IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 65 OF 2022

(Originating from the Judgment Rombo District Court at Rombo in Economic Case No. 6 of 2019 dated 29th December, 2020)

PATROKIL SILVESTER KIMARIO .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

15th August & 12th September, 2023

A.P.KILIMI, J.:

The appellant one **PATROKIL SILVESTER KIMARIO** was arraigned at the District Court of Rombo for two counts, namely; first 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 1st Schedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act, Cap. 200 R.E.2019. And second, is Unlawfully entry into National Park contrary to section 21 (1) (a) of The National Parks Act [CAP 282 R.E 2002] as amended by Act No. 11 of 2003,

At the trial court the particulars of the first count detailed that that on 24th October,2019 at Kamwanga-Kairo area in Kilimanjaro National Park within Rombo District in Kilimanjaro Region, appellant was found in unlawfully possession of Bushbuck meat which is equivalent to one killed Bushbuck valued USD 600 which is equal to 1,380,000/=Tshs the property of the Government of the United Republic of Tanzania. In the second count, at the same time and area, the appellant did enter into Mount Kilimanjaro National Park without permit from authorized officer.

The appellant at the trial court denied the above counts, consequently paraded three witnesses to prove their case. Briefly, Wakala Mohamed (PW2) a park Ranger and Ayoub Richard (PW3) on 24/10/2019 around 07:00hrs being on patrol at Kamwanga area within the Kilimanjaro National Park they saw one Motorcycle mark Boxer with Reg. T 802 B, they surround the said motorcycle and saw appellant coming while carried a sulfate bag and bush knife, they put him under arrest and started to search him whereby inside they found a bag of fresh meat of animal known as Bushbuck ,they then filled certificate of seizure of those items which are meat on a sulfate bag, one bush knife and the said Motorcycle.

Thereafter they took the appellant with those exhibits to Tarakea police station and handled to exhibit keeper known as DC Simon and later on the same day at 11.00 hrs the said trophy was handled to one Ismail Walele Auliae (PW1) a wildlife Officer for identification and valuation, PW1 exercised his profession and identified the said meat to be of Bushbuck valued at 600 USD is equal to Tsh.1,290,000/=.

Before PW3 testified in court, on 8/12/2020 the trial court noticed that the appellant has jumped the bail, the trial court then proceeded to direct the prosecution to continue under section 226 of Criminal Procedure Act Cap.20. R.E.2019. " CPA" Following the close of prosecution case, later on 29th day of December, 2020. The trial court delivered judgment in the absence of appellant and sentenced him to serve twenty years imprisonment for first count and one year imprisonment for second count, also ordered them to run concurrently.

Later after more than a year, it was on 20/9/2022, the appellant was arrested and procured before the trial court, he defended thereat that he was sick. The trial court held that his reasons are not sufficient without any

proof of any medical report, and consequently proceeded to read to him the sentence issued on 29/12/2020.

Aggrieved by the said conviction and sentence of the trial court, the appellant has knocked the door of this court by way of appeal basing on the following grounds;

1. That, the learned trial Magistrate erred in law when he presided the matter without to have a permit from D. P. P.
2. That, the trial Magistrate erred in both law and fact in failing to evaluate in analysis the principles requirement of chain of custody doctrine, consequently rendered the same unestablished to justify the conviction against the appellant taking into account that the alleged exhibit (meat) taken to Tarakea police station from scene of incident but there is more explanation how those exh reached at Mkuu police station and if is the same alleged to be found, with the appellant.
3. That, the learned trial Magistrate grossly erred in law and fact by failing to note that the appellant was not given the right/opportunity to be heard by the magistrate who ordered disposal of the exhibit and no photographs of the perishable government trophy were taken as directed by the PGO.
4. That, the learned trial Magistrate grossly erred in both law and fact by convicting the appellant with the evidence which is un-consistence from PW1, PW2 and PW3.
5. That, the learned trial Magistrate grossly erred in both law and fact by failed to note that there, was contradiction between the evidence of PW1, and others when he said that on 24/10/2019 the Magistrate ordered the said exhibit to be destroyed because the exhibit was started to decay, this left the question whether the said exhibit was seized the some ours ago " at the same day."

6. That, the learned trial Magistrate erred in law and fact when he ruled out that the Act of accused jumped the bail is the one of the indications to establish that the accused had the guilty and based on this to convict the appellant.

The appellant subsequent to the above filed supplementary grounds of appeal as follow: -

1. That, the learned trial magistrate erred both in law and fact in failing to note that, I never singed any document to attest that I was found with bush buck meat.
2. That, the learned trial magistrate erred in law and fact when he failed to not that, the officer who investigated this case was never summoned to testify.
3. That, the learned trial magistrate erred in law and fact in failing to note that no photos were taken to prove that I was with the exhibit at any time.
4. That, the learned trial magistrate erred in law and fact in failing to note that there was no evidence of independent witness.
5. That, the learned trial magistrate never gave any order for disposal of the alleged meat, the order which he should have appended her signature.
6. That, the learned trial magistrate erred in law and fact when he admitted Exhibit P6 (the motorcycle) without proving to the facts as to who is the owner of the said exhibit and who was arrested with the said exhibit after the alleged incident had occurred.
7. That, there was no any, documentary evidence which proved and show that he was the owner of the motorcycle which was found in the National Park by either the store keeper, learned trial magistrate together with his signature.
8. That, the learned trial magistrate erred both in law and fact in failing to note that, Exhibit No. 05 and No. 06 were tendered and admitted in evidence as exhibits one year after his arrest without any reasonable explanation.

When the appeal came for hearing the appellant appeared himself and presented his appeal by filing written submission. Having read his written submissions in context did not follow the above grounds as numbered but in essence he has stated only on two issues, First, he started complaining about the chain of custody of the alleged bushbuck meat, he then contended that the items were unprocedural seized because no receipt was issued to him. He has challenged the manner the items stored up to the time when the meat was disposed, that did not afford reasonable assurance that those exhibits tendered at the trial and destroyed are the same as the one recovered from the forest. To buttress his view, he has referred the case of **ZAINABU D/O NASSORO @ ZENA V.R.** Criminal Appeal No. 348 of 2015 (unreported)

Secondly, the appellant contended that there was no independent witness who witnessed the search and seizure exercise, he then said this is contrary to the law and sought support of the case of **ANDREA AUGUSTINO @ MSIGARA AND ANOTHER V.R.** Criminal Appeal No. 365 of 2018 (Unreported). The appellant end here and left other grounds unattended although he raised them up to supplementary grounds as shown above.

Responding to this appeal, Ms. Edith Msenga, learned State Attorney submitted in respect to the first ground that the consent and certificate were filed at the trial court as shown at page 9 of typed recorded of the court.

Arguing in respect to ground number 6, the learned state Attorney contended that it is not true that the appellant was convicted because he jumped bail as he alleged, but it was proved that he committed the offence beyond reasonable doubt, he was found in possession of Government trophy and prosecution brought evidence therefore the case was proved as per requirement of the law.

Responding to ground number three, she submitted that the chain of custody was established, this is because all process were followed, and paper trail was shown by PW1, PW2 and PW3. PW2 arrested the appellant, with meat of Bush bag, he filled certificate of seizure, accused signed, exhibits were taken at Tarakea Police Station then handled to exhibit keeper who signed, handing certificate was complete. After that exhibits remained with DC Saimon Exhibit keeper, on the same date exhibits were taken to PW1, who did valuation and filled valuation form, then the accused was taken to the court, and inventory was filed and the order for disposal was issued.

In respect to alleged inconsistence by the appellant, the learned counsel responded that such did not occur because PW1, PW2 and PW3 was having no any inconsistent, but she added that even if there is any contradiction, the same is cured by section 388 of CPA, because the same did not go to the root and did not occasion injustice on the part of the appellant.

Replying to the third ground which the appellant is alleging he was not present at the order of disposal, the learned counsel contended that it is not true, the appellant was present and addressed this court to see at page 7 of typed proceeding of District Court

In regard to the complaint that there was no photograph as directed by PGO, the learned State Attorney replied, despite the appellant did not state which PGO says so but also in evidence it is not true. Furthermore, submitting on supplementary grounds, she said in respect to first ground it is not true, because the appellant signed certificate of seizure and inventory. In respect to second ground, she said it is true, the investigator was not summoned to testified, but for the prosecution for those witnesses testified were enough to prove the case as per section 143 of Evidence Act Cap 6 R.E. 2022.

The learned State Attorney further observed that the third ground is a repetition. But for the fourth ground, she contended that there was no independent witness during search due to the circumstances of the search, since the appellant was arrested at the center of Park, thus it was difficult to get independent witness, therefore it qualifies to the emergence search under section 42 of CPA.

In regard to ground number 5 she also said is a repetition. But in respect to grounds number 6 and 7, she responded that it is true that appellant was arrested with motorcycle with registration No. T802B make Boxer, but according to section 351 (1) of CPA, it is immaterial to search for who is the owner of it, so long it was used, prove of ownership is immaterial, prove of possession at the commission of the crime is enough. Last in respect to ground number 8, she contended that, all exhibits tendered was under custody of the police, and the prosecution has established chain of custody until the day it was tendered in the court.

I have considered the rival submissions above, before I proceed with the tackling of the grounds above, I aware that this court being the first appellate court has a duty to re-evaluate the evidence of the trial court, but also, it is trite law that a first appeal is in the form of a rehearing. Therefore,

this court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. (See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) observed that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

The excerpt of the case law above, has triggered me to commence with ground number six above, where the appellant has alleged that, he was convicted because he jumped the bail. In my view to answer this allegation I think it would be better to consider the effect of the appellant jumping bail to his case, the point here is whether upon his arrest and brought before the trial court justice took its course on his part. To appreciate the nature of the appellant's complaint in this ground and for ease reference, I reproduce what transpired at the trial court the date he was procured to be heard therein as hereunder;

"Date: 20/9/2022

Coram: LE.NYELLA - RM

Pros: Chacha Joseph- kinapa

Accused: Present

C/C: Lightenes

PP; *we have arrest accused person who did jumped bail and judgment was delivered in his absence on 29/12/2020, we pray the judgment to be read over to him today in his presence.*

Court; *Prayer granted, accused is hereby asked why he did jumped bail.*

Accused; I *was sick for a long time and I failed to notify the court and my sureties.*

Court; *the reasons are not sufficient without any proof of any medical report, judgment is hereby read over to the accused person.*

Previous conviction

Pp; We have no records of the previous conviction however we pray for a severely sentence.

Mitigation

I have family which depend on me, I pray for mercy of this court.

Court; *the sentence delivered on 29/12/2020, its hereby read over today to the accused person and prosecution side.*

I.E. NYELLA-RM

20/09/2022"

According to section 226 (2) of the CPA Cap. 20 R.E. 2022, the law posed a duty to the trial magistrates to ask the accused who had absented from his trial, whether he had any explanation for his absence. Therefore, this law provides a statutory opportunity to a person who fails to appear after an adjournment but he is all the same convicted in absentia; to explain why he did not turn up for his trial. And for purpose of clarity to this, Section 226 (2) provides that:

> *"(2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied* ***that his absence was from causes over which he had no control*** *and that* ***he had a probable defence on the merit."***
>
> [Emphasis added]

(Also, see the case of **Magoiga Magutu @ Wansima vs. Republic** [2016] TZCA 608 (TANZLII) which quoted with approval the cases of **Marwa s/o Mahende vs. R** [1998] TLR 249 and **Lemonyo Lenuna and Lekitoni**

Lenuna vs. R (1994) TLR 54.). In the case of **Marwa s/o Mahende vs. R** (supra), the court had this to say;

> *"In our view the subsection [i.e. section 226(2) of CPA] is to be construed to mean that an accused person who is arrested following his conviction and sentence in absentia, should be brought before the trial court ... The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are not often represented by counsel.* ***They are not aware of the right to be heard which they have under the subsection, it is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right*** *by ensuring that the accused, upon his arrest, is brought before the court, which convicted and sentenced him, to be dealt with under the sub-section."*
>
> [Emphasis is mine]

In my interpretation of the law above, the said provision provides two duties to the trial court when this scenario happens, first, to ask the accused

convicted in absence caused of doing so, then ascertain the reasons and decide whether he had control or not and the second one is to ascertain whether he had a probable defence on the merit. In the case of **Magoiga Magutu @ Wansima vs. Republic** (supra) the court at page 24 had this to say;

> *"It seems to us the phrase "he had a probable defence on the merit in section 226 (2) of the CPA bear a special duty which trial magistrates have towards the lay accused persons who missed out the chance to testify in their own defence. Here, the law impliedly expected the learned trial magistrate* ***to specifically make a finding whether even from the perspectives of the evidence of PW1, PW2 and PW3; the trial court can glean out some semblance of probable defence for the benefit of the lay accused person.***
>
> *The lay appellant should have been informed that the trial court* ***had discretion to set aside the appellant's conviction in absentia if the appellant showed that his absence from the hearing was from causes over which he had no control and that he had a probable defence on the merit."***

[Emphasis is mine]

I am mindful the said provision create discretion to the trial court to do so, but as a rule always discretion must be exercised judiciously. I am persuaded to borrow the words of my brother Kihwelo, J. (as he then was) in the case of **Mlelwa Salum vs. Republic** [2020] TZHC 4545 (TANZLII) when he said at page 5 that;

> *"Discretion, however wide it may be, is a discretion to be exercised judiciously having regard to the particular circumstances of each case."*

Back home, in this case at hand the trial rightly did direct in the first part of the said law but did not go further to test the second part of the law which is whether the appellant had a probable cause on merit as observed by the law highlighted above. In view thereof I am of considered opinion that the trial court did not exhaust its discretion bestowed to it by the law.

In the circumstances, since the trial magistrate, did not comprehensively address the appellant on the above requirement, it is my

view the appellant was denied his right to be heard under section 226 (2) of the CPA, consequently I hold that this is a fundamental breach which indeed prejudiced the appellant.

The next point I have asked myself is whether this matter be tried *denovo*, I think the answer is simple, since the duty of prosecution case in this matter was exercised to the completion, and having not yet dealt with any ground challenging the prosecution case, in my opinion I cannot set aside the entire prosecution case, but also ordering *denovo* might be used to fill up the gap. In **Idd Abdallah @ Adam vs. R. (CAT),** Criminal Appeal No. 202 of 2014, Mwanza Registry (unreported) the court observed that:

> " *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 purpose of enabling the prosecution to fill up the 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 be blamed, it does not necessarily follow that a retrial shall be ordered/ each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of Justice require*"

However, as observed hereinabove justice dictates the appellant be addressed the requirements of the law above, then upon so doing the trial court should proceed in making the judgment accordingly. In the event the prosecution case at the trial court is hereby not disturbed and proceed to remain intact. But for the remaining proceedings starting from apprehension of the appellant, I invoke my revisionary powers under section 373 (1) (b) of the Criminal Procedure Act (supra), nullify only part of the proceeding dated 20/09/2022 and the trial court's judgment and sentence thereto on two counts charged.

I order that the matter be remitted to the trial District Court for a re-trial only starting from when the appellant was apprehended and presented before the trial court after jumped the bail, then the trial court is ordered to ascertain appellant absence in accordance to the provision section 226(2) of CPA and proceed writing a new judgment forthwith.

It is so ordered.

DATED at **MOSHI** this day 12th September 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: Judgment delivered today on 12th day of September 2023 in the presence of Ms. Edith Msenga, learned State Attorney for Respondent and also appellant present.

Sgd: A. P. KILIMI
JUDGE
12/09/2023