

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO. 25 OF 2023

*(Originated from Economic case no. 46 of 2019 in the Resident Magistrate Court of
Morogoro at Morogoro)*

HASSAN ATHUMANI FUNDI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 31/07/2023

Date of Judgement: 13/10/2023

BEFORE: G. P. MALATA, J

At the Resident Magistrate Court of Morogoro, the appellant herein was charged with the offence of unlawful possession of Government Trophies to wit; twenty (20) wildebeest tail worth USD 13,000 equivalent to TZS 19,966,300 contrary to section 86(1)(2) of the Wildlife conversation Act (WCA), No.5 of 2009 [Cap 283 R.E 2002] as amended

by Written Laws (Miscellaneous Amendments) Act no. 4 of 2016 read together with Paragraph 14 of the first schedule and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act (EOCCA), Cap 200 R.E 2016 as amended by Written Laws (Miscellaneous Amendment) Act No. 4 of 2016.

When the charge was read over to the accused (the appellant herein) pleaded not guilty to the charge. To prove the case, the prosecution brought a total of seven witnesses and tendered six exhibits.

The testimonies which led to the conviction of the accused at the trial court was as follows;

PW1, PF 18327. Ins. Nyoni testified that he is the police officer with 14 years' experience, on 04/05/2019 around 900 nights while at the police station he received the officer from Matambwa National Park which is within Selous Game Reserve, who told him that there are people selling government trophies at Duthumi. They prepared for the arrest measures and went to Bonye village where they managed to arrest the appellant who was with his other fellows who managed to ran away. They interviewed the appellant who admitted to have trophies and lead them to his house, they found no one at the house, later she came the woman by the name of Salome Bunga who decided to knock on the

door one woman came out and she introduced herself as Angela Jonas, she recognized the appellant as her in law. They called the ten leader and informed him about the accusation against appellant.

That it was testified that, the appellant took the officers to his room and show them a black bag and after opening they found twenty trophies covered with white towel, a bus ticket with the name Thahiri Mchopanga.

It is on record that, the appellant told them that, the trophies belonged to Thahiri who was at the guest house at Bonye in room number six. The officers filed the certificate of seizure, the appellant signed with his finger, the certificate was also signed by the ten-cell leader and one wildlife officer. PW1 identified the certificate of seizure and prayed the same to be received as evidence by the trial court, the first accused (the appellant herein) objected the tendering of the evidence based on the fact that he was not arrested around 9.00pm the bag was not found on the table and he was forced to sign the document. While the 2nd accused didn't object the admission of the exhibit. The trial court found the objection by the accused is not the legal one and the certificate of seizure was admitted and marked as Exhibit P1 and was read before the parties and court.

Further PW1 identified the bus ticket with the name Thahiri Mchopanga from Masasi to Dar es salaam and the both accused didn't object the admission of it, and it was admitted and marked P1.

PW1 further testified that they took the exhibit together with the appellant to the police station for interrogation, the appellant told the officers that he was given the wildebeest by a person who sleep in one guest house, they went to the guest house and the watchman told them that the person they are looking for is at room 6, they found the second accused and upon interrogation he denied to know the appellant, but he agreed that the bus ticket belongs to him he is from Masasi to Duthumi as a witchdoctor, search was conducted in the room and they found nothing, the second accused was also found with another ticket which belonged to Shemkanda bus with name Thahiri Mchopanga from Dar es salaam to Duthumi, PW1 identified the bus ticket received and marked exhibit P3.

PW2, Enock Samwel Maywazi, the conservation warden testified that on 04/05/2019 while at his place of work, he was informed that at Duthumi area, Bonye village there is someone with government trophies, they informed the office and got permission to go ahead, they went to Duthumi police station and give information to DC Nyoni and make

arrangement so that they can arrest the suspect. Around 9.00 pm they went to the and they were informed that the one with the trophies is the first appellant, they started looking for him and they found him around club of the local beer and the witness pointed at the appellant, the appellant confessed before the officers that he has twenty trophies and they decided to go to his house and the appellant he led them to his mother-in-law house. They managed to call the neighbour and the ten-cell leader. They try to knock the door of that house and one woman by the name of Angelina Jonas opened the door and she recognize the appellant as his son in law. The appellant led the officers in the room and show them a small bag black in color which was near the table, upon opening the bag they found the trophies covered with white towel, after counting them was 20 trophies.

They file a certificate of seizure which the appellant also signed, PW2 further stated that he can identify the certificate of seizure as it has his name and signature, they also found the bus ticket which belonged to Tashriff with the name Thahiri Mchopanga from Masasi to Dar es salaam and PW2 identified the ticket (exhibit P1) by pointing out the marks mentioned. PW2 further testified that the appellant told them that he was assigned to collect the trophies by one traditional doctor by the

name of Thahiri Mchopanga and that the ticket and the bag belonged to him. the appellant told them where to find the second accused and he led them to Bunye Guest house where they found the second accused. The appellant recognized him as Thahiri Mchopanga as person who assigned him to collect the trophies. They conducted search in the room and found nothing, they took both accused to the police. PW2 identified exhibit P2.

PW3, F8175 PC Eligius testified that on 04/05/2019 around 6.00 pm he saw Inspector Nyoni coming with two people who were under arrest with the police and wildlife officer, he told them that he arrested those people with government trophies. PW3 kept the suspect in custody and he asked the accused to hand over their properties, the second accused handed over TZS 449,000/=, slippers blue in colour, ticket of Shemkand Bus from Dar es salaam to Duthumi dated 04/05/2019, he wrote a prison property receipt and gave the copy to the accused.

PW4 H5981 DC Msae testified that on 05/05/2019 he was called by Inspector Nyoni and assigned file with no. KIK/IR/148/2019 which concerned found with government trophies, he was assigned to investigate the case, he was handed over twenty trophies which was wrapped in a white towel and put on the small black bag and the

accused were already in custody. He started to interrogate the appellant, he introduced himself to him and told on the purpose of interrogation and his rights, that he is not forced to say anything concerning the allegation, his right to call the relative to be present during interrogation and the appellant agreed to give the statement, in the course of interrogation the appellant admitted to be arrested with twenty trophies and he stated that he was assigned to collect them by one Thahiri Mchopanga who is the local medical from Masasi. After recording the statement, he read the statement to him and the first appellant signed the statement. He looks for one Jospeh Bilango who made valuation of the trophies and made valuation report and PW4 recorded his statement. After the investigation he took the accused with the exhibit and hand them over to Morogoro police station. At the police he handed over the exhibits to Coplo Quilinus. PW4 identified exhibit P2. He further stated that he can identify the statement made by the appellant through his signature, handwriting and name of the appellant and the appellant's signature. PW4 prayed the document to be admitted as evidence, the appellant objected its admission on the reason that the statement was taken on 07/05/2019 while he was arrested on 04/05/2019. The court had to conduct an inquiry and later the court

rejected to admit the statement for it was taken outside the prescribed time without any extension of time.

PW5, Shabani Kondo Samta testified that on 04/05/2019 he was at his house, one of the citizens came to his house and told him that he should go to the house of one Angela the police are looking for him. After reaching the said house he found Insp, Nyoni and other police who informed him that he was called as the leader of that place to witness arrested a man. He recognized the person under arrest as Athuman Hassan Fundi. PW5 testified that, the accused was hired by one local doctor, the accused directed them to the room where he kept twenty trophies, he took the bag and took off twenty trophies which were covered with a towel, inside the bag they also found a bus ticket of Tashriff company. The police officer filed a certain form and the accused signed it and other two namely Salome Bunda and Angelina Jonas signed as well. PW5 identified the certificate of seizure, the bus ticket and the bag with twenty trophies.

PW6, Joseph Changula Bunango testified that he is the wildlife officer and among his duties is to conduct valuation and examine government trophies, on 05/05/2019 while at his office he was called by DC Msae to go to Duthumi police as there were trophies which need to be examined.

He went to Duthumi Police station, he found DC Msae who came out with black bag and took out twenty trophies which were covered with white towel, PW6 recognized the trophies and identify them to be nyumbu trophies as it has black and white colour and at the end it has gray colour. He filed the valuation form by following conservation Act no. 5 of 2009 and GN No. 207 of 2012.

PW7, E8949 testified that he is a police officer and on 06/09/2019 he was at the Central police station in Morogoro, he was handed over exhibits with case no. KIK+/IR/148/2019 with D/C Msai from Duthumi police station, the exhibits was small black bag and inside there was twenty government trophies covered with white towel, he handed over a ticket bus of Tashriff bearing the name of Thahiri Mchopanga, the handover was done by the form called the chain of custody and he registered it on register book and named it entry 223/ 2019, on that entry he specify the date he received the exhibits which was 06/05/2019 at 10.00 am. The exhibits were 20 trophies, white towel which was inside the bag and the bus ticket.

On 03/12/2020 Ins Nyoni came to give evidence in court and PW7 was the one who carry the exhibits to the court for Insp. Nyoni to handover to the court\ PW7 identified the book written the court exhibits register,

P 16 No. 2/2018, No. 1/2017 and entry number 223/ 2019 and he prayed to the court the book to be received as exhibit, and the court exhibit register was admitted without objection and marked as exhibit P5.

That marked the end of prosecution witness, having heard such evidence the trial court found out that, the appellant had a case to answer. They were given the right to defend their case, generally they denied to have any involvement with the case.

DW1, Hassan Athumani Fundi testified that on 04/05/2019 he was at a local beer club where the police came, his other friends ran away and he was surprised as to why they are running away because he was innocent he remained on that place. The police arrested him and asked him if he was Fikiri Abdallah, he said that is not his name and he told them his name. The police asked him to take them to his house, he asked as to why he should take them to his house and he was told that he will know when they reach there. They start to go to his house on the way the police officer told him that he should have taken them somewhere else, they took him to a place he doesn't know and the house he is not aware with, they stayed outside the house and he didn't know what the police did on that house as it was night time. They took

him to the police station and they send him to lock up where he met the second accused for the first time. They stayed at Duthumi police station for two days and they were taken to Morogoro Central Police station, they stayed there four days and they were taken to the court and given the case that they sell the wildebeest, the appellant stated that the case against him is fabricated and that is why the prosecution failed to call the woman to prove that the bag was found in his room, as to his name is Hassani Athumani and not Hassani Fundi, PW7 on his evidence said he does not know the him, the arresting officers and police who received him at Duthumi both said he was not arrested with anything, PW5 did not bring any evidence that he is among his village people.

DW2 testified that testified that on Saturday around 10.00 pm he was around stand where he saw four people who introduced themselves to him as police, they took him to the police without his consent and locked him at the police custody and join him with Hassan Athuman for the offence of being found with government trophies. The police officers asked him not to say anything, from the court they took him to prison. Dw2 further stated that PW1 proved to this court that he arrested him without warrant and they took all his properties without his consent.

On assessment of evidence, the trial court was satisfied that, the prosecution had proved the case against the appellant beyond reasonable doubt, the; learned trial Magistrate convicted and sentenced the appellant to serve twenty years imprisonment. Aggrieved by conviction and sentence, the appellant raised four grounds of appeal as follows;

1. That, the learned trial Magistrate erred both in law and fact for failure to comply with the mandatory procedure laid down in section 210 (3) of the Criminal Procedure Act [CAP.20 R.E 2019].
2. That, the learned trial Magistrate erred both in law and fact for failure to read the charge to the appellant in the language the appellant can understand.
3. That, the learned trial Magistrate erred both in law and fact for failure to read the charge to the appellant without taking into consideration that chain of custody was not established as per procedures laid down in the Police force and Auxiliary Services (Police General Order) Order,2021, Order 229 as,
 - (i) No explanation on how the alleged 20 tails were handled first at Duthumi Police Station.

- (ii) No document tendered to prove who handled the alleged exhibits from Duthumi Police Station to central Police of Morogoro.
 - (iii) Only black bag alleged to keep exhibits was marked with exhibits registered number but not the exhibits (20 tails) themselves as require by laws.
 - (iv) Failed to label the alleged exhibit at scene as per paragraph 8 of P.G.O 229.
4. That, the learned trial Magistrate erred both in law and fact for failure to realize that the owner of the house which was found with the alleged exhibits who was the crucial witness was not brought to court to prove if the appellant was indeed living in that house.
 5. That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant based on exhibit P6 which was not a document authorised by the law to ensure the chain of custody.
 6. That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant without consideration that there was no arrest warrant tendered by prosecution to prove that appellant was arrested as per law procedures.

7. That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant based on the search and exhibit P1 was conducted without a search warrant contrary to procedure of law.
8. That, the learned trial Magistrate erred both in law and fact for admitting exhibit P1 contrary to the requirements of the laws i.e. No trial within a trial conducted to prove the exhibit P1.
9. That, the learned trial Magistrate erred both in law and fact for failure to take into consideration the defense evidence rather he took only part of defense to exclude co-accused from the offence.
10. That, the learned trial Magistrate erred both in law and fact to enter conviction relying on the evidence of PW1 and PW2 while their evidence was strongly denied by appellant.
11. That, the learned trial Magistrate erred both in law and fact to enter conviction without corroborative evidence.
12. That, the learned trial Magistrate erred both in law and fact for failure to examine as to where those twenty (20) Nyumbu been killed as the evidence of PW7 adduced.
13. That, the learned trial Magistrate erred both in law and fact to enter conviction against the appellant while the prosecution case was not proved to the hilt.

When the appeal was called for hearing both parties were presented, the appellant was unrepresented while the respondent (Republic) was represented by Mr. Emmanuel Kahigi learned state Attorney.

Submitting in support of the appeal, the appellant quarried as to why the owner of the house where the exhibit was found, was not called as witness.

As to the fifth ground the appellant stated that exhibit P6 used in convicting him was erroneously used as the same was invalid as it was not explained as to how the chain of custody was before tendering it to court.

Submitting on the sixth ground the appellant stated that, he is complaining that there was no arrest warrant produced in court.

On the seventh and eighth ground of appeal complained that the exhibit P-1 was admitted without trial within trial.

Submitting on the ninth ground of appeal, the appellant complained that the court did not consider the appellant's evidence.

As to the tenth, eleventh and thirteenth ground of appeal the appellant stated that there was no evidence to corroborate and warrant conviction.

The twelfth ground of appeal, the appellant fault the trial court that it did not consider as where the 20 nyumbu were killed.

The appellant prayed the first, second and third ground to be considered accordingly. He further prayed that the appeal be allowed, conviction quashed and the sentence be set aside.

Responding to the submission by the appellant, Mr Kahigi stated that the Republic oppose the appeal based on the following;

On the first ground the appellant is complaining on noncompliance of section 210(3) of the CPA. The provision requires the trial magistrate to read the evidence and ask the witness to comment on it. It is true that, there is nowhere stated that, the section was complied with. This being a mandatory provision was not complied with, the learned counsel, however stated that he see no effect to the evidence passed without requirement of section 210(3) of CPA being complied with.

As to the second ground of appeal, the learned counsel stated that, it is a mere afterthought as he did not understand the nature of the charges due to language problem.

Submitting on the third ground of appeal, the learned counsel stated that the chain of custody of the seizure items is well stated on page 65 –

67 depicts as such the prosecution witnesses detailed well on how the chain of custody mannered accordingly.

On the fourth ground Mr. Kahigi stated that, it is exempted by section 143 of the Evidence Act, that there is no law compelling either party to call certain witness and that there is no number of witnesses to prove a case in court.

As to the sixth ground he submitted that, they are reiterating what is submitted on the third ground.

With regard to the seventh ground of appeal, on arrest warrant, the stated that there was no need of arrest warrant in terms of section 13(1)(a) of CPA, PW1 testified that he received information of the incidence, section 14(1) the police officer may arrest without arrest warrant.

That on the eighth ground he submitted there is no need to have trial within trial as it was neither cautioned nor extra judicial statement which require for such procedure but not for such other documents. As to the ninth ground, he submitted that, the evidence by the appellant was considered at page 8 of the judgment.

As to grounds 10 and 11, the case was proved beyond reasonable doubt, all the prosecution witnesses and all tendered exhibits proved the case beyond reasonable doubts. As to the twelfth ground, the issue was unlawful possession of government trophies were proven before the court. Mr. Kahigi prayed told this court that, the appeal has no merits thus be dismissed accordingly.

On his short rejoinder, the appellant stated that, the alleged house belonged to Angelina Jonas but he was not living with Angelina Jonas.

To start with, this being the first appellate court, has a duty to revisit the whole proceedings, evidence and any other records admitted in court during trial, with the view of understanding the evidence and procedures used to arrive at the conclusion. This position was promulgated in the case of **Leonard Mwanashoka vs. Republic**, Criminal Appeal no. 226 of 2014 (unreported), where the court of appeal held that;

"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the of the first I appellate court, to not only summarise but also to objectively evaluate the gist and value of the defence evidence,

and weigh It against the prosecution case. This Is what evaluation Is all about'

That being the position I shall consider the grounds of appeal as submitted by the appellant and the learned state attorney while re-evaluating the evidence of the trial court.

The first ground relates to noncompliance with section 210(3) of the CPA

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.

I have noted that, the court did not comply with the provisions of the section, it did not read the evidence of all witnesses. The records of appeal don't indicate how the trial magistrate complied with the requirement of section 210(3). This was procedural error. However, I hasten to remark that the said omission did not cause miscarriage of justice on the part of the appellant, in his complaint the appellant made an empty claim without indicating how he was affected by that noncompliance.

It is settled that such omission is an irregularity which is curable under section 388 of the CPA as the Court of Appeal decided in the case of **Paul Dioniz vs. Republic**, Criminal Appeal no. 171 of 2018 while quoting with approval the case of **Flano Alphonse Masalu @ Singu vs. Republic**, Criminal Appeal no. 366 of 2018 (both unreported) that;

"If we may go further and ask ourselves whether non-compliance of section 210(3) of the CPA prejudiced the appellant to the extent that it occasioned miscarriage of justice, our answer would be in negative. This is because such anomaly can be cured under section 388 of the CPA. On this we are guided by the case of Flani Alphonse Masalu @Singu vs. Republic, Criminal Appeal no. 366 of 2018 (unreported).

To succeed on such kind of ground of appeal, must not only plead that there was non-compliance of the section but also has to demonstrate how the non-compliance prejudiced him. In the present case, the appellant just pleaded non-compliance without indicating how the irregularity occasioned injustice to him.

For the reasons, I have stated above, **I find no merit on this ground of appeal and is hereby dismissed.**

On the second ground, the appellant faults the trial court magistrate for failure to read the charge in a language he can understand. The record bears the testimony that the court read the charge and explain to the accused and asked him to plead thereto. It read the charge on 22/10/2020 before trial commenced, for easy reference I hereby reproduce what transpired;

*Court: Charge read over and explained to the accused persons
who are asked to plead thereto*

Accused plea

1st Accused plea

It is not true

Signed

2nd accused plea

It is not true

Signed

I have carefully examined the records of the trial court. The appellant and the second accused who is not part of this appeal were arraigned before the trial court on 14/05/2019. The charge was read to the accused, the accuseds plea were not recorded for lack of DPP consent.

On 22/10/2020 new charge was brought to the court together with the certificate conferring jurisdiction to the trial court to prosecute the appellant and they were admitted in court, hence confer full jurisdiction to entertain the case.

If the charge was read in language not understood to the appellant, that was a fatal omission rendering the whole proceeding a nullity, because the appellant was not afforded a reliable interpretation of the courts proceedings and he was therefore prevented from understanding the proceedings.

Looking carefully at the trial court records charge was read to the accused on the same day and they all pleaded not guilty to the charge, the plea was followed by the preliminary hearing.

In **Mussa Mwaikunda vs. Republic** (2006) TLR 387, the court of appeal had time to explain what constitutes fair trial. The court said:

"Perhaps it is useful to digress a bit and state here that there must be minimum standards which have to be complied with if an accused person is to undergo a fair trial. As stated in Regina vs. Henley (2) (a case from New South Wales Court of Criminal appeal) quoting Smith J, in R vs Prosper at page 48 the standard are;

- (a) To understand the nature of the charge*
- (b) To plead to the charge and to exercise the right of challenge.*
- (c) To understand nature of the proceedings namely, that is an inquiry as to whether the accused committed the offence charged.*
- (d) To follow the course of proceedings.*
- (e) To understand the substantial effect of any evidence that may be given in support of the prosecution.*
- (f) To make a defence or to answer the charge*

Given the circumstances of this case, it is without doubt that the trial court did comply and the appellant was made aware of the proceedings before it and cross examine the prosecution witnesses, in view of what they testified. If he was not aware, how was he able to cross examine and enter defence evidence for something he did not know. Certainly, this court finds it as mere afterthought. **This ground has no merit and is hereby dismissed.**

Regarding others grounds of appeal touching evidential value, this court decided to look at wholly.

Having gone through the evidence on record this court gathered that; **one**, PW1 received information from undisclosed person that, there were some people at Bonye Village dealing with Government trophies, **two**, on receipt of the said information from undisclosed person PW1 with other officers went to Bonye Village and arrested the appellant at local brew club, **three**, that PW5 stated that the appellant's room was searched in the present of himself, Salome Bunda and Angela Jonas found Government trophies and the certificate of seizure was signed by Salome Bunda, Angela Jonas and the appellant, **four**, that in course of search they retrieved one black bag with twenty (20) Government trophies and bus tickets, **five**, appellant stated that, he was given a job to buy Government trophies by local doctors (PW5 testified).

Reading between lines of the evidence by the prosecution who bears the duty of proving the case beyond reasonable doubt, I have undoubtedly gathered that; **first**, neither the prosecution witness stated that the informer named the appellant to be responsible for selling Government trophies, **second**, it is silent as to how arresting officers of the appellant came to know the appellant without being told his name or shown by good samaritan and that there is no link as to how they did go to arrest the appellant in the absence of any piece of evidence linking the

appellant with the said trophies. Further the appellant was at local brew club arrested with no wildebeest tail, how did they go to arrest him in the absence of trophies been in possession of the appellant? **third**, during arrest the appellant was found with no Government trophies, **forth**, they went to search the appellant's room in the house belonged to Angela Jonas and found one black bag, Tashriff tickets and twenty (20) Government trophies, however, there was no special mark given to the black bag, Tashriff tickets and the twenty (20) Government trophies to differentiate with others as they are commonly existing.

Seizure is regulated by section 38 (3) of the Criminal Procedure Act Cap. 20 R.E.2022 which gives the following directions:

*"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being **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 witnesses to the search, if any.**"*

There was no description or special mark was placed differentiating with other items seizure in other crimes. The issue of just mentioning the

black bag, Tashriff tickets and twenty (20) Government trophies to me does not suffice. The prosecution ought to have provided evidence specifically establishing among others, the special marks put by the officer at the time of seizure of items from the appellant and how it was stored for purposes of making assurance that, the items are ones found with appellant and not otherwise. That was not done all.

Fifth, the certificate of seizure is alleged by PW5 to have been signed by PW5 himself, Salome Bunda and Angela Jonas who were present at time of searching. The paragraph states that; at page 57.

"Then he fill certain form and 1st accused signed it, and that Salome Bunda sign, it also Angela Jonas sign. After I sign that I leave that place."

At page 29 **PW1**, testified that

*We managed to call the ten leader and he come and he was called **Shabani Kondo Samata**.....*

That certificate of seizure, I was the one who fill that and the 1st accused sign through his finger, ten cell leader, and one officer from wildlife office".

The certificate of seizure **Exhibit P1** provides person who signed on it that;

*"Signed: **Insp. Nyoni***

*Person his house searched: **Hassan Fundi***

*1. Witnesses to the search: **Shaban Kondo Samata** and*

*2. Witnesses to the search: **Eneck Majahasi**."*

Looking at the story of the above quoted part of evidence by the prosecution witnesses, it is clear that, the three pieces of evidence is narrating different and separable story which do not link to each other in any way. **First**, PW5 mention the person who signed **exhibit P1** to be himself and two women, namely Angela Jonas and Salome Bunda. This one independent story, **second**, PW1 through his oral testimony mentioned persons who signed **Exhibit P1** to be himself, accused, PW5 and one officer from wildlife office. This is another independent story and no mention of persons by PW5 though they were together and no women involved and **third**, the last independent story is that of **Exhibit P1** which elucidate that, the certificate was signed by PW1, Hassan Fundi, Shaban Kondo Samata and Eneck Majahasi, the last independent story.

To me these contradictions are fatal and casts reasonable doubt on the prosecution evidence.

In the case of **Said Ally Ismail Vs. R**, Criminal Appeal No. 249 of 2008 (unreported), it was categorically said;

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

Where there are inconsistencies, the Court's duty is to consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the matter. That was said by the Court in the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3 in the following words:

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

Sixth, the evidence on record depicts that, there were Government trophies, however, neither of prosecution witnesses linked with wildebeest tails as the Government trophies testified about. They failed even to mention it at once. It is trite law that, evidence must be adduced for the purposes of proving the fact in issue. In criminal cases

the Republic bears the duty of proving existence of facts, event and fact in issue that the accused is and the only person who committed the offence. Evidence adduced therefore must prove the items of which the accused is arraigned with. In this case prosecution must prove what is specifically stated in the charge sheet, that is accused being found in unlawfully possession, control and knowledge of the wildebeest tails totaling twenty (20). The evidence on record speaks of government trophies without mentioning and proving specifically the nature of trophies the accused is arraigned with. However, the evidence on record do not hit for any specific trophies namely wildebeest tails and proving it beyond reasonable doubt. The only piece of evidence is **Exhibit P1** which is doubtful for the above stated reasons. In the case **Sylivester Stephano Vs Republic, Criminal Appeal No. 527 of 2016**, the court of appeal principled that;

"As it were, the appellant was facing a charge of being found in unlawful possession of Government trophy. The charge alleged the trophy to be hippopotamus teeth. One of the basic principles of our criminal justice is that the prosecution is, in every trial, duty bound to prove the charged offence beyond all reasonable doubts.

In that accord the prosecution was bound to establish that the appellant was found in possession of the

hippopotamus teeth and that the possession was unlawful.

The contradiction complained of here is in respect of the kind of trophy the appellant was found in possession. The contradiction would have been resolved by a properly filled certificate of search envisaged in section 22(3) of the Act. Unfortunately, Exh. PE1 is of no assistance at all on account of apparent deficiencies implored by the learned State Attorney that the part indicating the type of trophy has been altered. In the circumstances, as rightly argued by the learned State Attorney, it cannot, with certainty, be concluded that it referred to hippopotamus teeth. We, therefore, have no hesitation to state that the contradiction complained of is material and goes to the root of the prosecution case."

It is trite law that, one of the basic principles of our criminal justice is that the prosecution is, in every trial, duty bound to prove the charged offence beyond all reasonable doubts. Further, should there be any inconsistency or doubt in criminal case which goes to the root of the case such doubt has to be resolved in favour of the accused.

That the noted inconsistencies and contradictions herein above in my view touches the root of the matter, thus the justice itself.

The principle of chain of custody entails the court careful handling of what is seized from the accused up to the time when evidence is tendered in court. See the case of **Paul Maduka and another vs. Republic**, Criminal Appeal no. 110 of 2007. In order to maintain chain of custody, the appellant has to show affirmatively that tempering has taken place and the court must prove its chronological documentation that record the sequence of custody of evidence and the evidence collected needs to be preserved from the time it is collected to the time it is presented in court. The idea behind recording the chain of custody is to establish the alleged evidence is in fact related to the alleged crime. In the case of **Illumina Mkoka vs. Republic**, [2003] TLR, 245 (Unreported) the court held that:-

*".. the point that proper recording of the chain of custody of exhibits helps to establish that **the alleged evidence (exhibits) is in fact related to the alleged crime.**"*

As stated above therefore, absence of clear chronological chain of custody of what were seizure, recorded, marked with special identity, transferred to exhibit officer, kept and brought to court creates a grave doubt. Further, the inconsistencies and contradictions pointed about is another area of doubt. Failure to connect the appellant as to how they

arrested him in the absence of being first named by the informer and that the appellant was arrested at local brew club, how then did they arrest him?

There no evidence linking these two incidences. We are expecting that, arresting the appellant must have been preceded by some other information not only that there were people at Bonye Village dealing with trophies but the names of those culprits must have been disclosed for the police officers to arrest the appellant. That piece of evidence which is in my view vital is not there. How then did the PW1 go direct to the appellant and not someone else?

The owner of the house was present during search, seizure and arrest of the appellant, further PW1 and PW2 testified that they arrested the appellant, who upon interrogation showed them where he hid the trophies, the appellant disputed that evidence and stated that the police are the ones who took him to the house of one Angelina Jonas. It is true that, Angelina Jonas and Salome Bunda were not called to testify.

In the case **Boniface Kundakira Tarimo vs. Republic**, Criminal Appeal No. 350 of 2008 (unreported), the Court made the following observations:

"... It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against the party, even if such inference is only a permissible one"

Angela Jonas and Salome Bunda who alleged by PW5 to have been present during search and signed the certificate of seizure did not in fact sign and document including the certificate and were not called as witness. Considering the three different stories by PW1, PW5 and **Exhibit P1** which casted doubts. The raised point though not mandatory to call them but it adds to the already observed shortfalls.

Having took time to re-evaluate and reconsider the evidence on record, in line with principles governing proof of criminal offence, I now wish to be guided by the case of **Nyawkama s/o Ondare @ Okware v. Republic**, Criminal Appeal No. 507 of 2019 (unreported) where it was held:

"Before we embark in considering the appellant's, we must state that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence

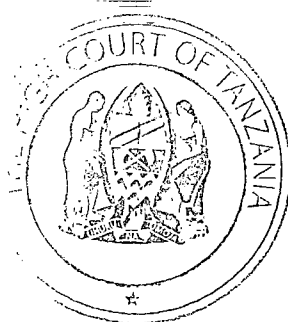
*side before it arrives to the conclusion of the case for and against the issues framed for determination. **Indeed, if this task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion; more so where failure to consider the appellant's defence is remarkably an issue in a given appeal.***


In the light of evidence on record, it is incontrovertibly that, the prosecution evidence was full of inconsistencies, contradictions and gaps, thus failed to prove the offence of being found with unlawful possession of Wildebeest tails totalling twenty (20) beyond all reasonable doubts against the appellant.

In the upshot, I hereby allow the appeal, quash conviction and set aside sentence imposed by the trial court. It is further, ordered that, the appellant be released from custody forthwith unless lawfully held by any other offence.

IT IS SO ORDERED


DATED at MOROGORO this 13th October, 2023.




G. P. MALATA
JUDGE

13/10/2023

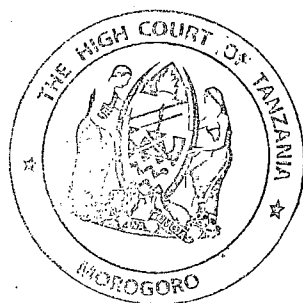
Court: Judgement delivered at Morogoro in Chambers this 13th October, 2023 in the presence of Appellant and Mr. Simon Mpina, State Attorney for Republic.


A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023

Court: Right to appeal to the Court of Appeal explained.




A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023