IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC CRIMINAL APPEAL NO. 8 OF 2022

(Originating from Tabora Resident Magistrate's Court in Economic Crime Case No. 49 of 2020)

SALUM KAYANDA @ KAKUZU

SALUM RAJAB @ KANOGE **.....APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 24/07/2023

Date of Delivery: 10/08/2023

MATUMA, J.

The appellants herein jointly stood charged in the Resident Magistrate's Court of Tabora at Tabora for Unlawful Possession of Government Trophy C/S 86(1)(2)(c)(ii) of the Wild Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and Section 57(1) and 60 (2) of the Economic and Organized Crime Control Act Cap 200 R.E 2019. They were also charged for unlawful Possession of Weapon in the Game Reserve contrary to section 17(1) and (2) of the Wildlife Conservation

Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and Section 57(1) and 60 (2) of Economic and Organized Crimes Control Act Cap 200 R.E 2019.

It was alleged that on 28/08/2020 the appellants were found in unlawful possession of one limb and one skin of giraffe valued at Tshs. 34,875,000/= the properties of the government of the United Republic of Tanzania. In the second count they were alleged to have been found in possession of five pieces of wire snare, one axe, one knife and one bush knife at Kabulwanyele area in Luganzo Game Controlled area within Kaliua District in Tabora Region, without a valid permit from the Director of wildlife.

During trial at the trial court the prosecution lined up four witnesses while the appellants in their own entered their respective defenses. At the end of the trial, the trial court became satisfied that the prosecution's case was proved beyond any reasonable doubts in both counts. It thus convicted and sentenced the appellants to serve twenty (20) years imprisonment term for the first count of unlawful possession of government trophy and another twenty (20) years imprisonment for the second count. The sentences were ordered to run concurrently.

Aggrieved by the decision of the trial court, the appellants lodged a joint petition of appeal in this Court which contained three grounds but mainly complaining that the prosecution case was not proved to the required standard i.e proof beyond reasonable doubts.

At the hearing of this appeal, the appellants were present in person and were represented by Mr. Kilingo Hassan learned advocate while the

Respondent/Republic was represented by Mr. Mmary Nurdini and M/S Orester Kemilembe learned State Attorneys.

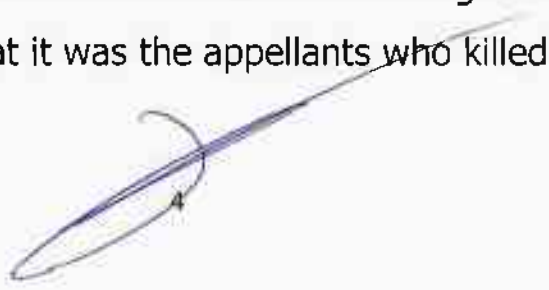
Mr. Kilingo learned advocate in arguing for this appeal submitted that the chain of custody was broken contrary to the requirement provided for under PGO No. 229 (8)(a). He contended that PW1 in this case one David Francis was the only witness who testified that they seized the exhibits during their patrol and he finally tendered the exhibits in court without explaining the chain of custody of such exhibit from the time it was seized until when it was finally tendered in evidence. The learned advocate argued that establishment of the chain of custody be it through paper trail or oral evidence is vital failure of which is fatal. To that effect he cited before me the cases of ***Iluminatus Mkoka versus The Republic (2003) TLR 245*** and that of ***Jason Pascal and another versus The Republic, criminal appeal no. 615 of 2020***.

Mr. Kilingo learned advocate then argued that the appellants' defense was not considered at all. He sailed this court to the defense evidence which shows that the appellants did not dispute to have been found in the game reserve but they had a written permit which they gave to the arresting officers but such permit was taken away nor produced in court. They tendered in court the copy of such permit to substantiate their defense. The learned advocate faulted the trial court for failure to tell how such defense failed to cast doubts to the prosecution evidence. Therefore, it was his contention that the case was not proved beyond reasonable doubts against the appellants.

M/S Orester Kemilembe learned State Attorney responding to the arguments of Mr. Kilingo supported the appeal and argued further that apart from the lacking of evidence on the chain of custody, the exhibits tendered in court were not cleared for their respective admissions. She referred this court to the case of ***Robinson Mwanjisi and another versus The Republic (2003) TLR 218*** and that of ***Paulo Maduka and Others versus The Republic, Criminal Appeal No. 100 of 2007*** (unreported).

I have duly considered the contents of the appellants' grounds of appeal as argued by their advocate and the submissions made by the learned State Attorney. I have as well gone through the records of the trial court. On the grounds to be stated soon herein below, I join hands with both parties that the prosecutions' case was not proved beyond reasonable doubts against the appellants.

First and foremost, it is apparent on record that the appellants were not found in physical possession of the alleged government trophies. They were seen walking into a built hut within the game-controlled area (game reserve) and arrested therein. They were not found in possession of even a single piece of any government trophy. Approximately twenty meters away according to PW1 David Francis Wambura and PW2 Laurent Daud Sebastian it is when they found a dead giraffe on a trap wire. Further PW1 and PW2 supra in the course of their search in the hut they found among other things the wire snare resembling that which had killed the giraffe. That is what made them to conclude that it was the appellants who killed the giraffe.



First of all, there is no direct evidence that it was the appellants who trapped and killed the said giraffe. Their connection to the alleged killing was due to the alleged wire being found into their possession. They however disputed to have been found in possession of such wire. During trial, PW1 explained that in the hut they found one trapping wire, another one trapping wire was the one killed the giraffe and in the course of further search around the area they found some other wires which made the total wires to be five. Unfortunately, the wires were tendered together as exhibit P7. No evidence on record pointed out which of the five wires was found in the hut of the appellants and which one was found in the neck of the killed giraffe so that the trial court and even this court could have a look on them to see the alleged resembles.

Not only that but also even if it could have been inferred that the appellants were the one who trapped and killed the giraffe, still it was not right to charge them for unlawful possession of government trophies because hunting, killing and or wounding of specified animals in part I, II or III of the first schedule to the Wildlife Conservation Act is a distinct offence chargeable and punishable under section 47 of the Act. Since the appellants were not found in physical possession of the alleged trophy nor there was any evidence to infer a constructive possession, then the charge of unlawful possession was drawn against them on suspicious grounds and could not therefore stand against them.

Now back to Mr. Kilingo's arguments that the chain of custody was broken and conceded by the learned state attorney, I find that both learned counsels are absolutely right. In the instant matter, it was the giraffe found

dead and not its limb or skin. PW1, PW2 and PW3 who were the arresting officers were very clear to that effect. Unfortunately, what was tendered in court was not that which was allegedly found in possession of the appellants. The appellants as I have said earlier were accused of possession just because a giraffe was found dead twenty meters away from their hut. Therefore, possession here was linked to a giraffe and not part of it. PW1 in tendering the giraffe limb and skin exhibit P2 did not explain whether such exhibits were taken from the dead giraffe in question or it related to a different giraffe altogether. If it related to the giraffe in question PW1 did not explain who skinned the giraffe and who did cut off the limb from the giraffe and why.

Under the herein above observations, I find that there was no connection in evidence between the alleged found giraffe and the exhibits (P2) tendered in court. That is where I find the arguments of M/S Orester Kemilembe learned State Attorney that such exhibits were tendered without being cleared for their respective admissions legally sounding. Had PW1 cleared the exhibits before their admission in evidence we could have been told how comes a skin and a limb out of a giraffe. The appellants could have been therefore not found guilty because the exhibits were suspicious.

But again, as rightly argued by Mr. Kilingo Hassan learned advocate the chain of custody as a whole was completely broken. Needless to say, we are not availed with any evidence on record as to how the exhibits were handled from the day they were seized i.e 28th August, 2020 up to when they were tendered in evidence on 27th July, 2021. That is a year period. The skin and limb seized according to the evidence was fresh. The question is whether at the time of tendering them in evidence after one year they

were still fresh or not. If not, who handled them until the change of condition. Paragraph 25 of Police General Orders no. 229 provides that:

> *"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 exhibit should be photographed before disposal."*

Also, in the case of ***Michael Gabriel v Republic, Criminal Appeal No. 240 of 2017*** (unreported) the Court of Appeal observed that:

> *"the chain of custody of the skins was not observed.....there is nothing in the evidence showing how the same were handled from the time of their alleged seizure at Loliondo to the time when the valuation report (exhibit P4) was tendered in the Resident Magistrate's Court of Manyara at Babati"*

As a matter of principle, it is well settled law that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused person to ensure that it is the same which was finally tendered in court to avoid possible prejudices to the accused.

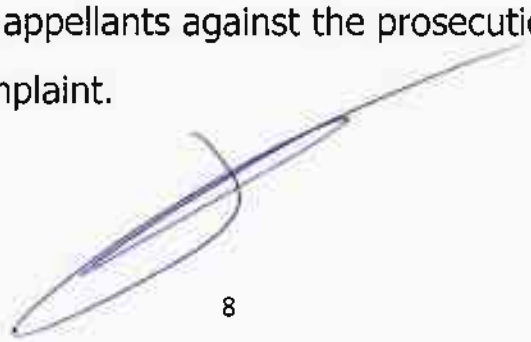
From the above observations, I agree with the learned counsels that the chain of custody was not observed to all exhibits from the moment they were seized, stored and finally tendered in evidence.

On the ground that the appellants' defence was not considered, I am also in agreement with the learned counsels for both sides that the

appellants had impeccable defense which casted reasonable doubts to the prosecution case. Had it been properly considered; they could have benefited against the prosecution case.

In their respective defenses the appellants stated that they are honey dealers/harvesters and had a written permit to enter into the game-controlled area and open spaces in accordance to the Wildlife Conservation Act no. 5 of 2009 and the Local Government (Urban Authorities) Act no. 7 of 1982. PW1 and his fellows took away such permit which was original and they in fact agreed to have taken that permit which they did not return to the appellants nor tendered it in evidence. That necessitated the appellants to tender the copy of it which the court did not admit as exhibit but as an ID. The prosecution did not deny the permit in which the appellants were allowed to carry with them **panga (bush knife), shoka (axes), kamba (ropes), tezo, bicycles and motorcycles.**

From such a defence it is obvious that the appellants entered into said game-controlled area lawfully and were in execution of a lawful purpose. Nobody found them in execution of any wrongful act. All what they were subjected for resulted into suspicious grounds by the Wildlife Officers who treated the appellants as poachers merely because they found them into the game reserve/game-controlled area. Had the trial court properly directed its mind on the defence of the appellants it could have given it weight to the extent of benefiting the appellants against the prosecution case. I therefore allow this ground of complaint.



In the upshot, I allow the appeal, quash the conviction and set aside the sentence meted against the appellants. I further order for their immediate release from custody unless held for some other lawful cause. Right of appeal explained.

It is so ordered.

MATUMA

JUDGE

10/08/2023

COURT; Judgement delivered in chambers in the presence of the appellants in person and their advocate Mr. Kilingo Hassan and in the presence of M/S Aneth Makunja, learned State Attorney for the Republic/Respondent.

MATUMA

JUDGE

10/08/2023