IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 120 OF 2022

(C/F District Court of Karatu at Karatu. Y.O Kisengerian- RM, dated 09/09/2021 in Economic case No. 6 of 2019)

ALLY HEMED .....APPELLANT

VERSUS

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

JUDGMENT

25/05/2023 & 28/06/2023

MWASEBA, J.

Before the Resident Magistrate's Court of Arusha, the appellant, Ally Hemed, was charged with and convicted of Unlawfully Possession of a Government Trophy Contrary to **Section 86 (1) and (2) (b) of the Wildlife Conservation Act**, No. 5 of 2009, read together with **paragraph 14 of the 1st scheduled, and Sections 57 (1) and 60 (2) both of the Economic and Organized Crimes Control Act**, [Cap 200 R.E 2002] as amended by **Section 16 (a) and 13 (b)**

respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The facts of the case were unveiled by the prosecution that on the 27th day of March, 2019 at Majengo- Mto wa Mbu area within Monduli District in Arusha region, the appellant was found in unlawful possession of a government trophy to wit, Giraffe's meat (2kg) which is equivalent to one killed Giraffe valued at USD 15,000 which is equivalent to Tanzania Shillings 35, 850,000/=.

The appellant denied having committed the said offense. He stated that on the material day, some people went to his home asking for help to push their car after getting a breakdown. He went with them, and after they pushed the car, they took him to their car and took him to Karatu Police Station, where he was locked up and then arraigned him before the court.

At the trial court, the prosecution paraded five (5) witnesses and tendered three (3) exhibits, whereas the defence had only one witness, who was the appellant himself. After the hearing of both parties, the trial court found that the prosecution discharged its duty to prove the case beyond a reasonable doubt. The appellant was convicted and sentenced

to pay a fine of Tshs. 71, 700,000/= or to serve twenty (20) years in prison.

The trial court's decision aggrieved the appellant, who is now challenging the same based on eight (8) grounds of appeal as depicted in the petition of appeal.

Submitting in support of the appeal on the 1st, 6th, and 8th grounds of appeal, the appellant complained the allegation that he was found with two (2) kgs of Giraffe meat; however, the same was never brought before the court as exhibit. He submitted further that he was never involved in the process of filing the inventory form and destroying the said meat; thus, PGO No. 229 was never complied with. He complained further that no picture was taken when the meat was destroyed. Thus, the case was not proved beyond a reasonable doubt. He supported his arguments with the case of **Nathael Alphonce Mapunda vs. Republic**, [2006] TLR 395.

Opposing the appeal, on the 1st, 6th, and 8th grounds of appeal, Ms. Makala learned state attorney for the respondent submitted that in this kind of offence, the prosecution has to prove three ingredients that is possession, it was a government trophy, and he had no permit. She argued further that PW1 and PW2 proved that the appellant was found

with the meat, which was later on identified as a government trophy. Further to that, the meat was not tendered before the court as it was already destroyed after the inventory form was filled, and when the meat was taken to the justice of peace, the appellant was present. She added that no picture is needed to prove that the said meat was destroyed. Thus, there is no merit on these grounds.

Coming to the 2nd ground of appeal, the appellant complained that Exhibit P1 was admitted as an exhibit, but the same was never read aloud for him to understand its contents. Thus, he prayed for the same to be expunged from the records. His argument was supported by the case of **Geophrey Jonathan Kitomari and 3 others vs. Republic**, Criminal Appeal No. 237 of 2017.

Responding to this ground, Ms. Makala supported that Exhibit P1 was not read aloud after its admission as required by the law. However, she added that even if trophy evaluation form will be expunged from the record, the absence of proof of the value of the trophy is inconsequential to conviction and sentence as valuation is not among the ingredients of the offence of unlawful possession of government trophy. She supported her argument with the case of **George Lazaro**

Ogur vs. Republic, Criminal Appeal No. 69 of 2020 (CAT at Arusha-Unreported).

Regarding the 4th ground of appeal, the appellant submitted that Exhibit P3 was tendered by the person who was not present when he was arrested, and the same was not read aloud after its admission and prayed for the same to be expunged from the records. He submitted further that after a certificate of seizure was filed, he was never given a receipt as required by **Section 38 (3) of the Criminal Procedure Act**, Cap 20 R.E 2019. He cited the case of **Benjamin Holela vs. Republic**, [1992] TLR 121 to bolster his argument.

Responding to the 4th ground of appeal, Ms. Makala argued that a certificate of seizure was tendered by a rightful person as he was a custodian and investigator, but the same was not read aloud after its admission. It was her further submission that if the same will be expunged from the record, oral testimony of PW1 and PW2 that the appellant was found with Giraffe meat will prevail. Her argument was supported by the case of **Simon S/O Shauri and Another vs. Republic**, Criminal Appeal No. 62 of 2020 (CAT at Arusha, Unreported).

Amplifying the 3rd ground of appeal, the appellant submitted that the prosecution evidence was not properly evaluated by the trial court. It

was his further submission that PW1 did not know how to identify the said meat as a Giraffe meat, and he never explained the criteria used to identify it. Further to that, PW2 said the meat had some skin which helped him to identify that it was a Giraffe meat. However, it was impossible for two kilograms to have a skin of an animal on it, and the same caused a person to serve twenty years in prison. He substantiated his argument with the case of **John Mwombeki Byombariwa vs. Regional Commissioner and Region Police Commander Bukoba** [1987] TLR 73.

Replying to this ground, it was Ms. Makala's submission that the prosecution evidence at the trial court was not fabricated as PW1 (Militia men) elaborated on how the appellant was arrested, and PW2 explained how he identified the meat to be Giraffe meat.

Submitting on the 5th ground of appeal, the appellant complained that the statement of Ally Mbukuzi (Exhibit P4) was admitted contrary to **Section 34B (a), (b), and (f) of the Evidence Act**, Cap 6 R.E 2019 as there was no proof that he was nowhere to be found. Further to that, there was no proof that the prosecution made any effort to find the said witness as required by the law. Therefore, he prayed for this ground to be found with merit.

Responding to this ground, Ms. Makala submitted that the prosecution did submit enough evidence to prove that Ally Mbukizi was out of reach; that's why they notified the court to submit his statement, and the same was admitted by the court. Thus, this ground has no merit.

It was the appellant's argument on the 7th ground of appeal that, it was wrong for the trial Magistrate to believe the prosecution evidence which was full of contradiction. He added that PW3 and PW5 stated that the crime was committed in 2020, the charge sheet shows that the crime occurred in 2019. Further to that, PW5 said the appellant was found with the fresh meat of a Giraffe while other witnesses said he was found with the roasted meat of a Giraffe. He supported his arguments with the case of **Jeremiah Shemwetwa vs. Republic** [1992] TLR 213. He prayed for the court to find merit in this appeal and allow it.

Responding to this ground, Ms. Makala submitted that the contradictions pointed out by the appellant does not go to the root of the case as they are normal discrepancies which does not go to the root of the case. She supported her argument with the case of **Chukwudi Denis Okechukwu and 3 Others vs. Republic**, Criminal Appeal No 507 of 2017.

Having briefly given what transpired in the trial court, the submissions made by both parties in support and against the appeal, this court is now called upon to answer the issue as to whether this appeal is meritorious or not.

In determining this issue, I wish to start with the 2nd and 4th grounds of appeal, where the appellant criticised that Exhibit P1 (Valuation form) and Exhibit P3 (Certificate of Seizure) were not read aloud after their admission for him to understand their contents. This fact was not contested by the learned state attorney. Having revisited the trial court's records, this court confirmed that the said exhibits were not read aloud after its admission, and the same is hereby expunged from the records as prayed. See the case of **Robinson Mwanjisi and 3 Others vs. Republic** [2003] T.L.R 218. Thus the 2nd and 4th grounds of appeal have merit.

Coming to the 7th ground of appeal, the appellant complained that the statement of PW3 and PW5 was contrary to the charge sheet regarding the time the appellant was arrested and the kind of meat he was arrested with. He added that while PW3 and PW5 said he was arrested in 2019, the charge sheet shows he was arrested in 2020, and PW5 added it was roasted meat and not fresh meat, as submitted by other

witnesses. On her side, Ms. Makala submitted that as long as the prosecution proves the appellant was found in possession of government trophy without a permit, the contradiction regarding the time the incident occurred does not go to the root of the case.

I am aware that in this kind of cases, the prosecution needs to prove that the appellant was found in possession of a government trophy. In our case, although Ms. Makala submitted that the contradiction of time does not go to the root of the case, other contradictions create doubts on the part of the prosecution. While other witnesses PW3 and PW2 said a certificate of Seizure was filled by Ally Mbukuzi, who is alleged not to be found, PW4 (Frank Mushi) testified that he was the one who filed the certificate of seizure and valuation form, and others were signed including the appellant.

In the case of **Mohamed Matula vs. Republic** (1995) T.L.R.3, which was referred in **Moshi Hamisi Kapwacha vs. Republic**, Criminal Appeal No. 143 of 2015 (Unreported), the Court considered, among other issues, contradictions and inconsistencies in the prosecution evidence and the duty of the trial court to address the same. Particularly, the Court held: -

> "*Where the testimonies by witnesses contain inconsistencies and contradictions, the court must address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter.*"

In the case at hand, I am of the firm view that the pointed-out inconsistencies and contradictions on the year of the incident as alleged in the charge and testimonies of prosecution witnesses, together with the contradictions on who prepared the certificate of seizure although the same was expunged go to the root of the matter. Unfortunately, the trial court did not address them although they are apparent on the record.

This court is of the view that this is a fit case given the circumstances, which entitles me to draw an adverse inference against the prosecution, and I accordingly do so. The result is to throw more doubts into the prosecution case, which legally must be resolved in favour of the appellant as it was held in the case of **Shabani Mpunzu@ Elisha Mpunzu vs. Republic**, Criminal Appeal No. 12 of 2002 and Michael **Godwin and Another v. Republic**; Criminal Appeal No. 66 of 2002 (Both unreported).

Having re-evaluated the evidence, I am convinced that the pointed-out flaws, to wit; one, inconsistencies and contradictions on who was the person who prepared the certificate of seizure and the year the incident occurred. Two, the expungement of all documents submitted by the prosecution as exhibits for failure to be read aloud after its admission. In the circumstances, I hold that the prosecution did not prove the case against the appellant beyond a reasonable doubt.

Therefore, as the 2nd, 4th and 7th grounds dispose of the appeal, there is no need to determine the rest of the grounds.

All said and done, I allow the appeal, quash the conviction, and set aside the sentence. I order the appellant to be released from custody forthwith unless otherwise held for other lawful reasons.

Ordered accordingly.

DATED at **ARUSHA** this 22nd day of June, 2023.

N.R. MWASEBA

JUDGE