

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 4 OF 2023

(Originating from Economic Case No. 44 of 2018 Resident Magistrate's Court of Arusha)

EMILLY PAREMENA MASSAWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

29th March & 26th July, 2023

GWAE, J.

The appellant, Emily Paremena Massawe was arraigned before Resident Magistrates' Court of Arusha at Arusha (trial court) in Economic Case No. 44 of 2018 for the offence of unlawful possession of Government Trophy c/s 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (herein after the WCA) read together with paragraph 14 of the 1st Schedule and section 57 (1) and 60 (2) the Economic and Organised Crimes Control Act, Cap 200 R.E. 2002 (EOCCA) as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments Act) Act, No. 3 of 2016.

It was the prosecution accusation that on 7th June day of 2018, the appellant together with Alex Samson @ Alen @ Kadogoo and Bartholomeo

Pascal, not party to this appeal proceeding were alleged to have been found in unlawful possession of Government Trophy to wit; 206 kilograms of Giraffe's meat valued at USD 15,000 which is equivalent to Tshs. 33,786,000/=. The property of the United Republic of Tanzania without the permit from the Director of Wildlife.

At the trial court, the prosecution marshalled eight witnesses and tendered twelve exhibits to prove their case while defence had three witnesses, the appellant and the other two accused persons. According to the prosecution evidence, the ordeal ensued on 7th June 2018 as PW8, game patrol ranger while with other officers received a tip from the informer that, at a place called Mpakani (buguruni-Namanga) area within Longido District in Arusha Region, there was a person suspected selling game meat in his house. They headed to the area and upon arrival threat, they met two people (those not party to this appeal) coming out of the house carrying a sulphate bag containing meat. However, when they saw the game officers, they dropped it and managed to abscond from the scene by using a motor cycle. The game officers surrounded the house and arrested the appellant herein with the game meat on the floor who mentioned the escapees as the real owners of the said meat. The meat was seized and upon analysis, it was discovered to be of giraffe.

At the end of the trial, the appellant was found guilty whereas the court found the evidence against other accused persons especially as to their identification inadequate. Hence, they were acquitted. The appellant was sentenced to serve the term of twenty (20) years in prison. Aggrieved with the trial court's decision, the appellant preferred this appeal advancing three grounds as follows;

1. That, the trial court erred in law and in fact in convicting and sentencing the appellant while it had no jurisdiction.
2. That, the trial court erred in law and in fact in convicting while the prosecution did not prove the case beyond reasonable doubt.
3. That, the trial court erred in law and in fact in convicting and sentencing the appellant without properly evaluating the evidence as adduced during hearing.

At the hearing of the appeal, the appellant was represented by Mr. Sylvester Kahunduka, the learned advocate whereas Ms. Alice Mtenga, learned State Attorney represented the respondent,.

Submitting on the first ground of the appeal Mr. Kahunduka stated that, the proceedings of the trial court do not depict if consent and transfer were received by the trial court. What is seen however, is the fact that the state attorney merely prayed to file the consent and the same was granted without being endorsed. He referred the court to section 3 of EOCCA which stipulates that, it is only the High Court which is clothed

with jurisdiction to determine economic and organized crimes unless the DPP gives consent under section 26 (2) of EOCCA and certificate under section 12 (3) of the same Act. According to him, it is when two documents are issued. He added that the subordinate court may hear and determine an Economic Offence related cases. Learned counsel also cited the case of **John Marine and another vs. Republic**, Criminal Appeal 42 of 2020 (unreported), which observed that, documents tendered before the court must be formally received to form part of the proceedings and the same be endorsed. The Court of Appeal went on stating that, failure of doing so, the trial court lacked jurisdiction as in the case at hand and such omission is fatal. He thus prayed for an order of the court directing a retrial by if there is sufficient evidence and there was no gaps to fill.

On the 2nd and 3rd grounds, the learned counsel argued them jointly by stating that, as the trophy was not taken to the trial court, therefore, in lieu thereof there was production of an inventory form, PE9 filled by PW5 at Longido Primary Court Magistrate. He argued that, PE9 has several defects, **firstly**, that, it was directed to DC at Longido but the same is sealed with primary court magistrate who has no jurisdiction to act upon a document executable by District Court. **Secondly**, that, the appellant

was seen by the primary court magistrate while in the police motor vehicle which means, the order was issued in the absence of the appellant who was under restraint. **Thirdly**, that, the appellant was not asked whether he was found in unlawful possession of the trophy in question. He argued that, there ought to be a formal application for destruction of the government trophy. Mr. Kahunduka urged the Court to refer to the case of **John Julius Martin and another vs. Republic** (unreported), Criminal Appeal No. 42 of 2020 (Unreported-CAT). Hence, in his opinion, the procurement of PE9 was not in conformity with procedural law and there was violation of the right to be heard. He prayed for the same be expunged from the record.

It was Mr. Kahunduka's further submission that, according to the evidence adduced during trial, the house searched was a dwelling house while PW8 stated that there was information prior to arrest of the appellant. Therefore, there was contravention of section 38 (1) (3) of the **Criminal Procedure Act**, Cap 20 Revised Edition, 2022 (the CPA) for failure to prepare search warrant and issue receipt since it was not an emergency search.

Mr. Kahunduka also argued that, the evidence of PW8 who tendered PE12 or PE11 as indicated in the seal (statement of PW8) as well as

certificate of seizure (PE6) is contradictory with evidence adduced by the appellant. Hence, creation of doubt whether it was the appellant who was found in possession of the trophy in question or the two persons who flee the scene while dropped two sulphate bags. He prayed that this Court find the irregularities fatal and release of the appellant

Opposing the appeal, Ms. Mtenga submitted on the 1st ground that, there was a consent filed under section 26 (2) of EOCCA. The same vested jurisdiction to the trial court accompanied by a certificate of transfer which were all endorsed by the trial court, signed and dated by the court clerk on the same day. She argued that, the case of **Julius Marine** (supra) is distinguishable since in the former case the proceedings were absolutely silent while in the appeal at hand, there is an order of the trial court which shows when the same was filed.

On the 2nd ground, Ms. Mtenga submitted that, the evidence of PW5 is very clear and to the effect that, he sent the appellant to the court primary for the purposes of destruction of the trophy and the appellant was interviewed by the Primary Court Magistrate. She however conceded to the fact that, the inventory form was addressed to the District Court but the one who issued the order was Longido Primary Court, which has power to order destruction while the matter is under investigation and not

in the committing court. Thus, word appearing in the inventory form were by slipup. She also argued that even without the inventory form, the appellant's guilt had been sufficiently established by other pieces of evidence including certificate of seizure and oral evidence.

Regarding the search and seizure, it was Ms. Mtenga's submission that, the same was properly conducted as seen at Page 72 of the typed proceedings. PW3 made endeavors to trace OCS-Namanga Police Station but was not present hence proceeded considering that, the matter was urgent according to the information furnished to him by the informer. Equally, regarding the issue of receipt by virtue of section 38 (3) of CPA, Ms. Mtenga asserted that, it was not necessary for the arresting officers to issue receipt where there was certificate of seizure replacing the receipt. She embraced her argument by a decision of the Court of Appeal in **Papaa Ole and another vs. Republic**, Criminal Appeal No. 47 of 2020 (unreported).

She finally averred that, there is ample evidence, which incriminates the appellant as the one found in unlawful possession of government trophies in his residential house. On the complaint that, the appellant was found in unlawful possession of less kilograms of meat or more is

immaterial as what matters is the type of animal meat. She prayed that, this Court to dismiss this appeal.

In his brief rejoinder, Mr. Kahunduka reiterated his earlier submission and maintained that, the trial court had no jurisdiction as well as the case against the appellant was never proved at the required standard.

Having gone through the trial court's records, grounds of appeal as well as the rival submission of the parties' counsel, I now proceed to determine the grounds of appeal.

Starting with the **1st ground** regarding the jurisdiction of the trial court. It is pertinent to quote section 26 (1) of EOCCA in order to be safer when determining this ground, it provides that;

"26 (1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.

Also section 12 (3) of the same law reads;

(3)The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."

From the above quoted provisions, it is a trite law that, the subordinate courts lack jurisdiction to entertain economic and organised crimes unless the Director of Public Prosecutions (DPP) issues the consent and certificate of transfer save the High Court. In the matter at hand, it is undisputed that, before trial, the trial court was required to have both the consent from the DPP and certificate of transfer conferring jurisdiction to a subordinate court.

Going through the proceedings, at page 40 it is evidently clear that, on 13th November 2021, before hearing proceeded, Mr. Kagirwa, the learned State Attorney, prayed to file the Consent and the trial court granted such prayer. The same is again featured in page 45 of the same proceedings of 17th November 2021 when the learned state attorney again prayed to substitute the charge because the previous charge sheet and the Consent duly filed had four (4) names of accused persons instead of three accused persons. There is a chain of judicial authorities by the Court of Appeal which have underscored the importance of the Consent and certificate from DPP before trial in the subordinate courts for instance in **Ally s/o Salim @ Nyiku vs. The Republic**, Criminal Appeal No. 87 of 2020, CAT at Tanga (unreported) the Court of Appeal had this to say;

"Ordinarily, all economic offences under the EOCCA are triable by the High Court. Nonetheless, the D.P.P or any State Attorney duly authorized by him has powers to transfer, by certificate, the trial of any economic offences on a court subordinate to the High Court. If the trial involves pure economic offence the transfer has to be done under section 12 (3) of the EOCCA but if the trial is of a combination of both economic and non-economic offences such a transfer has to be done in terms of section 12 (4) of the EOCCA ..."

See also precedents in **Abdulswamadu Azizi vs. The Republic**, Criminal Appeal No. 180 Of 2011 **Rhobi Marwa Mgare and Two Others vs. The Republic**, Criminal Appeal No. 192 of 2005, **Elias Vitus Ndimbo and Another vs. The Republic**, Criminal Appeal No. 272 of 2007, **Nico s/o Mhando and Two Others v. The Republic**, Criminal Appeal No. 332 of 2008 (all unreported-CAT).

In the circumstances, I am inclined to hold that, the consent and certificate were filed before the beginning of the trial. More so, the substitution of the charge was followed by the filing of the consent and certificate afresh. The trial court therefore, had jurisdiction to try and determine this matter. The 1st ground therefore fails.

I now proceed to determine the 2nd and 3rd grounds jointly as they carry the same substance. The appellant has seriously challenged the way

the inventory form, PE9, was done by the primary court instead of the district court and that, he was not availed right to be heard before disposing the trophy in issue. He thus prayed for the same to be expunged from the record. This matter was thoroughly pointed out and discussed by the trial magistrate in page 17 and 18 of her judgment and I wish to quote part of her findings;

"I had the liberty to look close at exhibit P9, it is true that it was addressed to Longido District Court, but signed by Longido Primary Court magistrate. Does this make the document illegal? I believe the answer is No. I say so because defence side have not doubted that the stamp and signature of the magistrate are not genuine.

Was the accused not taken before the magistrate? The answer to that is reflected in the inventory form itself; it has accused names and signature. And PW5 who prepared the inventory form have stated how the accused was presented before the Primary Court magistrate & he was heard as he did not have any objection on the giraffe meat being disposed. The same is also affirmed by PW8 who was also present before the magistrate."

From this excerpt and looking at PW5's testimony, the appellant was taken to the primary court magistrate who asked him if he identifies the trophy to be his, in which he answered in affirmative. During cross-examination, the appellant did not challenge the fact that, he was taken

to the primary court for destruction of the trophy. I have also considered that any nearest magistrate may issue a disposal order of any perishable exhibit provided that an accused is present as per PGO 229 at paragraph 25). In the circumstances, challenging that he was not availed right to be heard is an afterthought.

Similarly, the appellant's complaint that, the document is headed Longido District Court but the inventory form was filled at Longido Primary Court, does not vitiate the proceedings and decision therefore. I am of that view just like of the learned trial Magistrate due reason that; there is court seal, signatures of the accused and that of Resident Magistrate who issued the order. To this effect, it is my considered view that, there was a proof that, a formal inventory form was filled before the meat was disposed of. The appellant's complaint in respect of PE9 is therefore not merited since the irregularity does not go to the root of the case and can be conveniently pardoned by section 388 of the CPA.

Appellant also challenged the way the search and seizure certificate, exhibit P6, was filled. According to the appellant's counsel, the same was not an emergency as there was a prior information. It is noteworthy pointing out that, rationale behind controls on powers of search and seizure was well laid down by the Court of Appeal of Tanzania in **Badiru**

Mussa Hanogi vs. Republic, Criminal Appeal No. 118 of 2020

(unreported) where it was held that;

"In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies, seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in people's private premises in fulfilling their undisclosed ill-motives."

In our instant criminal matter, it was testimony of PW3 that, after he received information from one Michael Msokwa, a game ranger on the trophy found at the appellant's place. He went to the crime scene without a seizure form as he could not get the same from Officer Commanding Station (OCS), the policer officer in authority to keep and issue search order. The evidence adduced by the prosecution witness, PW3, during trial, is to the effect that, the OCS was by then absent and that he could not pick his phone, the testimony, which cures the alleged violation of the provision of the law.

In the circumstances of this matter, the search was conducted without either search order or search warrant. However, the evidence given by PW3 is self-explanatory that the warrant order would not easily be obtained as result the article, trophy would be hidden, or the suspects would abscond from being apprehended. Hence, there was a requirement to conduct emergency search under section 42 (1) (2) and (3) of the CPA. For that sake of clarity parts of the evidence of PW3 is reproduced herein under;

*"I decided to call my OCS who was not in the office but he did not pick the call. Since Michael Msokwa told me, it was urgent, I went there and met him at Gorofani area...
...They packed the car there.....As I was going to that house, two people ran away, they had a luggage "furushi" and they threw it and ran away.....Before entering his hous, Emily Massawe searched us all who were to enter inside his house. He then opened his door and I and I Michael Msokwa followed him inside the room, we found a lot of meat in pieces scattered on the floor and there was an animal skin....."*

Correspondingly, as to the appellant's complaint that, there was no issuance of mandatory as required under section 38 (3) of the CPA. However, I am of the considered opinion that the omission to issue a receipt cannot vitiate the prosecution as was stressed in the case of

Jumanne Mpini @ Kambilombilo and another vs. The Republic,
Criminal Appeal No. 195 of 2020 (unreported-CAT).

I have further examined the evidence on record, and found it watertight. There is oral evidence adduced by the prosecution witnesses (PW1 to PW8) including that of an independent witness one Godfrey Lema who appeared before the trial court as PW6. There is also documentary evidence namely; handing over certificates (PE1-PE3), Certificates of search and seizure (PE5 & PE6), trophy valuation report (PE8), inventory form (PE8) and the appellant's cautioned statement (PE11). Therefore, I find that, the case against the appellant was proved beyond reasonable doubt. Hence, the conviction and sentence arrived at by the trial court against the appellant is commendable.

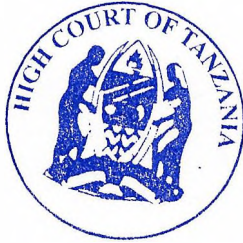
Consequently, I find no reason to fault a well-reasoned decision rendered by the trial court. The appellant's appeal is thus dismissed in its entirety.


It is so ordered

DATED and delivered at **ARUSHA** this 26th day of July, 2023.


M.R. GWAE
JUDGE

Court: Right of appeal to the Court of Appeal fully explained




M.R. GWAE
JUDGE
26/07/2023