IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

DC. CRIMINAL APPEAL CASE NO. 41 OF 2023

(*Arising from Economic Crime Case No. 13 of 2022 in the District Court of Tabora*)

FRANK CHARLES MSOVU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 21/08/2023
Date of Judgment: 06/10/2023

KADILU, J.

In the District Court of Tabora, the appellant was charged with three counts namely, unlawful possession of Government trophies contrary to Section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, [Cap. 283 R.E. 2019] read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap. 200 R. E. 2019]. The second count was unlawful possession of firearm contrary to Section 20 (1) and (2) of the Firearms and Ammunitions Control Act No. 2 of 2015 read together with paragraph 31 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] and the third count was unlawful possession of ammunition contrary to Section 21 of the Firearms and Ammunitions Control Act, No. 2 of 2015 read together with paragraph 31 of the 1st schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act.

According to the records, the appellant was found guilty of the charged offences hence, for the first count he was sentenced to serve five

(5) years imprisonment. For the second count, he was imprisoned for a term of five (5) years, and for the third count he was sentenced to serve five (5) years imprisonment. All sentences were to run concurrently. Dissatisfied with the conviction and sentence, the appellant filed the present appeal containing five (5) grounds as reproduced hereunder:

1. *That, the learned trial Magistrate erred in law and facts to find the appellant guilty of the offence charged based on weak prosecution evidence which did not establish the offence beyond reasonable doubt.*
2. *That, the trial Magistrate erred in law and in facts for failure to consider properly and evaluate the appellant's evidence in defence which was reasonable and justifiable enough to show that the charge was not proved.*
3. *That, the trial Magistrate erred in law and facts in its evaluation and analysis of evidence by according underserving weight on the shaky prosecution evidence.*
4. *That, the trial Court erred in law and facts when it shifted the burned of proof to the appellant.*
5. *That, the trial Court erred in law and facts when it relied on extraneous matters to justify and rest a conviction against the appellant.*

On the strength of those grounds of appeal, the appellant has prayed this Court to allow his appeal by quashing the conviction and set aside the sentence. He further implored this court to set him at liberty. When the appeal was called on for hearing, the appellant was represented by Mr. Kelvin Kayaga, learned Advocate whereas the respondent Republic enjoyed legal services of Ms. Tunosye Luketa, the learned State Attorney. Before arguing in support of the appeal, the learned Advocate for the appellant prayed to argue all the grounds of appeal jointly.

In submitting on the grounds of appeal, Mr. Kayaga contented that the charged offence was not proved beyond reasonable doubt. According

to him, the trial court did not analyse evidence properly as the prosecution evidence was weak. The learned Advocate made reference to exhibit P2 (issue voucher) on page 28 of the typed proceedings of the trial court in submitting that the exhibit is not among the seizure items from the house of the appellant after search. He then argued that the evidence of PW1 was incredible. He stated that the appellant was the one who handed over the exhibits to the store keeper, one Paulo Masanja. Further to that, PW4 stated that he signed exhibit P1 but he did not state whether the same were obtained from the appellant.

Regarding the third ground, Mr. Kayaga contended that exhibits P2, P3, P4, P5 and P6 were not well connected with exhibit P1, they did not correlate. PW1 stated that the exhibits were handled by using a handover book which was never produced in evidence or its extract. He explained that PW3 informed the court on page 37 of the typed proceedings that he was the one who was in possession of the exhibits, but this piece of evidence was not supported by evidence of PW1. The court was required to draw adverse inference against evidence of the prosecution and see doubt in proving the charged offences. Mr. Kelvin referred to the case of ***Jackson John v Republic,*** Criminal Appeal No. 515 of 2015, where it was held that chronological documentation is necessary. Short of that, the doubt in prosecution evidence cannot be overruled.

In yet another contention, Mr. Kayaga told this court that PW2 was not an independent witness because he had a conflict of interest. Mr. Kayaga made reference to page 34 of the typed proceedings, in which it is shown that PW2 went to the appellant's house with TAWA officers who were the complainants. He argued that PW2 was not a leader of that area nor was he a mere passerby. According to Mr. Kelvin, evidence of PW2

was not supposed to be relied on. He added that there is no single prosecution witness who pointed out the exact place of the appellant's house where the alleged exhibits were found. For that reason, Mr. Kelvin opined that it was not proved that the seized items were Government trophies and their value was not established.

On the second ground of appeal, Mr. Kayaga explained that the appellant's explanation was reasonable, but they were not accorded any weight. The appellant stated that he was a lawful owner of the seized weapon and he was the one who took it out to show PW1. PW1 took the weapon ownership book of the appellant, but he did not tender it in evidence. This was sufficient to the court to draw an adverse inference against the prosecution side according to Mr. Kelvin.

Regarding the 4th ground of appeal, Mr. Kayaga submitted that the burden of proof was shifted to the appellant contrary to the rules of criminal justice. The appellant was required by the trial court to establish that he owned the weapon legally. The Advocate referred to page 7 of the trial court's judgment to support his point. He explained that the doubt raised regarding documents of weapon ownership was not supposed to be resolved by the appellant. He referred to the case ***of Sultan Seif Nassoro v. Republic*** [2003] TLR 228 and ***Republic v Kerstin Cameron*** [2003] TLR 84, where it was stated that the appellant was not required to prove his innocence. He finally prayed the trial court's decision to be overturned and the appeal to be allowed so as to set the appellant free.

In opposition to the appeal, Ms. Tunosye submitted that the case was proved beyond reasonable doubt. She referred to the case of ***Moses Charles Deo v Republic*** [1987] TLR 133, in which it was held that being

in possession of a weapon infers knowledge and authority. It was further submitted by Ms. Tunosye that PW3 valued the seized Government trophies as shown on page 35 of the typed proceedings. According to Ms. Tunosye, PW3 got the exhibits from the storekeeper and he returned them to him after having valued them.

Ms. Tunosye made reference to page 28 of the typed proceedings on which it is shown by PW1 that he was issued with issue voucher by the storekeeper and it is not true that the chain of custody was broken. She further submitted that it is not true that PW2 was not an independent witness. She cited the case of ***Msetyi Daniel Mseti v Republic***, Criminal Appeal No. 137 of 2021 in which it was stated that an independent witness is not necessarily a local leader. According to her, all exhibits tendered and evidence of witnesses presented were sufficient for the court to find the case proved beyond a reasonable doubt.

She added that on page 7 of the trial court's judgment it is shown how the trial Magistrate considered evidence of both sides. She also urged this court to read on page 46 of the proceedings and evidence of PW3 on pages 49 and 50. She argued that Section 100 (3) (a) of the Wildlife Conservation Act shifts the burden of proof to the accused person in Government trophies cases. She cited the case of ***Joseph Nangai v R.***, Criminal Appeal No. 40 of 2020 to buttress her point. She added that the exhibit which is alleged to be in possession of the prosecution did not prove ownership of the weapon by the appellant, but his father. So, she replied that there is no need for the court to draw a negative inference about the prosecution. Finally, she prayed for the appeal to be dismissed.

In rejoinder, Mr. Kayaga submitted that the bag was not tendered as one of the exhibits, but PW1 told the court that during the search they

seized a beg in which the trophies were stored and labelled it as Lugano/KAU/IR17/2022. Mr. Kelvin maintained that in the circumstances of this case, PW2 was not an independent witness. He further argued that the way PW2 reached at the scene of the crime, disqualified him from being an independent witness.

Now, in determining the appeal, I opt to first consider the first improvised ground of appeal. *The major issue here is whether or not the prosecution proved the case against the appellant before the trial court beyond reasonable doubt.* I am alive that the first appellate court may step into the shoes of the trial court and analyse evidence so as to reach to a fair decision. Regarding the complaint by the appellant relating to the broken chain of custody, I hasten to agree with the contention by Mr. Kelivin that, in cases involving exhibits, the chain of custody must be uninterrupted. There should be chronological documentation and, or paper trail showing the seizure, custody, control, transfer, analysis, and disposition of the concerned evidence.

The Court of Appeal has in various cases underscored the importance of maintaining the chain of custody. This was the legal position that was also emphasized by the Court of Appeal in the case of ***Paulo Maduka & Others v Republic,*** Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania at Dodoma. In that precedent, the Court of Appeal also underlined that the idea behind recording the chain of custody is to establish that the alleged evidence is in fact, related to the alleged crime rather than, for instance having been planted fraudulently to make someone guilty. It further remarked that the chain of custody requires that from one person to another, there must be documentation and it has to be provable that nobody else could have accessed the exhibit.

The requirement to prove the unbroken chain of custody was also emphasized by the same Court of Appeal in the case of ***Anania Clavery Betela v Republic,*** Criminal Appeal No. 355 of 2017, Court of Appeal of Tanzania at Dar es Salaam. I am also a believer of the legal stance that, a chain of custody of an exhibit can be proved by oral or documentary evidence since they both hold the same evidential value. This position was underlined by the Court of Appeal in the case of ***Marceline Koivogui v Republic,*** Criminal Appeal No. 469 of 2017.

It is from the prosecution evidence that, Exhibit P3 (a shotgun), P4 (six bullets), P5 (giraffe tail), and P6 (hippopotamus hoof) were seized by PW1 from the appellant on 9/3/2022. However, it is apparent from the record that only Exhibit P3 was labelled whereas Exhibits P4, P5, and P6 were not labelled according to the requirement of the PGO No. 229 paragraph 8 which is applicable to CRO's when handling exhibits as detectives. The PGO provides that:

"The investigating officer shall attach an exhibit label (P.F.145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the exhibit which requires examination."

PW1 handed over the said exhibits to the storekeeper, one Paulo Masanja who kept them in his custody until they were tendered before the trial court, but who was not called to testify. During cross-examination on page 30 of typed proceedings, PW1 testified as follows:

"We handed over the exhibits through the exhibits' book. I did not tender the handover book before this court. In the admitted exhibit P1, there is

no place written "pump action." In the admitted exhibit P2, there is no place written shotgun pump action or the word "label." The storekeeper did not write label, but he wrote the names of the exhibits only. ... The admitted exhibits P5 and P6 are different items. There is no label in the admitted exhibit P4. The bag has not been tendered as an exhibit, but the label is on the bag."

It is evidenced that there is no documentary exhibit tendered in court to show the chronological documentation to establish the chain of custody of the said exhibits. The most accurate method of establishing the chain of custody is on the documentation as explained in the case of ***Paulo Maduka*** cited earlier.

I have observed that the description of exhibit P3 (shotgun) by PW1 throughout his testimony (see for example pages 27 and 29 of the proceedings) does not correspond with the description in the certificate of seizure, exhibit P1. While PW1 described exhibit P3 as TZ CAR 50048 shotgun pump action, in the certificate of seizure it was merely named as shotgun TZ CAR 50048. Failure to describe the exhibit properly or identify its peculiar features before the admission, renders the foundation for tendering it improper as the same was not cleared for admission before being admitted. See the case of ***Robinson Mwanjisi v Republic,*** [2003] TLR 218 at page 225. The same was quoted by this Court in the case of ***Mathias Agustino Lukala v Republic,*** Criminal Appeal No. 3 of 2023, High Court of Tanzania at Tabora, at page 8 which goes as follows:

"In the present case, the exhibits which were admitted during the trial were taken from the appellant without a certificate of seizure, the chain of custody was broken and, the admission was improperly done, as it was stated in the case of Robinson Mwanjis. This was in contravention with the law. While an order of retrial may give the prosecution the opportunity

to rectify some of the defects or fill in the gaps, other defects cannot be rectified and they render the would-be prosecution case very weak."

In the case, at hand, the prosecution paraded four (4) witnesses who at one point handled the exhibits P3, P4, P5, and P6. There is no adequate paper trail as well as oral evidence of the chain of custody. The importance of the integrity of the chain of custody of exhibits is assurance of their reliability. Therefore, the chain of custody of the said exhibits was broken from the time they were seized from the accused person to the point in which they were tendered before the trial court. I hold that view due to the fact that, **first**, there was no strict documentation of the chain of the exhibit from seizure to the time of tendering. It is also unknown as to when exactly was the exhibits received at Tabora to the storekeeper. **Second**, some of the tendered exhibits were not labeled. Moreover, a bag that kept them and which was labeled, was neither produced in evidence nor reflected in the certificate of seizure. **Third**, the exhibits were handed over to the storekeeper through the hand over book (page 30 of the proceedings), but the handover book or its certified copy was not tendered in court which could show exactly when the exhibits were received by the store keeper. **Four,** the nature of what was received, and in what condition, has remained a secret only known by a person who handed over the exhibits to the storekeeper. Again, PW3 at pages 36 and 37 of the proceedings shown to have taken possession of the said exhibits on 11/03/2022, but there is no record showing that the exhibits had changed hands. He did not even mention the person who handed the same to him or on when he returned the alleged exhibits P5 and P6.

It is the appellant's complaint that he had a firearm license/ a gun book, but it was seized during the search. The trial court's records reveal

that on 24/6/2023, Advocate for the appellant issued a notice to the prosecution side to produce the original book with various receipts evidencing ownership of the shotgun by the appellant, but the same were never produced. Mr. Kelvin opined that in such circumstances, the trial court was entitled to draw an adverse inference against the prosecution for failure to produce extracts of such gun book since that was vital in clearing doubt regarding ownership of exhibit P3.

I have noted that the alleged book has not as well been listed in the list of seized items although PW1 stated explicitly on page 29 of the trial court's proceedings that he seized a book showing that exhibit P3 was owned by the appellant's father. Ms. Tunosye submitted during the hearing of this appeal that the book was not important since it does not belong to the appellant, rather to his father. On this point, I join hands with Mr. Kelvin that failure to produce the said book creates doubt about what was exactly the motive behind. More so, where it was stated that the appellant admitted to have committed the charged offences in his cautioned statement, but the same was not produced in evidence and the trial court was not informed if the appellant was taken to the justice of the peace to record his confession after having admitted the offences.

In addition, it was the prosecution's evidence that the first information about the crime was received by the TAWA Officers from their secret informer who was not called to testify. In my humble opinion, the informer would have assisted the court to know about where, when and how the alleged Government trophies were obtained by the appellant. It is a settled position of the law that adverse inference should be drawn against the prosecution side for failure to call material witnesses without

plausible explanation. A combination of all these factors lead to the adverse inference being drawn by the court against the respondent as correctly opined by the Advocate for the appellant.

Coming to the last issue about whether the prosecution proved the case against the appellant beyond reasonable doubt, exhibits P5 and P6 were Government trophies and their value was indicated in the charge sheet as well as in the valuation form. Nevertheless, there is no proof of the exchange rate or the basis for stating the value of the trophies at the time of valuation. The appellant indicated in his defence that TAWA Officers were moving around Kaliua and arrest different persons accusing them of having committed wildlife crimes. The assertation was corroborated by evidence of DW2 and DW3. The defence evidence established more that the appellant handed over the weapon and six bullets voluntarily to TAWA Officers while offering the explanation that he inherited it from his deceased father.

To support his explanation, he showed the firearm license/gun book to the arresting officers which they seized. He also showed them a card containing the information about the weapon and the owner. During the trial, it was admitted as exhibit D1 to establish his ownership of the alleged firearm. Henceforth, it was improper to require him to prove the ownership while the license/gun book was with the prosecution. The appellant's role was just to raise doubt and not to prove his innocence beyond reasonable doubt. His standard of proof was only on the balance of probabilities.

Exhibit P2 which was admitted as shown on page 29 of the typed proceedings is not among the exhibits listed on page 11 of the typed proceedings during the preliminary hearing. For this matter, the prosecution had a duty of disclosure which is an essential part of the right to a fair hearing. In the absence of the disclosure, the admission of Exhibit P2 was in contravention of the right to a fair hearing which entitles exhibit P2 to be expunged from the record. In the case of ***Musa Mwaikunda v R.,*** [2006] TLR 287 at page 293, the Court while underlining the minimum standards for fair trial/ fair hearing held that:

"The minimum standards which must be complied with for an accused person to undergo a fair trial are: he must understand the nature of the charge, he must plead to the charge and exercise the right to challenge it, he must understand the nature of the proceedings to be an inquiry into whether or not he committed the alleged offence, he must follow the course of the proceedings, ***he must understand the substantial effect of any evidence that may be given against him****, and he must make a defence or answer to the charge."*

In addition, in the case of ***Oscar Petro & Another v DPP,*** Criminal Appeal No. 117/2019, High Court of Tanzania at Arusha, this Court stated that fair hearing in criminal trials includes pre-hearings of cases and related matters. Thus, in line with what I have discussed above in relation to the grounds of appeal, it is apparent that the prosecution evidence suffered from numerous doubts incapable of justifying the conviction and sentence against the appellant. That said, I think the analysis which I have made is sufficient to dispose of the entire appeal without testing the rest of the grounds of appeal. Otherwise, that will amount to performing

an academic or superfluous exercise which is not the core objective of the adjudication process.

I accordingly allow the appeal, quash the conviction, set aside the sentence against the appellant, and order that he shall be released from prison forthwith unless held for any other legally justified cause. It is hereby ordered further that, the offensive weapons allegedly found with the appellant and the said Government trophies shall be forfeited for the Government of the United Republic of Tanzania. The right of appeal is open to any aggrieved party.

It is so ordered.

KADILU, M.J.,
JUDGE
06/10/2023

Judgement delivered in chamber on the 06th Day of October, 2023 in the presence of Mr. Kelvin Kayaga, Advocate for the appellant who is also present under custody, and Ms. Joyce Nkwabi, State Attorney for the respondent Republic.

THE HIGH COURT OF TANZANIA

KADILU, M. J.
JUDGE
06/10/2023