IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 2 OF 2023

(Originating from the Judgment of Siha District Court in Economic Case No. 1 of 2021 dated 13th October, 2022)

DEWANGWA ASINDAMU MASAKI .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

25th July & 9th August, 2023

A.P.KILIMI, J.:

The appellant, **DEWANGWA ASINDAMU MASAKI** was convicted for three counts and sentenced 20 years imprisonment for each count by Siha District Court. Both counts were of the same offence of unlawful possession of Government trophy contrary to section 86(1) and (2)(c)(ii) of the Wildlife Conservation Act NO.5 of 2009 read together with paragraph 14 of the 1stSchedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act, Cap. 200 R.E.2019.

At the trial court the particulars of the first count contend that that on or about 15th February,2021 at Namwai area within Siha District and Kilimanjaro region, appellant was found in unlawful possession of three (3) TREE HYRAXES meat which is equivalent to three killed Tree Hyraxes valued at Tshs.689,400/=, In second count he was found in possession of two (2) Red duiker meat which is equivalent to two killed Red Duiker valued at 1,149,000/= and in second count he was found in possession of two (2) Dikdik meat which is equivalent to two killed dikdik valued at 1,149,000/= all in total valued at Tshs 2,987,400/= the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

Aggrieved by the said conviction and sentence of the trial court, the appellant has knocked the door of court by way of appeal basing on the following grounds;

1. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the court being having no jurisdiction to hear, try and determine this case as there were neither consent from the state attorney nor certificate conferring jurisdiction to the court sought or issued and being admitted before the court
2. That, the learned trial magistrate grossly erred both in law and fact in failing to note that the whole exercise of the alleged search and seizure flouted the

mandatory provisions of section38 (2) and (3) of the CPA as there were no magistrate's approval sought after completion of the seizure of the alleged wild animal's meat, further there were no receipt issued pursuant to subsection (3) of the above-mentioned section of law.

3. That, the learned trial magistrate grossly erred both in law and fact in failing to note that there were neither search warrant nor written authority issued by the officer in charge of station to the PW1 to conduct search and seizure in the Appellant's house, taking into account that it was not an emergency search.
4. That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the inventory form (Exhibit. P.5) was wrongly and prosecution acquired, tendered and admitted in evidence as exhibit.
5. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant on an irregular proceedings and judgment.
6. That, the learned trial magistrate grossly erred both in law and fact in convicting the Appellant basing on weak, tenuous contradictory, incredible and wholly unreliable · prosecuting evidence from prosecution witnesses.
7. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by law.

Before dwell in into the merit of these grounds let me recapitulate the facts gleaned from the record. On the fateful date one Samwel Chelewa, a Conservation Ranger got an alert from the informer that at Namwai area there is a person called Dewangwa Asindamu Masaki who own Government trophy at his home. He then sought a company of police officer called PC Abilah, and hamlet leader one Enock Shedrack Macha. They went and

ambush the appellant house. Upon being searched, the appellant was found in possession of three dry meat of tree hyrax, four pieces of Dik Dik meat and red duiker four pieces. The same were seized and appellant arrested and charged as above stated.

When the trial court ruled out that the appellant has case to answer, he replied that he will defend himself and he will have one witness who is his wife. On the date scheduled for defence, the appellant informed the trial court that his wife cannot appear before this court and help him in his defense, therefore he cannot also defend himself and prayed the trial court to pass judgment on him. The trial court ruled out that the appellant has waived his right to defend his case and proceeded with the judgment.

At the hearing of this appeal, the appellant appeared for himself while the Republic was represented by Mr. Peter Utafu and Ms. Edith Msenga both learned State Attorneys. Both agreed this appeal be argued by way of written submissions which this court permitted them to do so.

To support his appeal the appellant decided to submitted only in respect to first ground leaving others grounds unattended because this ground is the core foundation of this case, thus if is sustained then the

case crumbles. but prayed to adapt other grounds as they are, in this ground he submitted that, the trial court tried this case without having competent jurisdiction, because it commenced the hearing of the case without the consent of the Director of Public Prosecutions. He further submitted that it is well settled that, case of this nature can only be tried by a subordinate court after the DPP has filed a consent and certificate conferring jurisdiction to the court, something which was not done in this case.

Arguing in regard to what transpired at page 11 of the typed court proceedings, the appellant submitted that on that date public prosecutor prayed to the consent and certificate, but it is not certain as to what he was praying for, and if he was praying to file the said documents in court, still the same are unreliable and cannot form part of the trial court's proceedings since were not properly filed before the trial court by lacking an endorsement of the trial court officer designated so as to be legally filed and placed in the court file. To bolster his stance, the appellant referred the case of **Adam Seleman Njalamata vs. The Republic**, Criminal appeal No.196 of 2016 at page 5, the CAT at Dsm (unreported).

Replying to the grounds of appeal, learned State attorney contended on the first ground that in terms of section 12(3) of the EOCCA Cap 200, the jurisdiction of Economic Court can be conferred to a subordinate court upon certification under the hand of the DPP or any State Attorney duly authorized by him. This infers that, before a subordinate tries and economic case, it has to be conferred with the jurisdiction to try such a case upon certification from the DPP or his subordinates, then invited me to refer the case of **Kulwa Nassoro Mohamed vs. Republic**, Criminal Appeal no. 183 of 2018 CAT at Dar-es-Salaam (unreported). He further submitted the same was complied with at the trial court and invited me to refer page 13 of the trial Court's proceedings dated 1st March 2023 therefore this ground be dismissed.

Contending jointly in respect to the second and third ground of appeal, the learned state Attorney submitted that, the procedures of search and seizure was compiled as per section 42(1)(b)(i) and (ii) of the Criminal Procedure Act [Cap 20 R.E 2019] considering that it was an emergence search. He further said according to Prosecution witnesses, G2309 CPL ABILAH (PW1), and Enock Shedrack Macha (PW2), the search, seizure and arrest was done from 01 :30 hours mid-night of 15th February 2022. The

witnesses had to timely respond to their lead information without any delay. The time of search and subsequently seizure of the Government Trophy was during night hours, at such hours it was impracticable to first procure the Court's order, or at large to follow the procedures under section 38 of the Criminal Procedure Act. The Search was an emergency one, and the Police officers involved needed to act urgently to prevent loss and destruction of the exhibits by the Accused person. To buttress this stance the learned state Attorney referred case of **Slahi Maulid Jumanne vs. Republic,** Criminal Appeal Number 292/2016 and **Muluqus Chiboni @ Silvester Chiboni and John Simon vs. Republic,** Criminal Appeal Number 8 Of 2011 (Both unreported).

In response to the fourth ground of appeal, the learned state attorney contended that the inventory form was properly acquired, tendered and admitted during trial as Exhibit P5. Also, the magistrate approved the destruction of the exhibits and thereafter signed the inventory form in the presence of the accused person, these were testified at the trial court, thus invited this court to visit Trial Court's proceedings dated 11th July 2022. And added that trophy was not tendered, Exhibit P5 was tendered in lieu of the said meat.

Furthermore, joining the fifth and sixth ground of appeal, the learned state attorney contended that in presenting its case, the Respondent complied to all procedures and according to relevant provisions under the Criminal Procedure Act [Cap 20 R.E 2019] and the Economic and Organized Crime Control Act [Cap 20 R.E 2019]. Starting from issuance of consent and certificate conferring jurisdiction to Siha District Court, arraignment and plea taking, preliminary hearing, opening of the prosecution case, examination of witness, tendering of exhibits, closure of the Prosecutions, establishment of a prima facie case, defence hearing, conviction and finally sentence. However, he stated, since the appellant refused to explain specifically to all grounds it is difficult to point out on specific aspects such as how were the trial procedures irregular and how unreliable was the prosecution's evidence.

In respect to the last ground of appeal, the learned stated attorney submitted that, the prosecution proved by evidence on how PW1 and his colleague called the Chairperson to take them to the Appellant's home, how arrest, search and seizure were conducted by PW1 before PW2, how the exhibits were valued by PW3, how the exhibits were taking to the store

keeper PW4, How the exhibits were taken to Siha District Court for inventory and how the perishable exhibits were destroyed. Also, argued that Prosecution was able to lead the paraded witnesses to tender exhibits to substantiate their testimonies. Those exhibits include Seizure Certificate (Exhibit P1), Chain of Custody Form (Exhibit P4), Trophy Valuation Report (Exhibit P2), Inventory Form (Exhibit P5), Final Disposal of Exhibits form (Exhibit P1), and Exhibit Register (Exhibit P3). Therefore, this part managed it duty of proving the case beyond reasonable doubt, to fortify this stance referred me the case of **Said Hemed vs. Republic** [1987] TLR 117.

Having considered the rival submissions above, I wish to start with first ground which also was argued by the appellant. It is true as stated by the appellant that the first date which was on 23rd February, 2021 when the appellant was arraigned at the district court, the said court was having no consent to prosecute economic cases. But the record shows the same, later on 1st March, 2022 was filed legally and thereafter the charge was read to appellant forthwith. I wish reproduced the consent of the State Attorney In-charge and the Certificate Conferring Jurisdiction on the District Court to try an Economic Offence, which read thus:

"CONSENT OF THE STATE ATTORNEY

I, KHALILI KHAMIS NUDA, *The Reginal Prosecution Officer thereby being incharge of Kilimanjaro Regional office, do hereby in terms of section 26(2) of the Economic and Organized Crime Control Act [Cap 200 R.E 2019] and part III, paragraph 6 of the Economic Offences (Specification of offences for consent, Notice, 2021 GN NO. 496H of 2021* ***DO HEREBY CONSENT*** *to prosecute of* ***DEWANGWA S/O ASINDAMU @ MASAKI*** *for Contravening the provision of section 86(l)(2)(b)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016, read together with paragraph 14 of the first schedule and section 57(1) and 60(2) both of Economic and Organized Crime Control Act [Cap 200 R.E 2019], the particulars which are detailed hereinabove.*

Signed at Moshi this 8th day of November, 2021.

Signed
Khalili Khamis Nuda
REGIONAL PROSECUTING OFFICER

CERTIFICATE OF ORDER FOR TRIALS OF AN ECONOMIC OFFENCE
IN THE DISTRICT COURT OF SIHA AT SIHA

I, KHALILI KHAMIS NUDA, *The Reginal Prosecution Officer thereby being incharge of Kilimanjaro Regional in the exercise of powers vested in me by section 12(3) of the Economic and Organized Crime Control Act [Cap 200 R.E 2019] and part III, paragraph 6 of the Economic Offences (Specification of offences for consent, Notice, 2021 GN NO. 496H of 2021* ***DO HEREBY ORDER THAT*** *that of* ***DEWANGWA S/O ASINDAMU @ MASAKI*** *who was charged for Contravening section 86(l)(2)(b)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016, read together with paragraph 14 of*

the first schedule and section 57(1) and 60(2) both of Economic and Organized Crime Control Act [Cap 200 R.E 2019], BE TRIED BY THE DISTRICT COURT OF SIHA AT SIHA

Signed at Moshi this 8th day of November, 2021

Signed
Khalili Khamis Nuda
REGIONAL PROSECUTING OFFICER

Presented for filing this 1st day of March 2021

Signed
Registry Officer"

In view of the above, the facts that when the said consent was filed, the charge conferred was read again to the appellant and later the case proceeded for PH and later hearing, in my opinion since the charge was read again to him immediately after the above consent filed on 23/03/2022 and asked the appellant to plead thereto, I am settled the first plea taken despite of being an error, was not fatal since it does not prejudice the accused person in any way, thus does not go to the root of the case. Therefore, is cured under section 388 of the Criminal Procedure Act, Cap 20 RE. 2022. In that regard I find this ground devoid of merit and dismissed forthwith.

Coming to second and third grounds of appeal, in essence though was not argued by appellant, have raises the issue of illegal search, seizure and issue of receipt after seizing. The power to search and seizure must be conducted according to the law, the provisions of section 38 (1) and (3) of the Criminal Procedure Act Cap. 20 R.E. 2022 "CPA" are relevant. And for purpose of clarity, I reproduce hereunder:

> *"38. -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle or place.*
> *(a) anything with respect to which an offence has been committed;*
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
> *(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and* ***the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life of property, he may search or issue a written authority to any police officer*** *under him to search the building, vessel, carriage, box, receptacle or place as the case may be.*
> *(2) N/A*

> *(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing* ***shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."***
> [Emphasis Added]

In view of the above provision of law, principally means no search of a premises shall be affected without **one;** search warrant, **two;** the presence of the owner of the premises, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property. (See **Samweli Kibundali Mgaya vs. Republic** Criminal Appeal No. 180 OF 2020 CAT at Musoma).

According to the trial court proceeding PW1 G2309 CPL Abilah, who led the arresting group said on 15/02/2021 at about 01:00hrs being on patrol within the KINAPA while accompanied by Mchau, and Mr. Chelewa both Rangers. Mr. Chelewa got information that at Namwai village there is

one person called Dewangwa Masaki who is a poacher and has in his possession

government trophy. Then they went to that village, on the way he called the local leader and got one Enock a cell leader, who they met him on the way and he was asked to take them to Dewangwa Masaki (appellant), he agreed. Then they proceeded to the house of appellant and at 01:30hrs, (see handwritten proceeding) they managed to arrest him in possession of the alleged trophies.

I have considered the above circumstances and the time they got information and acted upon within 30 minutes, I can't hesitate to concede with the argument by the learned state attorney that the Search was an emergency one, and the Police officers involved needed to act urgently to prevent loss and destruction of the exhibits, therefore I agree with the respondent that it was impracticable follow the procedures under section 38 of CPA, rather to follow the procedure under section 42(1)(b)(i) and (ii) of the same law, which provides thus;

> *"**42.**-(1) A police officer may-*
> *(a) N/A*
> *(b) enter upon any land, or **into any premises**, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected*

with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be—

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; and

(ii) ***the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part."***

(Also see cases of **Slahi Maulid Jumanne vs. Republic** (supra) and **Muluqus Chiboni @ Silvester Chiboni and John Simon vs. Republic** (supra).

In respect to seizure certificate, the evidence shows the trophies seized were listed and witnessed by independent witness hamlet leader (PW2), others were arresting officer PW1, Mukhsuni Mchau and one who wrote it is police officer G 2309 PC Abdilah. Both signed and accused person also signed, at the trial the same was tendered and admitted as exhibit P1. Therefore, the fact that the owner of premise was present and independence witness present to my view, not only that witnesses PW2 and PW2 testified orally in court that the appellant was in possession of

alleged trophies, I am of considered opinion the seizure was complied with the law, thus cannot be denied by the appellant.

In respect to the issuing receipt to the seized items. It has been observed the purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein (See **Selemani Abdallah and Others vs. Republic**, Criminal Appeal No. 354 of 2008 (unreported). Indeed, in this matter the no receipt was issued, the point to be consider is that does that failure affect the seizure certificate which shows exactly items taken from the appellant. In my view since it has been proved above the process of the certificate of seizure had no any flaws, which justify that those trophies were received from appellant, therefore, failure to issue receipt is minor defect that does not occasioned any failure of justice, (See cases of **Jibril Okash Ahmed vs. the Republic**, Criminal Appeal No. 231 of 2017 and **Mbaruku S/O Hamisi and 4 others vs. Republic** Consolidated Criminal Appeals No. 141, 143 & 145 of 2016 & 391 of 2018 (Both unreported). Having observed above, I also find grounds two and three devoid of merit and are hereby dismissed.

In ground number four, the appellant avers that the inventory form (Exhibit P.5) was wrongly and prosecution acquired, tendered and admitted in evidence. As said in his submission said nothing on this ground, be it as it may, it is a trite law, there are two types of procedures to prepare an inventory form. One that provided under paragraph 25 of Police General Orders (PGO) and the other procedure of disposing of perishable exhibits is provided by section 101 (1) of the Wildlife Conservation Act, Cap 283 as amended by the Written Laws Miscellaneous Act, No.2 of 2017 now Revised Edition 2022. The procedure under (PGO) was considered by the Court of Appeal in the case of **Mohamend Juma @ Mpakama vs. Republic** Criminal Appeal No. 385/2017 (CAT Unreported). The Court made a reference to Paragraph 25 of the PGO which states that-

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."*

In this matter, a police officer E9631 D/SGT Shaban (PW5) who was assigned to investigate the case testified on how he received exhibits from wildlife officer, he then took exhibits to the court for inventory in the

presence of the appellant, is the one wrote on it asking the magistrate an order for disposal, then the magistrate signed the inventory in the presence of the accused and ordered the exhibits be destroyed. All these transactions were recorded in paper commonly known as chain of custody form (exhibit P4), thereafter PW5 tendered the said inventory form showing Exhibits destroyed were three tree hyrax, two common duiker and four pieces of dikdik. The said inventory form was admitted by the trial court as exhibit P5. In view of the above, it is my settled opinion evidences produced by PW5 show all the procedure and custody of those item were compiled according to the law above, thus this ground also fail for want of merit.

For remaining three grounds, in my view their crux trigger one issue, which is whether the offences charged against the appellant at the trial court were proved beyond reasonable doubt. First, I shoulder with the argument of the learned State Attorney when he said, the appellant refused to explain specifically to all grounds it is difficult to point out on specific aspects such as how were the trial procedures irregular and how unreliable was the prosecution's evidence.

According to prosecution evidence PW1 narrated how they entered to the Appellant's home, how arrest, search and seizure were conducted witnessed PW2 hamlet leader, how the exhibits were valued by.PW3 Onesmo Haule wildlife, how the exhibits were taking to the store keeper PW4, then were taken to Siha District Court for inventory and how the perishable exhibits were destroyed. The above steps taken were evidenced or exhibited by Seizure Certificate (Exhibit P1), Chain of Custody Form (Exhibit P4), Trophy Valuation Report (Exhibit P2), Inventory Form (Exhibit P5), Final Disposal of Exhibits form (Exhibit P1), and Exhibit Register (Exhibit P3).

Despite of the above evidence to be intact, as observed above, the appellant at the trial and on appeal have not produced contradictory evidence on the version of the prosecution story. In my opinion his silence is treated as admission to the offence that he was found in possessing of the said government trophies. In this situation, I wish to reason deductively that, since the appellant did not dispute the prosecution evidence knows the truth. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the

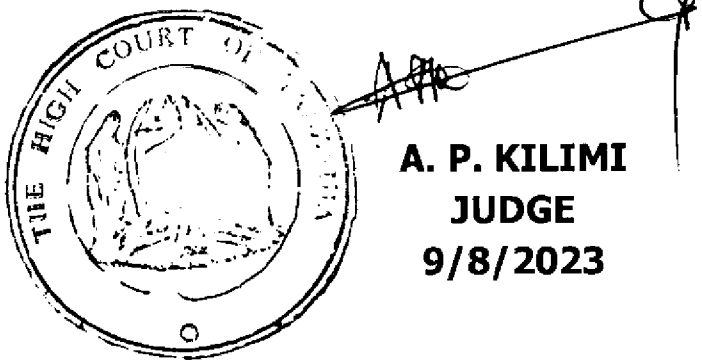
witness (see: **George Maili Kemboge v. Republic**, Criminal Appeal No. 337 of 2013, **Damian Ruhele vs. Republic**, Criminal Appeal No. 501 of 2007 and **Athumani Rashidi vs. Republic**, Criminal Appeal No. 264 of 2016 (Both unreported). In the circumstances, I find that all three grounds above devoid of merit and dismissed.

The last issue I find convenient to address before I pen off, is the sentence awarded to the appellant at the trial court. The appellant was charged and convicted for contravening section 86(l)(2)(c)(ii) of the Wildlife Conservation Act, read together with Paragraph 14(d) of the First Schedule to and section 57(1) and 60(2) the EOCCA Cap. 200 R.E. 2019, section 60 (2) of the EOCCA provides for a sentence of not less than twenty years but not exceeding thirty years, the trial convicted him to the minimum sentence which is justifiable for being the first offender as shown in the record.

Having said so, I am satisfied that the Appellant was properly convicted and sentenced. Thus, I find no reason to fault the decision of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety.

It is so ordered.

DATED at **MOSHI** this 9th day of August, 2023.



A. P. KILIMI
JUDGE
9/8/2023