IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

ECONOMIC APPEAL NO. 8 OF 2022

(Originating from Economic Case 12 of 2021 District Court of Biharamulo)

BEKENGA ERNEST..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

23rd May and 21st June, 2023

BANZI, J.:

Before the District Court of Biharamulo, the appellant was charged with the offence of 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 of the Written Laws (Miscellaneous Amendment) (No.2) Act No. 4 of 2016 ("the WCA") read together with paragraph 14 of the 1st Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] ("the EOCCA"). It was alleged that, on 19th September, 2021 at about 15:00 hours at Ntungamo village, within National Park within Biharamulo District in Kagera Region, the Appellant was found in unlawfully possession of Government trophy to wit; Bushbuck meat

valued at Tshs.1,380,000/=, the property of the United Government of Tanzania.

After a full trial, the appellant was convicted and sentenced to twenty years imprisonment with an order of forfeiture of his motorcycle with registration number MC174 BBP make SANLG. Aggrieved with his conviction and sentence, he preferred an appeal before this Court armed with seven grounds and then, he filed three additional grounds which taking them together they boil down into the following complaints; **one**, the prosecution has failed to prove the case beyond reasonable doubt as his conviction was based on weak, incredible, concocted and unreliable evidence; **two**, his conviction was wrongly entered by relying on exhibit P2 without proof from Government Chemist; **three**, the trophy in question was illegally disposed via Exhibit P4 which was not signed by him; **four**, Exhibits P2, P3, P4 and P5 were wrongly admitted for being denied the opportunity to object; **five**, the trial was conducted in the absence of the consent of the Director of Public Prosecutions (DPP) and certificate conferring jurisdiction on subordinate court to try economic and non-economic offences and **six**, his defence was not considered.

Briefly, the facts of the case leading to the conviction of the appellant run as follows; on 19th September, 2021 around 15:00 hours Juma Said Ngao

(PW3), a wildlife officer from Burigi Chato National Park was with his colleagues conducting patrol along Biharamulo Lusahunga road. In the course of patrol, they saw a motorcycle with a plastic bag on the back seat and upon raising suspicion, they began to chase it and after reaching Ntungamo area, it fell dawn. They went closer and since there was another motor vehicle nearby, they asked the driver namely Amon Ibrahim Mofati (PW4) who accepted to witness the search. Thereafter, they searched the plastic bag and managed to find a piece of dried meat. PW1 identified it as Bushbuck meat. Upon being asked if he has permit, the appellant replied that, he had none. PW1 seized it through certificate of seizure (Exhibit P2) which was signed by the appellant, PW4 and himself. Thereafter, he took the appellant and seized trophy up to Biharamulo police station.

On 20th September, 2021 Ayoub Manyusi Nyakunga, a wildlife officer (PW2) upon being assigned by his superior, he went to Biharamulo police station where he was handed over a piece of meat by H.3829 D/C Andrew (PW3). He identified it as bushbuck meat because it has fibres in its muscles and colour was dark red which is different from other animals. The he conducted valuation whereby, such piece was equivalent to whole animal valued at USD 600 equivalent to Tshs.1,384,800/= at the prevailed exchange rate of Tshs.2,308/=. On 21st September, 2021, PW3 filled in inventory form

and went to the District Court of Biharamulo together with the trophy in question and the appellant. The District Court ordered the meat to be destroyed. On the same date, he arraigned the appellant to court.

In his defence, the appellant testified under oath and denied to commit the alleged offence. His defence was very short. He claimed that, on the fateful day while he was on his way from the market, he was arrested and found with maize, cassava and *nyanya chungu* which he bought from market. He prayed for the trial court to consider his defence and acquit him. He called his cousin sister one Hadija Hamis who testified as DW2. Her testimony was to the effect that, in the year before 2021, the appellant went to visit her and she gave him cassava, banana, beans and *nyanya chungu* Later, he was called by police and asked to go there. She went there and found the appellant in custody. She was given beans, cassava, banana and *nyanya chungu* and was told to take them home. She left and took the same to appellant's house.

When the appeal was called for hearing, the appellant appeared in person unrepresented whereas, the respondent had the services of Mr. Yusuph Mapesa learned State Attorney.

The appellant had nothing much to say rather than praying to adopt his grounds of appeal to form his submission. He then prayed for his appeal to be allowed and he be released from prison.

In response, Mr. Mapesa opposed the appeal. Responding to the first complaint, he argued that, the trial court convicted the appellant after it believed the evidence of PW1 and PW4 because as it was stated in the case of **Goodluck Kyando v. Republic** [2006] TLR 363 that every witness is entitled to be believed unless there is reason for not believing his evidence. He further argued that, in the matter at hand, there was no reason for the trial court not to believe PW1 and PW4 and as a matter of law, this court being the appellate court is bound by the finding of the trial court as far as credibility is concerned. He supported his argument by the case of **Omary Mohamed v. Republic** [1983] TLR 52. In respect of the second complaint, it was his submission that, Exhibit P2 was tendered by wildlife officer who according to section 86 (4) of the WCA is a competent person to conduct valuation of trophy and signed on valuation certificate. Equally, he was competent witness to tender certificate of valuation after he successfully identified the meat in question. He added that, the government chemist is not recognised under the WCA because, according to this law, it is only the

Director of wildlife or wildlife officer who are permitted to conduct valuation on trophies.

Concerning the third and fourth complaints, he submitted that, the appellant was involved in the process of disposal of the trophy in question. He added that, the inventory (Exhibit P4), was tendered without any objection from the appellant. The same applied to Exhibit P2, P3 and P5 which before they were produced in evidence, the appellant was given opportunity to state if he has objection and he replied that, he had no objection. The further submitted that, the issue of not signing the inventory has no basis. Besides, the appellant did not cross-examine prosecution witnesses on this issue which connotes that, he accepted the truth of prosecution testimony. He cited the case of **Kanaku Kidali v. Republic**, Criminal Appeal No. 326 of 2021 CAT (unreported) to support his submission on consequences of failure to cross-examine a witness.

Reverting to fifth complaint, he argued that, for subordinate court to try an economic offence, there must be consent and certificate conferring jurisdiction in accordance with sections 26 (1) and 12 (3) of the EOCCA. In the instant case, it is on record under page 8 of the proceedings that, the consent and certificate were duly filed and received by the trial court. He supported his submission by citing the case of **Omary Bakari @ Daud v.**

Republic, Criminal Appeal No. 52 of 2022 CAT (unreported). Coming to the last complaint, it was his submission that, at page 10 of the judgment, the trial magistrate considered the evidence of both sides. In that regard, he prayed for appeal to be dismissed for want of merit.

In his brief rejoinder, the appellant insisted that, he was not found with the alleged trophy and the same was not analysed by chemist. He also challenged his arrest for not involving his local leaders. At the end, he reiterated his prayer to be released from prison.

Having considered the record of the trial court and submissions by learned counsel of both sides, the issue for determination is *whether the case against the appellant was proved beyond reasonable doubt.*

It is important to underscore that, in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, the burden of proof lies upon the prosecution except where there is any other law expressly providing otherwise. Section 100 (3) (a) (d) of the WCA is one of such exceptions to the general rule concerning burden of proof. The provisions of this section are very clear that, the accused person has the

duty to prove that the possession of the government trophy is lawful and the trophy is not the government trophy. However, as it was stated in the case of **Said Hemed v. Republic** [1987] TLR 117 that, when the burden proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. Therefore, it was still the duty of the prosecution to prove possession of government trophy beyond reasonable doubt. Likewise, as required by law, the appellant was under the duty to prove on balance of probabilities that, the possession of the said trophy was lawful; that is, with the permit of Director of Wildlife and the trophy in question was not government tropny.

Starting with the fifth complaint concerning lack of consent and certificate of the DPP, it is the requirement of the law under section 26 (1) of the EOCCA that, a trial in respect of an economic offence cannot commence without the consent of the DPP. Section 26 (2) of the EOCCA empowers the DPP to establish and maintain a system concerning the process of seeking and obtaining of his consent expeditiously. Currently, such system is governed by GN No. 496H of 2021. Equally for economic offence to be tried by subordinate court, there must be the certificate of the DPP or any State Attorney duly authorised by him, conferring jurisdiction to such subordinate court pursuant to section 12 (3) of the EOCCA. In the

matter at hand, looking at page 8 of the typed proceedings, on 26th May, 2022, the prosecutor informed the trial court that, they have already filed the consent and the certificate conferring jurisdiction. Then, the trial court received the two instruments and proceeded with trial by reading the charge to the appellant and recording his plea. Moreover, the consent and certificate in question are found in the original record. In that regard, this complaint has no merit because the trial took off after the two instruments were duly filed.

I now turn to third and fourth complaints which I am going to determine jointly. According to section 101 (1) (a) of the WCA, the court is vested with the power to order disposal of perishable exhibits prior to commencement of the proceedings. However, the procedure to be followed before the disposal order is issued was developed by case laws starting with the case of **Emmanuel Saguda @ Sulukuka and Another v. Republic,** Criminal Appeal No. 422 "B" of 2013 CAT (unreported) followed by **Mohamed Juma @ Mpakama v. Republic** [2019] TZCA 518 TanzLII and **Matheo Ngua and Three Others v. The DPP** [2020] TZCA 153 TanzLII. The established procedure requires the accused person to be present and be heard before the magistrate issues the disposal order of perishable exhibit intended to be produced later in evidence. In the matter at hand, the

evidence of PW3 show that, when the disposal order was sought before District Court of Biharamulo before commencement of proceedings, the appellant was present and he signed in the inventory in question (Exhibit P4) by endorsing his thumb print which signifies his acceptance for the meat in question to be disposed. The complaint by the appellant that he did not sign in Exhibit P4 is unfounded because, although the issue of signing in a document is not the matter of law which could form basis of objection before it is tendered in evidence, but the appellant did not challenge it before it was admitted. Besides, he did not cross-examine PW3 on this claim of not signing in Exhibit P4. This implies that, he accepted the veracity of PW3's testimony. Basing on that, it is the considered view of this court that, the procedure of disposal of the meat in question was complied with and Exhibit P4 is valid and the same was legally admitted in lieu of bushbuck meat.

Reverting to the fourth complaint concerning admission of Exhibits P2, P3, P4 and P5 without giving the appellant the opportunity to object, I also agree with learned State Attorney that, this complaint lacks merit. At page 16 of the proceedings indicates that, when PW1 sought to tender certificate of seizure, the trial magistrate supplied it to the appellant and he was asked if he has any objection. The appellant objected it and after hearing both sides, the trial magistrate received it as Exhibit P2. The same applied to

Exhibit P3 at page 19 of the proceedings whereby, the appellant after being given opportunity to object, he replied that, he has no objection. The situation was the same at page 22 and 23 of the proceeding during admission of Exhibit P4 and P5 respectively, whereby, the appellant was given opportunity to object and he replied that, he has no objection. Thus, this complaint also lacks merit.

I now turn to the first, second and sixth complaint which I am going to determine jointly. As stated herein above, it is the duty of prosecution side to prove beyond reasonable doubt that, the appellant was found in possession of government trophy without permit from the Director of wildlife. The evidence of prosecution shows that, on the material date while PW1 with his colleagues were in normal patrol, they saw the appellant in his motorcycle with a plastic bag. Upon raising suspicion, they began to chase him and after apprehension, they searched him in the presence of independent witness (PW4) and managed to found dried wildlife meat. PW1 identified it as bushbuck meat and seized it through certificate of seizure (Exhibit P2) which was signed by PW1, the appellant and PW4. The appellant in his defence did not deny to have signed in Exhibit P2. Likewise, when it was sought to be tendered in evidence, he objected on the ground that, he was not found with wild meat but he did not raise the issue of not signing in

certificate of seizure. Likewise, he did not cross-examine PW1 on this aspect of not signing in Exhibit P2 which connotes that, he accepted the truthfulness of PW1 It is a settled principle that, failure to cross-examine a witness on a vital point, ordinarily implies the acceptance of veracity of the testimony and anything raised thereafter to the contrary is taken as an afterthought. See the case of **Issa Hassan Uki v. Republic** [2018] TZCA 361 TanzLII. Since PW1 stated that the appellant signed the certificate of seizure and he was not cross-examined on that aspect, it is the considered view of the court that, the appellant signed Exhibit P2 to acknowledge that, the bushbuck meat in question was actually found in his possession. It was held in the case of **Song Lei v. The Director of Public Prosecutions and Others** [2019] TZCA 265 TanzLII that:

> *"...having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle."*

The appellant in his defence claimed to be arrested on the date of incident with maize, cassava and *nyanya chungu* which he bought from the market. To support his defence, he brought his cousin, Hadija Hamis (DW2) whose part of testimony at page 32 of proceedings reveals that and I quote:

"One day last year Bekenge Ernest my cousin came to visit me at my house. I gave him cassava, banana, beans and nyanya chungu."

From the extract above, it seems that, the appellant went to DW2 in the year 2020 and it was when he was given those items, he was arrested with in 2021. But when DW2 was cross-examined, she stated that the appellant went to her house on Saturday. It can be recalled that, the appellant was arrested on 19th September, 2021 and looking at the calendar, it was on Sunday. If the appellant went to DW2 on Saturday, then it was on 18th September, 2021. But if the things he claimed to be arrested with were given to him by DW2 on Saturday before he was arrested on Sunday, then how comes the appellant himself claimed to have bought the same from the market on the date of arrest? For these blatant contradictions, the appellant defence is farfetched from being plausible. Although the trial court just summarised the defence evidence without analysing the same, it is the considered view of this court that, such omission is not fatal because this being the first appellate court, it has the duty to step into the shoes of the trial court and analyse it as I have just done hereinabove. With this finding, I find it safe to conclude that, the defence evidence did raise any doubt on prosecution case. This concludes the sixth complaint which lacks merit too.

Apart from that, the meat in question was examined and successfully identified by the wildlife officer, PW2 who according to section 86 (4) of the WCA, he is a competent officer to examine, identify and assess the value of government trophy. According to his evidence, he identified the meat in question to be bushbuck meat because of the fibres on its muscles and its colour was dark red which is different from other animals. After that, he assessed it by equating it to one killed bushbuck whose value is USD 600 equivalent to tshs.1,384,800/= at exchange rate of Tshs.2,308/= prevailed on that date. His evidence was supported by certificate of valuation, Exhibit P3. Besides, the appellant did not cross-examine PW2 on his expertism in identification of government trophy.

Furthermore, the appellant complained over absence of Government Chemist but such complaint lacks basis because the WCA does not require the trophy to be examined and identified Government Chemist but either the Director of wildlife or wildlife officer. In our case PW2 was wildlife officer who qualified to identify and assess the government trophy. In addition, through Exhibit P5 which is chronological documentation showing movement of the meat in question from seizure to the point it was disposed, it is clear that, the chain of custody was proved. Thus, it is the finding of this court that, the prosecution side has managed to prove beyond reasonable doubt

that, the appellant was fond in possession of bushbuck meat which is the government trophy in the meaning of sections 3 and 85 of the WCA. Therefore, the first and second complaints also lack merit.

Having said so, I find nothing to fault the decision of the trial court on the conviction and sentence meted against the appellant. Thus, I find the appeal with no speck of merit and it is hereby dismissed.

It is so ordered.

I. K. BANZI
JUDGE
21/06/2023

Delivered this 21st June, 2023 in the presence of Ms. Matilda Assey, learned State attorney for the respondent and the appellant in person. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
21/06/2023