

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 58 OF 2022

**(Arising from Economic Case No. 74 of 2019, in the Resident Magistrate's
Courts of Morogoro, at Morogoro)**

BETWEEN

MOHAMMED SAID NYENJE APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

31th March, 2023

CHABA, J.

The Appellant, Mohammed Said Nyenje was charged and convicted by the Resident Magistrate's Court of Morogoro, at Morogoro for the offence of unlawful possession of government trophies contrary to section 86 (1), (2) (b), and (3) of the Wildlife Conservation Act, as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2016, read together with paragraph 14 of the First Schedule to and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [CAP. 200 R. E, 2019].

At the end of trial, whereby the trial court heard five prosecution witnesses and one defence witness, the learned trial magistrate was satisfied that, the prosecution side did manage to prove the case beyond reasonable doubt, thus

found the appellant guilty of the offence, and thereafter convicted the appellant and sentenced him to serve twenty (20) years imprisonment.

Determined to prove his innocence, the appellant decided to file this appeal raising fourteen (14) grounds of appeal. I will not reproduce all fourteen grounds of appeal for a reason that with all these grounds, there is only one ground which is sufficient to dispose of the entire appeal. The Respondent / Republic didn't file reply to the petition of appeal asserting that they will exercise their rights during hearing of the appellant's appeal.

When this appeal was called on for hearing, the Republic / Respondent was represented by Mr. Edger Bantulaki, learned State Attorney while the Appellant appeared in person, and unrepresented.

Arguing in support of grounds of appeal, the appellant basically relied on the grounds of appeal narrated in his Petition of Appeal. He stated and complained that, the offence which is levelled against him is unknown to him. He prayed the court to consider his grounds of appeal, quash conviction and set aside sentence imposed against him. The appellant concluded by lamenting that, even the statement he made before the police station was not brought in court as an exhibit.

In rebuttal, Mr. Bantulaki, the learned State Attorney did not seek to challenge the appellant's grounds of appeal. Specifically, Mr. Bantulaki conceded to the second ground of appeal which took an exception to the trial court's reliance on unsworn testimonies advanced by the prosecution witnesses namely, PW.1, PW.2, PW.3, PW.4 and PW.5 respectively. He submitted that,

the evidence of PW.1, PW.2, PW.3, PW.4 and PW.5 were received and recorded by the trial magistrate under section 198 (1) of the Criminal Procedure Act [CAP. 20, R. E, 2022] without the witnesses being sworn or affirmed. He averred that, upon travelling through the evidence adduced by the prosecution witnesses, he conceded that the appellant's complaints have merits. He therefore, prayed the court to expunge the testimonies adduced by PW.1, PW.2, PW.3, PW.4 and PW.5 from the court records.

To fortify his argument, Mr. Bantulaki accentuated that, the Court of Appeal of Tanzania in different occasions has dealt with the matter at hand regarding unsworn or unaffirmed testimony in the case of **Hamisi Chuma @ Hando Mhonja and Another Vs. Republic**, Criminal Appeal No. 371 of 2015, CAT sitting at Tabora, at pages 6 - 8 in which, the CAT did not hesitate to expunge the testimonies of PW.2 and PW.7 as the same had no evidential value.

He continued to submit that, since the error or irregularities was committed by the trial court and that according to him, the evidence on record is watertight, the only remedy available to such irregularities is to quash the appellant's conviction and set aside the sentence imposed against the appellant. He was however, of the view that, the Respondent / Republic would wish the court to refrain from ordering the appellant to be set free, and order that the matter be tried de-novo.

To end up his oral submission, Mr. Bantulaki referred this court to the case of **Fatehel Manji Vs. Republic, 1966 E.A at page 343**, wherein the Court



upon facing with a similar situation like the present appeal, it ordered the matter to be tried de-novo.

To rejoin, the appellant had nothing substantive to reply. He opposed the argument put forward by the learned State Attorney and prayed the court to set him free, regardless of the opinion advanced by the Respondent / Republic.

I have keenly considered the oral submissions by both parties. In principle, the learned State Attorney supports the appellant's appeal. Having going through the impugned trial court proceedings and Judgement, the central issue for determination by this court is, whether this appeal is meritorious.

On reviewing the trial court proceedings, it is apparent on the face of it that the evidence adduced by the prosecution witnesses (PW.1, PW.2, PW.3, PW.4 and PW.5) were truly received by the Hon. trial magistrate and recorded without indicating that the respective witnesses were sworn or affirmed before they proceeded to advance their testimonies. That being the case, such an act convinces me to restate the current position of the law which is to the effect that, a witness to any criminal matter cannot testify in court unless he is sworn or affirmed. Section 198 (1) of the Criminal Procedure Act [CAP. 20 R. E, 2022], provides that: -

*"Every witness in a criminal cause or matter, **shall subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation** in accordance with the provisions of the Oaths and Statutory Declarations Act". [Bold is mine].*




The use of the word "**shall**" under section 53 (2) of the Interpretation of Laws Act, [CAP. 1 R. E, 2019] confers the imperativeness, in taking an oath or affirmation prior to giving testimony. Section 53 (2) of the Interpretation of Laws Act (Supra), clearly provides that: -

"Section 53 (2) - Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

As hinted above, it is apparent from the court record of the trial court that, PW.1, PW.2, PW.3, PW.4 and PW.5 respectively, were not sworn or affirmed as required by the law and pursuant to the provisions of the Oaths and Statutory Declarations Act [CAP. 34 R. E, 2019] which is an Act to make provision for the administration of oaths and affirmations in judicial proceedings and for statutory declarations. In this regard, the act done by the trial magistrate contravened the provision of section 198 (1) of the CPA (supra) which is couched in mandatory terms that evidence must be given on oath or affirmation. **(See: Peter Pinus & Another Vs. Republic, Criminal Appeal No. 10 of 2016 (unreported).**

The CAT when dealing with a similar matter where a witness advanced testimony without oath or affirmation being administered, in the case of **Bulyanhulu Gold Mine Ltd Vs. Kenneth Robert Fourie**, Civil Appeal No. 105 of 2021 (unreported), it remarked that: -



"...we think it is appropriate, to lay ground as for the Court's position generally, on issues of taking evidence from witnesses in all courts. Before taking evidence from a witness in a court of law, it is mandatory for a judicial officer presiding over the proceedings to administer oath to a witness before the latter can adduce his or her evidence. This is a deep-rooted rule of court practice that is now a traditional legal norm in this jurisdiction. That is what this Court reaffirmed in the case of Attu J. Myna v. CFAO Motors Tanzania Limited, Civil Appeal No. 269 of 2021 (unreported)".

As correctly submitted by the learned State Attorney, the failure was a serious omission that rendered the unsworn or unaffirmed testimony not only lacking evidential value, but also fatal and it vitiates the respective court proceedings.

(See: In Republic Vs. Marsham Ex-Parte Pethick Lawrence (1912)

2K.B 362 DC, Nestory Simchimba Vs. Republic, CAT-Criminal Appeal No. 454 of 2017 **and Christian Ubechi Vs. Republic,** Criminal Appeal No. 274 of 2019, (CAT) (All unreported).

Inspired by the afore-mentioned precedents, I fully associate myself with the above decisions which I consider proper position of the law. I accede to the learned State Attorney's prayer that the evidence of the prosecution witnesses be expunged from the court record, of which I hereby do. For clarity, it is hereby ordered that the evidence adduced by PW.1, PW.2, PW.3, PW.4 and PW.5 are expunged from the court record. The appeal is hereby allowed.



Having expunged the evidence advanced by the prosecution witnesses, I allow the appeal, quash the conviction and set aside the sentence meted against the appellant.

As to the way forward, I am inspired and guided by the decision of the CAT in the case of **Bulyanhulu Gold Mine Ltd Vs. Kenneth Robert Fourie** (supra) which adopted the style in its earlier case in **North Mara Gold Mine Limited Vs. Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 (unreported)c, where the Court expunged the unsworn evidence, nullified the Award of the CMA, quashed the judgment of the High Court and ordered for re-hearing of testimonies of the said witnesses followed with composition the award.

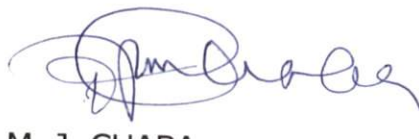
Having found the present appeal falls in the same category of the cited precedents of the CAT, and having in mind that this court is bound by the CAT decisions, I have decided to follow the course without any reservations.

For the interest of justice and taking into account that the appellant is facing the offence of unlawful possession of government trophies, I order and direct that, the original record in Economic Case No. 74 of 2019 be remitted to the RM's Court of Morogoro, at Morogoro for expeditious re-hearing of the testimonies of PW.1, PW.2, PW.3, PW.4 and PW.5 respectively, in accordance with the law.

In the final event, the presiding resident magistrate having competent jurisdiction, shall compose a judgment in accordance with the law. In the

meantime, the appellant, Mohamed Said Nyenje shall remain in custody pending re-hearing of testimonies of unsworn or affirmed evidence of prosecution witnesses. Order accordingly.

DATED at **MOROGORO** this 31th day of May, 2023.

A handwritten signature in blue ink, appearing to read 'M. J. Chaba', is written over a horizontal line.

M. J. CHABA

JUDGE

31/05/2023