IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 102 OF 2022

(Originating from the Resident Magistrate's Court of Arusha at Arusha in Economic Case No. 53 of 2018)

DAREMI LILO SALEHE .....APPELLANT

VERSUS

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

JUDGMENT

27/04/2023 & 15/06/2023

MWASEBA, J.

Before the Resident Magistrate's Court of Arusha, the appellant herein was charged with, and convicted of Unlawful Possession of a Government Trophy contrary to **Section 86 (1) and 2 (b) of the Wildlife Conservation Act** No. 5 of 1999 read together with **Paragraph 14 of the first schedule to, and Sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act**, Cap 200 as amended by **Sections 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendment)** Act No. 3 of 2016.

The facts of the trial case were unveiled by the prosecution that, on the 5th day of July, 2018 at Munguri Village within Kondoa District in Dodoma Region, the appellant was found in unlawful possession of government trophies to wit; one (1) piece of elephant tusks equivalent to one killed elephant valued at USD 15,000 equivalent to Tanzanian Shillings Thirty-Four Million One Hundred Forty Thousand (Tshs. 34, 140,000/=) only, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The appellant denied any involvement in the commission of the crime and claimed that he was set up by a person called Hamisi due to their farm conflicts.

At the hearing of the case before the trial court, the prosecution case was constructed on the testimonies of four (4) prosecution witnesses with five (5) exhibits while one (1) witness with no exhibit concluded the defence case. After full trial, the appellant was convicted and sentenced to pay a fine of Tshs 341, 400,000/= in default to serve twenty (20) years imprisonment.

In pursuit of his innocence, the appellant lodged the present appeal to this court stating twelve (12) grounds of appeal as depicted in his memorandum of appeal.

When this matter came up for hearing, the appellant fought solo, unrepresented while the respondent, Republic enjoyed the legal service of Ms. Eunice Makala, learned State Attorney. The matter was disposed of by way of written submissions upon the consent from both sides.

Submitting in support of the appeal on the 1st ground, the appellant complained that the Arusha RM's court tried this case without having jurisdiction as there was no certificate and consent from the DPP which is contrary to **Section 12 (3), (4), and 26 (1) of EOCCA**. He referred this court to the case of **Jumanne Leornard Nagana @ Azori Leornard Nagana and Another vs Republic**, Criminal Appeal No. 515 of 2019 (CAT) and prayed for the trial court proceedings to be set aside for being a nullity, sentence and conviction to be quashed, and the appellant be left at liberty.

Responding to this ground, Ms. Eunice contended that a certificate and consent were signed on the 17th day of June, 2019 by one Innocent Eliawony Njau and filed in court on the 1st day of August, 2019. Thus, the allegation on the 1st ground is not true and has no merit.

Coming to the 3rd ground of appeal, the appellant submitted that he was arrested on 05/07/2018 but was taken to court on 30/07/2018. The act of being in police custody for too long is a torture and contravenes

Article 13 (6) (e) of the Constitution of the United Republic of Tanzania, 1977. He argued further that **Section 32 (1) of the Criminal Procedure Act**, Cap 20 R.E 2019 demands a suspect to be taken to court as soon as possible and **Section 29 (1)** of EOCCA requires the suspect to be taken to court within 48 hours. Thus, he prayed for the court to set him free for the violation of his constitutional rights.

Submitting In respect of the 11th ground of appeal, the appellant alleged that a case against him was not proved beyond a reasonable doubt. He submitted so due to the fact that he was not issued with a receipt after being arrested with the alleged trophies which is contrary to **Section 38 (3)** of the CPA. He supported his arguments with the case of **Shabani Said Kindamba vs Republic**, Criminal Appeal No. 390 of 2019 (CAT-Unreported)

Responding to the 3rd and 11th grounds of appeal, Ms. Eunice stated that the appellant failed to prove that he was tortured in the police custody therefore no right was infringed. Regarding the issue of being delayed to be taken to court, she submitted that the appellant was arrested at Kondoa in Dodoma Region and taken to Arusha with his exhibit so, the delay was not long to cast doubt on the prosecution side. She referred

this court to the case of **Ramadhan Iddi Mchafu vs Republic**, Criminal Appeal No. 328 of 2018 (CAT at Arusha, Unreported).

Submitting on the 6th ground of appeal, the appellant stated that Exhibit P1 (Handing over form) and Exhibit P2 (Valuation Report) were not read aloud in court after their admission as exhibits. This is evidenced at pages 21 and 23 of the trial court proceedings, thus he prayed for the same to be expunged from the records. He supported his arguments with the case of **Joseph Maganga and Dotoo Salum Butwa vs Republic**, Criminal Appeal No. 536 of 2015 (Unreported).

Replying to this ground, Ms. Eunice submitted that even if the court will expunge Exhibit P1 and P2 as they were not read aloud after they were admitted as exhibits, still the testimony of PW2 will prevail.

Coming to the 7th ground of appeal, the appellant alleged that the valuation report was made by an unauthorized person which is contrary to **Section 86 (4)** of the EOCCA. He argued further that the person who conducted a valuation was a Game Officer while it was supposed to be a Wildlife Officer, Wildlife Ranger, and Wildlife Warded.

Ms. Eunice replied to this ground that in the case of **Ramadhan Idd Mchafu vs Republic** (supra) the Court of Appeal while citing the case of **Jamal Msombe vs Republic**, construed that a wildlife officer also

includes Game Ranger Officer. Thus, a Game ranger was an authorized officer, and this ground has no merit.

The appellant on the 8th and 9th grounds of appeal, complained that when he was arrested by PW1 and PW2 the trophy alleged to have been found with him was not marked. Further to that, when he was arrested at Kondoa a custodian of the said trophy was not mentioned and they did not state where the same was kept which creates doubt if it was the same tusk found with the appellant when he was arrested or not. He prayed for the court to consider all the irregularities and decide in favour of the appellant herein.

Responding to this ground, Ms. Eunice submitted that PW1 and PW2 were credible witnesses to testify as they are the ones who arrested the appellant having a government trophy without licence. Further to that, the act of PW4 to submit the trophy to PW1 on 23/10/2019 did not mean the same fall under the hands of a stranger and break the chain of custody as long as the same was admitted and tendered before the court. She referred this court to the case of **Joseph Leonard Manyota vs The Republic**, Criminal Appeal No. 485 of 2015 (Unreported) to bolster her argument.

In brief rejoinder, apart from reiterating what had already been submitted in chief, the appellant insisted that a certificate and consent were supposed to be admitted and received by the court. A mere presence of the same in the file does not mean the trial court had jurisdiction to entertain the matter. He supported his arguments with the case of **Maganzo Zelamoshi @ Nyanzomola vs Republic**, Criminal Appeal No. 355 of 2016 (CAT-Unreported) and **Maulid Ismail Ndonde vs Republic**, Criminal Appeal No. 319 of 2019 (CAT at Arusha).

I have gone through the rival submissions from both sides and the record, the issue for determination is whether this appeal is meritorious or not.

Starting with the first ground of appeal, the appellant complained that the trial court tried his case without having a consent and certificate from the DPP which is contrary to **Section 12 (3), (4), and 26 (1) of EOCCA**. On the other hand, Ms. Eunice submitted that the certificate and consent were filed on 01/08/2019 hence, this ground has no merit. However, in rejoinder, the appellant submitted that on 1/08/2019 the records are silent on whether the said consent and certificate were admitted at the court, and it is silent how they found their way into the court's record.

Having gone through the records of the trial court, this court noted that on 01/08/2019 the coram appeared as follows:

Date: 01/08/2019

Coram: C.A. Chitanda, SRM

Prosecution: Rose Sule

Accused: Present

C/c: Mboggo

State Attorney: For Phg I am not ready.

Accused: I am ready too.

Court: Charge sheet read over and explained to the accused who asked to plea thereto:

Accused: It is not true

Court: Entered a plea of not guilty.

From the above-cited quotation, it is clear that the Consent and certificate were not formally admitted before the court before the read-over of the amended charge sheet which the records are also not clear if they prayed to substitute the charge sheet or not. In the case of **Maulid Ismail Ndonde vs Republic**, (supra) the Court of Appeal had this to say:

> *". . the consent and certificate signed on 10th April 2018 were not officially received by the trial court. . .*

Consequently, the absence of the consent and the certificate of the DPP, the trial court lacked jurisdiction to try this case rendering the entire proceedings a nullity."

See also the case of **Maganzo Zelamoshi @ Nyanzomola vs Republic** (Supra).

Basing on the above legal position, I agree with the appellant that the consent of the DPP to commence a prosecution and the certificate to confer jurisdiction on the subordinate court were not formally filed in the trial court. Consequently, the trial court proceedings are hereby nullified for want of jurisdiction.

Following the nullification of the proceedings, the order which was supposed to follow is a re-trial order. However, the principle as regards the situations under which a retrial may be ordered was stated in the famous case of **Fatehali Manji vs Republic** [1966] E.A. 343 in which the following was stated:

"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its facts and an order for retrial should only be made where the interests of justice require it."

However, having gone through the evidence of the trial court this court noted that ordering a re-trial will allow the prosecution to go and fill their gaps. This is because a chain of custody of the trophy was not elaborated as from the day the appellant was arrested to the day he was arraigned before the court. The prosecution failed to explain why the appellant was taken to court after the lapse of 25 days instead of 48 hours from the time he was arrested as required by the law. Based on the pointed-out prosecution weaknesses in their case, an order of retrial is not appropriate. This ground suffices to dispose of the whole appeal so, there is no need to determine the remaining grounds.

From the above reasoning, this appeal is allowed for being meritorious. The conviction and sentence imposed to the appellant is quashed and set aside. Consequently, I order that the appellant be immediately released from custody unless he is held therein for any other lawful cause.

Ordered accordingly.

DATED at **ARUSHA** this 15th day of June, 2023.

N.R. MWASEBA

JUDGE