THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT ZONE

AT MTWARA

CRIMINAL APPEAL CASE NO 59 OF 2022

(Originating from Nanyumbu District Court at Nanyumbu in Criminal Case No 5 of 2022)

HUSSEIN ISSA KAMTANDE.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

9th & 26th of June 2023

LALTAIKA, J.

The appellant herein, **HUSSEIN ISSA KAMTANDE** was arraigned in the District Court of Nanyumbu at Mangaka in **Economic Case No 5 of 2020**. He was charged with three counts (ii) Unlawful possession of government trophy c/s 86(1)(2(b) and 3(b) of the Wildlife Conservation Act No 5 of 2009 read together with paragraph 14 of the First Schedule to and section 57(1) and section 60(2) of the Economic and Organized Crime Control Act Cap 200 RE 2019. **(ii)** Unlawful entry into a Game Reserve c/s 15(1) and (2) of the Wildlife Conservation Act (Supra), third count:

unlawful possession of weapons in a game reserve c/s 17(1) and (2) of the WCA No 5 of 2009 read together with relevant sections of EOCA. (iii)

When the charge was read over and explained to the accused (now appellant) he denied any wrongdoing. A plea of not guilty was entered necessitating full trial. On completion of the trial, the learned trial Magistrate was convinced that the prosecution the first count. The second and third counts were not proved. The learned Magistrate proceeded to convict the appellant as charged and sentenced him to a twenty (20) years' imprisonment term.

Dissatisfied, the appellant has appealed to this court initially on three (3) grounds. Later he lodged five (5) additional grounds. The respondent republic is in full support of both conviction and sentence. Whereas the appellant appeared in person, unrepresented, when the appeal was called on for hearing on 9/6/2023, the respondent Republic enjoyed skillful services **Edson Lawrence Mwapili & Steven Aron Kondoro**, learned State Attorneys.

Not being learned in law, the appellant had nothing to add into his expounded grounds of appeal. He prayed that the learned State Attorneys proceed with their submissions based on his ground and he would, if conditions necessitated, counter such arguments orally in rejoinder. The arrangement received this court's nod of approval and the learned State Attorney rolled up their sleeves, in turn. Mr. Mwapili argued against the three original grounds of appeal leaving his learned brother Mr. Kondoro to

argue the five additional grounds. The next part of this judgement focuses on submissions by the learned counsels.

On the first ground of appeal, that the trial court erred in law and facts as it failed to evaluate the adduced evidence, Mr. Mwapili thought it was without merit. This is because, the learned State Attorney said while consulting his records carefully, the trial court had evaluated the evidence of both parties as per page 10 to 15 of the trial court's typed judgement. Mr. Mwapili went further to quote the first paragraph of page 10 of the trial court's typed judgement where the learned Magistrate penned down: *"Having summarized....I now turn to evaluate the same evidence..."*

Based on the above, Mr. Mwapili was fortified that the learned Magistrate had evaluated the evidence of both sides. As a result of such evaluation, Mr. Mwapili reasoned, the accused was acquitted for the 2nd and 3rd counts. To this end, Mr. Mwapili prayed earnestly, the ground was baseless and warranted dismissal.

Moving on to the second ground of appeal that there was no evidence to prove the exhibit upon which conviction was based to be buffalo meat, Mr. Mwapili stated that in his opinion, the prosecution had proved that the 5 pieces of meat impounded from the appellant were buffalo meat and not otherwise. The learned State Attorney consulted the trial court records and informed that PW1 and PW4 Wildlife Officers from **LUKWIKA LUMESULE GAME RESERVE,** employees of the Tanzania Wildlife Authority (TAWA), were trained in conservation and had properly proved the prosecution's allegation.

Going further into the details of the proceedings of the trial Court, Mr. Mwapili submitted that PW1 who arrested the appellant had told the court "I examined the said meet due to the experience I have and the knowledge I have from the College, and I was satisfied that it was buffalo meet." PW4, on his part, was responsible for identification and valuation. He had stated that "At first I identified those 5 pieces of meat to be of buffalo due to the knowledge I have and my working experience... the skin of buffalo is thicker." In an attempt to buttress his argument, Mr. Mwapili stated that PW4, who tendered a **Trophy Valuation Certificate** (Exhibit P4) was a graduate in Wildlife Management from Sokoine University of Agriculture (SUA). He concluded by praying that the ground of appeal be dismissed for lack of merit.

On **the third ground,** that the trial court based its conviction on poor and insufficient evidence, Mr. Mwapili strongly disagrees. The learned counsel forcefully argued that the prosecution had paraded six (6) witnesses (PW1 to PW6), tendered 5 exhibits admitted as Exhibits P1,P2,P3,P4 and P5 with which it proved the allegations levelled against the appellant beyond reasonable doubt. Mr. Mwapili insisted that the prosecution had proved beyond reasonable doubt that *the meat* was buffalo's and thus government trophy. He prayed for the ground of appeal to be dismissed for lack of merit.

Taking over from his learned brother, Mr. Kondoro stated that upon careful scrutiny of the five additional grounds of appeal he was convinced that they centered on two complaints. The first complaint, Mr. Kondoro

reasoned, was that the seizure receipt was not tendered. The learned Counsel went on to highlight that the second complaint was rather general as it faulted, in general terms, the prosecution's task to prove the case beyond reasonable doubt. The next part of this judgement is a summary of Mr. Kondoro's meticulous submission on the two complaints.

On the 1st complaint Mr. Kondoro clarified that the appellant had based his argument on **section 38(3) of the Criminal Procedure Act Cap 20 RE 2022**. He added that the appellant had referred this Court to the decision of the Court of Appeal of Tanzania in **SELEMANI ABDALLAH AND OTHERS V. R.** Crim App 354 Of 2018 that emphasize on acknowledgement of receipt. Nevertheless, Mr. Kondoro stated, the [more recent] Court of Appeal decision in **RAMADHANI IDD MCHAFU V. REPUBLIC CRIM APP 328 OF 2019** had qualified that position. Going by the latter, Mr. Kondoro emphasized, lack of receipt during search was not fatal. He prayed that the grounds related to this complaint be dismissed for lack of merit.

Moving on to the second complaint, Mr. Kondoro stated that the appellant had brought up many things including how the search was conducted. He went on to argue that according to **section 106(1) of the Wildlife Conservation Act Cap 283 RE 2022** the manner in which search can be conducted is provided. It is provided further that "authorized officers" are the persons empowered to conduct such search. Mr. Kondoro argued that he was alive to the evidentiary principle on burden of proof "onus probandi" that the one who alleges must prove. Since the issue is

Wildlife Crime, Mr. Kondoro submitted, such proof must be beyond reasonable doubt. To strengthen his argument, he cited the cases of **Woodminton v. DPP [1935] AC 462** and the Court of Appeal of Tanzania's case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219.

Cognizant of their duty as expounded above, the learned Counsel argued, the entire evidence adduced in court was meant to leave no doubt in proving the allegation levelled against the accused especially being found with government trophy. Mr. Mwapili stated that it was obvious that the appellant was a resident of Nanyumbu and lived close to the game reserve, a protected area. He was arrested with 8 snares which he used in illegal poaching, added Mr. Kondoro. The learned Counsel concluded his submission by a prayer that the appeal be dismissed in its entirety.

In rejoinder, the appellant stated that it was on 6/12/2020 around 19:00 when game rangers came to his home place. He had just taken his supper and was getting ready to go and watch a football match at a nearby social club. The rangers put him under arrest and handcuffed him and searched through his premises. While the search was going on, the appellant recalled, some rangers were outside the house. He was found with, among other things TZS 69,400 in cash and *"kinyonga cha barani"* (a "brand" name for a type of tobacco from Songea, Southern Tanzania). He was then whisked taken to the game rangers' camp and locked up throughout the night.

The next morning, the appellant narrated in deep reflection, he was taken to mto Lukose, a nearby river. One of the askaris covered his eyes with a red cloth and his mouth with a black cloth. He was taken further into the forest. He was tortured with the intention of forcing him to accept that the snares and pieces of meat belonged to him. Later he was asked to say his last prayer and he did. However, before he was given the last, one of game rangers advised that it was improper to kill him because they had taken him from his home [alive].

It was resolved not to kill him, but he had to accept that the snares and the pieces of meat belonged to him. Based on that decision, he was taken back to Lukosi Camp and later to Court. The appellant concluded by a prayer that this court sets him free.

I have dispassionately considered rival submissions. More importantly, I have taken keen interest in examining the trial court's records. The task ahead is to determine whether the appeal has merit. The two skilled State Attorneys have indicated outrightly that the respondent Republic supported both conviction and the sentence. The unrepresented appellant, on his part, relies on this court to reevaluate the evidence tendered in the lower court and come up with its own position.

In line with the above, I started by a careful examination of the evidence tendered. It can be recalled that the accused was arraigned in court for three counts. I agree with Mr. Mwapili that the learned trail Magistrate did indeed evaluate both the prosecution and defence evidence. As a result, he found that the first and second counts were not proved. I

have no reason to interfere with the court's findings on the 1st and 2nd counts. I am left with the third count. The rest of my analysis and subsequent verdict are therefore, squarely on count three.

Apparently, the appellant was found guilty of Unlawful Possession of Government Trophy c/s 86(1)(2(b) and 3(b) of the **Wildlife Conservation Act (Supra) "the WCA".** The WCA provides:

> *"trophy" means any animal alive or dead, and any horn, ivory, tooth, tursh, bone, claw, hoof, skin, meal, hair, feather, egg or other portion of any animal and includes a manufactured trophy...*

The above list, presented as it is to a criminal court, raises a number of challenges to ensure that conviction is based on the strength of the prosecution case and not the weakness of the defence case. The first challenge is that while it is not that difficult to tell say a live Thomson gazelle, piece of ivory or skin of a leopard even without any forensic evidence, it is quite tricky, so to say, when it comes to other not so spectacular "trophies". A court of law must warn itself against uncritical acceptance of such evidence.

The trophy in the instant case for instance, is five kilograms of what is alleged to be buffalo meat. I must point out that the new **Revised Edition of the WCA 2022** does not use the term "meat" but "meal". I can safely assume that the same is a slip of the pen on the side of the parliamentary draftsman. A "meal" of a buffalo is unheard of anywhere in the world unless we are talking about grass. It is my hope that the

authorities concerned will correct the clerical error as soon as possible to avoid further confusion.

Be it as it may, the above clerical error has given me **an important entry point to deepen my analysis**. Let us face it, the game rangers had indeed invaded the "meal" of the appellant and decided that what he had just had for supper and some leftovers estimated at five kilograms, were buffalo meet hence government trophy. The same askari who had arrested the appellant turned himself into an expert witness and told the court "*I examined the said meat due to the experience I have and the knowledge I have from the College, and I was satisfied that it was buffalo meet.*" This raises a lot of doubts. I will come back to this shortly.

Another askari from the same camp (PW4) allegedly trained in Wildlife Management (I assume this includes some aspects of Valuation) tendered a **Trophy Valuation Certificate** (Exhibit P4). I have not been alerted to any Government Notice or an online database that includes the name of PW4 in the way we can access Environmental Impact Assessment (EIA) experts approved by the National Environment Management Council (NEMC) and gazetted as experts.

Assuming that this Court will simply accept some document purported to have been tendered by a graduate in Wildlife Conservation sciences takes us far below the standard of proof in criminal cases. The standard imposed on this court by the dictates of the **EVIDENCE ACT CAP 6 RE 2022** and wisdom handed down by the Court of Appeal of Tanzania over the years is nothing short of proof beyond reasonable doubt.

As alluded to above, I find PW1's evidence extremely intriguing. He faced the trial court and stated, "I examined the said meat due to the experience I have and the knowledge I have from the College, and I was satisfied that it was buffalo meet." With all due respect, this is not how criminal offences, especially those that attract long sentences, are prosecuted. This evidence raises a lot of doubt on the "experience" of the askari who is probably not trained as a vet and the "knowledge" from college.

To be fair, I have not heard of any college that trains experts in using their "naked eyes" to tell game meet from that of their closely related domesticated "cousins." This expert evidence that does not use any scientific method in forensic sciences is worrisome. It is prone to abuse by unfaithful askaris commonly known as "askari gemu". It is my finding that such "opinion" is insufficient to prove the allegation beyond reasonable doubt.

In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** earlier on cited by Mr. Kondoro the topmost Court in our country stated as follows on proof of a criminal offence beyond reasonable doubt:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

At this juncture, I am inclined to return to the "meal" narrative. Those familiar with the history of Wildlife Conservation Policy and Legislation in our country know that the WCA 2009 is supped to be

implemented in line with new conservation thinking worldwide that embraces the notion of community-based natural resource management. The National Wildlife Policy 1998 as Revised in 2007 is a part and parcel of the WCA. In fact, it is mandatory for anyone enforcing the WCA to take cognizance of the Policy. Section 6 of the WCA provides:

> ***6. Any person exercising powers under this Act shall be under general obligation to promote and have regard to the Wildlife Policy of Tanzania.***

One of the main changes brought by the WCA 2009 compared to its predecessor the Wildlife Conservation Act 1975 is recognition of the critical role of communities living next to protected areas. This has come to be known in conservation circles as Community-based natural resource management (CBNRM) principles. In addition to the clerical error pointed out above on "meal" versus "meat", I have also gone through the sections providing for the **sentence of 20 years imprisonment term meted by the trial court.** I think there is room for improvement in line with the general obligation under section 6 to avoid overcriminalization.

As the provisions stand, there is hardly any distinction between a dealer in elephant tasks worth millions with a member of the local community who has succumbed to "temptation of the flesh" to devour a wandering rabbit. As long as the value of that rabbit as per a Valuation Certificate, exceeds TZS 100,000/= the jail term is the same. This "one size fits all" approach is not right. It epitomizes overcriminalization and overreliance to fences and fines or 'fortress' conservation.

In line with the mandatory requirement to implement the Wildlife Policy of Tanzania, **I think there should be a distinction between a wildlife trafficker, poacher or "jangili"** in the real sense of the word, motivated by profit **from a member of the local community with no financial motive whatsoever**, who has succumbed to "temptation of the flesh". Traditional justice systems in Africa distinguished between a person stealing maize (corn) to satisfy his immediate hunger and outright thievery motivated by profit. The former was punished less severely. Can there be a distinction between a real *jangili* who invade our parks to kill critically endangered wildlife to sell trophy abroad and ***a Jangili Jirani (JJ)?***

It is noteworthy that the appellant's village is next to **LUKWIKA LUMESULE GAME RESERVE.** He is different from the typical *jangili* who leaves the comfort of life in the city often with ammunition to kill wildlife as a part of an organized criminal racket. I challenge our brave park rangers who are well equipped *askaris*, already doing a commendable job in protecting our country's wildlife resources to avoid searching family dinner tables to inspect the "meal" unless doing so is extremely necessary. They should, instead, confront the problem of poaching head-on.

I am not saying they are not doing this but invading the "meal" of old men and women and arrest them with pieces of "bush meat" may send a signal that real poachers are left to plunder our elephants, rhinos and other big games for profit, totally against international conventions such as the **Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES),** while next door neighbours are

made to suffer whenever *askaris* smell some tasty meet cooking in their homesteads.

Dealing with persons like the current appellant falls under the larger basket of human-wildlife conflicts and requires some flexibility and innovative approaches to promote community-based natural resource management (CBNRM) principles. There is no end to that type of conflict. Avoiding overcriminalization by promoting good neighbourliness (ujirani mwema) is the way to go. This is because, communities living outside protected areas often bear a burden of problem animals who invade their farms and livestock. As for real poachers and wildlife traffickers, this falls squarely under outright criminality and requires high level approach to combat it. I know it is not easy to distinguish between the two groups, but it is never too late to try.

If the above requirement of the Wildlife Policy and CBNRM principles are carefully adhered too, courts will no longer be put into trial to guess whether the impounded "meal" was Nguruwe Mwitu's ***Potamochoerus larvatus*** or Nguruwe wa Kufugwa's ***Sus scrofa domestica*** without any forensic examination to that effect. As for elephant tasks, rhino horns, zebra's skin, and lion's claw, even in the absence of forensic expertise, there shouldn't be any problem.

When it comes to any of the above products of wildlife traffickers and transnational poachers, to borrow the phrase from US Supreme Court Justice Potter Stewart (as he then was) "I know when I see it" (See **Jacobellis v. Ohio 378 U.S. 184, 197**)

Like Justice Stewart, I know a rhino horn when I see it. I can also tell a skillful wildlife trafficker from a member of the local community, living next to a game reserve, whose crops had been completely devoured by his herbivorous neighbours in the previous season. Although they are all labelled poachers "majangili" I think the word "jangili" is being overused. As alluded to above, engaging a Jangili Jirani (JJ) through some policy friendly way of ensuring that members of the community living next to a protected area take active part in protecting their wild neighbours is warranted.

Needless to say, that neighbours should always find a middle ground for living in harmony and taking care of one another. In the Holy Scriptures we are taught Love Your Neighbour as You Love Yourself ***"Mpende Jirani Yako Kama Unavyojipenda Mwenyewe."*** This includes offering employment opportunities to the *jirani* and building a robust social service delivery system that refrains from searching family dinner tables unless it is extremely necessary. In having such a category, incidences of going for "low hanging fruits" to beef up statistics on "arrested and prosecuted poachers" through searching one's dinner table would reduce. As a matter of facts some purely human wildlife conflicts can be dealt with through bylaws and other less formal institutions. That way the *Jangili Jirani* may easily be converted into a conservation champion albeit with some economic incentives such as employment and a market for honey and other forest products.

All said and done, I allow the appeal. I quash the conviction and the sentence of the trial court. I hereby order that **HUSSEIN ISSA KAMTANDE** be released from prison forthwith unless he is being held for another lawful cause.

It is so ordered.

E.I. LALTAIKA
JUDGE
28.06.2023

Court

This judgement is delivered under my hands and the seal of this court this 28th day of June 2023 in the presence of Mr. **Melchior Hurubano**, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
28.06.2023

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
28.06.2023