IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 53 OF 2022

(Originating from Same District Court in Economic Case No. 1 of 2021)

SHAGHUDE RAMADHANI SHAGHUDE .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

21st Feb. & 23rd May 2023

A.P.KILIMI, J.:

The appellant mentioned above together with other two persons were charged with five counts. In the first three counts both were charged for one offence of unlawful hunting contrary to section 19(1) and (2)(a) of the Wildlife Conservation Act, NO.5 of 2009 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-EOCCA, Cap 200 R.E.2019.

On the fourth count, the appellant was charged alone for the offence of unlawful possession of Government trophy contrary to section 86(1) and (2) (c) (ii) of the Wildlife Conservation Act NO.5 of 2009 read together with

paragraph 14 of the 1st Schedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act, Cap. 200 R.E.2019.

And lastly, on the fifth count, both accused persons together with the appellant were charged for the offence of unlawful entry into the National Park without licence or written authority contrary to section 21(1)(a) of the National Park Act, Cap 282 R.E.2002.

Having heard the entire case on merit the trial court found the prosecution failed to prove the first, second, third and fifth counts, consequently acquitted all said accused persons. But in respect to the fourth count which the appellant was charged alone, the trial court found to have been proved by the prosecution, then convicted him and sentenced him to pay fine of ten times value of the trophy which is Tshs. 11,500,000/= in default to serve twenty years imprisonment.

According to the fourth count which the appellant was convicted with, the prosecution at the trial alleged that on 26th March, 2021 at Kisiwani village within Same District and Kilimanjaro region was found in unlawful possession of two (2) heads of fresh meat of dik-dik which is equivalent to Tshs.575,000/=, all in total valued at Tshs 1,150,000/= only the property of

the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

According to the facts led to appellant trial which can be gleaned from the record, were to the effect that, PW3 Inspector Pesa with his fellow members of anti- poaching task team, on 25/3/2021 got information from a man named as Wolfman Mbilinyi that the appellant and the other two men charged together at the trial court, that three days past they did hunt and killed giraffe and buffalo. They then mounted a plot to arrest them. Next day on 26/3/2021, they got information that the appellant is in his homestead. They then at about 2.00 am went to his home. Upon Knock his door, the appellant opened, they put him under arrest, and told him they need to search his house. Together with other officers, they conducted the search which witnessed by ten cell leader of the area. In the course of search under appellant's bed they found a sulphate bag with two dik-dik heads and one trap without any permit to such effect. The certificate of seizure was prepared and filled and then appellant was arrested forthwith for further procedures of identification of trophies and statements writing.

In his defence the appellant vehemently denied to be found with above said stuffs, also objected to sign search and seizure certificates.

As stated above, the trial court in evaluating the above facts found the appellant guilty, convicted and sentenced him as stated above.

Aggrieved by the conviction and sentence of the trial court, the appellant has turn up to this court appealing basing on the following grounds;

1. That, a trial Hon Magistrate erred in law and fact for admitted of Exhibit P14 Trophy valuation form and admission of Exhibit P 9 Caution Statement of Appellant for not read and explained loudly before a trial court.
2. That a trial Hon Magistrate had erred in law and in fact by relying and admitting testimonies' of PW3 who was not listed as a witness in preliminary hearing.
3. That Preparation and Admission of Exhibit P9 Caution Statement of the Appellant are erred in law and in fact for lack of mention a time for starting and finishing interrogation to the Appellant.
4. That, Prosecution side erred in law and in fact for failed to take photograph of the alleged trophy.
5. That, the Hon Magistrate had erred in law and in fact for convicting the appellant by relying on the testimonies of the witnesses of the prosecution side which were contradicting.
6. That Prosecution side erred in law and fact for failed to summons, name or tendering before the trial court as a witness, the Hon Magistrate who make order for disposal of alleged Government trophy.
7. That a Prosecution side erred in law and fact for charged appellant on two offences committed in deferent time and circumstance in a one charge sheet.
8. That a trial Hon Magistrate erred in law and in fact for convicted appellant while have a doubt for break of chain of custody.

9. That conviction of the appellant was result of bad Judgment for not consider evidence of the appellant witness DW7.

At the hearing of this appeal, the appellant was unrepresented while the Republic was represented by Mary Lucas learned Senior State Attorney. Both agreed this appeal be argued by way of written submissions.

To support his appeal the appellant submitted in respect to first ground that, the trial court erred in law and in fact for admitting exhibit P14 (Trophy valuation form for two dik-dik heads) and Exhibit P 9 (Cautious Statement of the Appellant) without being read and explained loudly before a trial court as required by the law. To support this stance, he has referred the cases of **Robinson Mwanjisi and 3 others v. Republic** [2003] TLR 218, and **Lack Kilingani v Republic,** Criminal Appeal no 402 of 2015 and **Tumaini Jonas v Republic** Criminal Appeal no 337 of 2020 CAT at Dodoma (both Unreported).

In regard to second ground, the appellant submitted that according to page 13 of the proceedings, prosecutions had listed number of names and exhibits to be used in their evidence, and PW3 was not among those mentioned. This led to the accused be taken by surprise and not be able to properly prepare for his defense.

On the third ground of appeal, submitted that the preparation and admission of exhibit P9 caution statement of the appellant erred in law and in fact for lack of mention the starting and finishing time of interrogation of the appellant, therefore did not consider the requirement of the law. To support this argument he has referred section 50(1)(a) of Criminal Procedure Act Cap.20 R.E. 2022 and the case of **Ester Lofrey Lyimo v.Republic** Criminal Appeal no 123 of 2020 CAT at Dar es salaam (Unreported).

The appellant on fourth ground of appeal, submitted that, there were no photos taken of the said seized government trophy pursuant to Police General Order (P.G.O) no 229(25) which provides that upon the seizure of perishable exhibit, the photograph of it should be taken.

On regard of sixth ground of appeal, the appellant submitted that prosecution side erred in law and in fact for failure to summon or even submitting a name before the trial court of a magistrate who made an order for disposal of alleged government trophy. He added that this was necessary so as to remove any doubt on whether the magistrate who made the order for disposal was not the one who tried the case.

He further maintained that a magistrate who made a disposal order was a crucial and material witness to the prosecution's case in proving on whether, what he/she ordered to be disposed was indeed the two heads of dik-dik and that the magistrate was not the one who tried this case. The appellant buttresses his assertion by referring the case of **Boniface Kundakira Tarimo v. Republic** Criminal appeal no 350 of 2008 (unreported) and **Hemed Said v Mohamed Mbilu (1984) T.L.R. 113.**

The appellant in respect to seventh ground of appeal, submitted that the accused was charged and convicted based on the defective charge. He further said the appellant was charged for five counts as afore mentioned, first three count charged of offence of unlawful hunting and killing one giraffe. On trial there was no place alleged that the appellant participated on the crime of hunting and killing a Giraffe and Buffalo. Therefore, is saying charging appellant on the first three counts in one charge sheet confuses the appellant to defend his case on the ground that the first two count was committed on different circumstances and time, and there is no link between those two counts with the other counts which he was charged, and the appellant's involvement in the offences charged is still questionable.

On regard to eighth ground of appeal, he submitted that, the seizure items were sent to the District Game Officer, he further said, the idea behind recording the chain of custody is to establish that the alleged exhibit is in fact related to the alleged crime, rather than, for instance having been planted fraudulently to make someone appear guilty. To support his position has referred the case of **Paulo Maduka and 4 others v. Republic,** Criminal Appeal no.110 of 2007, CAT **(unreported).**

Lastly, the appellant on ground nine submitted that, a trial magistrate failed to consider evidence of DW7 Rose Ramadhani who testified that she lived with appellant. And on 26.3.2023 people knocked at appellant door and when she opened, she heard appellant screaming, she saw some holding guns while standing outside and other inside appellants' room, then decided to run to the ten cell leader and informed him of the visitor and they went together to the house. He further submitted that this evidence creates a doubt if alleged two head of dik-dik was true found on the appellant room or was brought by Police officers who enter in the room of appellant before the independent witness attended on the scene.

Ms. Mary Lucas responding to the above submission supported the conviction and sentence, and further contended in respect to ground number one and two that, the inventory form (exhibit P14) argued by the appellant that it was improperly admitted, doesn't have any effect to him as this inventory concerns with other accused person who were charged together with him and it contains item seized from them, the same with the cautioned statement. On convicting the appellant, the trial magistrate relied on inventory (Exhibit P13) which has the items seized from him as shown in the certificate of seizure (Exhibit P5) hence urges that these grounds have no limb to stand.

In respect to ground number two, she submitted that the appellant contends that failure to name a witness at the preliminary stage have no effect to the appellant, as he did not prove how was affected by the said omission, however the aim of conducting preliminary hearing as provided for under Section 192 of the Criminal Procedure Act, Cap 20 R.E 2022 is to accelerate trial, hence even if the witness not mentioned, came to testify before the court, did not amount to injustice as the appellant had a time to hear and cross examine the witness during trial as it is shown at page 26-28 of the typed proceeding.

Ms. Mary Lucas further submitted in regard to ground number four and six that it is true that, there is no photograph taken at the time of disposing the exhibit, but this also cannot render the evidence given on how the exhibits was handled and disposed to be illegal, as PW7 testified as among of the witnesses who witnessed the magistrate doing inventory, also the appellant was present and did not dispute during cross examination. To support her stance, she has referred the case of **Nyerere Nyague v. Republic**, N0.67 of 2020 (Unreported).

On ground number seven, Ms. Mary Lucas contended that the appellant was found with the government trophy on 26/3/2021.This have been proved by the testimonies of PW3 and PW5. Therefore the argument given by him on his written submission has no merit.

Replying grounds number 8, the learned Senior State Attorney contended that, the witnesses paraded by the prosecution shows clearly on how did they handled the seized exhibit from the time of arrest up to the disposal as rightly testified by PW3, PW6, PW7 and PW10 respectively and it is well documented. To support her point, she cited the case of **Paulo Maduka & Others** (supra).

At the end she replied ground number nine by contending that the trial magistrate convicted the appellant basing on the strong evidence given by the prosecution witness and on his judgement, he considers the all evidence given by both sides and came into finding that the prosecution side proves their case beyond reasonable doubt henceforth. Therefore, the argument raised by the appellant on this ground has no merit.

In determining the above submitted, I have considered and scanned the entire record at the trial which shows the evidence adduced, and now I resolve the above grounds as follows;

Starting with ground number one, the record reveals that exhibit P14 is the trophy valuation report of two head of Dik-dik found in possession of the appellant, and according to page 42 of the typed proceeding reveals so. The record shows no way the said exhibit was read to the appellant. I don't agree with the assertion of Ms. Mary Lucas that it concern other accused persons because the record shows is only the appellant who was alleged arrested by those two heads of dik-dik. Second, the record at page 41 and 42 reveals that the caution statement taken was of the appellant and also nowhere it was read to him.]

It is a trite law as observed in the case of **Robinson Mwanjisi and Three Others** (supra), the Court held *inter alia* at page 220 that: -

> *"Whenever it is intended to introduce any document in evidence; it should* ***first be cleared for admission, and be actually admitted, before it can be read out***"
> [Emphasis added].

It is therefore, the alleged documents did not complete the third stage of being read out in court so that its contents could be heard by the appellant. This means that the appellant admitted something whose content he did not know. Having considered this improper admission, I hereby expunge exhibit P9 and P14 from the record. I have then asked myself what is the effect of expunging exhibit P14. In view, this means the exhibits two head of dik- dik was not valued, and to my opinion this is fatal as per section 86(3) and (4) of the Wildlife Conservation Act [CAP. 283 R.E. 2022] since the value is very important in assessing the punishment as held in this case at the trial court judgment, this goes without saying even the punishment of the appellant was illegal. Having analyzed as above, I find this ground has merit and is accordingly sustained.

In respect to the second ground, I concede with argument of Ms. Mary Lucas that there is no law to that effect. And for this I wish refer the decision of the Court of appeal in the case of **Bandoma Fadhil Makoro and Another v. Republic,** Criminal Appeal No. 14 of 2005 (unreported). where it was stated that:

> *"There is no equivalent provision for trials in the subordinate Courts and there is no law therefore which prevented the prosecution to call as witnesses PW2 and PW5, even though those witnesses were not listed at the preliminary hearing."*

Therefore, basing on above authority there is no law which prohibits the subordinate courts to call witnesses not listed at the preliminary hearing, I thus find this ground of appeal lacking in merit.

In respect to ground number three, which deals with exhibit P9 for want of showing time for starting recording caution statement, I find also this has nothing to deal with, since when I was dealing with first ground above, the said exhibits have been expunged.

In regard to ground number four, I concede with Ms. Mary Lucas that the facts there is no photograph taken at the time of disposing the exhibit, cannot render the evidence given on how the exhibits was handled and disposed to be illegal. But since, she has said that, it does not render the handling of exhibits be illegal. I am persuaded to observe the procedure used when the said exhibits of two head of Dik-dik were found in possession of the appellant.

The law provides any search has to comply with the CPA, the provisions of section 38 (1) and (3) of the CPA on the power of search and seizure are relevant. And for purpose of clarity, I reproduce hereunder:

> *"38. -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle or place.*
> *(a) anything with respect to which an offence has been committed;*
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is

satisfied that any delay would result in the removal or destruction of that thing or would endanger life of property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) N/A

(3) ***Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.****"*

[Emphasis Added]

In **Samweli Kibundali Mgaya v. Republic** Criminal Appeal NO. 180 OF 2020 CAT at Musoma, deduced from the quoted provisions of law that, no search of a premises shall be affected without **one;** search warrant, **two;**

the presence of the owner of the premises, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property.

My perusal on the record of the trial court denotes that no receipt acknowledging seizure of the said exhibits was issued. In **Selemani Abdallah and Others v. Republic,** Criminal Appeal No. 354 of 2008 (unreported) the Court of Appeal stated;

> *"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized."*

In this matter PW3 police officers received information of the incident earlier, therefore he and his fellow's officers were well prepared, in my view, I believe had ample time, thus the issue of issuing a receipt was not an emergence.

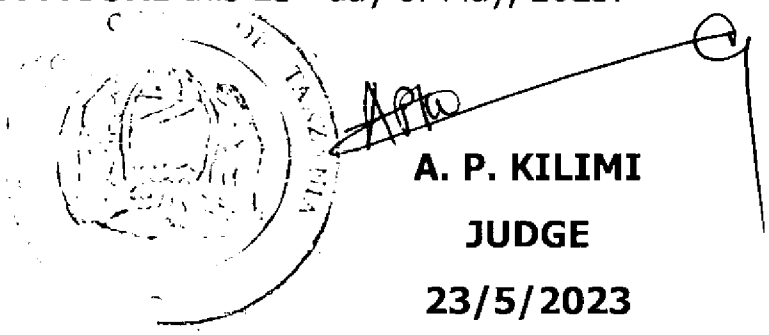
Having reasoned so, I am of settled opinion this has vitiated the justice on part of the appellant and should be taken as a benefit of doubt to him.

In the circumstances, I find that the determination of the first and this ground of appeal is sufficient to dispose of the appeal and find no need to consider and determine the remaining grounds of appeal.

For the reasons state above, the conviction of the appellant was vitiated with legal flaws which render it to be unsustainable. I thus find this appeal therefore have merit and consequently the conviction of the appellant is quashed and sentence set aside. The appellant should therefore immediately be released from prison unless lawfully being held.

It is ordered accordingly.

DATED at **MOSHI** this 23rd day of May, 2023.



A. P. KILIMI

JUDGE

23/5/2023