the appellant. The trial court convicted the appellant and pronounced sentence him for each offence. He referred this court to page 11 of the impugned judgment. He maintained that the court pronounced sentence for

each offence as required by the law and no error was committed in sentencing the appellant.

With regard to the 7th ground of appeal, Mr. Daud submitted that the appellant's defence was considered by trial magistrate. However, the same was not strong enough to shake the prosecution case. He referred this court to page 8 and 9 of the impugned judgment. He added that whatever the case this court has power to consider his defence at this stage and make its findings. To cement his argument, he cited the case of **Athuman Musa Vs Republic, Criminal Appeal No.4 of 2020** (unreported).In rejoinder, the appellant insisted that his appeal has merits and pray the same to be allowed and the impugned decision be set aside.

After a careful analysis of the rival arguments made by the parties and perusing the court's record, I am in position to determine this appeal. I will start dealing with the last ground of appeal for an obvious reason, that is, it is concern with the trial court's jurisdiction to try the case against the appellant . It is a common knowledge that one of the crucial things to looked at before a court of law starts hearing any case is its jurisdiction since lack of jurisdiction is fatal.

It is a common ground that pursuant to section 3 of EOCA, the court with jurisdiction to try economic offences was, at the time of the trial of the appellant and to date is the High court of Tanzania. However, section 12(3) of the EOCA gives powers to the DPP or any state Attorney dully authorized by him to issue certificate and order that an economic offence be tried by the court subordinate to the High Court as may be specified in the certificate. Moreover, section 26 (2) of the EOCA

provides for a requirement of a consent from the DPP or a person authorized by him. In this case the aforementioned two documents, to wit consent and certificate from the DPP conferring jurisdiction to the trial court to try the appellants case are contested. To start with, let me make it clear that the appellant's concern is that there is no consent and certificate of the DPP which were endorsed by the trial court whereas the learned state attorneys maintained that the consent and certificate of the DPP were properly filed in court. Upon perusing the courts records I noted that there is a certificate and consent of the DPP filed in the case file but the same is not signed by the registry officer, not stamped and does not indicate when was it received. In addition, there is nowhere in the proceedings indicating that certificate and consent of the DPP was presented in court and endorsed by the trial magistrate. Now, pertinent questions which arises here are many, such as when was said consent and certificate of the DPP filed in court, why is not endorsed by the court, how did it get its way into the court file, in short the list is endless. In the case of **John Julius Martin** (supra), the Court of Appeal was confronted with a similar situation to the one at hand and had this to say;

"....In this respect, the issue is , is it enough for the instruments to just be delivered in the trial court's file or a prosecuting attorney should orally move the trial court in session before commencement of the trial for it to endorse the documents as admitted and also record that act in writing.....the situation in the above case is akin to the state affairs obtaining in this case. Thus, we hold that because the instrument of consent and the certificate at page 3 of the record of appeal , were neither endorsed as having been admitted by the trial court ,nor does the record show that the documents were admitted , the trial court tried the case without jurisdiction.

Under the law of this country, any decision reached by any court without jurisdiction is nullity, see ***maganzo zelamoshi@ Nyanzomola*** *(supra).Thus, the first ground of appeal questioning the jurisdiction of the trial court succeeds. Accordingly, the proceedings of the trial court are nullified. The conviction of the appellant and the sentence imposed upon them are equally quashed and set aside...."*

From the foregoing and on the strength of the holding of the Court of Appeal in the case of **John Julius Martin** (supra), I am inclined to agree with the appellant that the trial court had no jurisdiction to try the case against him since there was neither an endorsement on the consent and certificate of the DPP nor does the proceedings reflect that there were such documents recorded. Consequently, I hereby nullify the proceedings of the trial court, set aside the conviction and sentence imposed on the appellant. Guided by the decision of the Court of Appeal in the case of **John Julius Martin** (supra) in which , after nullifying the proceedings of the High Court and trial court had this to say on the way forward;

"Ordinarily, there are two alternative and competing orders that a court may make after nullifying proceedings following technical defects like it has happened in this case. It is either to order trial de novo or to release the appellant..... if we order a retrial of the appellants , we will be opening up unlimited opportunity for the prosecution to fill in the gaps that have been observed in the first trial, to the prejudice of the appellants.

In view of the above reasons , this appeal succeeds. As we have already quashed the conviction of the appellate and set aside the sentences that had been imposed upon them, we further order their immediate release from prison , unless their continued incarceration is in respect of another lawful cause"

Having nullified the proceedings of the trial court and set aside the judgment of the trial court, I will not order re-trial of the appellant since

doing so will be tantamount to giving an opportunity on the prosecution to rectify some of the issues complained of by the applicant in this appeal, for example the issue on the chain of custody of the exhibits. Thus, I hereby, order release of the appellant immediately unless he is otherwise lawfully held.

Dated this 20th day of June 2023

B.K.PHILLIP

JUDGE