IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 76 of 2022

(From the Resident Magistrate Court of Arusha at Arusha in Economic Case No. 111 of 2017)

ALLEN STEPHANO @ KIMARO ..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

24th May & 23rd August, 2023

KAMUZORA, J.

Before the Resident Magistrate's Court of Arusha, Allen Stephano @ Kimaro, the Appellant herein was charged with three counts. The first count is 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 First Schedule to and section 57(1) and 60(2) both of the Economic and Organised Crimes Control Act [Cap. 200 R.E 2022]. The second count is unlawful hunting of specific and scheduled animal without permit contrary to section 47(a) (c) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14

of the 1st schedule to, and section 57(1) and 60(2) both of the Economic and Organised Crimes Control Act. [Cap. 200 R.E 2002], as amended by section 16 (a) and 13(b) respectively of the written Laws Miscellaneous Amendment Act No 3 of 2016. The third count is unlawful possession of weapon in certain circumstance contrary to section 103 of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the 1st Schedule to and section 57(1) and 60(2) both of the Economic and Organised Crimes Control Act. [Cap. 200 R.E 2002], as amended by section 16 (a) and 13(b) of the Written Laws Miscellaneous Amendment Ac No. 03 of 2016.

After a full trial, the trial court was satisfied that the prosecution side proved its case in the required standard that is, beyond reasonable doubt for all three offences and proceeded to convict and sentence the Appellant to serve 20 years imprisonment for each offence and ordered the sentence to run concurrently. Being aggrieved, the Appellant preferred an appeal to this court challenging both conviction and sentence imposed by the trial court. The Appellant raised 9 grounds of appeal and with the leave of this court he added 4 more grounds.

I do not intend to reproduce the grounds of appeal as they are couched in a confusing manner. I will however point out issues which are gripped from the grounds of appeal.

1. *Whether the charge was defective.*
2. *Whether there was proper search and seizure of exhibits, handling and admission of exhibits in court.*
3. *Whether the offence was proved beyond reasonable doubt against the Appellant.*

As a matter of legal representation, the Appellant appeared in person while the Republic was dully represented by Ms. Riziki and Mr. Hassan Alawi, both learned State Attorneys. With the leave of this court, hearing of the appeal proceeded both by way of written and oral submissions whereas, the Appellants presented his Swahili written submission which was adopted by the court and the Respondent's counsel replied orally.

On the first issue related to the defectiveness of the charge sheet, the Appellant raised two limb of arguments which he considered as making the charge defective; one, that, the provision of section 113 which refer the jurisdiction of the court was not cited in the charge sheet and two, that, the evidence did not support the charge sheet.

On the first limb it was argued that the trial court erred in convicting the Appellant while the charge sheet did not cite section 113(2) of the Wildlife Conservation Act. The learned State Attorney responded that section 113 of the Wildlife Conservation Act confers jurisdiction to the court irrespective of the place the offence was committed. They were of the view that the non-citation of the section did not prejudice the Appellant.

Basically, jurisdiction of the court is the creature of statute and there is no law which enforce the inclusion of jurisdiction section in the charge sheet. Section 113 is not the charging section rather a section referring the jurisdiction of the court. The said section read: -

> *"Notwithstanding the provisions of other written law, a court established for a district or area of Mainland Tanzania may try, convict and punish or acquit a person charged with an offence committed in any other district or area of Mainland Tanzania."*

The above provision is direct on the jurisdiction of the court. It is clear that the Resident Magistrates Court which tried the Appellant had jurisdiction under the law to hear and determine the case even if committed outside its jurisdiction.

The Appellant referred the decision of the Court of Appeal in the case of **D.P.P Vs. Pirbaksh Asharaf & 10 others,** Criminal Appeal No

345 of 2017 to insist that the court had no jurisdiction. I agree that among the issues referred before the Court of Appeal in that case, was the issue on the jurisdiction of the court based on the provision of section 113 (2). However, in its more recent decision, Criminal Appeal No. 325 Of 2021 **The Director of Public Prosecutions Appellant Vs. Damiano Stanslaus Clement and 2 others**, the court cited with approval its decision in **Makoye Masanya and three others Vs. Republic,** Criminal Appeal 12 No.29 of 2014, (unreported). Relying on the provisions of section 387 of the Criminal Procedure Act (CPA), the Court of Appeal held;

> *" So, even if there was a District Court in Meatu, the offence was committed in Meatu, and the Appellants were arrested there, their trial in the District Court of Bariadi is not necessarily an incurable irregularity unless they can show that by so doing some injustice has been occasioned to them. The Appellants have not suggested so in their grounds of appeal or in their oral submission in Court. We therefore reject that ground of appeal."*

Since the jurisdiction of the court is the creature of statute, I agree with the counsel for the Respondent that the Appellant was unable to demonstrate how he was prejudiced by failure to cite the provision relating to the jurisdiction of the court in the charge sheet. In my view, such omission was neither fatal nor prejudicial to the Appellant.

On the second limb, the Appellant submitted that the trial magistrate wrongly convicted the Appellant while the evidence adduced by the prosecution did not support the charge sheet. That, while PW4 who was the valuation officer and PW3 who was the store keeper claim to have seen Zebra meat, it was different from the charge sheet which indicated that the Appellant was found in possession of **wildebeest meat**. He was of the view that the prosecution side was bound by section 234(1) of the CPA to amend the charge sheet for the same to correspond with the evidence.

Responding to this issue, the learned State Attorney submitted that there existed no variance between the charge and evidence. It was insisted that the evidence clearly supported the charge as the Appellant was found in possession of the wildebeest meat and what was disposed is wildebeest meat as per the evidence of PW4 at page 35 of the proceedings. It was insisted that there was typo error from one witness who mentioned zebra meat and the Respondent's counsel prayed for this court to consider that there was no contradiction in the prosecution evidence.

I have revisited the evidence as well as the charge sheet. The charge sheet shows that the Appellant was found in unlawful possession

of wildebeest tail and hind limb. Similar facts were also captured during preliminary hearing. The evidence by prosecution witnesses revel that the Appellant was arrested by PW1 Yasin Omary Beleku and PW2 Ronald Lyimo. In his testimony at page 23 of the typed proceedings, PW1 mentioned that they found the Appellant in possession hind limb and tail of wildebeest namely zebra. At page 26, PW1 gave a detailed explanation on how he identified the tail as he mentioned that zebra tail is peculiar by nature. PW2 also mentioned that they found the Appellant with hind limb and tail of wildebeest namely zebra. He also mentioned that zebra is identified by its peculiar tail and skin colour.

PW1 claimed to have handled the exhibit seized to James Kagusa PW3. In his testimony at page 31 of the typed proceedings, James Kagusa claimed to have received from Yasin Beleko (PW1), hind limb of zebra which was unskinned, tail of zebra and snare/trap made of wire. He reiterated such fact at page 33 of the proceedings when he was referring the exhibits which he listed in the handover document when handling the exhibits to Simon Barnabas (PW4). At page 36 of the proceedings PW4 claimed to have received unskinned hind limb and tail of zebra from PW3 for valuation. His testimony clearly shows that he identified and valuated zebra animal.

The certificate of seizure and handover documents indicate the seized property as tail and hind limb of wildebeest. From that analysis, I agree with the Appellant that there was variance between the charge sheet and evidence on the parts of animal allegedly seized from the Appellant. I do not agree with state attorney's contention that it was typing error only because only one witness mention zebra. From the totality of evidence as analysed above, it is obvious that all prosecution witnesses mentioned zebra in their evidence. Logically wildebeest and zebra are both wild animals but they are different even in their physical appearance. Since the prosecution witnesses were referring zebra, it was expected for the prosecution to consider the variance between the charge and evidence and seek leave to amend the charge. Failure to amend the charge sheet is fatal and prejudicial to the Appellant.

In short, despite the fact that the court had jurisdiction to try the case, it is clear from record that the prosecution evidence did not support the charge hence, the Appellant was prejudiced on that basis. In that regard, it is my settled view that the offence was not proved on the required standards. I therefore find merit in the first ground of appeal and this would have entailed the disposal of the entire appeal.

But for avoidance of doubt and assuming that the evidence supported the charge, what could be looked into is whether the offence was proved beyond reasonable doubt. That entail discussion of the rest of the issues.

On the second issue the Appellant is challenging the procedures for search and seizure of exhibits, exhibit handling/chain of custody and procedure for admission of exhibits in court.

Starting with issue of search and seizure, it was the Appellant's argument that the arresting officers wrongly searched the Appellant without a search warrant and they failed to issue a receipt. That, since the arresting officers were in their normal patrol, they were expected to have search warrant and receipts. He insisted that the arresting officers contravened the provision of section 38 (1) of the CPA. He argued that the case of **Andrea Agustino @ Msagara Vs. Republic**, Criminal Appeal No. 365 of 2018 and **Saban Said Kindamba Vs. Republic,** Criminal Appeal No. 390 of 2019 to insist that where search is not urgent, the arresting office must produce search warrant and issue a receipt for properties seized from the suspect upon search. He was of the view that, since the officers were in normal patrol and had certificate

of seizure it means that the search was not emergent thus, they could have obtained search warrant.

I agree that search warrant is one of the requirements under the law. However, the circumstance of the case could not guarantee procuring of the search warrant before conducting search. The said search was not a planned one as seem to be suggested by the Appellant. From their evidence, the arresting officers claimed that they were in normal patrol when they encountered the Appellant and searched him. In those circumstances, it was not expected for them to stay the arrest until they could seek for arrest warrant. In fact, the search could not be nullified on the basis of failure to obtain search warrant. Similarly, failure to issue receipt cannot invalidate the search unless proved that such failure prejudiced the accused.

Regarding issue for exhibit handling/chain of custody, this goes with the evaluation of evidence in totality. It was argued by the Appellant that there was no proper chain of custody and that the exhibits tendered were not read over in court after their admission hence denied the Appellant his right to a fair trial as the Appellant failed to prepare a sound defence. To cement on this the Appellant cited the case of

Joseph Maganga and Another Vs. Republic, Criminal Appeal No 536 of 2015 (Unreported).

The counsel for the Appellant conceded to the fact that the exhibits were not read out in the court and urged this court to expunge them from record. He however prayed the court to consider the oral evidence in record to convict the accused person in considering the decision in the case of **Robson Mwanjisi and 3 others Vs. Republic, 2003 TLR 218 and Simon Shauri Dawi Vs. The Republic,** Criminal Appeal No 62 of 2020 CAT at Arusha.

In **Robinson Mwanjisi and three others v. Republic,** [2003] T.L.R 218, the Court gave guidance on the proper procedure for admission of documentary exhibits in evidence. It stated *inter alia as* follows: -

> *"whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out otherwise it is difficult for the Court to be seen not to have been influenced by the same."*

In the case at hand exhibits P1 to P6 were well admitted by the trial court but the same was not read out before the court. As conceded by the counsel for the Respondent, all documentary evidences are expunged from record for they were not read in court as required by the

law. However, oral evidence which the Respondent urged this court to consider cannot sustain conviction. As pointed out in the first issue, there is variance between the testimony by prosecution witnesses on what was seized as compared to the charge sheet. While the charge sheet refers exhibits as wildebeest tail and hind limb, the testimony by all prosecution witnesses refers exhibits as tail and hind limb of zebra which were unskinned. With that variance, it cannot be said that there was clear chain of custody of allegedly seized exhibits. That affects the strength of prosecution evidence and cannot safely be relied upon to convict the accused.

Having said so, this court go for determination of the last issue on whether the offence was proved beyond reasonable doubt against the Appellant. With the above analysis on the first and second issue, there is no doubt that the prosecution evidence could not have been safely relied upon to convict the Appellant. It is clear that the evidence did not support the charge and having expunged documentary evidence from record, the remained oral testimony was not water tight to amount to conviction. It is my conclusion that the offence was not proved beyond reasonable doubt against the Appellant. I will not therefore labour much in discussing if in its decision the trial court considered defence evidence

or not. Whether such evidence was considered or not, the fact remains that the prosecution side is bound to prove their case beyond reasonable doubt. The prosecution evidence in this case did not prove the offence against the Appellant beyond reasonable doubt. I therefore find merit in the third issue

In concluding, this court find the Appellant's appeal to have merit and proceed to allow it. The trial court's judgment and conviction are hereby quashed and the sentence imposed against the Appellant is set aside. The Appellant be released immediately from prison unless lawfully held for any other valid cause.

DATED at **ARUSHA** this 23rd day of August, 2023

D.C. KAMUZORA

JUDGE