IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 24 OF 2022

(Appeal from the decision of the District Court of Simanjiro in Criminal Case No. 62 of 2021 dated 18th October 2022)

HAMIS HAJI MOLLEL.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date: 12/6/2023 & 4/7/2023

BARTHY, J.

The above-named appellant was arraigned before Simanjiro District Court (hereinafter referred to as the trial court), charged with two counts. In the first court the appellant was charged with the offence of unlawful possession of government trophy contrary to Section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 as amended by Section 59(a) (b) of the written laws (Miscellaneous Amendments) No. 2 of 2016 [now CAP 283 R.E 2022] (hereinafter referred as the Act); 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], (hereinafter referred as EOCCA).

The particulars of this offence were such that, on 19/10/2021, at Mirongo Game controlled area within Simanjiro District in Manyara Region, the appellant was found in possession of eland meat with its tail, thus equated to one killed eland value at USD 1,700 equivalent to Tsh. 3,927,000/= the property of the government of Tanzania without permit from the Director of Wildlife.

On the second count, the appellant was charged with the offence of unlawful possession of weapons in certain circumstances contrary to Section 86(1) and (2) (c)(ii) of the Act.

The particulars to the second count were availed that, on 19/10/2021 at Mirongo game-controlled area within Simanjiro District in Manyara Region, the appellant was found in possession of one machete in circumstances which raise a reasonable presumption that; he used it in the commission of the offence of unlawful possession of government trophy.

The appellant pleaded not guilty to both counts; hence full trial ensued. In establishing the offences committed, the prosecution side paraded four witnesses and tendered six exhibits. On the other hand, the appellant was the sole witness for the defence.

Upon hearing both sides, the trial court was convinced that the case against the appellant was proved to beyond reasonable doubt in respect of the first count and sentenced him to twenty (20) years imprisonment. He was acquitted of the second count.

A brief factual background giving rise to the present appeal as gathered from the record is such that; on 19/10/2021 during night hours; PW3 one Johnson Kanankira, a game warden accompanied with his colleagues were doing patrol at Terrat area within the forest resource.

While doing the patrol, they saw a flash light. As they followed it, they saw the appellant on a motorcycle. They stopped and arrested the appellant. At the back of the motor cycle there was a parcel tied to it. The parcel was opened and am eland meat with its skin and tail was found.

The records further reveal that, the appellant was found with three flash lights tied to his motorcycle, one panga and one solar battery make Sunda. The certificate of seizure was filled in respect of the seized items and later the appellant was arraigned before the trial court.

The appellant on his defence evidence he denied the offences he stood charged. He maintained that, on 18/10/2021 he was carrying a passenger on his motorcycle, as they reached at Mirongo village he was stopped by wildlife wardens.

He further testified that, the passenger he was carrying got off the motorcycle and run away. The sack that belonged to the passenger was opened and two torches, one solar battery and the horn were found. The appellant contended that, the wildlife wardens brought a tail and a panga which he did not know.

The trial court did not buy the appellant's evidence rather it was convinced that the prosecution evidence had discharged its burden. The court then convicted and sentenced him as shown above.

The appellant aggrieved with both conviction and sentence meted out against him, he lodged the present appeal with six (6) grounds of appeal, which after a careful scrutiny can be conveniently reduced into three grounds as follows;

1. *That, the trial court erred in law to rely on the evidence of the prosecution to convict the appellant on suspicious, contradictory, inconsistent and unreliable evidence.*
2. *That, there was no sufficient evidence to ground the appellant's conviction.*
3. *That the trial court did not consider the appellant's defence.*

At the hearing of this appeal, the appellant appeared in person while the respondent the Republic was represented by Ms. Rhoida Kisinga learned state attorney.

When the appellant was called to expound his grounds of appeal, he had nothing of substance to tell the court apart from adopting his grounds of appeal to form part of his submission.

On the respondent's side, Ms. Kisinga vehemently opposed the appeal. Submitting on the first ground of appeal she contended that, there was ample evidence to support the appellant's conviction. She maintained that there was consistence in the evidence adduced by PW1 to PW4.

She added that, the evidence was also backed up with the exhibits tendered. She went on stating the appellant himself signed exhibit P4 to show that the evidence was not fabricated.

Ms. Kisinga PW3 narrated on how the appellant was arrested then found in possession of the trophy which he was carrying on his motorcycle. The appellant could not produce any permit when he was required to.

She further submitted in length on how the trophy was identified and valued by PW4 who tendered the valuation form as exhibit P5. She

contended that after valuation, the meat which had started to decompose was disposed in the presence of the appellant.

Ms. Kisinga pointed out that, the appellant failed to cross examine the prosecution witnesses and failure to cross examine the witnesses amounts to admission of the facts. To bolster her arguments, the learned state attorney referred to the case of **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2021 Court of Appeal of Tanzania at Arusha (unreported).

With respect to the second ground, Ms. Kisinga was firm that there was sufficient evidence tendered by the prosecution side to warrant conviction of the appellant after the careful consideration of his defence.

Submitting on the third ground of appeal, Ms. Kisinga contended that the trial court considered the appellants defence as seen on pages 6 and 7 of typed judgment. She argued that the trial court accorded weight and analyzed properly the appellant's defence.

She therefore urged the court to dismiss the appeal.

The appellant rejoined stating that he was arrested in the village in absence of the village leader and he was not charged within 24 hours.

Having gone through the rival submissions of the parties, the sole issue for my determination is whether this appeal has merits.

I will start my deliberation with the first ground of appeal in which the appellant challenged the prosecution evidence to be suspicious, contradictory, inconsistent and unreliable evidence.

In determining the first ground, this court sitting on the first appeal is enjoined to re-asses the evidence on record and where possible to come up with its own finding.

The appellant was charged and convicted with the offence of unlawful possession of the government trophy. The evidence on record shows that the appellant maintained his innocence at all the time. He also claimed that, he was not arrested by the witnesses who testified before the trial court.

He further stated that he was arrested at the village and not in the forest on 18/10/2021 and not on 19/10/2021.

On the other hand, PW3 who was the arresting officer stated that, with his fellow wardens named Goodluck Nnko and Alex Kipii managed to arrest the appellant with the government trophy namely eland meat. PW3 claimed to have signed the certificate of seizure with his colleagues which was tendered as exhibit P4.

However, going through the said exhibit it is only PW3 and the appellant who signed it. His colleagues never signed. I have also gone through exhibit P2 the so called "hati ya makabadhiano ya vielelezo" the two named wardens did not sign as witnesses.

The record further reveals that, it is only PW3 who testified at the trial, whereas other who were listed as prosecution witnesses were not called to testify. This cast a grave doubt on the prosecution case taking into account the claims raised by the appellant that the game warden who testified before the trial court did not arrest him.

Also, the appellant raised the doubt as to where and when exactly he was arrested, the issue which was never addressed by the trial court.

Considering the fact that no reason was given as to why Goodluck Nnko and Alex Kipii were not called to testify to corroborate PW3's evidence.

Their absence entitled the court to draw an adverse inference. In the case of **Azizi Abdallah v. Republic** [1991] T.L.R. 71 which was referred in the case of **Haji Bakari Hassan v. Republic,** Criminal Appeal No. 365 of 2004 (unreported), the Court of Appel held among others that: -

" the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who,

from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

The rule on adverse inference was further reiterated in the case of **Sungura Athumani v. Republic,** Criminal Appeal No. 291 of 2016 (unreported) at page 8 wherein the Court of Appeal stated: -

"Speaking of the rule in adverse inference, it is not quite the obligation of the prosecution to call a superfluity of witnesses. On the contrary, the prosecution is expected, as it is, indeed, in the best interests of justice, for it always be concerned with shortening trials. Thus, where a particular case an incident is deposed by a large number of witnesses, the non-featuring in court of some of the witnesses should not be taken as a cause to disbelieving the prosecution version. ***Nonetheless, the general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who from their connection with***

the transaction in question are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. *" (Emphasis added).*

I am thus settled in my mind that this is a fit case given the circumstances, which entitles to draw adverse inference against the prosecution. The result is to throw more doubts into the prosecution case which legally must be resolved in favour of the appellant.

On submission of Ms. Kisinga, she contended that the appellant failed to cross examine prosecution witnesses which implies the admission of their evidence. She referred to the case of **Nyerere Nyangue v. Republic** (supra) in which it was succinctly pointed out that, failure to cross examine a witness on particular aspect amounts to acceptance of that fact.

This position of the law has been restated in number of cases such as the case of **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 8 of 1992 and **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (all unreported) to mention but few. In the latter case, the Court of Appeal observed as follows:

"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 evidence."

Though it is correct, as submitted by the learned state attorney in view of the referred authority, failure to cross examine a prosecution witness on material respect is tantamount to acceptance of the evidence to be true, the said rule is not absolute.

This was pointed out in the case of **Kwiga Masa v. Samweli Mtubatwa** [1989] T.L.R. 103 which was referred with approval in decision of Court of Appeal in **Zakaria Jackson Magayo v. Republic,** Criminal Appeal No. 411 of 2018 (unreported);

"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the challenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting part on the point. ***The witness's story may be improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross***

examination. *In any case, it may be apparent on the record of the case, as it is in the instant case,* ***that the opposite party, in omitting to cross examine the witness, was not making a concession that the evidence of the witness was true***." [Emphasis added].

I am of the settled mind that, where, like in the instant matter, where the appellant is unrepresented layman, before drawing an inference that, he did not cross examine the witness because he accepted his evidence to be true, the trial court had to consider the weight of the evidence of the prosecution side if it is not wobbly and may warrant conviction without a doubt.

On this point, I would like to draw an inspiration from the High Court of South Africa in the case of **State v. Maxwell Gordon** (171298) [2018] ZAWCHC 106 in which it was stated;

It cannot be fair if an accused person who clearly lacked familiarity with the courtroom strategy and tactics as well as legal knowledge, was ambushed with an explanation of his right to cross examination after the evidence which he did not listen to with an informed mind, was tendered

against him. Unsophisticated accused are generally not oriented in any way and arising out of ignorance, do not know what their role is and what is expected of them by the court during evidence -in - chief. The orientation and induction of accused person should ensure that such accused find their position in relation to unfamiliar circumstances of a court and formally introduce them to what is expected on what is to follow. In my view, fairness to unrepresented accused demands that the right to cross-examine and the purpose of cross examination should be fully explained to him or her before the first State witness is sworn in, affirmed or warned.

It follows therefore the omission by the prosecution to call material witnesses to corroborate PW3's testimony, leaves a lot to be desired on the doubts raised by the appellant on his defence.

Considering that there is the contradiction on the evidence of PW3 who stated that the certificate of seizure was signed by himself and other wildlife wardens, which is Exh. 'P4' it does not bear the signature of anyone except of the appellant. As for other witnesses it only bears their names and dates.

The absence of other signatures of the witnesses, it makes the doubt raised by the appellant on his defence to be plausible; that none of those who arrested him appeared to testify before the trial court.

On top of that, the appellant has raised another doubt on the evidence tendered by the prosecution side on the time and place of his arrest. On this point there is variance of evidence between the prosecution witnesses.

As the records show that, PW3 stated on his testimony he stated that they arrested the appellant on 19/10/2021 during nigh hours with his colleagues. After reporting to their office, they took the appellant to the police station and handed over the suspect to PW1.

Whereas, PW1 on her testimony she stated that she took over the night shift, then in the morning of 19/10/2021 the wildlife warden by the name of Johnson (PW3) brought the appellant to the police station with various exhibits and certificate of seizure.

Again, on the charge sheet arraigning the appellant before the trial court, it did not state the time the appellant was found in possession of alleged government trophies.

This court finds that the inconsistence in the evidence of the prosecution witnesses are not normal errors that would have been caused

by memory loss due to passing of time. As pointed out by the Court of Appeal in the case of **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006, Court of Appeal (Unreported).

The inconsistence and contradictions of evidence of PW1 and PW3 and that Exh. P4 are not minor as they go to the root of the case. The trial court did not address this issue before the trial. As I find that had the trial court tried to resolve these questions he would not have reached into its findings.

As decided by court in the Case of **Ludovick Sebastian v. Republic**, Criminal Appeal No 318 Of 2009, the Court of Appeal found that the trial court did not address the inconsistencies and contradictions in the evidence of the prosecution witnesses which rendered their evidence not credit worthy, but it was relied upon it to convict the appellant.

In the present matter, it is clear that the trial court did not apprehend correctly the substance and quality of the prosecution evidence tendered which resulted into an erroneous finding of fact which necessitates the intervention.

Thus, this court has to step into the shoes of the trial court and make its findings that the evidence of PW1 and PW3 was not corroborating each other and leave sufficiently doubts as to when the appellant was arrested

and who witnessed the seizure on the possession of the alleged wild trophies to warrant conviction.

There is no other cogent evidence to support the allegation that the appellant was really arrested on the night of 19/10/2021 with the wildlife meat which is the government trophy, since he was in the custody of PW1 at the police station since morning of the said date as stated on her evidence.

It is therefore my considered holding that the offence of unlawful possession of the government trophy was not proved against the appellant before the trial court to the required standards.

Thus, the first ground of appeal sufficiently disposes of the appeal before me. Consequently, the appeal is allowed, the conviction and sentence meted against the appellant are quashed and set aside. I further order the appellant be forthwith set to liberty unless lawful held.

It is so ordered.

Dated at **Babati** this 4th date of July, 2023.

G. N. BARTHY

JUDGE