IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISRTY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 84 OF 2022

(Arising from Economic Crimes Case No. 21 of 2021 at District Court of Babati at Babati.)

SILVESTER IRUSU @ SENSE _____APPELLANT

VERSUS

THE D.P.P _____ RESPONDENT

JUDGMENT

10/07/2023 ***&*** *01/09/2023*

BADE, J.

The appellant herein was arraigned at the District Court of Babati at Babati on the offence of Unlawful Possession of Government Trophy Contrary to section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments No. 2) Act No. 4 of 2016 read together with paragraph 14 of the 1st Schedule to Sections 57 (1) and (60) (2) of the Economic and Organized Crimes Control Act (Cap 200 R.E 2019).

The trial court found him guilty and sentenced him to thirty years in prison.

Aggrieved by the aforesaid conviction and sentence, he lodged this appeal on nine (9) grounds of appeal:

i. That, the learned trial magistrate grossly erred both in law and in fact in convicting the appellant on a judgment which contravened mandatory requirement of section 312 (1) and (2) of a CPA (Cap 20 R.E 2022), as the same has no any strong reasons reached by the trial magistrate, rather the same has only suspicion on why the appellant opted to run away till his arrest instead of having critical and thorough evaluation and determination of the evidence on record. Hence the said judgment is null and void.

ii. That, the trial magistrate grossly erred both in law and in fact to convict and sentence the appellant after failed to consider the appellant's defence, especially that of DW2, a chairperson of the hamlet of the appellant's premises who testified not to be involved in witnessed the obtaining of dry and cooked meat at the appellant's premises with the appellant arrest.

iii. That, the trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failed to note that there was variance between charge and evidence on record, as the evidence on the record speaks out that some people other than the appellant were found unlawful possession of government trophy (dry and cooked meat) in the absence of the appellant while the charge sheet states that is the appellant who was found unlawful possession of government trophy hence wrongly conviction and sentence to the appellant.

iv. That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failing to note that the identification of the said dry and cooked meat done by wildlife

officer (PW1) was poor as the witness testified to use his knowledge to identify the allege impala meat which rise some doubts on how can you identify a dry and cooked meat without skin to be government trophy by only knowledge without scientific procedure.

v. That, the trial magistrate grossly erred both in law and in fact in convicting and sentencing appellant after failed to note and consider the evidence of the prosecution side especially the evidence of PW4 a police investigator of the case at hand who testified before the court that on 23-04-2019 he was assigned the case at hand where the suspects (accused) were Paschal Selemester @Monga, Oderia Richard and Maria Elius who confessed to the charge but not the appellant who is Silvester Irusu @ Sense.

vi. That, the trial magistrate grossly erred both in law and in fact to convict and sentence the appellant after failing to note that the certificate of seizure which was tendered and received before the trial court was written names of the other people and signed by those people, this clearly shows that the appellant was not found with any impala meat as charged with, meaning that his name and signature did not appear on the certificate of seizure (PE2) which tendered before the trial court.

vii. That, the trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failed to note that the important exhibits such as certificate of seizure (PE2), inventory form (PE6) which were tendered before the trial court were

tendered by improper people who did not produce the same, hence deny the opportunity to the appellant to make cross examination to the people who was not responsible with the exhibits mentioned above.

viii. That, the trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failing to draw an adverse inference to the prosecution side after they failed to summon material witnesses who were able to testify to the material facts.

ix. That, the trial magistrate grossly erred both in law and fact to convict and sentence the appellant on a charge of offence which was not proved beyond a reasonable doubt.

The essence of this matter lies in the allegation that on the 20th day of April 2019 at Sangaiwe Village within Babati District in Manyara Region appellant was found in possession of impala meat equivalent to one killed impala valued at USD390 equivalent to Tanzanian Shillings Eight Hundred Ninety-Seven Thousand Only (TZS 897,000/=) the property of Tanzania Government without permit from the Director of Wildlife.

During the hearing, the prosecution had a total of four witnesses while on the defense side, the accused had one witness.

The evidence of the prosecution side was to the effect that Nchambi Nguza Sema **(PW2)** after receiving information that in Sangaiwe Village there was a person in possession of a government trophy together with **PW3** who is the chairperson of Sangaiwe Village went to the premises of appellant, they conducted a search, they search a first house and

found small pan with a cooked meat, they also found a dry meat. The search was also done to the 3rd house and found a pot with cooked meat and local honi. In the house, they found the appellant's children who told them that their father went to "Magugu Mnadani". After the search, they took the said meat to **PW1** a wildlife officer who identified and evaluated the seized government trophy. From his knowledge, he identified the trophy as an impala which according to law one impala is equal to USD 390 which is equivalent to TZS 897,000/=.

PW4 a police officer finalizes prosecution evidence by stating that he was assigned a case to prosecute in respect of the offence of unlawful possession of government trophy. In the said case the suspect was Paskali Seleman @ Monga, Oderia Richard, and Maria Elias. That the suspect was under the age of 18 years old. He further testified that suspects confessed to having been found with some meat which was in a pan and pot. There was also a locally made "honi" with six batteries and a spear. The seized meat was disposed of by court order since it had started to decay.

On the defense side, the appellant who testified as **DW1** stated that he was arrested, taken to the police, and then to court without knowing the allegation against him. He further testified that he did not commit the offense he was charged with. His witness, **DW2** testified that as a ten-cell leader, he was not involved in the search which was conducted in the appellant's premises which led to the seizure of the said exhibits and his arrest.

This appeal was argued by way of written submissions having obtained the leave of the court to so do. The appellant appeared in person,

unrepresented, and the respondent was represented by learned State Attorney Akisa Mhando.

Regarding the 1st and 2nd grounds of appeal, the appellant submitted that the trial magistrate unlawfully contravened sections 312 (1) and (2) of the Criminal Procedure Act since he failed to scrutinize the evidence on record before reaching a conclusion. He further argues that there was no reason which led him to impose such judgment and, he failed to consider evidence made by the appellant things which caused such judgment to be unfair to the appellant.

Arguing the 3rd and 4th grounds of appeal, he submitted that the evidence adduced by PW4 as seen on page 17 of the proceedings, is that PW4 was assigned the case and the suspects were Paschal Selemester @ Monga, Oderia Richard, and Maria Elias. He further alleges that PW4 testified that the suspect confessed to being found with the meat which was in the pan and in the pot. In his view, there should be an amendment of the charge as it is required by the law under section 234 (1) of the CPA so long as no methodology is used to substitute the charge from the said three suspects to the appellant being found with a government trophy. He insisted that whenever there is any variation of names of the suspect between the charge sheet and evidence adduced amendment should be done to cure the charge and make it not to be defective. To support his position, he cited the case of **Michael Gabriel, CAT No. 390 of 2019**, where the court held that;

> *"It is stated that the appellant was found in possession of two leopard skins at Ng'arwa-Orkin area in Ngorongoro District, the arresting officer said in his evidence that the appellant was found*

in possession of the government trophy at a distance of 1 kilometer out of Loliondo town where he was arrested".

He prayed to be released since nowhere in the court records shows that the prosecution prayed to amend the charge as per the mandatory requirement of section 234 (1) of the CPA.

Submitting on the 4th ground of appeal, he submitted that the identification was done wrongly as there was no scientific procedure conducted that could scientifically prove whether the said meat originated from impala or from domestic animals. He added that there was no proof of the said meat to be the trophy as it was alleged by the prosecution witness.

Regarding the 6th and 7th grounds of appeal, he submitted that the trial magistrate erred after he failed to note that the certificate of seizure which was tendered and received before the court had written names of other people who are Pascal Seleman, Oria Richard, and Maria Elius and signed by them not appellant. He argued that this shows clearly that he was not found with any impala meat as charged. Its appellant contention that the trial magistrate erred by receiving important exhibits such as a certificate of seizure and inventory which was not tendered by the witness who was not responsible for the exhibit mentioned above.

Moreover, he submitted that section 38 (3) of the CPA put a mandatory requirement for the arresting officer when arresting the suspects with anything intended to be used in evidence must issue a receipt that is the requirement of law and failure by the prosecution to observe such requirement shows that the case was not proved beyond reasonable doubts. He further contended that there was also a serious violation of

section 38 (3) of the CPA as there was no search warrant the search was not an emergency one as the records bear out that there was early information from the informer concerning the deal of possession of the government trophy.

In rebuttal, in the 1st and 2nd grounds of appeal, counsel for the respondent in responding to the allegation that the trial magistrate did not comply with section 312 of the Criminal Procedure Act Ms. Mhando submitted that the trial magistrate did evaluate the evidence of the prosecution together with that of the defence and arrived at the conclusion that the appellant was found in possession of the government trophy. He referred this court on pages 4-7 of the judgment. That at page 6 of the judgment, the trial magistrate did consider the appellant's defense as he stated that there was no evidence to prove that the appellant possessed a permit.

About the 4th ground, he submitted that the trophy was indeed identified by PW1 to be that of impala. On page 8 of the typed proceedings, PW1 stated that he managed to identify it through his knowledge which made him know that both the cooked and dry meat were impala meat. She further stated that the appellant did not cross-examine PW1 on how he managed to identify the meat through his knowledge without scientific procedure. In her view this means that he had accepted PW1's assertion of identification as failure to cross-examine amounts to admission of facts as stated in the case of **Samson Kejo vs The Republic,** Criminal Appeal No. 302 of 2028 CAT at Arusha (unreported) where the court held that:

"It is a trite law that a party who fails to cross-examine a witness on certain fact is deemed to have accepted that fact and will be stopped from asking the trial court to disbelieve what the witness said".

Responding to the 6th and 7th grounds of appeal she submitted that even though the certificate of seizure did not bear the appellant's name, that does not mean that the said meat was not found in his house. She further argues that the appellant did not cross-examine **PW2** as to why the certificate of seizure did not bear his name considering that he was not present during the search. This is an afterthought argument because the appellant allowed the court to receive the said exhibit on page 13 of the proceedings and he did not cross-examine the witness on the allegation of names. She further added that despite that **PW3** was not cross-examined the search was conducted in the presence of **PW3** who is the chairperson of Sangaiwe Village. That his presence was sufficient to prove that the meat was found in the house of the appellant who was not present during the search.

Regarding the allegation that there was no receipt issued after the search, her reply was to the effect that according to **PW2** on page 10 of the proceedings, he stated that he was on patrol when they received information that there was a person at Sangaiwe Village who is in possession of government trophy. In her view this statement shows that they had no knowledge that they were going to conduct a search at the appellant's premises, therefore it was indeed an emergency search. To cement his position, she cited the case of **Matata Assoro and**

Another vs The Republic, Criminal Appeal No. 329 of 2019 CAT at Arusha (unreported) which held that;

> *".....there is no dispute that PW1 did not issue a receipt following seizure but in view of the fact that the appellants countersigned a certificate of seizure containing a list of items seized from them, such certificate was sufficient under circumstances considering that there was also oral evidence from the arresting witnesses and the independent witness".*

The Appellant did not file any rejoinder submission. So having read the filed submissions, I have carefully considered the rival arguments by parties, and am of the settled mind that the issues for determination before me are; (i) whether the judgment of the trial court contains the reason for its decision, (ii) whether there was a variance between the charge sheet and the prosecution's evidence, and (iii) whether the prosecution proved the case against the appellant beyond a reasonable doubt.

Going through the trial court's judgment I found the allegation by the appellant that the said judgment is null and void for contravening section 312 (1) and (2) of the Criminal Procedure Act is misconceived as the said judgment contains points for the determination and reason for the decision therein.

Coming to the allegation that there was a variance between the charge sheet and evidence, first of all, this is a new issue that the appellant did not raise at the trial court. Going through the court record, it is established that the charge sheet states that the appellant was found in unlawful possession of a government trophy and the prosecution

evidence was to the effect that when the search was conducted at the appellant's house, the appellant was not present at the time, so the suspect was his children who were found in that house, after investigation it came out that it was indeed the appellant who brought the said trophy at the house.

That is the reason the original suspects were released and the appellant was arrested a year later as he was nowhere to be found after the incident, so there is no variation between the charge sheet and evidence as alleged by the appellant. The case of **Michael Gabriel vs Republic,** Criminal Appeal No. 240 of 2017 (unreported) cited by the appellant is distinguishable from this case as the facts of these cases are different. The facts of the cited case were that the appellant was charged with being found in unlawful possession of two leopard shins at Ng'arwa-Orikiu area in Ngorongoro District but the arresting officers **PW1** and **PW4** testified during the trial that the appellant was found in possession of skins at a distance of about one kilometer out of Loliondo town where he was arrested. The court found that it was necessary to amend the charge failure of which had the effect of rendering the prosecution case remaining unproven. In the present appeal, the facts are different as the government trophy was found in the appellant's premises in his absence, and the suspects which were mentioned by **PW4** in his testimony were the people who were found in that house during the search and seizure of the said trophy.

Regarding the last issue of whether the prosecution managed to prove the case against the appellant beyond a reasonable doubt, It is the appellant's allegations that they failed as their evidence raises a lot of

doubts taking into consideration that there was no proper identification of the said government trophy, there was no receipt issued after the search and the exhibits were tendered by improper person. Going through the evidence of the prosecution, **PW1** testified that as a wildlife officer, he was able to identify through his knowledge, the meat to be that of Impala, and under the law (See Section 86(4) and Section 114(3) of the Wildlife Conservation Act, as well as Regulation 4 of the Wildlife Conservation (Valuation and Trophies) Regulations 2012); Wildlife Officers are allowed through their knowledge to identify trophies, so the allegation that there should have been scientific procedure is misconceived.

The other allegation is that there is no receipt issued after a search. It is not in dispute that **PW2** did not issue a receipt after the search of the premises and seizure of the said impala meat. The examined trial court record shows that the certificate of seizure was signed by the people who were found in the house where the said trophy was seized including an independent witness, **PW3,** a chairperson of the Sangaiwe Village, so the omission to issue a receipt had no adverse impact on the appellant. In the case of **Matata Assoro (supra)** cited by counsel for the respondent, it was held that:

> *"There is no dispute that PW1 did not issue a receipt following seizure but in view of the fact that the appellants counter-signed a certificate of seizure containing a list of items seized from them, such certificate was sufficient under the circumstances considering that there was also oral evidence from the arresting witnesses and the independent witness".*

About the allegation that the certificate of seizure which was tendered and received before the trial court had written names of persons other than the appellant, this allegation is meritless, as already discussed above that during the search appellant was not present, and the names in the certificate of seizure are the names of the people who were present in the house during the search. It is also in evidence that the appellant was arrested almost a year later because he was nowhere to be found.

Regarding the allegation that important exhibits like a certificate of seizure and inventory form were tendered by a witness who was not responsible, it is on record that the certificate of seizure was tendered by **PW2** who was the maker of such certificate and the appellant did not object to its admission, while the inventory was tendered by **PW4** who had knowledge of the same and the appellant did not object its admission. So, his allegation is misconceived and an afterthought.

The appellant also alleges that the search was conducted without a search warrant, and the record has testified to the fact that the search was conducted without a search warrant.

My proposition now is to take a thorough review of the law relating to search and seizure with particular interest in the requirement of a search warrant. For the purposes of this appeal, the referred law is section 38(1) of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA) read together with paragraphs 1(a), (b) and (c) and 2(a) and (d) of Police General Order (PGO) No. 226. Section 38(1) of the CPA provides as follows:

"38 -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be."

On the other hand, PGO No. 226 paragraphs 1(a), (b) and (c) and 2(a) provide to the following effect:

"1-The entry and search of premises shall only be affected, either

(a) on the authority of a warrant of search; or

(b) in the exercise of specific powers conferred by law on certain Police Officers to enter and search without a warrant

(c) Under no circumstances may the police enter private premises unless they either hold a warrant or are empowered to enter under the specific authority contained in the various laws of Tanzania.

2. (a) Whenever an O/C (Officer In charge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search."

In other words, all things being equal, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38(1) of the CPA and PGO No. 226 paragraphs 2(a) quoted above. In response to this allegation counsel for the respondent argues that the search was an emergency one which is why it was conducted without a search warrant.

The task before me now is to determine whether there were presented circumstances that necessitated the search to be carried without a warrant. It is on the record that **PW2** while in normal patrol received information from an informer that in Sangaiwe Village there is a person with a government trophy, after receiving such information he informed his colleague, and while on the way he informed inspector William of

Magugu police post requesting him to come and accompany them. According to the evidence on record, this search was not in emergency as covered under section 42 of the CPA, since Inspector William at the time he received the information, was at his station; but he did not bother to seek a search warrant or authorization from his boss, a police officer in charge of his station as required by the law. Instead, he went straight to the appellant's premises and conducted the particular search. In the case of The **Director of Public Prosecution vs Doreen John Malemba,** Criminal Appeal No. 359 of 2019, CAT at Dar es Salaam it was held that a search without a warrant under circumstances that are not covered under section 42 of the Criminal Procedure Act is an illegal search.

Conversely, evidence obtained from an illegal search becomes illegal evidence; and it deserves to be expunged from the record.

Expunging from the record the meat which is alleged to have come from an impala as it was illegally seized out of an illegal search; the remaining evidence crumbles for having nothing to support in a cause-and-effect approach. Having so found, the last issue is answered in the affirmative that the prosecution failed to prove the case against the appellant beyond reasonable doubt, hence this appeal is allowed.

Consequently, the conviction and sentence against the appellant is set aside and the appellant is set to liberty forthwith unless otherwise held for some other lawful cause.

It is so ordered.

DATED at **ARUSHA** on the **01st September 2023**

A.Z. BADE
JUDGE
01/09/2023

DELIVERED at **ARUSHA** on **01st September 2023** in chambers in the presence of the Counsel for the parties/ and/or parties in person.

A.Z. BADE
JUDGE
01/09/2023