THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CRIMINAL APPEAL CASE NO 86 OF 2023

(Originating from the District Court of Kilwa at Kilwa Masoko in Criminal Case No 9 of 2021)

ABDALLAH MOHAMED LIBISA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th & 27th November 2023

LALTAIKA, J.

Crime setting theory states that easy or tempting opportunities entice people into criminality. The beautiful, albeit long and porous Indian ocean coastline of Kilwa, a place described by **Ibn Battouta, way back in 1331-1332** as one of the most beautiful cities in the world is where this appeal originates. The beautiful coast is close to a place known in conservation circles as Kilwa Open Area. Illegal possession (and trafficking) in wildlife resources is bound to thrive in such an open area where ranger patrols are rare compared to other protected areas. This calls for, among other measures, deterrence sentences whenever a case is proved at the required standard. This appeal follows this line of reasoning.

The appellant herein **ABDALLAH MOHAMED LIBISA** was arraigned in the District Court of Kilwa at Kilwa Masoko on two counts of unlawful possession of government trophy c/s 86(1)(2)(c) (para iii) Contrary to Section 86(1) and (2) of the **Wildlife Conservation Act, Act No. 5 of 2009** as amended by written Laws (Miscellaneous Amendment) (No.2) Act of 2016 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 R.E. 2019.].

It was the prosecution story that on 14/9/2021 at NJINJO VILLAGE, Kilwa District in Lindi Region, the appellant was found in possession of government trophy to wit *warthog bones* valued at **TZS 1,039,050** property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife.

It was alleged also that on the same day and place, the appellant was found in possession of a government trophy *to wit* lion skin, lion's tail and 9 lion teeth and 36 lion claws valued at twenty-two million six hundred twenty-eight thousand two hundred **(TZS 22, 628,200/=)** only being the property of the Government of Tanzania without permit from the Director of Wildlife.

When the charge was read over and explained to the appellant (then accused) he pleaded not guilty. This necessitated the conducting of a full trial. Having been convinced that the case had been proved beyond doubt the trial magistrate (AM Mkasela, SRM) convicted the appellant as charged and sentenced him as follows. On the first count to pay a fine of TZS

5,000,000/= or a 20-year jail term. On the second count to pay a fine of TZS 3,117150/= or serve a term of 10 years in jail.

Dissatisfied, the appellant has appealed to this court on eight grounds. For record keeping purposes, I choose to reproduce the grounds herein below despite the many grammatical and typographical errors:

1. *The trial Court erred in both law and fact by convicting the appellant while the search of the said Government trophy contravened with the requirement of section 38 (3) of the evidence Act RE 2022 as well as section 106 of wildlife conservation Act since they did not acknowledge the receipt of seizure to the said government trophy in order to prove that such government trophy was found at the appellant place and no one else.*
2. *The trial Court erred in both law and fact by convicting Appellant while the trial Magistrate failed to observe that the prosecution evidence was contradictory unreliable and had material inconsistence.*
3. *The trial Court erred in law and fact by convicting the appellant without considering the principle guiding the chain of custody.*
4. *The trial Court erred in both law and fact and convicting the appellant while the process of admitting the exhibit before the court of law contravened with the requirement of section 210(3) of CPA RE 2022.*
5. *The trial Court erred in both law and fact by convicting the appellant while PW2 when adducing evidence before the court of law did not given time to identify the said government trophy seized from the appellant in order to identify if they are real exhibit seized at day, they searched the appellant at her home.*
6. *The trial Court erred in both law and fact by convicting the appellant without taking into cognizance the defense of the appellant.*
7. *the trial court erred in both law and fact by convicting the appellant while the prosecution witness did not prove the offence against the appellant at without leaving a shadow of doubt* ***as per section 3(2) of the Evidence Act***
8. *The trial Court erred in both law and fact by convicting the appellant and relying on the evidence of PW.3 the one performed the valuation report who was not qualified person as per* ***section 86(4) of the wildlife conservation Act of 2009.***

When the appeal was called for a hearing on the 8th of November 2023, the appellant appeared in person, without representation. The respondent

Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney.

The Appellant indicated that he had nothing substantial to add to his elaborate grounds of appeal hitherto filed in court. However, he reserved his right to a rejoinder in case the need arose.

Tanking the podium, Mr. Hurubano announced that the respondent fully supported the conviction of the trial court but objected to the sentence of 10 years imprisonment calling this court to review its appropriateness. He proceeded to counter the grounds of appeal as summarized in the next paragraphs.

On the first ground, Mr. Hurubano referred to Section 106(1)(b) of the Wildlife Conservation Act (supra) (the WCA) which allows an authorized officer to enter premises without a warrant, with a proviso stating that in the case of dwelling houses, an independent witness must accompany the officers. In the present case, Mr. Hurubano argued that the arresting officers were accompanied by the Ward Executive Officer (WEO) of the area.

Additionally, the learned State Attorney pointed out that the appellant signed the certificate of seizure, indicating that he was not prejudiced. To buttress his argument, Mr. Hurubano cited Section 142(1)(b)(iii) of the WCA allowing authorized officers to search without a warrant during emergencies. Mr. Hurubano asserted that the evidence of PW2 demonstrated that the search was **conducted in an emergency situation,** as it occurred at night while the officers were on patrol. He prayed for the dismissal of the first ground for lack of merit.

On the second ground, the Mr. Hurubano clarified that the appellant's complaint was on alleged contradiction between PW2 and PW3 regarding the location of the alleged items. Mr. Hurubano argued that this ground lacked merit since all items were found in the appellant's homestead. He cited the case of **ISSA HASSAN UKI v. REPUBLIC** Crim Appeal No 129 of 2017, highlighting that minor contradictions not affecting the core of the case may be overlooked. He requested the court to overlook any minor contradictions.

Concerning the third ground on the maintenance of the chain of custody, Mr. Hurubano contended that this ground had no merit. He referred to the case of **RAMADHANI IDDI MCHAFU VS. REPUBLIC** Crim Appeal No 328 of 2019, where it was stated that the prosecution was not required to tender the chain of custody form, and oral accounts were sufficient. He pointed to the trial court records, showing that PW2 explained how he took the impounded items to the exhibit keeper, and the latter tendered them in court (PW1). Mr. Hurubano prayed for the dismissal of the third ground for lack of merit.

On the fourth ground, which raised a complaint about non-compliance with section 210(3) of the Criminal Procedure **Act Cap 20 RE 2019 in admitting exhibits,** Mr. Hurubano chose not to address the ground, asserting that the section did not relate to the admission of exhibits but rather to the reading out of the evidence of the accused if he chooses. He prayed for the dismissal of the fourth ground.

Moving on to the fifth ground, the appellant contended that the court ignored PW2's failure to identify exhibits. Mr. Hurubano agreed with this but argued that the ground had no merit. He highlighted that PW3 (WEO/Independent Witness) and PW5, fellow arresting officer, were able to identify the exhibits. He prayed for the dismissal of the fifth ground for lack of merit.

On the sixth ground, Mr. Hurubano disagreed with the complaint that the trial court did not consider the defense evidence. He pointed to page 7 of the impugned judgment, indicating that the trial court did consider such evidence.

Responding to the 7th and 8th grounds conjointly, which grounds asserted that the case was not proved beyond reasonable doubt, Mr. Hurubano argued that these grounds had no merit. He stated that the prosecution successfully proved the two elements required: ONE, that the impounded items were government trophies, proven through the testimony of PW4 and the tendering of a valuation certificate (exhibit PE8), and TWO, that the items were found with the appellant, supported by the evidence of PW2, PW4, PW3, and PW5. Responding to the appellant's complaint about the credibility of the valuation report and PW3's evidence, Mr. Hurubano clarified that the report was tendered by PW4, not PW3. He prayed for the dismissal of the appeal in its entirety for lack of merit.

The appellant, on his part, expressed gratitude for the opportunity for a rejoinder mentioning that this was his second appearance before the court.

He complained bitterly that while this court had previously granted him bail, when he went back to Kilwa the trial court later denied it.

He requested the court to consider his grounds of appeal, emphasizing that there were numerous inaccuracies. He candidly stated that the items were not discovered in his house but in a dwelling, he had moved to in 2020 due to rain floods. Having moved through several houses, he clarified that it was the third residence he occupied. He mentioned having two wives, both residing in rented houses.

On the specific date, September 14, 2021, he asserted that he was found in a house that did not belong to him, sharing the residence with two other tenants, each occupying their own room. Despite a search that revealed nothing in his room, he claimed to have been handcuffed and later charged. The law enforcement officers allegedly discovered items in the living room and a drum in the third room, which they purported to contain lion claws. The appellant expressed the belief that the lower court had not acted justly, particularly because his fellow tenants were not summoned to testify.

Providing personal background information, he stated that he was 54 years old, originally from NJINJO, where he was born. He claimed to have seven children, ownership of a plot in Dar es Salaam, and approximately 70 acres of land in Kilwa. Additionally, he highlighted disputes with the Ward Executive Officer (WEO) and wildlife officers regarding pastoralism and protected land, indicating his intention to report them to government officers.

I have **dispassionately considered the grounds of appeal and arguments** by both parties. My role as the first appellate court is not limited to considering points of law. It extends to re-evaluation of evidence adduced in the trial court. In the course of doing so, I can come up with a different opinion if necessary. See the Court of Appeal of Tanzania's (CAT) case of **MARTHA MICHALE WEJJA V. HON. ATTORNEY GENERAL & 3 OTHERS** [1982] TLR 35.

As alluded to earlier, the appellant was arraigned in court charged with the offence of unlawful possession of government trophy. Like other criminal offences, the prosecution is duty bound to prove the same beyond reasonable doubt. See **JOSEPH JOHN MAKUNE v. REPUBLIC** [1968] TLR 44. The term proof beyond reasonable doubt is not defined in any of the criminal statutes but the CAT provided the following useful pointer in the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 thus:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

The word possession as used in penal statutes extends beyond custodianship or holding something in one's power. Section 2 of the Penal Code (Supra) provides:

> *(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether*

belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them"

The prosecution's allegation that the appellant was found in possession of the government trophies listed earlier was countered with, in my opinion, very weak defence evidence. The appellant's only explanation has been that the house where the said trophies were found does not belong to him. He failed short of explaining why he was found there. Prosecution witnesses on their part were consistent and provided the necessary information needed to enable the trial court to reach a just decision.

The appellant's other complaints as argued in the first ground of appeal relate to violation of the procedure governing search. The learned State Attorney addressed this sufficiently referring to **Section 106(1)(b) of the Wildlife Conservation Act** (supra) (the WCA) which allows an authorized officer to enter premises without a warrant, with a proviso stating that in the case of dwelling houses, an independent witness must accompany the officers. In the present case, as correctly stated by Mr. Hurubano, the arresting officers were accompanied by the Ward Executive Officer (WEO) of the area.

Mr. Hurubano had an equally impressive argument that the offence of unlawful possession has two elements, and both must be proved namely ONE, that the impounded items were government trophies and TWO, that the items were found with the appellant. In my opinion, I see no iota of doubt left by the prosecution in proving each of these elements.

As for identification of the impounded items, I am satisfied with the description and valuation report tendered by PW2. It should be noted that in the language familiar with the Convention on International Trade in Endangered Species (CITES) enforcement officers in different countries, trophies can be divided into two categories: One easily identifiable items such as elephant and Two: none easily identifiable items such as bushmeat. All items impounded from the appellant fall under the first category. I have no doubt that the same were properly identified and valuated.

With regards to the sentence imposed, I think it is fair to say that the learned State Attorney's prayer is legally sound but unnecessary. The learned trial magistrate ordered the sentences to run concurrently. Mathematically I would arrive at the same conclusion even if I replaced the 10-jail sentence with the 20 years minimum sentence. This is because the sentencing principles would still require me to take consideration of the specific surroundings including the fact that the appellant is a first offender. As alluded to earlier, deterrence sentences are required in a situation where preventive measures such as game patrols are scarce or not there at all.

Before I wind up, I prefaced this judgement with the crime setting theory. I want to emphasize that although courts and other law enforcement agencies have an important role to play, protection of our wildlife resources must go hand in hand with building stronger institutions at the grassroots. Although it is not expected that all places with wildlife will receive the same level of protection, it is vital to ensure the minimum conditions exist to bring a sense of accountability to wildlife traffickers.

In some cultures, certain animal bones, including those of warthogs, are believed to have medicinal properties. Traditional medicine practices may involve the use of specific bones for the preparation of remedies or as charms or talismans. Although it may appear harmless now, illegal trade in wildlife, including warthogs and their bones, poses a serious threat to biodiversity and can have detrimental effects on ecosystems.

Premised on the above, I dismiss the appeal in its entirety for lack of merit.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
27/11/2023

Court

This judgement is delivered under my hand and the seal of this court this 27th day of November 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney for the respondent and the appellant who has appeared in person unrepresented.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
27/11/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
27/11/2023