THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

CRIMINAL APPEAL NO.187 OF 2022

(From the District Court of Chunya at Chunya in Criminal Case No. 14 of 2021)

MAGANGA UGALI NGUDALO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order : 26.06.2023
Date of Judgement: 13.11.2023

MONGELLA, J.

This appeal originates from the district court of Chunya at Chunya in Criminal Case No. 14 of 2021. In that case, one Gadala Seni (1st accused) and the appellant (as 2nd accused) were arraigned for the offence of unlawful possession of government trophies under **section 86 (1), (2) (c) (iii) and (3) of the Wildlife Conservation Act, No. 5 of 2009** read together with paragraph **14 of the first Schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Organized Crimes Control Act [Cap 200 RE 2019].**

The particulars of the offence were that: on 09.12.2020 at Kambikatoto village within Chunya district and Mbeya region, the two were jointly and together found in possession of Government trophy to wit; Zebra meat

valued at USD 1200 equivalent to T.shs. 2,780,000/= the property of the government of the United Republic of Tanzania without permit.

Both, the 1st accused and the appellant pleaded not guilty, hence the matter proceeded to full trial. The trial court found that the case against the 1st appellant was not proved beyond reasonable doubt, hence acquitted him. The trial court, however found the case was proved against the appellant, hence convicted him and sentenced him to pay a fine of T.shs. 8,340,000/- or to serve 20 years in jail. Aggrieved by such conviction and sentence, he has preferred this appeal on the following grounds:

1. *That - the trial court erred in law when convicted and sentenced the appellant without taking into account that the prosecution failed to proof* (sic) *its charge as per law.*

2. *That - the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the evidence ofPW2 VEO who told the trial court that he one whom the search conducted in his domicile is the first accused and was the one who signed the certificate of seizure exhibit PE 2.* (sic)

3. *That - the trial court erred in law when convicted and sentenced the appellant without taking into account that failure to the prosecution side to tendered the said zebra meat to be seen physically before the trial court the charge against the appellant remains as tale of imaginable stories which lacks truth ness.* (sic)

4. *That - the trial court erred in law when convicted and sentenced the appellant without regarding that the evidence of pack rangers. wildlife conservation officer, and police officers were contradicted in whom was found with such trophy. But in fact the evidence of pw2 a VEO as a justice of peace in his area is accuracy and very important to proof the owner of such trophy.* (sic)

5. *That - the trial court disregarded the defence of the appellant.*

During the hearing which was conducted orally, the appellant fended for himself whereby he prayed for the court to adopt his grounds of appeal as his submission in chief. The respondent was represented by Mr. Bajuta, learned state attorney, who had to reply to the grounds of appeal following the appellant's prayer.

Mr. Bajuta commenced his submissions by giving a brief summary of the case. On the 1st ground, he averred that the offence against the appellant was proved at the trial court. That, the prosecution furnished three witnesses who tendered two exhibits and the trial court was satisfied that the charge was proved beyond reasonable doubt. He referred the court to page 3-4 of the trial court Judgement. He added that the trial court also observed that the appellant failed to ask relevant questions to the prosecution witnesses. It thus drew inference from the case of **Mawazo Anyandwile Mwaikwaja vs. DPP** (Criminal Appeal 455 of 2017) [2020] TZCA 268 TANZLII. That, the trial court further noted that the appellant never objected to the tendering of exhibits, especially "exhibit P2" the inventory form and the Seizure Certificate and never

cross examined or denied during defense, thereby admitting to the contents of the documents.

On the 2nd ground, Mr. Bajuta averred that PW2, the VEO, witnessed the search and he testified that when searching the house of the 1st accused, there were 8 houses in the compound and in the 4th house they found the trophy. That, the appellant was in one of the rooms in the said house. He added that the appellant also signed the seizure certificate with his thumb print and never cross examined the same on the allegation that he never signed.

As to the 3rd ground, he averred that the trophy could not be tendered before the trial court due to preservation issue. That, under **section 101 (1) (a) of the Wildlife Conservation Act (WCA),** the court may, on its own motion or on application by the prosecution, order the disposal of a trophy prone to decay and the order may be used as evidence. He averred that in complying with the said requirement, an inventory form was prepared. That the same was sought by PW3 who after arresting the 1st accused and the appellant, took them to Rungwa and thereafter to Manyoni district court to procure an order to dispose the trophy and an inventory form was thereby issued.

He added that the arrests took place in 2020 and the accused were tried in 2022. He further explained that the inventory form was issued to represent the trophy. He asserted that the order for disposition was sufficient proof in view of **Section 101 (1) (a) of the Wildlife Conservation Act (WCA)**. Further, he contended that the appellant never cross examined on the exhibit and never raised any claim on the same during his defense. He cited the case of **Hamisi Hassani Jumanne vs. Republic**

(Criminal Appeal No. 397 of 2021) [2023] TZCA 79 TANZLII, to support his argument and further stated that the chain of custody was never broken as the appellant and 1st accused person had been present throughout the process.

On the 4th ground, Mr. Bajuta asserted that there was no inconsistency in the testimony of the witnesses as to who was found in possession of the trophy. That, PW1 testified as to the value of the trophy while PW2 testified to have found a visitor identified as the appellant.

Addressing the 5th ground, he had the view that the trial court did consider the defense evidence but found the same insufficient to raise doubt on the prosecution evidence. He contended further that it is not necessary for the court to agree with all the evidence presented before it and that is the reason the trial court acquitted the 1st accused and convicted the appellant. In his view, all grounds of appeal are without merit. He prayed for this court to dismiss the appeal.

In his rejoinder, the appellant had nothing much to say other than that his grounds of appeal are water tight. He prayed for the same to be considered. That, he was merely a visitor in the 1st accused's home and had only come to attend a wedding and ended up being arrested.

I have considered the grounds of appeal, the submissions by the parties and gone through the trial court record. In resolving this appeal, I shall deliberate on the main issue as to whether the case was proved against the appellant beyond reasonable doubt. In the course of doing that, I shall also consider the issues: whether the trial court properly evaluated the evidence of PW2; whether the prosecution failed to tender the

trophy thereby rendering the charge unproved; whether the evidence of the prosecution witnesses was contradictory; and whether the defence case was considered. Prior to resolving the issues, I find it imperative to re-analyse the evidence presented before the trial court by both parties.

To prove its case, the prosecution called three witnesses being: PW1, Angelo Lunimba; PW2, Erick Edward Msola and; PW3, Christian Anthon Pesambili.

PW3, a wildlife conservation officer, testified that he received a tip from an informer to the effect that at Kambikatoto village, the 1st accused was in possession of government trophies. Accompanied by Samwel Pere and Josephat Mashauri, he went to Kambikatoto village. Upon arriving, they looked for the village executive officer, PW2 so that he could witness the search at the 1st accused's house. They let PW2 and the 1st accused search them first. Thereafter, they conducted a search in the 1st accused's house whereby they did not find any trophy. Then they moved to other 2 houses in the premises, but also did not find any trophy. When searching the fourth house, they found the appellant in the room who was identified to them. It was in the said house that they found three (3) pieces of dried Zebra meat and one toe.

He testified further that the appellant confessed to be the owner of the trophy and that he was involved in poaching activities. PW3 filled a certificate of seizure which was signed by the 1st accused, the appellant, and an independent witness. Thereafter, they took the 1st accused and the appellant to Rungwa and then to Manyoni at "*Kikosi dhidi ya Ujangili*" whereby they were instructed to procure an inventory form. He

testified further that he went with the accused to Manyoni district court whereby the inventory form was issued and an order for the same to be disposed of. He tendered both, the seizure certificate and the inventory form which were both admitted as exhibit PE2.

PW2, the VEO, testified that he was on the fateful day, awakened by the game rangers from Rungwa Game Reserve who informed him that they wanted to search his village as they were informed that there are people who possessed government trophies. He thus accompanied them to the house of the 1st accused whereby they did not find any trophy. However, when they searched another house, a visitor's house, they found three pieces of dried zebra meat which was seized and a certificate of seizure thereby was issued. He as well signed the seizure certificate.

PW1, a wildlife officer working at Manyoni central zone office testified that on 09.10.2020, while at home, he was called to Manyoni police station and required to identify the seized meat if the same was government trophy. He was shown the exhibits which were three pieces of meat and one toe which he identified as Zebra meat and toe. He valued the same as worth 1200 USD which, under the rate of T.shs. 2316.7 per a dollar, as per BOT standards, the same was equivalent to 2,780,000/=. He thereby filed a valuation certificate reflecting the value, which he tendered and was admitted as exhibit PE1.

On defence, the 1st accused gave his evidence as DW1 and the appellant as DW2. They both had no additional witnesses. The 1st accused denied the charge against him and averred that on the material day, game officers arrived at his home at night hours and wanted to search his house. That, he requested for village leaders to be

involved, but his request was denied. That, they searched his house but found nothing. He denied knowing the appellant and averred that he never invited him into his home and that the appellant was found in the house of one of his children.

The appellant testified that he was an invitee in the 1st accused house whereby he was invited by the 1st accused to the said house. That, he had gone there for a wedding ceremony and thereafter slept at the 1st accused's house, but he was arrested. He said that even the 1st accused requested for his release, but they did not release him. That, he was then taken to the police station and arraigned before the trial court. He denied having been found in the 1st accused's house with government trophies. He further claimed that he was denied the chance to call his relatives and village leaders to verify if he was responsible for the said trophies.

The records of the trial court depict that there are two charges. Initially, when the matter came before the trial court, on 10.08.2021, the 1st accused and the appellant were charged for unlawful possession of government trophies, to wit, dried meat of zebra and one toe valued at USD 1,200 equivalent to T.shs. 2,780,00/=. The charge reads:

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE COURT OF DISTRICT MAGISTRATE OF CHUNYA DISTRICT
AT CHUNYA
(Economic Crimes Jurisdiction)
ECONOMIC CRIME CASE NO. 14 OF 2021
REPUBLIC

VERSUS

1. GADALA S/O SENI
2. MAGANGA S/O UGALI NGUDALO

CHARGE

STATEMENT OF THE OFFENCE

UNLAWFUL POSESSSION OF GOVERNMENT TROPHY, *contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the 1st Schedule to and Section 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act [Cap 200 R.E 2019].*

PARTICULARS OF THE OFFENCE

Gadala s/o Seni and Maganga s/o Ugali Ngudalo on 09th day of December, 2020 at Kambikatoto village within Chunya District and Mbeya Region, were found in possession of Government Trophy to wit, Dried Meat of Zebra and one Toe valued at USD 1,200 which is equivalent to Tsh. 2,780,000/=, the property of the Government of the United Republic of Tanzania without permit.
Dated at Chunya on this 9th day of August 2021.

On 02.03.2022, when the matter came for preliminary hearing, the prosecution prayed for the charge to be substituted so as to amend the particulars of the offence, especially on the date the offence was committed. The charge was amended and a new charge presented before the trial court. The charge was read to the 1st accused and the appellant to which they entered a plea of not guilty. In the said charge, amendments were made to the title of the charge, especially on the name of the court. The charge also added one more provision to the statement of the offence, that is, section 60 (3) of the Economic and Organized Crime Control Act. They were thus charged for unlawful possession of government trophy, to wit, Zebra meat valued at USD 1,200 equivalent to T.shs. 2,780,000/=. The amended charge reads;

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE DISTRICT COURT OF CHUNYA
AT CHUNYA
ECONOMIC CRIME CASE NO. 14 OF 2021
REPUBLIC

VERSUS

1. GADALA S/O SENI
2. MAGANGA S/O UGALI NGUDALO

AMENDED CHARGE

STATEMENT OF THE OFFENCE

UNLAWFUL POSESSSION OF GOVERNMENT TROPHIES *c/s 86 (1) (2) (c) (iii) and (3) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the 1st Schedule to and Section 57 (1) and 60 (2) and (3) of the Economic and Organized Crime Control Act [Cap 200 R.E 2019].*

PARTICULARS OF THE OFFENCE

Gadala s/o Seni *and* ***Maganga s/o Ugali Ngudalo*** *on or about 09th day of December, 2020 at Kambikatoto village within Chunya District and Mbeya Region, jointly and together were found in possession of Government Trophy to wit, Zebra Meat valued at USD 1,200 which is equivalent to TSh. 2,780,000/=, the property of the Government of the United Republic of Tanzania without the permit.*
Dated at Chunya on this 02 day of 03, 2022.

Despite the alterations made to the charge, the evidence produced before the court was on the items listed in the first charge which was amended and no longer relied on. PW3 who seemed to head the entire search operation testified that the accused persons were found with three pieces of dried Zebra meat and one toe. PW1 who valued the items upon which the charge is founded also testified that the accused persons were found in possession of three pieces of dried zebra meat and one toe. Exhibit PE1, the valuation Certificate issued by PW1,

concerned the valuation of three items which were collectively valued at USD 1200 equivalent to T.shs. 2,780,000/=. Apart from that, the fact that there were three pieces of dried meat and one toe is reflected in both exhibits PE1 and PE2.

The record shows that there was no explanation brought before the court to justify the removal or otherwise of the toe from the initial charge upon its substitution while the evidence produced supported particulars of the offence depicted in the initial charge. I think after PW1's testimony, the prosecution or the trial court ought to have realized the variation and subsequently had the charge amended to reflect necessary details as required under **section 234 (1) of the Criminal Procedure Act [Cap 20 R.E 2022]** which Reads:

> "Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just."

The need to amend a charge when there is such variance between charge and evidence was also emphasized by the Court of Appeal in the case of **Thabit Bakari vs. Republic** (Criminal Appeal 73 of 2019) [2021] TZCA 259 TANZLII, in which it held:

> "It is expected that when the prosecution becomes or is made aware of the variance between the charge and evidence, it was required to seek leave to amend the charge. In the instant case this was not done. It is well settled that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case."

Maintaining the same view, the Court in **Erasto John Mahewa vs. Republic** (Criminal Appeal No. 287 of 2020) [2023] TZCA 17678 TANZLII, elaborated:

> "It is trite law that, the allegations contained in the charge must be supported by the prosecution account so as to prove the charge beyond reasonable doubt. The variance between the charge and the evidence adduced can be remedied before the end of the trial by invoking the provisions of section 234 (1) of the Criminal Procedure Act [CAP 20 R.E 2022] to amend the charge for cases triable by the subordinate courts like the present one. Where the variance remains unchecked, the adverse effect is that the prosecution case will be rendered not proved."

Having found the variance between the charge and evidence the apex Court held:

> "Under the circumstances, it was incumbent on the prosecution to seek leave of the trial court to amend the charge pursuant to section 234(1) of the CPA. However, this was not the case and yet, regardless of the variance, still the two courts below were satisfied that the charge was proved to the hilt. Failure to seek leave to amend the charge was fatal and prejudicial to the appellant

leading to serious consequences rendering the charge not proved beyond reasonable doubt."

It is clear that there was a variance between the charge and evidence on the charge which was apparently not addressed. The failure to do so, as seen in the foregoing decisions by the Court of Appeal rendered the charge unproved beyond reasonable doubt.

Even if I was to ignore the variance between the charge and evidence, upon considering exhibit PE2, specifically the inventory, I am of the view that the same ought to have been expunged. **Section 101 of the WCA** recognizes the need for the court to order disposal of a decaying trophy prior to commencement of proceedings and accords weight to the disposal order. This requirement came with the amendment of the said provision as introduced by **Section 37 of Act No. 2 of 2017**. The provision now requires for an application to be made where a party seeks for the trophy to be disposed. This is found under **Section 101 (1) of the WCA** which reads:

"101.(1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-

(a) prior to commencement of proceedings, order that-

(i) any animal or trophy which is subject to speedy decay; or

(ii) any weapon, vehicle, vessel or other article which is subject of destruction or depreciation,

and is intended to be used as evidence, be disposed of by the Director; or..."

The details on the procedure for disposal and signing of inventory form where the same is conducted during investigation procedures by the police is governed by **Paragraph 25 of the Police General Orders (PGO)** which reads:

> "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 in **Mohamed Juma @ Mpakama vs. Republic** (Criminal Appeal 385 of 2017) [2019] TZCA 518 TANZLII, which dealt with a matter that had been filed prior to amendments to the section 101 of the WCA, while addressing the application of **paragraph 25 of the PGO** 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."

It seems that PW3, opted for the second option under the PGO. However, the same was a wrong approach given that the whole process seemed to involve wildlife officers. I do not find the PGO being applicable to them. They ought to have observed procedures laid out under **Section 101 (1) of the WCA**.

Further, the inventory form had multiple errors; one, it did not disclose at which court the same was procured. There was no court seal annexed thereto, no name of the court displayed in any part of the document.

In addition, apart from the signature therein affixed in a column dedicated to the court, there was no name annexed thereto. What is visibly seen is the signature and title of the judicial officer which was "PCM" an abbreviation commonly used for primary court magistrates who by the way do not preside in district court. It remains unclear as to whether PW3 indeed went to Manyoni district court as he stated; whether the inventory was really signed by a magistrate given the non-disclosure of names; whether the order was at all produced by the court when there is no seal. All in all, the exhibit is fatally defective and cannot be relied on. In the foregoing, the inventory form is thus expunged.

With the Inventory form out of the way, the evidence on record is left wanting as a certificate of seizure cannot in itself serve as evidence of the trophy. The same ought to have been brought in court.

In such variance between the charge and the evidence on record and the lacking evidence of the prosecution, I find that the prosecution failed to prove the charge against the appellant as well, beyond reasonable doubt. In the foregoing, I quash his conviction and set aside his sentence. I herein order for his immediate release from custody unless held for some other lawful cause.

Appeal allowed.

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

X

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