IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 3 OF 2023

(Appeal from the decision of the District Court of Siha at Siha dated 29th September, 2022 in Economic Case No. 10 of 2021)

JULIUS GADIEL SWAI .....1ST APPELLANT
DAVID JACKSON MANDONDO .....2ND APPELLANT
GODFREY MUSSA PHILIMON.....3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

3rd October. & 7th November 2023

A.P.KILIMI, J.:

The appellants mentioned hereinabove were arraigned before the district court of Siha with one count of being in unlawful possession of Government Trophy contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with para 14 of the 1st Schedule to, and section 57(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019.

The prosecution at the trial court alleged that on the 6th day of July, 2021 at Mitimirefu TARIRI area within the district of Siha in Kilimanjaro region, all appellants were found in unlawful possession of Giraffe carcass equivalent to one killed animal valued at Tshs. Thirty four million six hundred thirty five thousand (Tshs. 34,635,000/=) the property of the United Republic of Tanzania. All appellants denied committing the alleged offence.

To prove the charge the prosecution paraded a total of 5 (five) witnesses, in brief the facts established at trial were to the effect that; Innocent Pius Malata (PW1) on 6th day of July, 2021 while in patrol he was informed about the killed animal at Mitimirefu within TARIRI farm. Accompanied by his colleague, they communicate with acting Village Executive Officer (PW3) and visited the crime scene. Being 25 feet from the place, they witnessed five people skinning the animal. PW3 succeeded to identify 4 of them. All accused persons when noted they were followed, they fled away. PW1 as a leader of the group, filled a certificate of seizure and seized a neck, head, two ribs, 4 legs and the skin. Later PW5 identified the animal to be giraffe after inspected the animal parts and thus filled a valuation certificate. According to him as per market value of the material date, one giraffe worth Tanzania shilling, thirty-four million six hundreds and

thirty-five thousand (34, 635,000/-). He also prepares an inventory (P6) for disposal order. In respect to their defence, all appellant refuted to be present at the scene of the crime stated.

The trial court upon considering the evidence was of the view PW3 identification was corroborated by PW1, thus proceeded to hold that their evidence was coherent and consistence thus credible, and rejected the defence of the appellants which based on arresting date and procedure, which did not cast any doubt on the prosecution side. Consequently, the trial court found the appellants guilty of the offence charged, convicted and sentenced them to serve 20 years imprisonment each.

Aggrieved by conviction and sentence, the appellants have filed a memorandum of appeal advancing five grounds of appeal as follows;

1. That the learned trial magistrate grossly erred both in law and fact in finding and holding that the Appellants were positively identified/recognized at the alleged scene of crime as being culprits despite there being no watertight visual identification evidence against the Appellants.
2. That the learned trial magistrate grossly erred both in law and fact in failing to note that the alleged inventory form (exh.P.6) was un-procedurally prepared acquired and tendered in evidence as exhibit.

3. That the learned trial magistrate grossly erred both in law and fact in failing to consider the principles which have to be taken into account in respect to chain of custody and preservation of exhibits.
4. That the learned trial magistrate grossly erred both in law and fact in using weak, tenuous, contradictory, inconsistency, incredible and wholly unreliable prosecution evidence from prosecution witnesses as a basis of the Appellants conviction.
5. That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellants despite the charge being not proved beyond reasonable doubts against the Appellants and to the required standard by the law.

At the hearing of the appeal the appellants were unrepresented while Ms. Edith Msenga learned State Attorney appeared for the respondent. It was agreed that the hearing proceed by way of written submission as scheduled by this court. All parties complied with the scheduling order and their effort is accordingly appreciated.

In their submission in respect to the first ground of appeal, the appellants faulted the trial court's decision on the issue of evidence of identification of the appellants at the crime scene, the appellants stated that when the trial magistrate was composing the judgment she relied solely on the evidence of visual identification. It was the appellants' submission that the trial magistrate had misdirected herself by relying upon identification

evidence given by PW1 and PW3 because it was weak. They argued that PW1 and PW3 claimed to have recognized the culprits before they ran away but they did not give detailed evidence on how they identified the appellants. Still challenging the evidence of identification, the appellants submitted that evidence of identification by PW3 was unreliable because it lacked explanations as to how long he knew the appellants, what made him remember the said suspects, time interval between the last time he saw them and the time of observation, he did not say the attire the appellants had put on and lastly did not say the time under observation. It was their submission that failure by PW3 to testify on those maters rendered his evidence of identification not watertight and the trial court ought not to have relied upon it to base its conviction.

It was the appellants' further submission that PW1 and PW3 had never disclosed to the police the names of those claimed to have recognized at the crime scene when the incidence was reported. Submitting further the appellants stated that PW1 said they identified the appellants through interrogation and through the whistle blower and VEO, they contended that the statement connote that they did not at all recognize anyone at the crime scene as they alleged. Hence it was their submission that they were

incriminated with the offence after their arrest and not because they were recognized at the scene of crime as alleged by PW1 and PW3.

Arguing further the appellants submitted that it is always expected that a credible and reliable witness would name a suspect at the earliest possible opportunity as failure to do so should raise a shadow of doubts on such witnesses' evidence. To support their contention, they cited the cases of **Marwa Wangiti Mwita and another vs Republic** Criminal Appeal No. 6 of 1995 and **John Jacob vs Republic** Criminal Appeal No. 92 of 2002. (Both unreported)

In respect to the second ground of appeal which was challenging the procedure for acquiring and tendering of exhibit P.6, the appellants submitted that the trial magistrate erred by failing to note that the exhibit P.6 had been wrongly and un-procedurally acquired, tendered and admitted in evidence as exhibit. Submitting further the appellants explained their reasons being, first, failure by the prosecution to disclose and summon the magistrate who ordered the disposition of the alleged wild animal's meat as a witness. Second is that none of the appellants were given an opportunity to be heard before or after the disposition of the alleged wild animal's meat. Third is that no photos of the said seized wild animal's meat were taken and

tendered in evidence so as to prove that the said wild animal meat really existed.

On the third ground challenging chain of custody and preservation of exhibits the appellants submitted that PW1 and PW3 were recorded to have said that among things they seized was a head of a giraffe however PW2 in his evidence said that he was handled government trophies which is of Elephant. Due to these discrepancies in the prosecution's case, they were of the view that it cannot certainly be stated that the prosecution discharged their duty of proving the charged offence to the required standard of the law.

It was the appellants' further submission that the trial Magistrate failed to observe and find that, the chain of custody of the said seized wild animal's meat was not established. They stated that PW2 who was a store keeper never labeled the exhibits (the alleged carcass) before keeping the same in the store so as to distinguish them from other exhibits. They further argued that it was uncertain as to who exactly prepared, filled the inventory form (Exh.P6) and took the alleged carcass to the unknown Magistrate for the said disposal, Since, PW4 (the Investigator) and PW5 (the wildlife officer) both claimed to have been the ones who performed the above mentioned

duties. Henceforth they submitted that it cannot be said with certainty that the chain of custody of the said wild animal's meat and its preservation was properly maintained throughout from the time of seizure until the destruction/ disposition of the same.

In their final submission, the appellants stated that the trial Court also relied on irregular proceeding to base a conviction against them. Referring to page 20 of the typed court proceedings, they said that after the 1st accused person had cross-examined PW1, the court cross- examined (PW1) before other accused persons had cross- examined him, and the public prosecutor had not yet re- examined this particular witness. They contended that this was a grave misdirection and un-procedural step taken by the trial Magistrate which occasioned injustice against them. Thus prayed this court to find merit in the appeal, allow the same, quash the conviction, set aside the sentence, and set them at liberty.

Submitting in reply of the above, Ms. Msenga learned State Attorney started her submission by supporting the first ground of appeal which was regarding identification of the appellants. She conceded to the fact that PW1 failed to properly establish identification of the appellants at the crime scene. She reasoned that the prosecution had a duty to lead the witness into

explaining all circumstances that enabled PW1 to clearly see the appellants who were 20 to 25 feet away. She was of the view that prosecution witnesses when testifying were obligated to put out all the details with regard to identification of the accused persons at the scene of crime. She said it was unfortunate that PW1 had failed to go into those details so as to eliminate all possibilities of mistaken identity.

The learned state attorney also supported the second ground of appeal that the inventory admitted and marked as Exhibit P6 was unprocedural prepared. She submitted that PW4 had failed to testify that during the proceedings for disposal order the accused persons were present. She stated that this was contrary to the legal requirement under PGO No 229 (25), as explained in the case of **Juma @ Mpakama vs Republic** Criminal Appeal No. 385 of 201. She contended therefore that this posed a whole irregularity and hindrance to the fair hearing of the accused persons.

On the other hand, Ms. Msenga disputed the third ground of appeal which was relating to the chain of custody. She submitted that in establishing chain of custody of the exhibits, the Prosecution did so by parading witness and demonstrating a strong paper trail. She referred to page 17 to 32 of the typed proceedings of the Trial Court and also in support of her argument,

she cited the case of **Petro Kilok Kinangai vs Republic** Criminal Appeal No. 565 of 2017 CAT at Arusha (unreported). From her submission the learned state attorney was of the view that the chain of custody was well maintained and there were neither irregularities nor inconsistencies in the prosecution case during trial.

Having gone through the records of proceedings, grounds of appeal and submissions from both parties, I do agree that the appeal in relation to the 1st ground is with merits. The issue of identification of the accused person is very vital in any case because it is what incriminates the accused person. The law on identification is clear that when a case is centered on evidence of visual identification, such evidence must be watertight before arriving at a conviction. This was so stated by the Court of Appeal of Tanzania in the case of **Hamisi Ally & Others vs Republic** [2016] TZCA 320 (TANZLII). The court observed as follows;

> *"Time and again this Court has insisted that when a case is centered on evidence of visual identification such evidence must be watertight before arriving at a conviction. This insistence is borne out of the fact that visual identification is of the weakest kind and hence the necessity of ruling out any possibilities of mistaken identity.*

> *In the celebrated case of* ***Waziri Amani v. R****. (1980) TLR 250 this Court stated that visual identification is of the weakest kind of evidence and the most unreliable and that a court should not act on it unless all possibilities of mistaken identity are eliminated".*

In the present matter, the record reveals that the alleged incident took place in the morning at around 10:11 hours that is on a broad day light. The crime scene was an area called Tariri farm. Given the circumstance of the crime scene being in the bushes the possibility of mistaken identity is inevitable. PW3 alleged that the appellants were about 10 to 15 meters away from where they were and when they got there the appellants ran away but he managed to identify them because he knew them before the incident. He said that he used to see them in his village and also attend meetings where they register their names. In my view merely saying of PW3 that he used to see the appellant is not enough. I think his evidence could be reliable if he could have mentioned the appellant's peculiar features to the next person the witness comes across after the incident.

I wish to fortify my view, from the decision of the court in **Mabula Makoye and Another vs Republic** Criminal Appeal No. 227 of 2017 (unreported) where it was observed that;

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to rely on to ground a conviction.* ***The witness must give details as to how he identified the assailant at the scene of the crime*** *as the witness might be honest but mistaken."*
>
> [Emphasis added]

For the above reasons, I am considered view the identification by PW3 was flimsy, in the circumstances the said evidence was not absolutely watertight to support the conviction. Thus, I find this ground with merit and sustained.

In respect to ground number two, I am also in agreement with Ms. Msenga that during the proceedings for disposal order, the accused person

must be present. In **Mohamend Juma @ Mpakama vs Republic** (supra) the Court made a reference to Paragraph 25 of the PGO which states that-

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard,* ***shall be brought before the Magistrate, together with the prisoner*** *(if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."*
>
> [Emphasis added]

The Court of Appeal held further that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits, when it stated that;

> *"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail)* ***to be present before the magistrate and be heard****. "*
>
> [Emphasis added]

In view of the above law failure to present the appellants in disposing the exhibits amount to expunge of the exhibits tendered which caused the case against the appellant to be unfounded. Thus, I hold also this ground with merit and sustained.

Another claim by the appellants though stated on the ground of appeal, but not argued, I find convenient to say on it albeit in brief, it is true according to the record the learned trial magistrate appeared to has cross examined the PW2 even before he was cross examined by second and third accused person. I am aware the court may ask questions of clarifications on matter not well understood, but according to examination made in this matter was indeed cross examination. I think the magistrate must take a neutral part in a trial in order to avoid a danger of the court as a custodian of justice be seen to shoulder one part of the case hence presumption of bias to it. In my opinion what happen in this matter in the eyes of law flaws the right to fair hearing.

Having endeavored as above, I am considered opinion the prosecution case at the trial totally failed to prove the charge against the appellants to the requires standard of the law. In view thereof, I see no need to deal with the remaining grounds of appeal since the above are sufficient to dispose

this appeal. Consequently, I allow the appeal and order the immediate release of the appellants from prison unless they are held for other lawful cause.

It is ordered.

DATED at **MOSHI** this day of 7th November, 2023.

X

JUDGE
Signed by: A. P. KILIMI