IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 45 OF 2022

(Originating from Economic Case No. 06 of 2021 of Same District Court)

JULIUS MICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24/07/2023 & 18/08/2023

SIMFUKWE, J.

In the District Court of Same at Same, Julius Michael, hereinafter referred as the appellant was charged and convicted with an offence of unlawful possession of Government Trophy contrary to **section 86(1)(2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009** as amended by **the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 read together with Paragraph 14 of the 1st Schedule to** and **section 57(1)** and **60(2) of the Economic and Organised Crimes Control Act, Cap 200 R.E 2019.**

It was alleged by the prosecution that on 24th day of June 2021 at Kizeruhi Gonja Maore area within the District of Same in Kilimanjaro region the appellant was found in unlawful possession of government trophies to wit:

meat of one buffalo valued at Tanzanian Shillings four million four hundred and five thousand six hundred and twenty-five shillings (4,405,625) the property of the United Republic of Tanzania.

After being arraigned before the trial court, the appellant pleaded not guilty. The prosecution marshalled six witnesses and the defence side had only one witness, the appellant herein. In his defence the appellant stated that he was found with domestic meat to wit cow meat.

After full trial the trial magistrate was of the opinion that the prosecution case was proved beyond reasonable doubts. The appellant was convicted and sentenced to pay a fine to the tune of Tshs 40,405,625/= or to serve twenty years term of imprisonment in default. The appellant was aggrieved, he decided to file the instant appeal. Through his amended petition of appeal, the appellant advanced the following grounds:

1. *That the trial court erred in fact and in law in admitting exhibit PE4 and PE5 as the appellant was not accorded the right to be heard, no photographs of the alleged trophy were taken, no proceeding for disposal were recorded and no disposal order was issued.*
2. *That, the trial magistrate erred in law and fact in that he did not summon the magistrate who is said to have ordered the disposition of the alleged seized government trophy to testify in court.*
3. *That, the trial magistrate erred in law and fact in accepting that hooves and skin of the said animal are perishable items and hence are subject to disposition.*

4. *That, the government trophy that is buffalo meat alleged to be seized from appellant home (sic) being items which change hands easily, the trial court wrongly convicted and sentenced the appellant on the offence charged without proper account of the chain of custody of the alleged trophy.*
5. *That the trial court erred in fact and law in holding that the appellant was found with government trophy a thing which was not proved beyond reasonable doubt.*

The appellant prayed that the conviction be quashed and the sentence be set aside.

Hearing of this appeal was conducted through filing written submissions, the appellant was represented by Mr. Ikamba Robert Msanga, Mr. Emmanuel Mashashi Ntungi and Mr. Mwakisiki Edward Mwakisiki, learned counsels, while the respondent was represented by Mr. John Mgave, the learned State Attorney.

Submitting on the first ground of appeal that the procedures of disposition of the government trophy were not complied with, the learned counsels argued that **section 101 of the Wildlife Conservation Act** (supra) and **paragraph 25 of PGO No. 229** provides guidance on how perishable items can be disposed procedurally by the Director and by the police during their investigation. The learned advocates amplified the cited provisions of the law by referring to the case of **Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017** (CAT) to support their argument.

Basing on the above cited laws, the appellant's advocates submitted that four things have to be done before disposing perishable items; ***first***, the accused must be brought before the Magistrate; ***secondly,*** the magistrate has to note the exhibit, ***thirdly***, the accused must be given right to be heard before the magistrate issues an order for the disposition and ***fourthly,*** photographs of the perishable government trophies should be taken.

The learned advocates argued that, in the instant matter although PW4 and PW5 testified to had taken the appellant to court on 25th June 2021 for procuring a disposition order, it is not on record that the appellant was heard. That is, the appellant was not given an opportunity to comment or say anything before such disposition order could be issued. The learned counsels cited the case of **Wilson Abraham Massawe vs Republic, Criminal Appeal No. 07 of 2022** (HC) at Moshi. It was stated that the same was a serious violation of natural justice as enshrined under **Article 13(6)(a) of the Constitution of United Republic of Tanzania** and as it was held in the case of **Mbeya-Rukwa Auto Parts and Transport Ltd v. Jestina Mwakyoma [2003] TLR 252** and **DPP vs Sabini Inyasi Tesha and Another [1993] TLR 237**. In the former case, the Court held that:

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right.* ***Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part."*** Emphasis added

The learned advocates were of the view that the process of disposing the exhibits should take a form of proceedings where the magistrate should record what transpired during the entire exercise that is from the moment when the prosecution sought an order until when the perishable exhibits are disposed. The proceedings should show every comment made by the accused about the disposal and that he noted the exhibit so as to substantiate the fact that the accused was really heard before the court could make an order disposing the exhibits. They said that, in the instant case the same was not done.

The learned advocates made reference to Items 4.4.1 and 4.4.2.1 of the **Exhibit Management Guidelines (Judiciary of Tanzania: Exhibits Management Guidelines), 2020** which provides for procedures for disposal of perishable items before commencement or during trial and recording of proceedings for every disposal of the exhibit made by the court.

It was argued further that in the instant matter no such proceedings were recorded by the magistrate. The learned advocates emphasised that in the case of **Abraham Massawe** (supra), the court held that such omission to record the proceedings creates doubt which should benefit the appellant.

It was submitted further that the record of the trial court does not show if there were photographs of the alleged seized government trophies as required by the **P.G.O No. 229(25)** which could serve the following: ***First***, it could show the image of the alleged trophy, ***second,*** it could have complemented the inventory form and disposition order and ***third,*** it could show that the trophy really existed. They were of the opinion that

such omission is fatal since it cannot be said with certainty that the alleged seized government trophies real existed and the appellant was found possessing them.

Moreover, the advocates of the appellant faulted exhibit PE5 because the accused/the appellant herein did not sign it. That, the thumbprint which appears there, is not indicating whether it is the appellant and whether it is from left or right hand with the usual words RHT followed by the name. It was alleged that the appellant can write and has a signature as shown in **exhibit PE4** where he signed in the space of signature.

It was also stated that **exhibit PE5** does not have the description of the quantity and type of the meat disposed as it is written buffalo meat which create variance between the charge sheet and evidence on record. That, the trial magistrate erred to admit and rely upon exhibit PE4 and PE5 to convict the appellant.

On the second ground of appeal, the learned advocates faulted the trial magistrate for failure to summon the magistrate who issued disposition order. They were of the view that the said magistrate was necessary to prove to the court: ***First;*** about the disposal application and if the appellant was brought before her; ***second***; she could have told the court about the order she issued and whether there was proceedings; ***third,*** she could have told the court about the government trophies which she ordered their disposal and whether she noted them and ***fourth***, she could have testified about the inventory which is Exhibit PE5 whether it is the same with particulars in the charge. It was averred that failure to call the magistrate who issued the disposal order raises doubt if at all the said magistrate performed the alleged duties. That, the effect of omitting to

call the Magistrate who ordered disposal of exhibit was clearly stated in the case of **Wilson Abraham Massawe** (supra) at page 11. It was insisted that the noted anomalies in respect of exhibit PE4 and PE5 renders such exhibits inadmissible and cannot be relied upon to prove the offence charged as alleged by the prosecution. The learned counsels prayed the court to expunge such exhibits from the records.

On the third ground of appeal, the learned advocates faulted the trial magistrate for accepting that the hooves and skin of the said animal were perishable items that were subject to disposition. They were disturbed with the fact that even the hooves and the skin of the alleged buffalo were disposed. The issue is whether the same falls under the category of perishable items. The learned advocates referred to the definition of perishable items as found under **Oxford Dictionary of Law**, 9th edition which defines perishable to mean *"thing likely to rot quickly or a thing having a brief life or significance especially food stuffs."*

Based on the above definition, the appellant's advocates were of the view that hooves and skin do not fall within the category of perishable items and they were not supposed to be disposed.

According to them, looking at exhibit PE5 the omission of particulars and the entry that what was disposed was buffalo meat was done purposely to hide the truth which was that, what was disposed was not buffalo meat which creates doubt which should benefit the appellant. Reference was made to the case of **Theobald Charles Kessy and Another vs Republic [2000] TLR 186** in which it was observed that disposal of exhibits in contravention of the law works an injustice to the defence. It was emphasised that if courts are to be allowed to dispose even exhibits

which are not perishable before conclusion of a trial or appeal, it will prejudice the accused as the availability of such items may be crucial in creating doubts over the prosecution case. In this case, the learned counsels were of the opinion that the appellant was prejudiced in his defence.

On the fourth ground of appeal the learned advocates submitted that the chain of custody of the alleged trophy from the time when it was seized to the time it was brought in court for disposition was broken. On the outset, they made reference to the case of **Paul Maduka and Four Others vs Republic, Criminal Appeal No. 110 of 2007**, in which it was held that:

> *"Where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence relates to the alleged crime."*

Further reference was made to the case of **Joseph Leonard Manyota vs Republic, Criminal Appeal No. 485 of 2015,** in which the Court made an exception regarding broken chain of custody for exhibits which cannot change hands easily.

Referring the instant matter, the learned advocates challenged the findings of the trial magistrate at page 12 of the typed judgment for holding that the chain of custody was maintained. They contended that the chain of custody was broken when PW4 handed over the exhibits to PW5 for identification and valuation purposes as there was no any documentation to signify the handing over. Thus, it is doubtful whether

the alleged seized government trophies were the same as those handed over to PW5 and ultimately exhibited to court for their disposition.

It was further submitted that the records reveal that there was negligence on part of prosecution in handling the exhibits in their disposal. That paragraph 2(a) of the **PGO (PGO 229)** entrusts the police officer with special duty to protect every exhibit. The learned counsels made reference to page 15 and 17 of the trial court proceedings where on 14.12.2021 the hearing could not proceed due to the fact that the keys to the exhibits room in police store were lost. Also, under the PGO there is a register showing movement of every exhibit which in the instant matter was not produced in court. It was observed that in absence of the register, it cannot easily and safely be concluded that the chain of custody was not broken. That, it creates doubt if the exhibits presented in court were the same as those alleged to be found in possession of the appellant since the keys of the exhibits store were lost.

On the fifth ground of appeal, it was submitted that the prosecution case was not proved beyond reasonable doubt as required by the law. The learned counsels made reference to the case of **Magendo Paul and Another vs Republic [1993] TLR 219** (CAT), **section 3(1) of the Evidence Act**, **Cap 6 R.E 2019** and the case of **Jonas Nkize vs Republic, [1992] TLR 213** which requires the prosecution case to be proved beyond reasonable doubt.

In the case at hand, the learned advocates were of the opinion that the ingredients of the offence of unlawful possession of government trophy were not proved beyond any reasonable doubt because of the following: ***Firstly,*** the blatant procedure adopted to dispose the exhibits made it

unsafe to convict the appellant as demonstrated under the first ground of appeal; ***Secondly***, the prosecution witnesses gave contradictory evidence which is material one as goes to the root of the case as stated in the book titled "**Law of Evidence, 16th Edition, 2007**" quoted in **Dickson Elia Nsamba Shapatwa and Another vs Republic** at page 7. For clarity, the learned counsels reproduced the testimonies of PW3, PW1 and PW2 respectively. That, at page 37 of the typed trial court proceedings, PW3 when re-examined by the court at page 37 he stated that:

> *'The meat was on the ground in the sulphate."*

Moreover, PW1 during examination in chief at page 21 made the following statements:

> *"We decided to go to the other house which is used as cooking place (jiko) where as we found a bicycle and in its carrier was a big pot…" (sic)*

PW2 when examined in chief at page 29 stated that:

> *…then we went to the kitchen, we entered and found the bicycle which had sufuria on top of it."*

From the above versions of evidence, the learned advocates averred that it is apparent that PW3 gave a self-contradictory testimony. Also, the testimony of PW3 contradicts the testimonies of PW1 and PW2. That, the inconsistency and contradictions were in some material facts which unfortunately the trial magistrate relied upon to convict the appellant at page 11 of the typed judgment. That, had he bothered to address the

inconsistencies would have found that the said testimonies fall short to sustain the conviction.

The learned counsels cited the case of **Mohamed Said Matula vs Republic [1995] TLR 3** (CAT), which held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has the duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

The third reason advanced by the learned advocates to support the argument that the prosecution case was not proved beyond reasonable doubt, was that the trial magistrate ignored the defence evidence. That, at page 11 of the typed judgment the trial magistrate acknowledged his duty to consider the defence but did not bother to discharge such duty but rather considered the issue of chain of custody and neglected the evidence of the accused that what was found in his house was cow meat and not buffalo meat.

It was contended further that the trial magistrate's remarks on the appellant's defence that it was an empty shell and a mere childish game of hide and seek crowns it all (page 12 of the typed judgment). That, it is now trite law that failure to consider defence evidence is fatal and vitiates the conviction as it was held in the cases of **Hussein Idd and Another vs Republic [1986] TLR 283** and **Jose Mwalongo vs Republic, Criminal Appeal No. 217 of 2018,** CAT at page 6.

In their conclusion, the learned advocates prayed the appeal to be allowed, the conviction and sentence meted out by the trial court be quashed and set aside and the appellant be released from prison.

In his reply to the submissions in chief, Mr. Mgave for the respondent did not support the appeal. On the first ground of appeal the learned State attorney argued that when the challenged exhibits to wit exhibit PE4 and PE5 were tendered before the trial court at page 43 and 45 of the typed proceedings, the appellant never raised the concern that he was not accorded right to be heard before the disposal of the government trophy could take place. Also, the fact that the appellant signed the inventory form before a magistrate by itself signifies that he was there and heard. Thus, the allegation of the appellant is feeble and bound to fall as it is an afterthought.

Responding to the allegations that the photos were not taken, Mr. Mgave submitted that, it is not mandatory though important. It was averred that since the appellant was present during the disposal and signed, it suffices. Also, the appellant accepted when the exhibits were tendered before the court and he never cross examined. That, failure to cross examine tells the court that the appellant agreed to have witnessed the disposal of the buffalo meat and it did not prejudice the appellant. The learned State Attorney referred to the case of **Nyakwama s/o Ondare @ Okware vs Republic, Criminal Appeal No. 507 of 2019 [2021] TZCA 592** [Tanzlii] which stated that *a party who fails to cross examine on an important matter in the testimony of the adversary side is taken to have accepted what is stated by the said party.*

Responding to the second ground of appeal on failure to call the magistrate who issued the disposal order, Mr. Mgave asserted that it was not necessary to call her since the inventory Form (Exhibit PE5) by itself with a seal of the court was conclusive evidence of the fact that the order was issued by the court. The learned State Attorney referred to **section 143 of the Evidence Act** (supra) which provides that there is no legal requirement for the prosecution to call specific number of witnesses, what is required is the quality of the evidence and credibility of witnesses. In support of his argument, he cited the case of **Yohanis Msigwa vs Republic [1990] TLR 114.** That, evidence of PW6 the court clerk who was present when the disposal order was issued by the Magistrate and the seal of the court in the inventory form signifies the presence and involvement of the magistrate.

Replying the third ground of appeal that the trial magistrate erred to accept hooves and skin as perishable items, the learned State Attorney was of the view that the trial magistrate did not error due to the nature of the items. That, before the magistrate ordered the disposal, it satisfied itself that the said trophies required to be disposed as they were perishable.

On the 4th ground of appeal which concerns chain of custody, Mr. Mgave contended that chain of custody was not broken. He narrated that after seizure was conducted to the appellant's house, the certificate of seizure was filled and signed by witnesses and the appellant. The said certificate of seizure was admitted in court as exhibit PE1 without objection from the appellant. The exhibits were then handled over by PW1 to PW4 through special form and both signed as seen at page 38 of the trial court proceedings. That, the handing over form was admitted in court as exhibit

PE2 without objection. That, the exhibits were then shown to PW5 a Wildlife Officer who identified the same and filled a trophy valuation certificate which was admitted without objection as exhibit PE4. Thereafter, an inventory was prepared by PW4 who took the appellant together with PW1 to the District Court magistrate who ordered the exhibits to be disposed. The inventory was filled to that effect, the appellant signed it together with PW1, PW4 and the Magistrate who issued the disposal order and the exhibits were buried in court premises in the presence of the appellant. The inventory form was tendered in court without objection from the appellant. It was insisted that from the time of seizure to the disposal of the exhibit, all movements of exhibits were documented. That, PW5 was shown the exhibits by the exhibit keeper PW4 and after valuation, the same remained in the hands of the exhibit keeper PW4. Thus, there was no need of documentation of that act of showing exhibits since the exhibits were not taken to another place by the one who valued them; hence, there was no tempering of the same. Thus, there is no point where the chain of custody was broken. It was observed further that the case of **Paul Maduka and Four others** (supra) would have been complied with in the circumstances where the exhibit is handed over to another witness (PW5). Therefore, the cited case is distinguishable to the present matter since the cited case, relates to physical exhibit that is money while in the present matter the subject matter was government trophy and the circumstances of this case do not permit or it is not mandatory to comply with the case above where there is sufficient oral evidence to prove the offence. The learned State Attorney cemented his argument with the case of **Chacha Jeremiah Mulimi and three Others vs Republic, Criminal Appeal No. 515 of 2015** [2019] TZCA 52.

It was stressed that, in this case all witnesses paraded by the prosecution testified how they handled, stored and moved exhibits in question from one point to another and the trial court believed them as there was no reason for not believing their testimonies.

Concerning the argument that the prosecution adjourned the matter on the reason that the keys to the exhibits room were lost, Mr. Mgave responded that at the time when hearing began, the perishable exhibits had already been disposed and those which were not disposed were stored till the day of hearing. Also, it was submitted that producing exhibit register was not necessary if all other exhibits tendered and admitted were enough to prove that the exhibits movement was systematic.

Responding to the 5th ground of appeal that the case was not proved beyond reasonable doubt, it was stated that at page 22 of the typed proceedings, PW1 testified that he arrested the appellant at home in possession of meat in the cooking pot and the appellant signed the seizure certificate. The seized exhibits and the appellant were taken to the police station where the exhibits were handed over to the exhibits Keeper PW4 by filling the handing over form. That, PW4 testified that he stored the exhibits until on 25/06/2021 when the exhibits were shown to PW5 for identification. PW5 identified the meat to be of the buffalo valued USD 1900. Thereafter, PW4 and PW5 took the appellant to the magistrate who as per page 44 of the proceedings ordered the disposition of the exhibits and filled the inventory form which was signed by the appellant. The disposal of the exhibits was done in the presence of the appellant and the said inventory was admitted without objection. It was the opinion of Mr. Mgave that the prosecution proved that the appellant unlawfully possessed the said wild meat.

In his conclusion, the learned State Attorney prayed the court to dismiss the appeal in its entirety.

In their detailed rejoinder, the learned counsels for the appellant reiterated what they had submitted in chief and called upon the court to resolve the grounds of appeal in favour of the appellant.

On the issue of failure to call the Magistrate who issued the disposal order, the learned counsels added that they generally understand that one is at liberty to call a witness of his choice, but they were convinced that not calling a material witness without any explanation is fatal and the court is entitled to draw an adverse inference on a party failing to call such material witness. They were of the view that the Magistrate was a very important witness in this case. To buttress their point, they cited the case of **Aziz Abdallah v. Republic [1991] TLR 71** in which the Court of Appeal stated 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."*

I have considered the rival submissions of both parties, the grounds of appeal raised by the appellant and the trial court's records. The issue for determination is **whether the prosecution case was proved beyond reasonable doubts before the trial court**.

On the first ground of appeal, it was the appellant's lamentation that exhibit PE4 and PE5 were relied upon to convict him without considering

the fact that the law and procedures for disposing government trophies were not complied with since the appellant was not accorded right to be heard, no photos were tendered and there were no proceedings for disposal which were recorded.

Mr. Mgave, the learned State Attorney was of the view that the procedures were fully complied and above all the appellant did not object the admission of the said exhibits which barred him to question the same at this stage.

Starting with the last suggestion of Mr. Mgave, with due respect to him, since the issue touches the point of law, the court cannot ignore it on the reason that the appellant did not object its admission.

Item **4.4.1** and **4.4.2.1 of the Exhibits Management Guidelines, 2020** (supra) provides that:

> *"(a) The court may order storage or disposal of perishable goods before commencement or during trial depending on the nature of the exhibit; and*
>
> *(b) Storage or disposal order shall direct where and how the perishable goods shall be kept and treated.*

4.4.2.1. The court shall record the proceedings for the said disposal." *Emphasis added*

PGO NO. 229 paragraph 25 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 exhibits should be photographed before disposal."

In the case of **Mohamed Juma @ Mpakama** (supra) it was insisted that the accused must be accorded right to be heard during the process of disposal of exhibits. Page 22 of the judgment of the cited case is relevant.

In the instant matter, I hasten to conclude that the appellant was not accorded right to be heard before the court issued disposal order of the alleged buffalo meat. This is evidenced through the evidence of PW6 a court clerk who at page 48 of the typed proceedings stated that:

"…I took the three persons to the chamber of Hon. Hellen Hozza. The three persons entered and the court issued the disposal order in the court…"

The above words suggests that the appellant was not heard. The prosecution did not establish the involvement of the appellant during the disposition of the said trophies and whether he was heard. There are no proceedings to substantiate what transpired before the Magistrate who issued the disposal order.

Despite the fact that the Inventory form (exhibit PE5) contains the thumbprint alleged to be of the appellant, still it cannot be concluded that the appellant was fully involved in the process and that he was heard. Also, as rightly submitted by the learned counsels of the appellant, there is doubt in respect of the signature of the appellant since according to the proceedings of the trial court, the appellant inserted his written signature in the certificate of seizure while in exhibit PE5 the thumbprint was inserted. The said thumbprint has no explanation as correctly stated by

the learned counsels of the appellant which raises reasonable doubts on part of prosecution.

I am of considered opinion that the above noted irregularities are fatal which warrant this court to expunge exhibit PE5 from the record.

The last issue which needs my determination is, whether the prosecution case can stand without exhibit PE5. The answer is definitely *'NO'.* The prosecution case cannot stand without Exhibit PE5 since the same touch the root of the offence as the the same was the subject of the charged offence of unlawful possession of government trophy.

It may be argued by the prosecution that through the evidence of PW1, PW2 and PW3 it was proved that the appellant was found in possession of the government trophy which PW5 the Game Officer who valued the trophy, testified that the same was buffalo meat.

However, as noted on the 5th ground of appeal, the prosecution oral evidence which remains after expunging the inventory form suffers inconsistence to the effect that while PW1 testified that the alleged meat of buffalo was found inside the pot which was on the bicycle; PW3 at page 37 of the typed proceedings stated that the meat was on the ground in the sulphate. I am of considered opinion that the noted discrepancies touch the root of the case as it is not certain as to where the alleged meat was found.

On the strength of the above findings, then I find no need of discussing the rest of the grounds of appeal since the two grounds of appeal alone suffice to dispose of the appeal.

In the event, I hereby quash the appellant's conviction and set aside the sentence meted against him. The appellant is henceforth set free unless lawfully held.

Appeal allowed.

Dated and delivered at Moshi this 18th day of August 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

18/08/2023