IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 81 OF 2022

(Arose from Economic Case No. 37 of 2021; in the Resident Magistrate's Court of Morogoro, at Morogoro delivered on 12th August, 2022)

BETWEEN

ALLY MBILU AND OMARY MRISHO JUMA ..... APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

15th Dec, 2023

M.J. CHABA, J.

This appeal is against conviction and sentence entered against the appellants, Ally Mbilu and Omary Mrisho Juma by the Resident Magistrate's Court of Morogoro, at Morogoro on 12th August, 2022. It is on records that, the appellants were arraigned before the trial Court facing two offences as follows: First Count was laid against the first Appellant, Ally Mbilu (1st Accused at trial) which was unlawful possession of Government trophies contrary to section 86 (1), (2) (ii) 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) of the Economic and Organized Crime Control Act, [CAP. 200 R.E. 2019], now [R.E. 2022]. The Second Count was laid against the 2nd Appellant, Omary Mrisho Juma (featured as 2nd Accused at trial) which was Unlawful Possession of

Firearms contrary to section 20 (1) and (2) of the Firearms and Ammunition Control Act, No. 2 of 2015 read together with Paragraph 31 of the First Schedule to, and Section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [CAP. 200 R.E. 2022].

At the culmination of full trial, the appellants were found guilty and convicted on both Counts and subsequently each of the Appellant was sentenced to serve a term of twenty (20) years imprisonment on each Count.

A brief factual background leading to the guilty, conviction, sentence of the Appellants and this subsequent appeal is that, on 15th December, 2017 at Kunke Village in the Ward of Turiani within Mvomero District in Morogoro Region, the Appellants were found while in possession of Government trophies, to wit; four elephant tusks valued at USD 30,000.00 equivalent to Tanzanian Shillings Sixty-Seven Million Three Hundred Twenty-Six Thousand (TZS. 67,326,000/=). On the same day, the 2nd Appellant, (Omary Mrisho Juma) was found while in Unlawful Possession of Firearms make Muzzle loading gun famously known as "Gobore" without permit or valid license from the Registrar of Firearms. As to how the Appellants were tracked by the security agencies, arrested and finally found in that scenario, the Republic / Prosecution side called and/or summoned at trial seven (7) witnesses and tendered five (5) exhibits to prove the case beyond reasonable doubts. The evidence on record shows further that, the Republic / Prosecution received the information from their secret informant at Dar Es Salaam that, the Appellants are dealers of

Government trophies in Morogoro Region. The secret informant in collaboration and coordination with the officers from Dar Es Salaam and Police officers from Morogoro Region organized a trap of arresting the Appellants, and finally they managed to arrest them while in possessions of Government trophies and fire arms as hinted above, and afterwards charged and prosecuted them accordingly, where at the height of full trial both were found guilty, convicted and sentenced to serve twenty years for each Count, hence the present appeal.

Discontented by the decision of the trial Court, the Appellants appealed to this Court contesting both conviction and sentence. In a bid to pursue for their rights, the Appellants jointly filed a petition of appeal comprised of fourteen (14) grounds of appeal. However, upon perusing these grounds of appeal, I have decided not to reproduce them here for a reason that, the main grievance of the Appellants is that, the prosecution side failed to prove their case beyond reasonable doubt, hence the Appellants' conviction and sentence do not hold water.

When the appeal was called on for hearing on 12th July, 2023, the Appellants appeared in persons, and unrepresented whereas the Respondent / Republic was represented by Mr. Shabani Abdallah Kabelwa, Learned State Attorney.

When the Appellants were invited to argue their appeal, being laypersons, they only adopted their joint grounds of appeal and prayed the Court to allow their appeal, quash the conviction, set aside the sentences imposed to them by

the trial Court and set them free from prisons. They further prayed to let the Respondent / Republic response to their grounds of appeal first and reserved their rights to make rejoinder if the need to do so would arise. That being the position, I invited Mr. Shabani A. Kabelwa on behalf of the Respondent / Republic to commence his arguments.

At the outset, Mr. Shabani A. Kabelwa, Learned State Attorney stated that the Respondent / Republic was supporting both conviction and sentences imposed by the trial Court against the Appellants. He averred that, upon reading all 14 grounds of appeal, he found that all had no merits. However, apart from his stance, Mr. Kabelwa argues that upon perusing the records of the trial Court he noticed that the trial resident magistrate recorded the evidence of PW1 (Simon Leonard Mushi) on 22nd February, 2022 without indicating that such testimony was taken and recorded upon affirmation or swearing. He submitted that, without indicating to that effect, that was a fatally procedural irregularities which renders the whole evidence adduced by PW1 and the exhibits tendered by him nullity. As to the consequences for failure to indicate whether the testimony of a witness was recorded upon taking oath (swearing) or affirmation, Mr. Kabelwa was straight that, such testimony lacks evidential value and its effect is to expunge it from the Court records and the exhibits tendered by a witness during trial must follow suit.

He further submitted that, since the trial Court violated the mandatory provision of section 198 (1) of the Criminal Procedure Act, [CAP. 20 R.E. 2022]

(the CPA), it means that the evidence given by PW1 (Simon Leonard Mushi) and the documentary evidence tendered by him which were received by the trial Court and marked as Exhibits PE1, Exhibit PEC2, and Exhibit PEC3 of which according to the proceedings of the trial Court were vital and essential to build up the prosecution case, if all will be expunged from the Court records, nothing will remain in the records as strong evidence to warrant sustainability of the Appellants' conviction. He added that, since the evidence given by PW1 appears to be so strong and heavily supporting the charge sheet and the entire case preferred by the prosecution side against the Appellants, unfortunately have been caught by the web of non-adherence to the relevant procedural requirements, taking into account that PW1 fully involved to trace and finally arrested the Appellants in connection to the offences they stood charged, and further that he is the one who prepared all relevant documents including filling the certificate of seizure, it means that this defects goes to the root of the case and the decision must favour the Appellants.

To buttress his contention, the State Attorney cited number of authorities expressing the consequences of such defects, and invited this Court to order the matter be tried de-novo as the mistakes was not caused by the prosecution side but it was committed by the presiding and/or trial resident magistrate. Among others, he referred this Court to the case of **John Hilarius Nyakibari Vs. Republic (Criminal Appeal 125 of 2020) [2022] TZCA 439 (18 July**

2022), where the Court of Appeal of Tanzania at page 7, second paragraph stated that:

> *"The foregoing apart, we are mindful that the mistake committed by the trial court's registry is a misstep that should not normally be visited on a litigant. For, it is settled that generally inefficiency of court staff in the performance of their duties should not penalize the unsuspecting litigant: Msasani Peninsula Hotels Limited and 5 Others v. Barclays Bank Tanzania Limited, Civil Application No. 192 of 2006 (unreported); see also a decision of the Supreme Court of India in G. Raj Mallaiah and Another v. State of Andhra Pradesh (1998) 5 SCC 123. The DPP had no hand in the mess caused by the trial court's registry and cannot be penalized for it".*

In a brief rejoinder, both Appellants reiterated their prayers and further prayed the Court to consider the length of period they have spend in prisons since 2021.

I have objectively gone through and considered the records of both the trial Court and this Court and prayers made by the Appellants and submission advanced by the Learned State Attorney, Mr. Kabelwa. The crucial issue for consideration and determination is whether or not the prosecution side proved

the case in line with the standards of proof in criminal law against the Appellants (Accused persons).

To begin with, as correctly submitted by Mr. Kabelwa, I agree that the evidence given by the key witness (PW1) on the side of prosecution is wanting. It is the requirement of law under section 198 (1) of the Evidence Act (supra) that, every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act [CAP. 34 R.E. 2019]. And section 4 (a) of the Oaths and Statutory Declarations Act (supra), provides for a person(s) who may be required to make oath or a

On reviewing the testimony of Simon Leonard Mushi (PW1), which in this case is the basis of the prosecution case, the same indicates that, before his evidence being taken and recorded by the trial resident magistrate, he neither sworn nor affirmed. Indeed, as rightly submitted by the State Attorney, it is the trial resident magistrate who recorded his testimony without taking oath (swearing) or affirmation to the PW1. Also, it is apparent on the impugned judgment that, the evidence of PW1 was given much weight by the trial resident magistrate in weighting the evidences of the prosecution. Both the proceedings and judgment unveil that, PW1 is the one who received information from the secret informant of the police that, the appellants were involving in the business of selling elephant tusks, and immediately organized the movement to travel to

I

Morogoro Region pretending him as a buyer of the alleged elephant task and finally led his colleagues to arrest the suspects, Appellants herein. He also involved fully in the whole exercise of search and/or searching and prepared a certificate of seizure where the Appellants / Accused persons appended their signatures thereon as exhibited in Exhibit PC1. Further, the records reveal that, PW1 involved to arrest the firearm made locally (Gobore) and a pipe which were collectively admitted in evidence Exhibit PC2. Moreover, PW1 tendered in evidence elephant tusks as Exhibit PC3 to prove the prosecution case in line with the charge levelled against the Appellants.

As I have stated earlier, since the whole evidence and exhibits tendered by the witness, Simon Leonard Mushi (PW1) was taken and recorded by the trial resident magistrate contrary to the requirement of the law under section 198 (1) of the CPA, it means that, one; such testimony and the exhibits thereof have no evidential value, and second; its consequence is to be discarded from the records as per the decision of the CAT in **Lazaro Daudi @ Manuel vs Republic (Criminal Appeal 376 of 2015) [2016] TZCA 224 (29 April 2016)** (extracted from www.tanzlii.go.tz).

As to the way forward, I am of the settled view that, in the circumstance of this case, a retrial can only be ordered if it will not allow the prosecution to fill up the gaps. It is apparent on records that, in this case the prosecution brought seven witnesses, whereas PW1 is said to be the key witness. Having discarded the evidence of PW1, ordinarily I could nullify the proceedings and

exercise my powers of revision under section 372 (1) and 373 (1) (a) of the Criminal Procedure Act [CAP. 20 R.E. 2022] to order a retrial, but I do not consider ordering a retrial to be a proper course in the circumstances of the matter under consideration. In the case of **ROBERT S/O MKABE VS. THE REPUBLIC, CRIMINAL APPEAL NO. 332 OF 2017 (UNREPORTED),** the Court of Appeal of Tanzania sitting at Tabora quoted with approval the decision in the case of **FATAHELI MANJI VS. REPUBLIC (1966) EA 341,** where the Court underscored the circumstances under which a retrial can be ordered. It held: -

> *"In general a retrial will be ordered only when the* ***original trial was illegal or defective;*** *it will not be ordered where the conviction is set aside because of insufficiency of evidence* ***or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it".*** *[Bold is mine].*

Guided by the above authority, having expunged the evidence adduced by PW1 and the Exhibits tendered by him, I am satisfied that, nothing will be left

intact to sustain conviction of the Appellants for the offences they stand charged.

Consequently, I allow the appeal, quash the conviction of the Appellants, Ally Mbilu and Omary Mrisho Juma, and set aside the sentences of twenty (20) years imposed by the trial Court against them on both 1st and 2nd Counts. I further order the Appellants be set free from prisons, unless are held for lawful cause. It is so ordered.

DATED at **MOROGORO** this 15th day of December, 2023.

M. J. CHABA

JUDGE

15/12/2023

Court:

Judgment delivered under my hand and Seal of the Court in Chambers this 20th day of December, 2023 in the absence of both parties.

A.W. MMBANDO

DEPUTY REGISTRAR

15/12/2023

Court:

Right of the parties to appeal to the CAT fully explained.

A.W. MMBANDO

DEPUTY REGISTRAR

15/12/2023