IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF TABORA

AT TABORA

CRIMINAL APPEAL NO. 14 OF 2023

(Originating from DC. Criminal Economic Case No. 12 of 2022)

IBRAHIM S/O RASHID @ LUHUVULA ....APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

Date: 17/7/2023 &11/8/2023

BAHATI SALEMA, J.:

In this first appeal, the appellant, **Ibrahim s/o Rashid@ Luhuvula** is challenging a conviction and a 20-year jail term passed by the District Court for Tabora at Tabora. The accused was charged with three counts of Unlawful Possession of Government Trophies c/s 86(1) and (2) (c) (ii) of **the Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the **Economic and Organized Crime Control Act**, Cap. 200 as amended.

The particulars of the case can be gleaned as follows: on 9th March, 2022 at Mtapenda village within the District of Kaliua in Tabora region, the accused person was found in possession of a government trophy, to wit: one hippopotamus tooth equivalent to one hippopotamus valued at 1500 USD equivalent to TZS 3,504,000/=; *second count*, nose and bones of bush pig equivalent to one killed bush pig valued at 420 USD equivalent

to 981,120 and *third count*; one ground Pangolin shell equivalent to one killed ground pangolin valued at 960 USD equivalent to TZS 2,242,560/= the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The evidence available on record reveals that PW1, Emmanuel Paschal, a wildlife officer was at work and received information from the informer that the accused herein of Mtapenda village possesses government trophies. After receiving such information, PW1 and his colleagues went to Mtapenda village, where the accused lived. They went to the village chairman, who told them he was sick and directed them to his vice chairman, Malick Yohana, PW3, and went to the appellant's house. Upon arrival, PW3 knocked on the door, and the appellant opened it. He was introduced to the wildlife officer and the purpose of going to his house. They started searching the accused house and climbed up to the ceiling where they found a bag and lowered it down, after opening it, they found one hippopotamus tooth, the nose of a bush pig, two bones of a bush pig, pangolin shells and gunpowder where he filled out a certificate of seizure and handed over to the storekeeper. The certificate of seizure was admitted as Exhibit "P1", the Hippopotamus tooth as Exhibit "P2", the nose of a bush pig as Exhibit "P3", two bones of the bush pig as Exhibit "P4", three pangolin shells as Exhibit "P5", and gunpowder as Exhibit "P6". PW2 Hatibu Mwangela, a wildlife officer and valuer testified that on 11/3/2022 the storekeeper sent him the exhibits which were labeled IR 15/2022 and the name of the accused was noted. He analyzed and identified the specimen and evaluated it. PW3, Malika Yohana Kayanda, a secretary of the Hamlet village testified that he was followed by wildlife officers from TAWA to accompany them to look for a person who

possesses weapons unlawful. They searched the house of Ibrahim but found nothing until they searched the ceiling board where they found a bag that had government trophies. They filled out all the exhibits in the form and the statement was recorded and signed by him.

In his defence, the appellant testified that the wildlife officer climbed to the ceiling and threw down a bag which he denied to be his property but admitted that Malika is the secretary of Hamlet village. In view of the evidence adduced by the prosecution and the defence, the trial court was satisfied that the prosecution had proved its case; convicted and sentenced the appellant as stated herein.

Disgruntled with the sentence and conviction meted out against him, he knocked at the door of this Court by way of appeal, armed with three grounds, namely;

1. That, the case for the prosecutions was not proved, against the appellant, beyond reasonable doubt as required by the law.
2. That, the learned trial magistrate erred in fact and law for failure to address his mind to the issue of the chain of custody of the alleged trophies in that;

i. *The storekeeper who already allegedly kept and labeled the seized trophies and recorded their movements from the store to PW2 and back, was not summoned in court to testify on the handling of the trophies.*
ii. *PW1 did not tender issue a requisition voucher from the alleged storekeeper to show that exhibit P2, P3, P4 and P5 came from the store before tendering them in court as exhibit.*

iii. *There is a discrepancy in the number of the seized trophies as described in the particulars of the offence, the testimony of PW1 and PW3 and what was tendered in court as an exhibit. While the particulars of offence in the charge sheet alleges one hippo tooth, a nose, and the unspecified number of bones of bush pig and a shell of ground pangolin, the testimonies of PW1 & PW3 and the contents of exhibit P1 coupled with what was tendered in court as exhibit P1, P2, P3, P4 and P5 accounts for hippo teeth (not tooth), two bones of bush pig and three pangolin shells.*

3. That, PW2 and PW3 did not identify in court, exhibits P2, P3, P4 and P5, to shed light on whether indeed they are the same trophies that were allegedly seized from the appellant.

The appellant prayed this honorable High Court to allow the appeal, quash the conviction, set aside the sentence, and order for the appellant's release from prison custody.

When the matter was called on for hearing, the appellant was self-represented whereas Mr. Charles Magonza, Ms. Idda Rugakingira and Ms.Wivina Rwebangira, learned State Attorneys for the Republic.

Being a layperson, the appellant adopted the petition of appeal and waited to rejoin.

In his rebuttal, Mr. Magonza for the Republic submitted on the third ground of appeal on the identification of the seized trophies that; PW2 Hatibu Mwangela identified a hippopotamus tooth, the nose of a bush pig, and three pangolin shells, whereas PW3 Malika Yohana testified that he found gunpowder, three pangolin shells, the nose of a bush pig, one tooth

of a bush pig, and two bones of a bush pig. He contended that it was identified and mentioned by PW1, Emmanuel Paschal and PW2, Hatibu Mwangela. Therefore, he urged this court to find no basis on this ground.

As to the second ground of appeal; on the chain of custody, the storekeeper was not summoned to testify in court. The learned State Attorney admitted that the storekeeper was not summoned, but oral evidence of PW1, Emmanuel Paschal and PW2, Hatibu Mwangela, both wildlife officers were enough to establish the chain of custody was not broken.He contended that PW1 explained to the court that after inspection he handed it directly to Paulo Masanja, a storekeeper, who labeled it as IR 15/2022 with the name of the accused. He further stated that PW2, who was the evaluator, explained to this court that he received the exhibits from the storekeeper, which had a label of IR and the name of the accused therein. He averred that oral evidence given established that the chain of custody was proper. The exhibits received were not tampered with or changed. Hence, the ground had no basis.

As to PW1, Emmanuel Paschal wildlife officer did not tender a requisition voucher from the storekeeper to show how exhibits P2, P3, P4 and P5 came from the store. He reiterated his submission that oral evidence was enough to establish that the chain of custody was not broken since PW2 and PW1 evidence was sufficient.

In respect of the discrepancy in the number of seized trophies. The learned State Attorney contended that in the charge sheet, the particulars of offence stipulated the offence. He submitted that by reading between the lines, there is no discrepancy since it explains one tooth. Also, the second count explains it openly. Nevertheless, he admitted that there was

a problem with a specific number of pangolins. He stated that the charge sheet reveals one pangolin shell, while the evidence adduced revealed three pangolin shells which were admitted. He admitted that the prosecution had a duty to make the necessary corrections. He quickly referred this court to section 234 of **the Criminal Procedure Act**, Cap. 20 and also cited the case of **Mohamed Kaningo V Republic**, 1980 TLR, page 186. He stated that the discrepancy can be cured as it was in the case of **Jamal Alli @ Salumu V Republic**, Criminal Appeal No. 2017.

As to the first ground of appeal, he contended that the case was proved beyond reasonable doubt. The accused was charged with three counts contrary to Section 86 (2) (c) (ii) of the **Wildlife Conservation** Act No. 5/2009 and **Economic and Organized Crime, Control Act,** Cap. 200. The prosecution had three witnesses and six exhibits, where PW1 and PW3 proved the arrest of the accused who was found with government trophies. PW1 and PW3 explained that during the inspection they found the alleged properties which were admitted in court. PW3 explained clearly that he went with PW1 to the accused place and after inspection, they succeeded to find a bag on the ceiling board. The prosecution had a certificate of seizure that was signed by PW3 and was admitted as part of the exhibit.

In his brief rejoinder, he prayed for this court to allow his appeal.

Having heard the rival submissions tabled by both parties, the issue for determination is whether the prosecution case was proved beyond reasonable doubt.

There is no dispute that the appellant was charged with three counts of unlawful possession of government trophies.

Beginning with the second ground of appeal, it is settled principle that in cases involving the movement of exhibits from one point to another, the evidence concerning the *chain of custody* is of utmost importance. As a matter of principle, it is well settled that, as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused person, which is the same as what was finally tendered in court. There are several authorities giving guidance on the chain of custody including the landmark case of **Paulo Maduka and Four Others v. Republic,** Criminal Appeal No. 110 of 2007 CAT (unreported), which insisted on the proper documentation of the paper trail from the time of seizure up to the stage at which the exhibit is tendered in court as evidence. However, documentation is not the only way to establish the chain of custody. The jurisprudence in this area has been developed cautiously over time. In several cases, such as **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No. 551 of 2015, and **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 [2018] TZCA 361, a demarcation was drawn between the handling of exhibits that cannot change hands easily and those that can change hands easily. The position of the law is that, for exhibits that cannot change hands easily, oral testimony on handling the exhibit suffices to establish the chain of custody.

Having traversed the court records, there is nothing shown in respect of the power of PW1 and PW2 to search with or without a search warrant. Also, the storekeeper who was the key witness did not appear in court, nor did tender the requisition voucher form. Therefore, I find this ground of appeal has merit.

As to the first issue, the storekeeper who already allegedly kept and labeled the seized trophies and recorded their movements from the store to PW2 was not summoned in court to testify on the handling of the trophies. The State Attorney submitted that PW2, who was the evaluator, explained to this court that he received the exhibits from storekeeper Masanja and the exhibit had a label of IR with the name of the accused. He further emphasized that oral evidence given established that the chain of custody was adhered to. The exhibits received were not tampered with or changed.

As correctly complained by the appellant, this court, having traversed the records of the court, noted that the storekeeper, who already allegedly kept and labeled the seized trophies and recorded their movements from the store to PW2 was not summoned in court to testify on the handling of the trophies. I am alive to the principle that, in proving any fact, it is the strength of the evidence that matters and not the number of witnesses, as provided under Section 143 of **the Evidence Act**, Cap. 6. Equally, it is vital to underscore that the general rule is that the prosecution is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, can testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an adverse inference against the prosecution. See, for example; **Azizi Abdalah v. Republic** [1991] TLR 71 and **Riziki Method @ Myumbo v. Republic**, Criminal Appeal No. 80 of 2008 CAT (unreported).

In the instant case, the storekeeper Paul Masanja was a material witness who could cast doubt on the discrepancies in the number of the seized trophies as described in the particulars of the offence and the

testimonies of two witnesses in respect of the number of pangolin shells that were received and admitted in court.

This witness was listed as one of the prosecution witnesses, but the prosecution opted not to call him without sufficient reason being shown. The materiality of his testimony comes from the fact that he labeled the exhibits and kept them in safe custody. This witness was also material to confirm that it was the accused person who signed and corroborated the evidence of PW1 and PW2, whose evidence was not watertight. Therefore, failure to call him without giving any reason at all casts strong doubt on the prosecution's evidence.

Coming to the allegation of tendering the requisition vouchers, as rightly alleged by the appellant, PW1 did not tender requisition vouchers from the alleged storekeeper to show that exhibits P2, P3, P4, and P5 came from the store before tendering them in court as exhibits as per the requirement of the law.

As to the issue of discrepancy in the number of the seized trophies as described in the particulars of the offence, the testimony of PW1 and PW3, and what was tendered in court as an exhibit. While the particulars of offence in the charge sheet allege one hippo tooth, a nose and unspecified number of the shell of ground pangolin contrary to the testimonies of PW1 and PW3 on the contents of the exhibit with what was tendered in court as exhibits P1, P2, P3, P4, and P5 account for hippo teeth (not tooth), two bones of bush pig and three pangolin shells.

Section 132 of **the Criminal Procedure Act**, Cap 20[R.E 2022] lays down the contents of a charge and states thus:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The appellant in the present matter was charged and convicted of the offences of government trophy c/s 86(1)(2) (c)(ii) of the **Wildlife Conservation Act**, No. 5/2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60 (2) of the **Economic and Organized Crime Control Act**, Cap.200

Going by the principle above, it was incumbent on the charge to make full disclosure of the particulars of the offence of government trophies, that is, according to the charge sheet, the particulars of the allegation that one hippopotamus tooth equivalent to 1500 USD equivalent to TZS 3,504,000/; nose and bones of a bush pig equivalent to USD 420 equivalent to TZS 981,120/= and one ground pangolin valued at USD 960 equivalent to TZS 2,242,560/=.Looking at the charge which appears to have been drawn and filed in court on 28th September, 2022, I have observed that on the third count, the particulars of the offence were different from those of the evidence adduced by witnesses. PW1, Emmanuel Paschal, wildlife officer in his evidence managed to find one hippopotamus tooth, the nose of a bush pig, two bones of a bush pig, pangolin shells, and one bag of gunpowder whereas PW2, Hatibu Mwangela, wildlife officer also stated that he received the exhibits in a green and pink bag which had a hippopotamus tooth, nose of bush pig and three pangolin shells and PW3, Malika Yohana Kayanda testified that he found gunpowder, three pangolins shells, nose of bush pig, one tooth,

two bones of a bush pig. The court in the case of **Vumi Liapenda Mushi vs The Republic,** (CAT), Criminal Appeal No. 327 of 2016 stated that;

> *"It is clear that there is variance in the charge and the evidence of PW3 which should be resolved in favour of the appellant."*

Hence, it is my considered view that the glaring contradictions that were apparent in the testimonies of the witnesses raised doubts about the credibility of the witnesses. I find merit in this.

This appeal, therefore has merit. In the upshot, I will allow the appeal, quash the conviction and set aside the sentence of the appellant. He shall forthwith be released from custody unless he is held for some other lawful reasons.

Order accordingly.

Right of appeal explained.

A. BAHATI SALEMA

JUDGE

11/08/2023

Court: Judgement delivered in presence of both parties.

A. BAHATI SALEMA

JUDGE

11/08/2023