THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

CRIMINAL APPEAL NO. 03 OF 2023

(From Criminal Case No. 23 of 2021 in the District Court of Mbarali at Rujewa.)

1. CHRISTOPHER LABDA MWANKINA
2. GERVAS ATHANAS CHIVUTWE ..... **APPELLANTS**

VERSUS

REPUBLIC.....**RESPONDENT**

JUDGEMENT

Date of Last Order : 27.06.2023
Date of Judgement: 13.11.2023

MONGELLA, J.

Before the district court of Mbarali at Rujewa, the appellants were charged with two offences, to wit; unlawful entry to the national park under **section 21 (1) (a), (2) and 29 (1) of the National Parks Act** [Cap 282 R.E 2002] and unlawful possession of Government trophy under **Section 86 (1), (2) (c) (iii) of Wildlife Conservation Act (WCA) No. of 2009** as amended by the **Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016** 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 particulars of the offences are that: on 11.10.2021 at Idunda Area within Ruaha National Park in Mbarali district in Mbeya region, jointly and

together, the appellants entered the mentioned National Park without permit. In the same day, they were found in possession of government trophies to wit, meat, skin and two tails of Buffalo valued at USD 3,800, equivalent to T.shs. 8,762,382/=, property of the Government of the United Republic of Tanzania.

After consent of the Regional Prosecution Officer was issued, the appellants were required to plead to the charges laid against them to which they plead not guilty. Following their plea of not guilty, the case proceeded to trial whereby the prosecution paraded six witnesses; PW1, Swahibu Mpongo Mbwama, a park ranger; PW2, F 1198 STG Moses; PW3, Dominick Joseph Rwebangira; PW4, J 190 PC Jofrey; PW5, Detective Corporal Athumani and; PW6, H. 1351 Detective Corporal Elimwokozi.

The prosecution evidence was to the effect that: on 11.10.2021, PW1 together with other park rangers to wit, Said Hamidu, Mwakanyamale, Chacha Collins and William Langu, while at Idunda area within Ruaha National Park heard a bang inside the park and suddenly appeared the 1st appellant carrying a sulphate bag with fish inside it of "Kambale" specie. He was also holding a machete on his hand. They arrested him and upon interrogating him, he disclosed that he had left a friend at their camp. Accompanied by him, they went to the farm where they found other persons who escaped, but they managed to catch the 2nd appellant. In the said camp, they found; buffalo meat, two buffalo skins and two buffalo tails, an axe, a machete and a knife. They also found dynamite inside a bottle. The items found were seized and certificate of seizure was duly signed by the park rangers and the appellants who signed with their thumb prints. The certificate was admitted as exhibit P1;

the axe, machete, and knife were collectively admitted as exhibit P2. The appellants were then taken to Ulanga ranger post.

On 12.10.2021 at 10:00hrs, the appellants were taken to Rujewa Police station and handed to PW2 together with exhibits P1 and P2 and a tin containing black flour. PW1 opened an investigation file with number RUJ/IR/1025/2021 for unlawful possession of Government trophies without permit. He also labelled all exhibits as RUJ/1023/2021and recorded the particulars of the appellants in the detention register and locked them up. He handed the exhibits to PW4 for storage in the exhibit room. On the same day PW3, a wildlife officer, was called to evaluate the value of the seized trophies whereby he obtained the same from PW4. The process involved PW5 who was the investigator of the case. PW3 conducted valuation of the trophies and duly filled a trophy valuation certificate in which he valued two buffalos at USD 3800 equivalent to T.shs. 8,762,382/=. The valuation trophy certificate was admitted as exhibit P3. On the same day around 11:30hrs, PW6 interrogated the 2nd appellant and recorded his cautioned statement up to 12: 40hrs. The same was admitted as exhibit P5.

On 13.10.2021, PW5 obtained the trophies from PW4 and sent them to court for obtaining orders regarding the trophies. The court ordered for the trophies to be disposed. An inventory form was duly filled by PW5 and signed by both appellants. The Inventory form was admitted as exhibit P4.

The trial court found that the appellants had a case to answer, thus they entered their defence as DW1 and DW2, respectively. Their defence was that: on 09.10.2021, while coming from their home at Mswiswi village,

they were arrested by PW1 and other park rangers who ordered them to give explanations as to where they were going. They had flour, machete, beans, knife and an axe in their bags. They were ordered to get into the rangers' motor vehicle so that they could go to the village office to hold a thorough investigation. The rangers instead diverged and took them to TANAPA office where they were tortured, threatened and forced to admit to the offences with which they were charged. They were then taken to Rujewa police station and finally arraigned to the trial court on 15.10.2021.

Upon considering the evidence of both parties, the trial court found the appellants guilty, convicted and sentenced them to pay fine of T.shs. 100,000/= or serve 12 months in jail for the first count and to serve 20-years imprisonment term for the second count. Aggrieved by said conviction and sentence the appellants have preferred this appeal on the following grounds:

1. *That, the trial court seriously erred to convict and sentence the appellants on the second count of unlawful possession of government trophies contrary to the evidence on record.*

2. *That, the trial court seriously misdirected itself to convict and sentence the appellants without considering the omission of the prosecution side to tender all material exhibits allegedly found in possession of the appellants.*

3. *That, the Hon. trial Magistrate seriously erred to convict and sentence the appellants without considering the contradictory testimonies of PW4 and PW5 on the chain of custody of exhibits.*

3. *That the trial court Magistrate seriously erred in law and fact to convict and sentence the appellants, the case against them (the appellants) having fallen below the standard required by the law.*

The appeal was argued by written submissions whereby the appellants were represented by Mr. James Berdon Kyando, learned advocate while the respondent was represented by Mr. Emmanuel Bashome, learned state attorney.

Mr. Kyando commenced his submission in chief by abandoning the 3rd ground of appeal. Jointly submitting on the 1st and 4th grounds he challenged the prosecution evidence thereby pointing out its flaws. He made reference to the records of the trial court averring that it was on record that on 11.10.2021, PW1 and other four park rangers saw a person carrying a sulphate bag containing fish "Kambale" specie and had a machete on his hand. He had the view that that piece of evidence does not include the trophies allegedly found in possession of the 1st appellant. He further challenged the prosecution for non-calling of all relevant witnesses. On this, he contended that though PW1 stated that they managed to go to where the 1st appellant had left his fellow friends at their camp and found the said trophies in the camp, but managed to only arrest the 2nd appellant while others escaped; none of the rangers, other than PW1 were paraded before the court as witnesses.

Mr. Kyando further faulted the procedure in which the seizure certificate was procured. He argued that Exhibit P1, the seizure certificate, was tendered while the same was procured contrary to the requirement of **section 106 (1) (b) of the Wildlife Conservation Act** as there was no independent witness available at the seizure. He contended that the

said requirement is mandatory as the word "shall" has been used in the provision. He referred to **section 53 (2) of the Interpretation of Laws Act**, Cap 1 R.E 2019, arguing that in the said provision the word "shall" is explained to mean that such function must be performed. In that respect, he challenged the seizure certificate arguing that neither the seizure certificate nor the proceedings disclose that there was an independent witness when filling and signing the same. Submitting further, he had the view that if there was an independent witness, the same would be a material witness whom the prosecution would have called, but no such witness was called. He thus prayed for the seizure certificate to be expunged from the record.

Mr. Kyando further contended that the prosecution failed to prove that the trophies found were in the appellants possession and not in possession of the persons that escaped. In the premises, he had the view that the prosecution failed to discharge its burden of proving the allegations as required under **section 110 (2) of the Evidence Act**. He also cited the case of **Hemedi Said vs. Mohamed Mbilu** [1984] T.L.R 113.

Mr. Kyando as well challenged Exhibit P5, the cautioned statement of the 2nd appellant tendered by PW6 on the ground that the same was admitted in violation of cardinal principles of natural justice. He argued that upon the exhibit being tendered, it was only the 1st appellant, who was not the author, who was asked as to whether he objected the admissibility of the exhibit, but the 2nd appellant who allegedly authored the statement was denied the right to object or accept the same from being admitted. In the circumstances, he prayed for the court to expunge the 2nd appellant's cautioned statement from the records. He

supported his stance with the case of **Steven Kacheza vs. Republic** (Criminal Appeal 5 of 2013) [2015] TZHC 2068 TANZLII.

Following his prayer to expunge the exhibit, he had the view that upon exhibit P5 being expunged, the evidence of PW6 remains without substance as he only testified on procedures he undertook during recording of the said statement. That, no information was given on what the 2nd appellant stated in the cautioned statement.

Considering the charge in the 1st count, Mr. Kyando argued that the appellants were charged with unlawful entry to the national park under **section 21 (1) (a) and 29 (1) of the National Parks Act** [Cap 282 RE 2002] which was a non-existent offence. He argued so saying that the provisions cited did not create the offence of unlawful entry into the national park, hence the offence was not proved against the appellants. He cited the case of **Willy Kitinyi @ Marwa vs. Republic** (Criminal Appeal 511 of 2019) [2021] TZCA 608 TANZLII to cement his argument.

Submitting on the 2nd ground, he averred that PW1 testified as to the appellants being found with dynamite inside a bottle and that PW2 alleged to have been handed a tin containing black flour. However, he said, the items were not tendered in the trial court to prove the allegations of the two witnesses. He considered the omission creating a lot of doubts as to the prosecution's allegations against the appellants.

In conclusion, Mr. Kyando contended that the case against the appellants was not proved beyond reasonable doubt. He therefore prayed for the appeal to be allowed, the conviction quashed, the sentence set aside and the appellants be set at liberty.

In reply to the compounded grounds, Mr. Bashome narrowed down the submissions of Mr. Kyando into issues of legality of the search and secure, the tendering of the 2nd appellant's cautioned statement and failure by the prosecution to prove that the trophies were in possession of the appellants exclusively as opposed to the persons that escaped arrest. Partly, he admitted that indeed the appellants were charged for a non-existing offence on the 1st count, but vehemently opposed the rest of the allegations.

As to the search, Mr. Bashome averred that the search was legally conducted as it was not conducted in a dwelling house, but a camp. In the premises, he had the stance that the presence of an independent witness was immaterial as per the provisions of **section 106 of the WCA**. He contended that since the search was conducted in a camp within the national park, there were no dwelling houses and park rangers could not have obtained an independent witness. He supported his submissions with the case of **Papaa Olesikaladai @ Lendemu & Another vs. Republic** (Criminal Appeal No. 47 of 2020) [2023] TZCA 51 TANZLII.

As to the cautioned statement being wrongly admitted, Mr. Bashome argued that there was an error in the typed proceedings as the original handwritten proceedings show that it was the 2nd appellant who was questioned over the cautioned statement to which he replied he had no objection and he did not cross examine PW6 when offered the chance to do so. He averred that the original record holds more weight than the typed proceedings and that where there is contradiction between the two, the original record prevails. He cemented that argument with the case of **Peter Sagadege Kashuma vs. Republic** (Criminal Appeal 219 of 2019) [2021] TZCA 754 TANZLII. In that respect, he

further argued that since the appellant did not object the admission of the exhibit or cross examine PW6 who tendered the exhibit, the cautioned statement sufficed to warrant the conviction of the 2nd appellant.

Considering whether the prosecution proved that the trophies were in possession of the appellants, he had the stance that the prosecution proved that the trophies were found in possession of the appellants. He reasoned that possession can be actual or constructive. That, in constructive possession, the prosecution needs to prove two main elements which are; **one**, if the accused persons had knowledge over the thing in question and **two**, whether the accused person had control over the same. In that respect, he contended that the 1st appellant who took the park rangers to his fellow culprits was clearly fully aware of what he had stored at the said camp and which is why immediately after their arrival all other persons including the 2nd appellant ran away entailing that they had knowledge over what was kept at the camp and that the same was an illegal thing. He supported his argument with the case of **Ashiraka Nahamala Milias vs. Republic** (Criminal Appeal 582 of 2019) [2021] TZCA 238 TANZLII.

Mr. Bashome further contended that the 2nd appellant, in his cautioned statement, confessed being in possession of the trophies and mentioned the 1st appellant as his fellow culprit. That, the 1st appellant also led the park rangers to the 2nd appellant and neither of them cross examined on the certificate of seizure which showed they were found in possession of the trophies.

As to the charge in the 1st count, Mr. Bashome admitted that it was true that the appellants were charged on a non-existing offence for the 1st count, hence the appellant ought to have been discharged on the offence. He referred the case of **Maduhu Nhandi @ Limbu vs. Republic** (Criminal Appeal 419 of 2017) [2022] TZCA 78 TANZLII and prayed for the appeal to be allowed as to such extent.

Addressing the 2nd ground, Mr. Bashome averred that the dynamite and tin containing black flour was immaterial to prove the offence of unlawful possession of government trophies, thus the omission by the prosecution to tender the same did not in any way prejudice the appellants. He found the ground without merit.

Rejoining, Mr. Kyando averred that with the collapse of the 1st count of unlawful entry to the national park doubts are automatically created as to allegation presented in the 2nd count. He argued so saying that in absence of proof as to where the appellants were found in unlawful possession of the said trophies, the question of possession of the trophies is rendered unresolved. He supported his averment with the case of **Willy Kitinyi @ Marwa vs. the Republic**(supra).

He further distinguished the decision in **Papaa Olesikaladai @Lendemu and Another vs Republic** (supra) from the case at hand on the ground that in the case at hand there is no proof on where exactly the said offence was allegedly committed by the appellants as in the said case. That, in the case at hand, the offence was committed at a remote area and thus in absence of such proof there is no excuse to absence of independent witness in the said search and seizure. He added that even Exhibit P1, the seizure certificate, did not disclose where the search was

conducted, that is, whether it was at the places listed in the seizure form or in the camp as alleged.

Mr. Kyando maintained his challenge on the process of tendering the cautioned statement. He averred that the procedure requires, where there is more than one accused person, that both/all are awarded the opportunity to challenge the admission of the exhibit tendered or otherwise. In the premises, he still argued that allowing one party alone to challenge the admission was wrong.

He also found the case of **Peter Kashuma vs. Republic** (supra) distinguishable arguing that the said case dealt with an unsigned typescript whereby the hand script was signed, but in the case at hand, both, the typed script and hand script were signed by the presiding magistrate. He had the view that the contradictions should be resolved in favour of the accused because both documents bear the signature of the presiding Magistrate.

As to proof of constructive knowledge rather than actual knowledge, he contended that the test was wrongly employed by Mr. Bashome. On the first condition as to knowledge over the thing in question, he alleged that the record does not show that the 1st appellant led the park rangers to where the alleged trophies were kept, rather the record shows that the appellant had taken park rangers to where his friend was. In that respect, he had the stance that the case of **Ashiraka Nahamala** (supra) is distinguishable as in the said case, the appellant had taken the police to show them where he had kept a subwoofer, he had stollen. He added that, according to PW1, discovery of trophies was made in the course of

search rendering the record silent as to whether any of them had knowledge of what was in the alleged camp.

As to the 2nd condition on whether the appellants had control over the trophies, Mr. Kyando averred that in the absence of the faulted cautioned statement the record shows nothing revealing as to whether any of the appellants was in control of the said trophies and not those that fled away. That, besides, PW1 who was allegedly with four other park rangers testified alone on the said scenario while others were not called. He considered the other park rangers, allegedly being together with PW1, material witnesses and argued that this court is entitled to draw an adverse inference on the failure of the prosecution to call them.

Mr. Kyando further disputed the allegation by Mr. Bashome that the appellant did not cross examine on Exhibit P1. He, he argued that the appellants were both lay persons, hence they only replied they did not know anything which was enough to show that they disputed the seizure certificate even though there was no useful question put to challenge the same.

As to the argument that the tendering of the dynamite was immaterial, he averred that the same was material as the record of the seizure shows that the appellants were found in possession of; *nyama ya Nyati vipande 2, Mikia 2, Ngozi 2 za uso zote za Nyati, shoka (1) , Panga (1), Kisu (1), Baruti ya Gobole G1.5* and the machete and knife had been tendered as material pieces of evidence, but the *gobole*-dynamite of a local made gun was never tendered while big animals like Buffalo are normally killed by such weapons not axes, knives and machetes which are used on the second stage of slaughtering. That, given the allegation

by PW1 that they heard a bang, the same suggests that the gun had been involved, hence the omission to tender the same creates doubts as to the allegations against the appellants as it was possible that they were rather shortlisted.

After considering the grounds of appeal, the submissions from parties and gone through the trial court record; I shall determine the following issues as appearing in the submission of both parties and cutting through all grounds of appeal: **one**, Whether the cautioned statement was properly admitted; **two**, whether the seizure certificate was correctly issued and; **three**, whether the offences against the appellants were proved beyond reasonable doubt.

On the first issue, initially in his submission in chief, Mr. Kyando averred that the 2nd appellant was not given an opportunity to object or otherwise accept the admissibility of his cautioned statement, that is, Exhibit P5, but the opportunity was only accorded to the 1st appellant. This fact that was countered by Mr. Bashome who averred that the original (hand written) proceedings show that the trial court accorded the 2nd appellant the opportunity to challenge the same. Rejoining, Mr. Kyando contended that the cautioned statement being challenged by one party was itself a fatal error.

I have observed both, the original and typed proceedings. In the former, it reflects that the 2nd appellant was accorded the opportunity to challenge the cautioned statement. In the later, it is recorded that it was the 1st accused that was accorded such opportunity. As reasoned by Mr. Bashome, indeed when there exist conflicts as to the original court hand written proceedings and typed court proceedings, the original

record prevails. Such stance was taken by the Court of Appeal in **Peter Kashuma** (supra). In the foregoing, it is clear that there was a clerical error in the typed proceedings. The remaining question is therefore whether the failure of the trial court to accord the 1st appellant the chance to object or not the admission of the 2nd appellant's cautioned statement was a fatal irregularity.

In my considered view, evidence of cautioned statement is always used against the maker. In that respect, the maker has to be given the opportunity to object or not the admission of the cautioned statement in evidence. In the matter at hand, it has already been resolved that the 2nd appellant, being the maker of the statement, was accorded the opportunity to object to the admission of the cautioned statement and he clearly never objected. He admitted to its admission. The record shows that the 1st appellant was not accorded that opportunity. In my considered view, however, I find the omission not fatal to render the exhibit expunged from the record. Though in practice the rest of the accused persons in a case can be given the opportunity to object or not to the admission of the cautioned statement of a co-accused, the admission of the statement where no such opportunity has been accorded cannot be rendered defective as the rest of the accused persons are not the makers of the statement.

Mr. Kyando argued in his rejoinder submission that the omission contravened the law, but he failed to state which law was contravened. Even where the co-accused persons have been incriminated in the statement, the admission of the same cannot be rendered defective on account of them not being given the opportunity to object or not. This is because the evidence of a co-accused can only be relied upon by the

court where there is corroborating evidence. Objections to cautioned statements are only on legal defects, such as, lack of voluntariness or where the statement is recorded in contravention of the provisions of section 50 and 51 of the Criminal Procedure Act. It is only the maker of the statement that can raise such objections. In that respect, the ground of appeal and arguments by the appellants' counsel are found to lack merit.

As to the second issue on whether the seizure certificate was correctly issued. Mr. Kyando challenged that the seizure certificate was improperly procured. His arguments were founded under the proviso to **section 106 (1) (b) of the Wildlife Conservation Act** which provides:

> "**106(1)** Without prejudice to any other law, where any authorised officer has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act, he may-
>
> (a)N/A
>
> (b) enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession:
>
> **Provided that, no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness**"

The proviso clearly sets a condition for presence of an independent witness where an authorized officer has to enter a dwelling house. In the case at hand, the appellants were charged for unauthorized entry to a national park and the search was allegedly conducted at a camp not a dwelling house hence this argument fails.

Now coming to whether the case against the appellants was proved beyond reasonable doubt; the appellants were jointly charged for two offences; **one**, unlawful entry into the national park and **two**, unlawful possession of government trophies.

In the first offence, the appellants were charged under **section 21 (1) (a), (2) and 29 (1) of the National Parks Act** [Cap 282 R.E 2002], which reads:

> "**21(1)** Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable –
>
> (a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both fine and imprisonment;
>
> (b) N/A
>
> **(2)** Any person who contravenes the provisions of this section commits an offence against this Act
>
> **29(1)** Any person who commits an offence against this Act is on conviction, if no other penalty is specified herein, liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both."

As evident, the two provisions do not disclose the offence of unlawful entry to the national park, a fact that is not contested by both parties. Addressing the foundation of the problem the Court of Appeal in **Dogo Marwa @ Sigana & Another vs. Republic** (Criminal Appeal 512 of 2019) [2021] TZCA 593 TANZLII, held:

> "It is now apparent that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and got confusion in section 21 (1) of the NPA. As far as we are concerned, the appellants were charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park."

See also: **Maduhu Nhandi @ Limbu vs. Republic** (supra). Since the first count did not disclose an offence known to law, the appellants were wrongly charged, tried and convicted for the same. The conviction and sentence entered on this court by the trial court are therefore quashed.

As to the offence of unlawful possession of Government trophies, Mr. Kyando was of the view that the same could not be proved due to the fact that the first offence was not proved. I contest this assertion, the offence of unlawful possession of Government trophies will not easily crumble on account of the first count not being proved, even if the alleged offence occurred under similar circumstances. The 1st count was rather disqualified for being preferred under a non-existent law. It can therefore not render the 2nd count unproved.

According to the evidence on record, PW1 and his fellow park rangers found the appellants at Idunda area within Ruaha National Park. At first, he met the 1st appellant who had a bag in which he had stored fish commonly known as "Kambale." He then arrested him and after interrogating him as to whether he had a permit to enter the area, they discovered he had none. He also disclosed that he had left his friends at the camp. Together with other rangers, PW1 led by the 1st appellant entered the said camp whereby other persons escaped save for the 2st

appellant who was caught. It was in such circumstances that the trophies, make, buffalo meat, two buffalo tails and two buffalo skins were found together with the axe, panga and knife which were then seized by PW1 as evident in exhibit P1.

The seized trophies were then stored at Ulanga ranger post and eventually taken to Rujewa Police station where they were kept and managed by PW4 until 13.10.2021 where PW5 sent the same to court for necessary orders. As found at page 26 of the typed proceedings, PW5 stated:

> *"On the 13th day of October 2021, I filled inventory of claimed property and send them to the court for necessary order of the magistrate. the magistrate ordered the material exhibit to be destroyed."*

From the above excerpt it is rather clear that, PW5 who was the investigator of the said case, did not comply with necessary requirements in dealing with disposal of a decaying exhibit to wit, parading the appellants before the said magistrate as set under **Order 25 of the Police General Orders**, which states:

> "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."

The Court of Appeal in **Mohamed Juma @ Mpakama vs. Republic** (Criminal Appeal 385 of 2017) [2019] TZCA 518 TANZLII, emphasized the importance of presenting the accused person before the magistrate from whom the order is sought. It stated:

> "The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard."

Further, upon viewing the evidence of PW5, there was no clear indication on who signed exhibit P4 and where the same was signed. Exhibit P4 has contradicting information on the court in which the order was issued, the title of the same addressed the inventory form to "Magistrate - District Court of Mbarali" while the order seems to have been issued by unidentified magistrate whose signature was attached, but the stamp therein reads "Resident magistrate primary court- Rujewa Mbarali." Clearly, there is neither an identity of who issued the said order nor the place the said order was issued. In consideration of these irregularities, which are fatal and the fatal omission by PW5 to take the appellants before the magistrate when seeking for orders to dispose the perishable exhibits, I hereby expunge exhibit P3 from the record.

In the absence of the trophies or a proper disposal order in lieu thereof issued by the court, the rest of the evidence by the prosecution presented before the trial court cannot stand to prove the offence of unlawful possession of government trophies beyond reasonable doubt. Even though the 2nd appellant's cautioned statement was admitted without objection, it cannot be established as to which trophies the

cautioned statement was made in respect of in the absence of the trophies or a properly procured inventory thereof. By this observation, I hereby find the charge in the 2nd count not proved beyond reasonable doubt by the prosecution.

In the foregoing, I allow this appeal, quash the conviction of both appellants in both counts, set aside their sentence and order their immediate release from custody, unless held for some other lawful cause.

It is accordingly ordered.

Dated and delivered at Mbeya on this 13th day of November 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA