IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 54 OF 2023

(C/f Economic Case No. 09 of 2021 District Court of Monduli at Monduli)

YAHAYA HASHIM @ ISSA ..... 1ST APPELLANT

KRISTOGON DAMIAN @ STANSLAUS ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th August & 13th October, 2023

TIGANGA, J.

The appellants, Yahaya Hashim @ Issa was arraigned before the District Court of Monduli at Monduli (trial court) for the offence of Unlawful Possession of Government Trophies contrary to section 86(1) and 2(b) of the **Wildlife Conservation Act No. 5 of 2009** as amended by section 59(a) and (b) of the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016 read together with paragraph 14 of the 1st Schedule to and section 57 (1) and 60(2) of the **Economic and Organized Crimes Control Act**, Cap 200 R.E. 2019 (EOCCA).

According to the prosecution evidence as indicated in the particulars of the offence in the charge sheet, it was alleged that on 21st November, 2020 at Bwawani area, Kigangonic, Mto wa Mbu area within Monduli District in Arusha Region, the appellants were found in unlawful possessing six (6) teeth of Giraffe which is equivalent to one Girrafe valued at USD 15,000 equivalent to TZS 34,635,000/= the property of the Government of United Republic of Tanzania.

During trial, prosecution evidence was to the effect that, on 21st November, 2020, PW4, a Wildlife Officer, received information that there people suspected to do illegal activities at Bwawa la Lekeni. They followed the tip given to the lake and found the appellants. As they looked suspicious, they searched the and found them with Giraffe teeth. The 1st appellant had 4 teeth while the 2nd had two teeth. They filled a Certificate of Seizure, arrested the appellant and took them to Monduli Police Station. The appellant pleaded not guilty; the Republic was supposed to prove the case at the required standard.

In their defence, the appellant denied the offence against them on the ground that, they were just arrested and alleged to be involved in poaching activities of the wild animal to wit; Giraffe while in fact they did not. They

claimed that they were not involved in the hunting or killing of the said Giraffe. At the end of the trial the court was satisfied that the prosecution proved their case against the appellants to the required standard. They were thus convicted and sentenced to either pay fine to the tune of Tshs. 346,350,000/= or serve twenty years imprisonment. Aggrieved with the decision, they filed this appeal advancing eleven (11) grounds as follows:

1. That, the trial court erred in law and fact when it determined Economic Case No. 9 of 2021 without requisite jurisdiction contrary to section 26 (1) of EOCCA as the record only shows consent but not certificate.
2. That, the trial court erred in law and fact when it convicted and sentenced the appellants in contravention of section 237 (1) of the **Criminal Procedure Act**, Cap 20 R.E. 2019 (CPA).
3. That, the trial magistrate erred in law and fact in convicting and sentencing the appellants by relying on exhibit PE1 and PE2 hence they were not properly admitted during trial.
4. That, the trial court misdirected itself when it held that, the said teeth were real Giraffe teeth while the identification method used was feeble which leaves doubt.
5. That, the trial court erred in law and fact in convicting the appellant on a defective charge for the same was at variance with evidence in respect of the place where the offence is alleged to have ben committed.

6. That, the trial court erred in law and fact in failing to note that, the prosecution side contravened mandatory requirement of section 38 (3) of the CPA.

7. That, the trial court erred in law and fact when it relied on exhibit P5, the Certificate of Seizure which was illegally acquired as it was not read out at the crime scene by the arresting officer.

8. That, the trial magistrate erred in law and facts in convicting the appellants without observing that there was non-compliance of section 231 (1) of the CPA.

9. That, the trial magistrate erred in law and fact in holding that the prosecution proved the case beyond reasonable doubt while there was serious contradiction in prosecution witnesses.

10. That, the trial magistrate erred in law and convicting and sentencing the appellants basing on extraneous matters which were not stated during trial.

11. That, the trial court erred in law and fact in failing to consider the appellant's defence as it raised doubts to the prosecution case.

The respondent/Republic opposed the appeal. Hearing of this appeal was by way of written submissions. At the hearing the appellants appeared in person and unrepresented whereas the respondent was represented by Ms. Akisa Mhando, learned state attorney.

On the 6th and 8th ground of appeal, the appellants submitted that, the arresting officers failed to issue receipt acknowledging seizing them with the alleged Government Trophies. Thus, there was violation of section 38 (3) of the CPA as underscored in the case of **Shaban Said Kindamba vs. The Republic**, Criminal Appeal No. 390 of 2019. The also argued that, the trial court failed to explain to them the substance of their charge contrary to section 23 (1)(a)(1) of the CPA which prejudiced them.

Regarding ground No. 7, the appellants argued that, the arresting officers did not read the Certificate of seizure to them after they filled the same. This prejudiced them the right to fair hearing, they prayed that the said exhibit be expunged.

Submitting jointly on the 9th and 10th grounds, appellant asserted that, the case against them has not been proved to the required standard, as there was no independent witness during their arrest and there was no receipt issued in respect to the items seized.

Lastly, the appellants complained that, their defence evidence was not considered as they all testified to be arrested in two different places. More so, the trophies which are alleged to be arrested with are small boned which can be picked anywhere and easily planted to them. They prayed for, this

Court allow the appeal, quash the conviction and set aside the sentence and set the appellants free.

Disputing the appeal Ms. Mhando submitted on the 1st ground that at page 2 of the typed proceedings, the record shows that the consent was filed which also implies that the Certificate conferring the trial court jurisdiction was filed along with it. Thus, the trial court entertained this matter as per the section 12 (3) of the EOCCA as the same was clothed with jurisdiction.

On the 2nd ground, Ms. Mhando, Senior State Attorney submitted that, the preliminary hearing (PH) is part and parcel of the trial as held in the case of **Gidion Musajege Mwakifamba and Another vs. The Republic**, Criminal Appeal No. 451 of 2019, CAT at Mbeya. In that, there was no err in substituting the charge during PH and the same was in pursuant to section 234 (1) of the CPA.

Regarding the 3rd and 4th grounds, Mr. Akisa submitted that, there was no error in reading exhibit P1, Giraffe teeth even though the same were not documents. Reading it did not prejudice the appellants in any way. Also, their identification was proper, as PW2 told the trail court that, due to his

expertise, he managed to identify such teeth and noted they have three stents indicating that they belong to a Giraffe.

On the 5th ground of appeal learned Senior State Attorney argued that, although the charge sheet and the evidence shows that, the appellants were arrested at Lekeni Bwawani and Bwawani area, both are the same place. Thus, there is no contradiction on the area where the appellants were apprehended and the trophies seized.

As to the 7th ground, Ms. Akisa conceded to the fact that, the Certificate of Seizure, exhibit P5, was not read to the appellants after their arrest. However, the same was neither objected nor cross examines during tendering and admission of the same. She prayed the Court to refer to the case of **Joseph Kanankira vs. The Republic**, Criminal Appeal No. 240 of 2019, CAT at Arusha and **Nyerere Nyague vs. The Republic**, Criminal Appeal No. 67 of 2010 where the Court of Appeal observed that, failure to cross examine on important material aspects or facts amounted to accepting such facts.

As to the 6th and 8th grounds, Ms. Mhando submitted that, the appellant's signing of exhibit P5 amounts to receipt of the same. Also the testimonies of PW3 and PW4 sufficed to prove that, the appellants signed

the said certificate. To support that contention, she referred the Court to the case of **Matata Nassoro and Another vs. The Republic**, Criminal Appeal No. 329 of 2019 CAT at Arusha, where the Court of Appeal ascertained that, since the appellants signed the certificate, in presence of seizing officers and independent witnesses who testified in court, the same is enough proof that, they signed. More so, the trial court complied to section 231 (1) (a) (b) of the CPA as reflected on page 33 of the typed proceedings.

On grounds 9th and 10th grounds, she argued them jointly that, lack of an independent witnesses was due to the fact that the appellants were arrested where there were no civilian residences nearby as they were in the middle of the park. To cement her point she cited the case of **Emmanuel Lyabonga vs The Republic**, Criminal Appeal No. 28 of 2020 where the Court of Appeal held inter alia that when search is conducted in remote areas with no dwelling houses, authorizing officer can conduct search and seizure without independent witness as required under section 106 (1) (b) of the WCA.

On the last ground, Ms. Akisa submitted that, appellants' defence was considered as seen in page 9 and 12 of the impugned judgment. However,

the same was baseless that is why it was disregarded. He prayed that; the appeal be dismissed.

In their rejoinder, appellants reiterated their position as put clear in the submission in chief and maintained that, that the case against them was not proved at the required standard.

Having gone through trial court's records and each parties' submissions while having in mind the principle that, as a first appellate court I am duty bound to assess and re-evaluate the evidence, the only question for determination is whether the case against the appellants was proved to the required standard to warrant their conviction.

Starting with the 1st ground, appellants claimed that, the trial court had no jurisdiction to determine the case for it was presented with the consent alone without certificate of the DPP. This being an economic related offence it is true that, the same required consent and certificate under section 26 (1) and 12 (4) of the EOCCA from the Director of Public Prosecution (DPP). section 26(1) of EOCCA provides that;

> *26(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*

While also section 12 (4) of the same law also provides reads;

(4) The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence, be instituted in the Court.

From the above quoted provisions, it is undisputed fact that, this case required both a consent from the DPP and a certificate order conferring jurisdiction. Looking at the trial court's proceedings, specifically at page 2, on 19th November, 2021, the prosecutor prayed to tender the substituted Charge and Consent. The same were received by the trial court. I also took the liberty to peruse the file record and find the said documents together with the certificate were indeed filed on that day. In that regard, failure to mention the Certificate being received while the same is in the same piece of paper with the Consent, that alone did not make the trial court to lack jurisdiction to hear and determine this matter. In that regard, the trial court had jurisdiction. This ground fails, it is consequently dismissed.

On the 2nd ground, section 234 (1) of the CPA provides for substitution of the charge during trial. As rightly argued by the respondent's counsel, the

fact that the charge was substituted during Preliminary Hearing does not nullify the proceedings because Preliminary Hearing is also part of the trial. More so, in the case of **Sali Lilo vs. R**, Criminal Appeal No. 431 of 2013 (unreported), Court of Appeal made an observation from **Mohamed Kaningo vs R** [1980] T.L.R. 279 that;

> *"While it is the duty of the prosecution to file charges correctly, those presiding over criminal trials should,* ***at the commencement of the hearing****, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if not to require that it be amended accordingly." (emphasis added)*

Applying this position to the appeal at hand, the trial court did not err in substituting the charge at the commencement of the trial after satisfied itself that the same was not laid correctly. This ground also fails.

On the 3rd ground of appeal respondent's counsel conceded to the fact that, exhibit P1, Giraffe's teeth is not something to be read to the court after its admission because it is not a document. However, I do not find any miscarriage of justice for such minute irregularity. The same does not go to the root of the case and can be pardoned. This ground also fails.

As to the 4th ground regarding identification of the trophies, it was PW2 and PW3 who identified the seized trophies as Giraffe's teeth. PW2's testimony as a wildlife experts, specifically elaborated on how the Giraffe teeth are different from other animal's teeth. Also, exhibit P4, the Trophies Valuation Report shows that, the same were identified physically and scientifically. During cross examination both appellants did not cross examine PW2 on their doubts in respect of how he identified the alleged government trophies. As held in the case of **Nyerere Nyague** (supra) and **Joseph Kanankira vs Republic** (supra) a person who fail to cross examine on important facts is deemed to have accepted the said facts and is estopped from further denying such facts. This ground also crumbles.

On the 5th ground of appeal, the appellants claimed to be convicted on a defective charge due to variance of places in the charge sheet and in the evidence. The charge sheet shows that, the appellants were arrested at Bwawani area whereas the evidence shows that they were arrested at Lekeni Bwawani both at Mto wa Mbu in Monduli District. With due respect, I do not see any variance of the places, as alleged by the appellant. Both, the charge sheet and the evidence shows the same area to wit; Bwawani area. This ground is meritless. The same is dismissed.

On the 6th and 7th grounds, the appellants are challenging the seizure procedure. Looking at the search and seizure, exhibit P5, the same was conducted under section 106 (1) (a) (b) and (c) of the WCA and section 42 of the **Criminal Procedure Act**, [Cap 20, R.E. 2022]. The former section provides for search and seizure in respect of wildlife while the latter provides for general searches conducted under emergency situations like in the case at hand. In this case, there is enough evidence to prove that the arrest and search was conducted in the remote area hence no possibility of an independent witness as required by the law. Further to that when exhibit P5 was tendered, the appellant's objection was only on the fact that, there was no signature of independent witnesses. They did not object further to its authenticity or rather challenge what was seized during. Even in cross examination that did not feature. This implies that the appellants admitted the seized trophies and other items being found in their possession. This is enough proof that the search and seizure was properly done. These two grounds therefore fail.

On the 8th ground of appeal, the appellants allege that, there was non-compliance of section 231 (1) of the CPA. The section provides for the court to explain the substance of the charge to the accused and inform them of

their right to give their testimonies under oath or affirmation, on their own behalf; and to call witness in their defence, if any. In the appeal at hand, at page 33 of the trial court's proceedings, both appellants were addressed under section 231 of the CPA after the trial court had found them with a case to answer. They both opted to fend themselves without any witnesses, hence they were not curtailed right to fair hearing as alleged. This ground also crumbles.

On the 10th ground, the appellants challenged the trial court's judgment that, it based on extraneous matters. During their submission, the appellants did not expound further on the alleged extraneous matters he referred to. However, looking at the trial court's judgment, it is my considered opinion that, the same properly addresses all the contentious matters and determined them hence reached a just verdict. I find no extraneous matter which was based on in the decision made. This ground also fails.

As to the 11th ground, the appellants challenged the trial court for not considering their defence evidence. However, looking at page 9, 10 and 11 of the trial court's judgment, the trial magistrate considered both appellants' defence and arrived to the conclusion that, the same did not cast any doubt

to the prosecution case. This ground also lacks merit and the same is dismissed.

Back to the 9th grounds in which the appellant complains that, the prosecution evidence was contradictory and the same did not prove the case against him beyond reasonable doubt. They however did not point out the contradictions and inconsistences apart from raising the issue of search and seizure as talked above. This being a criminal case, conviction may only be entered based on the strength of the prosecution case and not on the weakness of the defence case. Thus, the burden to prove the case never shifts. See **Jonas Nkize vs. Republic** [1992] TLR 213, **Abuhi Omary Abdallah & 3 Others vs. Republic** Criminal Appeal No. 28 of 2010 CAT at Dsm (unreported) and **Luhemeja Buswelu vs. Republic**, Criminal Appeal No. 164 of 2012, CAT at Mwanza (unreported).

Going through the trial court's proceedings and judgement and based on the above analysis, I find that, the case against the appellants was proved to the required standard i.e. beyond reasonable doubt hence, the conviction entered and the sentence passed was deserving. Therefore, this appeal is dismissed for want of merits and the trial court's decision is hereby upheld.

It is so ordered.

Dated and delivered at **Arusha** this 13th day of October, 2023.

J.C. TIGANGA

JUDGE