IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CRIMINAL APPEAL NO.39/2022

(From the District Court of Manyoni at Manyoni, Singida Economic Case 48/2018)

AMOS KISHIWA MATINA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of Judgement: 02/08/2023

A.J.Mambi, J.

This appeal emanates from an appeal filed by the appellant (**AMOS KISHIWA MATINA)** who was charged and convicted by the District Court of Manyoni basing on two counts. In the first count the appellant was found guilty and convicted for an offence of unlawful possession of government trophies c/s 86 (1) and (2) (c) of the Wild Life Conservation Act, 2009 read together with para 14 of the first schedule and section 57 (1) and 60 (2) the Economic and Organized Crimes Act, Cap 200 [R.E.2019]

In the second count the appellant was found guilty and convicted for unlawful dealing with government trophies c/s 80 (1), 84(1)., 111 (1) and 113 (1) (2) of the Wild Life Conservation Act, 2009 read together with para 14 of the first schedule and section 57 (1) and 60 (2) the Economic and Organized Crimes Act, Cap 200 [R.E.2019]

He was convicted as charged and sentenced to 20 years imprisonment.

Aggrieved, the appellant filed his petition of appeal containing the six similar grounds as follows-

I. That, the learned trial magistrate erred in law and fact by convicting the appellant while the trial basing on procedural irregularities.
II. That, the learned trial magistrate erred in law and fact when failed to notice that the chain of custody of the alleged exhibit was made outside the law.
III. That, your honour Judge the trial magistrate erred in law and in facts for admissibility of the prosecution exhibits tendered in court.
IV. That, your honour Judge the Appellant was convicted while the Prosecution side did not prove the case beyond all reasonable doubts.
V. That, your honour Judge the trial magistrate erred in law and in facts when failed to comply with section 9 (3) and 10(3) of the Criminal Procedure Act, Cap 20 R.E. 2019.

VI. That, the trial court erred in law and facts when ignored the appellant defence when analysing and evaluating the evidence tendered by both side.

During hearing, the republic was represented by the learned State Attorney Mr. Mwinginra while the appellant was represented by the learned counsel Mr. Ezekiel.

The learned counsel Mr. Ezekiel briefly submitted that the proceedings at the trial court were tainted by much irregularities on the procedures for tendering and admitting the exhibits. He briefly argued that, it was wrong for the prosecutor to tender exhibits (P1, P2, P3, and P4) instead of the witnesses. He was of the view that since the exhibits were wrongly tendered it means they were also wrongly admitted by the court. To substantiate his argument the learned Counsel referred various decisions of the court

The learned Counsel also contended that the trial magistrate mainly focused on the prosecution evidence and citing the provisions of the law while ignoring the defence evidence

I response, the Republic through the Learned State Attorney Mr Mwingira briefly submitted that he does not agree with the grounds of appeal. The Learned State Attorney submitted that the prosecution did prove the case

against the accused/appellant since he was found in possession of the government trophies that are elephant tasks. The State Attorney submitted that it is true that the exhibits were tendered by the prosecutor but the witnesses prayed to tender the exhibits.

With regard to defence evidence, the learned State Attorney was of the view that if the defence evidence was not considered at the trial court this court can step into the shoes and consider that evidence.

I have thoroughly gone through the grounds of appeal raised and the submissions of both parties. In my considered view the main issue is whether there were irregularities on the procedures at the trial court. The other legal issue is whether the defence evidence was considered on not. The last issue is whether the prosecution proved the case against the appellant beyond reasonable doubt.

I have considerably gone through the trial records observed that the trial court and District court were tainted by immense irregularities that warrants interference of this court. It is on the records that there were irregularities in tendering and admitting the exhibits. The legal procedures and practice are clear that the exhibits are tendered by the witnesses after praying to the

court before those exhibits are admitted. However, the trial court did not follow the legal procedures that makes the proceeding at the trial court fatally defective. I entirely agree with the appellant counsel argument that failure to follow the legal procedures on exhibiting admitting the exhibits vitiated justice to the appellant. Indeed, the prosecution also appears to admit that the exhibits were tendered by the prosecutor instead of the witnesses contrary to the legal requirement.

On the other hand, I have also noticed clear omission from the proceedings and judgement by the trial court as also noted by the appellant under the sixth ground of appeal. If one look at the judgment it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. Indeed, the trial magistrate focused much in quoting the provisions of the laws and summarizing the prosecution facts instead of analyzing and considering the evidence of both parties before making his decision. This according to the law is fatal as it can occasion to injustice to the other party that is the defence or the appellant in our case. The prosecution also appears to admit the omission that is why they were praying to this court to step into the shoes of the trial court and re-consider the evidence. However, the nature of this case and irregularities observed

do not warrant this court to step into the shoes of the trial court and re-consider the evidence as "the shoes are too large" for this court to wear. The only way in my view is to order the trial court to wear its own shoes that fits its legs and walk around the court room to determine the mater de novo.

It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. I wish to refer the decision of the court in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence".***

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering the defence evidence. It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE***

REPUBLIC Criminal Appeal No. 13 of 2012 where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too.*** *It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

It also on the records that the trial magistrate did not properly analyze the evidence apart from just reproducing the provisions of the law and

summarizing the prosecution facts before reaching into his conclusive decision. It should be noted that, it is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to clear any doubt and make a proper reasoned conclusion.

On the other hand, the record such as the Judgment does not show the trial magistrate evaluated the evidence of how both parties and make his decision with reasons. It is the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trait law that every judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the ***point or points for determination, the decision thereon and the reasons for the decision***, dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This can be reflected from section 312 of CAP 20 [R.E.2002] on the mode and content of the judgment which provides as follows:

"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced

to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and ***shall contain the point or points for determination,*** *the decision thereon and the* ***reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

(3) .....

(4) ...."

The importance of clearly analyzing and determining whether the evidence is acceptable as true or correct, was clearly discussed by the court in the case of ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** where it was held:-

"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2019] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".

I also wish to borrow a leaf from other common law countries. In a persuasive decision of the court in ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524)*** Pg 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019] which empowers this court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. The

Court is also empowered in the case of any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

> *"**372.** The High Court may call for and **examine** the record of any criminal proceedings before any subordinate court for **the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,** and as to the regularity of any proceedings of any subordinate court.*
>
> Furthermore, section 373 of the same Act provides that:
>
> *"(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise **comes to its knowledge**, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may* enhance the sentence*; or*
>
> *(b) in the case of any other order other than an order of acquittal, **alter or reverse such order**, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order*

reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will also refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in

that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the laws including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney.

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?. I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only

be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person...***"

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?. In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is a fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for retrial would be more justice and the interests of justice me do so. I am of the considered view that, an order for retrial will not cause any likely of injustice to the appellant.

In the circumstances I therefore remit the file back to the trial court for it to determine the mater afresh and prepare proper proceedings and the reasoned judgment.

Where it appear that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA, Cap 20 another magistrate should be assigned the case to proceed with matter. The Trial Court should consider this matter as priority on and deal with it immediately

within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for proper procedures need to be dealt expeditiously within a reasonable time.

Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

A. J. MAMBI

JUDGE

02/08/2023

Judgment delivered electronically this 2nd day of August, 2023 in presence of both parties.

A. J. MAMBI

JUDGE

02/08/2023

Right of Appeal explained.

A. J. MAMBI

JUDGE

02/08/2023