THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 86 OF 2023

(Arising from the decision of District Court of Mbarali at Rujewa in Economic Crime Case No. 18 of 2019)

IFANDA KAWAGA KISOLI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 17/08/2023
Date of Judgment: 09/10/2023

NDUNGURU, J.

In this appeal, the appellant, Ifanda Kawanga Kisoli, was arraigned before the District Court of Mbarali at Rujewa (herein referred as the trial Court) on five counts. In the first count, the charge was that of unlawful possession of Government Trophies contrary to section 86 (1) (2) (c) (iii) of

the Wildlife Conservation Act No. 5 of 2009 as amended, read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, (Cap 200 R.E. 2002) as amended. In the second count, the charge was unlawful possession of Government Trophies contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended, read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, (Cap 200 R.E. 2002) as amended.

In the third count, the charge was that of unlawful possession of fire arms contrary to section 20 (1) (a) (b) and (2) of the Fire arms and Ammunition Control Act No. 2 of 2015 as amended, read together with paragraph 31 of the first schedule to and section 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, (Cap 200 R.E. 2002) as amended. In the fourth count, unlawful possession of Ammunitions contrary to section 21 (a) (b) and (2) of the Fire arms and Ammunition Control Act No. 2 of 2015 as amended, read together with paragraph 31 of the first schedule to and section 57 (1) and 60 (1) and (2) of the Economic

and Organized Crimes Control Act, (Cap 200 R.E. 2002) as amended and in the fifth count, unlawful possession of Ammunitions contrary to section 21 (a) (b) and (2) of the Fire arms and Ammunition Control Act No. 2 of 2015 as amended, read together with paragraph 31 of the first schedule to and section 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, (Cap 200 R.E. 2002) as amended.

In the first count the particulars are that on 22nd day of August 2019 at Madundasi village within Mbarali District in Mbeya Region was found in unlawful possession of the Government Trophy to wit; ostrich meat valued at USD 1200 equivalent to Tshs. 2,760,684/= the property of the United Republic of Tanzania. In the second count, it was alleged that on the same date and in the same area as in the first count the appellant was found in unlawful possession of the Government Trophy to wit; skin of Topi valued USD 800 equivalent to Tshs. 1,840,456/= the property of the United Republic of Tanzania.

In the third count, it was alleged that on the same date and in the area as stated in the first and second counts the appellant was found in possession of the fire arms make Gobole without permit. Allegations found

in the fourth count, are that on the same date and in the same area as stated in the first, second, and third counts the appellant was found in unlawful possession of ammunition to wit; twenty-three pieces of iron (Golori) and in the fifth count, it was alleged that on the same date and in the same area as stated in the first, second, third, and fourth counts the appellant was found in unlawful possession of ammunition to wit; 20 grams of local gun powder.

The appellant did not admit the charge; hence a full trial was conducted. In order to prove its case, the prosecution paraded a total of nine witnesses and tendered eight exhibits whereas the appellant was a sole witness in his defence. At the end of the trial, the trial Court found that the prosecution had proved its case beyond reasonable doubt and accordingly convicted the appellant on both counts. In respect of the first count, second count, fourth count and fifth count the appellant was sentenced to serve 20 years imprisonment whereas as to the third count the appellant was sentenced to serve 5 years imprisonment.

Aggrieved by the trial Court's decision, the appellant approached this Court armed with seven grounds of appeal which are reproduced herein below:

1. *That, the learned trial magistrate erred both in law and facts to convict and sentenced the appellant while the prosecution failed to handing over certificate of seizure to the custodian, thus affect chain of custody.*
2. *That, the learned trial magistrate erred both in law and fact to convict the appellant while the prosecution failed to tender the extra judicial statement made at the peace of justice.*
3. *That, the learned trial magistrate erred both in law and fact to convict the appellant while the prosecution failed to conduct any scientific procedure to the exhibits alleged possessed by the appellant i.e. ostrich meat and oil were not taken to the chief government chemist for further identification.*

4. *That, the learned trial magistrate erred both in law and fact to convict the appellant while the prosecution witnesses adduced doubtful testimonies.*
5. *That, the learned trial magistrate erred both in law and fact to convict the appellant while some of items mentioned in the certificate of seizure contradicted from some exhibits tendered by prosecution witnesses.*
6. *That, the learned trial magistrate erred both in law and fact to convict the appellant while the prosecution failed to name the case number on the exhibit alleged to be possessed by the appellant, hence handing over to another office could not be fraudulently changed in any other way.*
7. *That, the learned trial magistrate erred both in law and fact to convict the appellant while the appellant was not taken to Rujewa Police Station on 23rd day of August 2019 and the exhibits alleged to be possessed by him handing over to the custodian on 26th day of August 2019 something unlawful before the eyes of law.*

When the appeal was placed before me for hearing, the appellant appeared in person (unrepresented). On the other hand, the respondent/Republic was represented by Ms. Lilian Chagula, learned State Attorney. The appeal was disposed of by way of oral submissions.

On his part, the appellant prayed the Court to adopt his grounds of appeal. He had nothing substantial to say, rather committing the fate of his appeal in the hands of the Court. Finally, he prayed the Court to allow the appeal.

Upon taking the stage to respond to the grounds of the appeal, Ms. Chagula commenced her submission by stating her position that she was not supporting the appeal. As to the 1st and 6th grounds of appeal, Ms. Chagula combined together and argued that the chain of custody was not broken as contended by the appellant. She also submitted that, the said exhibits are government trophies which cannot easily be tempered with or shift from one hand to another. She relied on the case of **Robert Nyambureti Nyanchiwa v The Republic**, Criminal Appeal No. 173 of 2020, HC at Musoma (unreported). She further argued that, the fact that

the exhibit was not numbered is misconceived on the ground that the trophies were given marks.

As regards the 3rd and 5th grounds of appeal, Ms. Chagula submitted that, there was no contradiction in respect of the trophies which were found in possession of the appellant and those mentioned in the certificate of seizure. She also argued that, the witness is not expected to be right in minor details of everything the appellant was found with, on the reason that the time had lapsed. She cited the case of **George Lazaro Ogur v Republic**, Criminal Appeal No. 69 of 2020, CAT at Arusha (unreported) in support of her view. She went on to submit that, the valuer testified to the effect that she identified those trophies by identifying the length of the wings, the smell of the oil and also skin. She added that, the valuer had scientific knowledge.

In relation to 2nd and 4th grounds of appeal, Ms. Chagula referred the Court at page 46 of the trial Court's typed proceedings to the effect that, PW6 who was a justice of peace testified how the appellant made his statement before her. She also argued that, the extra judicial statement made by the appellant was admitted and marked as exhibit P3. She went

on to submit that, PW2 said that they arrested the appellant at his home and not somewhere else as contended by the appellant.

Regarding the 7th ground of appeal, Ms. Chagula argued that, the appellant was sent to Rujewa Police Station on 23rd day of August 2019. She therefore urged the Court to find that the case against the appellant was proved beyond reasonable doubt, hence the appeal to be dismissed.

In his rejoinder, the appellant demonstrated that, he believes his grounds of appeal are very sufficient. In conclusion, he prayed the Court to allow the appeal.

I have dispassionately heard the submissions for and against the appeal on the light of the grounds of appeal and the basis for the trial Court's conviction. I find that the crucial issue calling for determination is whether or not the charge against the appellants was proved to the required standard.

On the point as to whether or not the prosecution proved the case beyond reasonable doubt, I see it is prudent to begin with issue of chain of custody. It is trite that chain of custody is established where there is proper documentation of the chronology of events in the handling of

exhibits from seizure, control, transfer until tendering in Court at the trial. See **Paulo Maduka & 4 others v Republic**, Criminal Appeal No. 110 of 2007, CAT at Dodoma and **Makoye Samwel @ Kashinje & 4 others v Republic**, Criminal Appeal No. 32 of 2014, CAT at Tabora (both unreported). With the development of jurisprudence, it be noted that, it is further settled that chain of custody can be established by oral account of the witnesses. See **Director of Public Prosecutions v Mussa Hatibu Sembe**, Criminal Appeal No. 130 of 2021, CAT at Tanga (unreported).

Going by the evidence on record, at the trial, it is undisputed that the appellant was arrested by PW1 and PW2 at his home on 22/08/2019. The evidence of PW1 and PW3 is to the effect that the appellant was sent to Rujewa Police station on the same date. But to the contrary, the evidence of PW4, the police officer is that the received the appellant with exhibits from PW1 on 23/08/2019. The two witnesses were very clear in their testimony that at the time of arrest the appellant was found in possession of one gobole, 23 piece of iron balls (golori), 20 grams of local gun powder, meat valued at Tshs. 2, 760,684, ostrich meat, one panga, and one axe. That evidence was supported by PW3 who gave the same story.

As I have pointed earlier, the trial Court record show that, the appellant was arrested on 22nd day of August 2019 at 19:00 hours and on 23rd day of August 2019 at about 18.00 hours, was sent to Rujewa Police Station. The record is silent as to where those exhibits and the appellant were kept from the date the appellant was arrested to the date he was sent to the Police Station together with those exhibits. It is at this point the chain of custody starts to break. The prosecution was required to give explanation where the said exhibits were kept before they were sent to Police Station for the purpose of maintaining the chain of custody.

The evidence of PW1 was that the informer told him that there is a person inside the national park possessing the trophies. From his piece of testimony, the informer did not mention the name of the appellant. It is not known at what point in time and what made the witness instead of going to the national park where the informer directed him but decided to go to the home of the appellant. In the first place, PW1 testified that, he was informed by the former that there is a person possessing government trophy inside the National Park. Later on, PW1 told the Court that he was accompanied with his fellow Park Rangers together with VEO of Madundasi

village (PW3) they went to Madundasi village to the appellant's house. This kind of evidence shake the credibility of PW1.

In addition to that, according to the evidence of F.3672 Corporal Salvatory (PW4) said that, on 23rd day of August 2019, he was received exhibits from the Park Rangers namely; Ndabile Yabie thereafter he handed over to G.3340 Corporal Mathayo (PW5) for safe custody. While in his testimony, PW5 said that, on 26th day of August 2019 he was received the said exhibits from PW4. The question here is who is telling the truth. Take it that PW5 is telling the truth, doubt which arises here is where did PW4 keep the said exhibits from 23rd day of August 2019, to 26th day of August 2019, when he handed over the same to PW5 for safe custody.

Further, there are contradictions on items seized from the appellant. The seizure note (Exhibit P1) shows that the following items were seized from the appellant: Gobole moja, Golori 23 (risasi zake), Baruti gram 20, Ngozi ya mnyama Nyamela, Mafuta ya Mbuni kama nusu lita, Mafuta oil kidogo, Kokoro moja (fishing net), shoka moja, Nyama ya Mbuni na Panga moja. However, in their testimony, PW1, PW2 and PW3 who were at the scene did not mention fish net to be among the exhibits the appellant was

found in possession. This flaw could have been resolved if PW1, as the seizing officer, could have complied with the requirement of law which demands the officer seizing the thing to issue a receipt acknowledging the seizure of the thing. Section 38(3) of the Criminal Procedure Act which provides;

> "(3) Where anything is seized in pursuance of the power *conferred by subsection (1) the officer seizing the thing* ***shall issue a receipt acknowledging the seizure of that thing****, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of the witnesses to the search, if any." [emphasis added]*

The other provisions which impose such a duty to the seizing officer is section 35(3) of the Police Forces and Auxiliary Services Act Cap322 R.E 2002 and section 22 (3)(b) of the Economic and Organized Crimes Control Act Cap 200. Further to that, it is trite that the items/exhibits seized during search must have a direct connection with the alleged offence, unless otherwise they are unlawful by themselves. In the instant case among the seized items are panga and axe. The prosecution has never established the existing connection between these exhibits (panga and axe) and the

offence the appellant was arraigned, after all things like panga and axe are for common use particularly in the villages.

Again, the evidence of PW1 and PW2 the arresting officers at page 32 and 33 of the typed proceedings told the trial Court that after arrested the appellant they took him and all exhibits to Rujewa Police Station and they handed over all exhibits to the police officer known as Bryton. However, according to the evidence of F.3672 Corporal Salvatory (PW4) at page 41 of the typed proceedings said that, he received a certificate of seizure from the Park Rangers and took the items listed in the certificate of seizure. In the instant case, no explanation brought from the prosecution witnesses on how and when the said exhibits were handed over to PW4 taking into account that PW1 and PW2 said that they handed over all exhibits to the police officer known as Bryton. This piece of evidence creates a doubt which benefits the appellant.

More so, there was no explanation brought from the prosecution witnesses where the appellant was taken care from 22nd day of August 2019 when he was arrested until on 23rd day of August 2019 when he sent to Rujewa Police Station. The evidence of PW3 is to the effect that

immediately after arrest on 22nd day of August 2019, the appellant was sent to Rujewa Police Station while in his testimony, F.3672 Corporal Salvatory testified to the effect that, on 23rd day of August 2019, he received the appellant at Rujewa Police Station. This is a confusion on the prosecution case.

Further, it is settled law that the statutory period available for the police to interview person suspected to have committed offence are closely regulated by the law under section 50 (1) and 51 (1) of the Criminal Procedure Act, (Cap 20 R.E. 2019). Section 50 (1) (a) of the CPA has prescribe the initial period of four hours for police interview, counted from the time when the accuse is place under restrain in respect of the offence. In case of extension of the time interview desirable, conditions for extension are prescribe under section 51 of the CPA. There is no doubt PW8 recorded the cautioned statement one day after the arrest, which was outside the periods prescribe by the law. In that regard, failure to object admissibility of a cautioned statement that is found to have been recorded out of time would not save the purpose. See **Iddi Muhidin @ Kibatamo v Republic**, Criminal Appeal No. 101 of 2018, CAT (unreported). In the

premises, the extra judicial statement became immaterial because the appellant's cautioned statement was recorded out of time.

In that regard, the contradictions and discrepancies stated above therefore goes to the root of the case. The contradictions were material to the prosecution case. It is now settled that discrepancies and contradictions in the evidence of the witness are basis for a finding of lack of credibility. See **Maramo Slaa Hofu & 3 others v Republic**, Criminal Appeal No. 246 of 2011, CAT (unreported).

Apart from the defects stated above, it is common ground that the government trophies subject to this case were not tendered in evidence. In the instant case, the evidence of PW5 and PW8 display that the said Ostrich meat and Topi skin alleged to have been found in possession of the appellant were disposed of. However, there is no evidence adduced to prove that the appellant was heard by the magistrate who issued the order for disposal of trophies. This contravened paragraph 35 of the Police General Orders (PGO), which requires the magistrate to hear the accused before issuing the disposal order. To back up my position I see it is very crucial to rely on the decision of the Court of Appeal in the case of

Mohamed Juma @ Mpakama v Republic, Criminal Appeal No. 385 of 2017 (unreported), it was held that such inventory form cannot be proved against the appellant who was not accorded the right to be heard. In absence of a hearing proceedings creates a doubt which benefits the appellant.

Therefore, Exhibit P7 is expunged from the record. Since the same was tendered in lieu of trophies there remains no evidence to prove the offence of unlawful possession of government trophies.

In the upshot, the major issue is answered in negative the prosecution did not prove the charge against the appellant before the trial Court beyond reasonable doubts. The conviction is hereby quashed and sentence meted is set aside. Further, I hereby order that, the appellant be set at liberty unless otherwise lawfully held.

It is so ordered.

D.B. NDUNGURU

JUDGE

09/10/2023