IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

DC CRIMINAL APPEAL NO. 69 OF 2022

RASHID HASSANI...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Originating from Economic Case No. 02 of 2018 at the District Court of Pangani at Pangani)

JUDGMENT

29/09/2023 – 16/10/2023

NDESAMBURO, J.:

Rashid Hassani was convicted of the following offences: one, unlawful possession of firearm contrary to sections 20(1)(b) and (2) of the Firearm and Ammunition Control Act, No. 2 of 2015 read together with paragraph 31 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016. Two, unlawful possession of Government trophy contrary to sections 86(1), (2)(c)(ii) and 3(b) of Wildlife Conservation Act No. 5 of 2009 as amended by Written Laws (Misclellaneous Amendment) Act No. 2 of

2016 read together with paragraph 14 of the 1st schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016. Three, unlawful possession of ammunitions contrary to sections 21(b) and 60(1) of Firearm and Ammunition Control Act, No. 2 of 2015 read together with paragraph 31 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2002 as amended by Act No. 3 of 2016. The appellant received sentences of 5 years of imprisonment for the first and third counts and 20 years of imprisonment for the second count. However, the record does not specify the order in which these terms of imprisonment would be served. Expressing dissatisfaction with both the conviction and the sentence, the appellant has chosen to file this appeal.

To support their case, the prosecution relied on six witnesses and five exhibits. The case unfolded through the testimonies of these witnesses, commencing with, Insp. Madata PW1, who recounted the following events: On 10th June 2018, in the company of Coplo Kenneth, PW2, and Mariam Thobias Gedi, PW4 part of the anti-

poaching squad, was on patrol searching for poachers. During their duty, they received information about a poacher who was identified as the appellant. They were also informed that the appellant unlawfully possessed a weapon. Acting upon this information, the trio, including Hussein Mohamed Msuke, PW3, the Village Executive Officer of Mikocheni village, proceeded to the appellant's residence and arrived at approximately 2:30 a.m, they surrounded the area. While outside, they encountered an individual walking and arrested him. He identified himself as the owner of the surrounded house.

While at the house of the appellant, and after/upon identifying themselves, they informed him of their suspicions. The appellant then guided them inside. Both PW1 and PW4 reported that during their search of the appellant's house, they found a black bag labeled "Bob Marley." Inside it, they discovered two tins of dynamite "baruti", seven rounds of ammunition, six marbles "gololi", four fireworks "fataki", a sisal rope, and a piece of iron. When questioned about the whereabouts of the weapon, the appellant directed them to another room. A search of that room led to the discovery of a homemade gun known as "gobore," as well as a waterbuck horn and a warthog

tooth. Following the search, they filled out a certificate of seizure, which was signed by PW1, PW3 (the VEO and an independent witness), and the appellant.

PW2 provided similar testimony to PW1, with the only difference being that she mentioned the waterbuck horn was found in the second room they searched, while the gun was retrieved from under the bed in the same room.

According to PW3's testimony, when they searched the appellant's house, they did not find anything. However, while outside searching they noticed a hanging bag containing seven rounds of ammunition, four firecrackers, and a sisal brush. Inside one of the rooms, they discovered an animal tooth. In another room, which the appellant used as a prayer room, they found a homemade gun and a waterbuck horn.

Following the recovery of these items, they took the appellant to the village offices, where they filled out and signed a certificate of seizure.

On 12th June 2018, PW5, Burhan Hussein, the District Game Officer, received a call and was asked to go to Pangani Police Station. There, he was shown a warthog tooth and a waterbuck horn. After examining and assessing these two Government trophies and at the end, the witness tendered the trophy valuation report as Exhibit P5.

The police file was then assigned to PW6, D/Cpl. Chacha, for investigation. At that time, the appellant was in police custody, and during the interrogation, the appellant could not provide any permit or license for the ownership of the gun. That on 4th June 2019 he took the gun to police headquarter for examination and on the 12th June 2019, he was informed that the ballistic laboratory report was ready for collection. He tendered the report as Exhibit P4 which shows that, the exhibits K – 1 muzzle load gun his report confirmed that the gun, labeled as Exhibit K-1, received from D/Cpl Chacha on 4th June 2019 was examined and found to be a muzzle-loading firearm. It was functioning correctly as designed, and when misused, it could potentially cause death or injury to living beings.

The appellant vehemently denied the charges against him. He acknowledged that his house was searched, but he insisted that nothing was found in his premises. He claimed that the police subjected him to torture and repeatedly questioned him about the gun's whereabouts. They escorted him out of his house, where they encountered a game officer carrying a bag.

Furthermore, they took him to a remote area, lit a torch, and showed him a gun, which the police alleged belonged to him. Later, they opened the bag, revealing two tins, marbles, and ammunition. He was then taken to the Village Executive Officer's office, where he was asked to place his thumb print in a written paper. He was later on taken to police station and charged with the three counts.

After considering the evidence presented by both parties, the trial court was persuaded that the prosecution had proven its case beyond a reasonable doubt. Consequently, it proceeded to convict the appellant and impose the earlier mentioned sentence. The appellant is now challenging this conviction and sentence on the following grounds:

i. *The learned trial magistrate erred in law and fact by acting upon weak, unreliable and contradictory evidence of the prosecution witnesses.*

ii. *The learned trial magistrate erred in law and fact by convicting the appellant on the first, second and third counts respectively which were not proved to the standard required by the law.*

iii. *The learned trial magistrate erred in law and fact by failing to properly consider the defence evidence.*

iv. *That, the prosecution case against the appellant was not proved beyond all reasonable doubt.*

On the hearing date, it was agreed that the matter to proceed by way of written submission. The appellant was self-represented while the Respondent/Republic had the service of Mr. Eric Mosha, a learned State Attorney.

Regarding the first ground, the appellant contended that there was a contradiction between the testimony of PW3 and that of PW1, PW2, and PW4. The three prosecution witnesses claimed that the Bob Marley bag, containing ammunition, firecrackers, and gunpowder, was found on top of the roof inside the appellant's

house, and the gun was recovered in a second room. In contrast, PW3 testified that nothing was found in the appellant's house. Instead, he stated that the bag was discovered outside the appellant's house, and the gun was retrieved from outside the house as well.

He also argued that there is a possibility that the exhibits were planted on him, raising doubts about the credibility of the prosecution witnesses. Additionally, the appellant claimed that Exhibit P4 was admitted improperly, as he was not given the chance to object to its admission when it was tendered as evidence. Furthermore, he pointed out that the warthog tooth was not tendered as evidence during the trial.

He also expressed concern about the prosecution's decision to allow PW6 to present Exhibit P4, the ballistic report, despite PW6 not being a ballistic expert and not having conducted the examination of the locally made gun. The appellant criticized the trial court for not informing him of his right to have the ballistic expert in court for cross-examination.

In conclusion, he argued that the prosecution did not sufficiently prove its case beyond a reasonable doubt and urged this court to grant his appeal.

The respondent strongly opposed the appeal. Mr. Mosha on the first ground contended that the evidence of PW1, PW2, PW3 and PW4 clearly indicate that the appellant's house was searched on the 10th June 2018 and found to contain a local gun, a warthog tooth, a waterbuck horn and ammunitions. These items were seized, and a certificate of seizure was properly filled out and signed by the police officer, the appellant, and an independent witness as required by the law.

The State Attorney firmly asserted that the evidence presented by the prosecution was compelling and sufficient to prove the three offences with which the appellant was charged. He emphasized that the act of signing the certificate of seizure indicated that the appellant accepted that the seized items were found in his possession. In support of this argument, he referred to the case of **Waziri Shabani Mizogi v The Republic**, Criminal Appeal No. 476

of 2019 which emphasized that signing the certificate of seizure implied the acceptance of possession of the seized items.

Regarding the contradictions in the testimony of PW1, PW2, PW3, and PW4, the respondent conceded that there were minor contradictions, but argued that these contradictions did not undermine the prosecution's case as all witnesses confirmed that the alleged items were seized from the appellant's premises. He urged the court to follow the precedent set by the Court of Appeal decision in **Raymond Adolf Louis and two others v The Republic**, Criminal Appeal No. 120 of 2019 where it held that, contradictions by any particular witness or among witnesses cannot be avoided in any particular case.

Regarding the complaint that the trial court failed to consider the appellant's defence, Mr. Mosha contended that the trial court did indeed consider the defence, and he referred the court to specific pages in the judgment. He also requested the court, as the first appellate court, to reevaluate the evidence and make its own

decision if it found that the trial court had not properly considered the defence.

In light of these arguments, he urged the court to dismiss the first ground of appeal.

Regarding grounds two and four, which assert that the prosecution failed to prove the case beyond a reasonable doubt, Mr. Mosha insisted that the evidence provided by the six prosecution witnesses and the presentation of five exhibits clearly established the offences with which the appellant was charged. He also pointed out that the appellant faced charges under the Wildlife Conservation Act No. 5 of 2009, and under Section 100 of that Act, the burden of proof shifted to the appellant, requiring him to demonstrate that he legally possessed the Government trophies.

Additionally, Mr. Mosha noted that the appellant did not cross-examine the witnesses. He cited the case of **Nyerere Nyague v Republic**, Criminal Appeal No. 67 of 2010, where it was held that failure to cross-examine a witness amount to an acceptance of their testimony. Therefore, he argued that the appellant's failure to cross-

examine the prosecution witnesses should be taken as an acknowledgment of their statements.

In light of these considerations, Mr. Mosha urged this court to reject grounds two and four, asserting that the prosecution had effectively proved its case beyond a reasonable doubt.

Regarding the admission of Exhibit P6 which was tendered by PW6, the State Attorney argued that there was no violation of the law. He pointed out that PW6, who tendered the exhibit, was an investigation officer of the case and had knowledge of the said exhibit. He emphasized that the absence of the ballistic expert's did not fatally affect the prosecution's case. He noted that unlike other reports, the Criminal Procedure Act, Cap 20 R.E 2019 does not mandate the court to inform the appellant if he so wishes to summon the ballistic expert for cross-examination. In support of this argument, he cited the case of **Thomas Ernest Msungu v The Republic**, Criminal Appeal No. 78 of 2012.

Addressing the complaint that the appellant was not given a chance to object to the admission of Exhibit P4, the State Attorney

contended that the complaint was baseless, as the record clearly indicated that the appellant had the opportunity to object but chose not to do so.

In conclusion, the State Attorney urged the court to dismiss the appeal.

Appellant did not file rejoinder submission.

After a thorough review of the record of appeal and careful consideration of the arguments presented by both parties, as well as the authorities cited, the central issue at hand is whether the prosecution successfully established its case beyond a reasonable doubt.

Starting with the first ground of appeal which challenges the decision of the trial court for relying on the weak, unreliable and contradictory evidence of the prosecution witnesses, to start with, I would like to cite authorities that govern this area. Among them is the decision of the Court of Appeal of ***Mohamed Said Matula v Republic*** [1995] TLR 3 where it was held that:

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

In **Sebastian Michael & Another v DPP,** Criminal Appeal No. 174 of 2007 (unreported) the Court of Appeal held that:

"It is trite that a contradiction can only be considered as fatal if it is material going to the root of the case".

Yet in the decision of the Court of Appeal in **Dickson Elia Nsamba Shapwata v Republic**, Criminal Appeal No. 92 of 2007 (unreported), it was observed that:

"It is fitting at this point to observe that contradictions by any particular witness or among witnesses cannot be avoided in any particular case".

The pivotal issue in this first ground of appeal revolves around the contradictory evidence provided by the prosecution witnesses, and which was conceded by the learned State Attorney. The contradictions rotate on the evidence of PW3, an independent

witness and that of PW1, PW2 and PW4 as to where the alleged black bag containing the dynamite "baruti", ammunition, marbles, fireworks, a sisal rope and a piece of iron was recovered. Also, where a homemade gun, a waterbuck horn and a warthog tooth were discovered. While PW1, PW2, and PW4 assert that these items were found inside the appellant's house, PW3 contradicts this by asserting that nothing was found inside the appellant's house. According to PW3, the bag was instead, found hanging outside while a gun, a waterbuck horn and a warthog tooth were retrieved from the appellant's other rooms.

The discrepancies mentioned above cast doubt on the reliability and consistency of the prosecution's evidence and give rise to questions about the exact area from which the seized items were retrieved. Considering these contradictions, it is essential to note that the trial court, as per the decision cited above, should have analyzed these inconsistencies and resolve them. Regrettably, the trial court did not discharge its duty to address such contradictions and inconsistencies.

As the first appellate court vested with the mandate to re evaluate the evidence and come up with its own finding, having re examined and considered the said contradictions and inconsistencies and having taken into consideration the timeline of events, specifically, the incident that occurred on 10th June 2018, and the subsequent testimonies given in court during June 2022. It is undeniable that a significant span of four years had transpired since the incident took place. Further, I have taken into account that, inconsistency among the witnesses is bound to happen, however, despite the above, I find the inconsistency shown by the prosecution's witnesses to be major and go to the root of the case and thus creating doubt as to whether the alleged exhibits were found in possession of the appellant. The reasons for holding this position are not far-fetched. The prosecution's case suggests that all four witnesses were present during the search of the appellant's house. If indeed all four witnesses were present and actively involved in the recovery of the exhibits, it would be improbable for each of them to provide divergent testimonies. It is noteworthy that not only PW3's testimony on where the alleged bag was recovered, but also

the place from which the waterbuck horn and the gun were retrieved differs from the testimonies provided by the prosecution's witnesses. It must also be considered that, the appellant in his defence raised a doubt that, the bag might have been implanted on him because the bag was found outside his house and he alleged that the game officer was carrying it.

In addition, as rightly submitted by the appellant, the warthog tooth was not tendered in evidence and this casts doubt on the prosecution's case while Exhibit P4 the waterbuck horn was unprocedurally admitted.

From the above illustration, I hold that, the first ground of appeal has merit and thus the inconsistency must be resolved in favour of the appellant. Consequently, I hold that, the prosecution did not successfully prove that, the appellant was indeed in possession of the alleged muzzle loader gun, the government trophies or the ammunitions. As a result, the first ground alone is sufficient to determine this appeal.

In the sentence where the trial court remained silent regarding the manner in which the sentences was to be served, it is important that the trial courts adhere to the established precedent. Specifically, in situations where sentences are imposed for offences committed in the course of the same transaction, it is imperative that they are served concurrently, unless there are specific exceptions that warrant a different approach. See **Emmanuel Mathias v The Republic**, Criminal Appeal No. 132 of 2020 CAT (unreported).

Consequently, the appeal is allowed. The judgment and the appellant's conviction are quashed. The sentence imposed on the appellant is set aside. The appellant is to be released from prison unless there are any other lawful orders in place.

It is so ordered.

DATED at **TANGA** this 16th Day of October 2023.

H. NDESAMBURO

JUDGE