

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

ECONOMIC APPEAL NO.13 OF 2023

(Arising from the District Court of Karagwe at Kayanga Original Economic Case No. 14 of 2020)

NKUBA DAMIAN 1ST APPELLANT

DATIUS FAUSTINE 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

15th & 22nd March 2024

A.Y. Mwenda, J

This is the first appeal filed by the appellants. They are aggrieved by the decision of the District Court of Karagwe at Kayanga which found them guilty of unlawful possession of government trophy contrary to section 86(1) and (2) (b) 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) of the Economic and Organized crime control Act [Cap 200 R.E 2019] and unlawful possession of instruments for commission of offence contrary to section 24(1)(b) and (2) of the National Park Act, [Cap 282 R.E 2003]. With the said conviction they were both ,sentenced to serve a jail term of twenty (20) years imprisonment for the

1st count and; to pay a fine to a tune of TZS 20,000/= or imprisonment for a term of six(6) months in default of payment of fine.

In this appeal, the appellants preferred a petition with ten (10) grounds. The same may be summarized into four which read as follows:

1. That, the trial court erred in law and fact to convict and sentence the appellants by admitting improper chain of custody form.
2. That, the trial court erred in law and fact to convict and sentence the appellants while both were acquitted in the 2nd count.
3. That the trial Magistrate misdirected himself by relying on improper identification of the said government trophies and
4. That the Chain of custody form (Exhibit.5) and Inventory form (Exhibit P. 6) were wrongly admitted in court.

At the hearing of this appeal, the appellants were present in person while the respondent republic marshalled Ms. Matilda and Mr. JAMAL ISSA, learned State Attorneys.

When he was invited to address the court in respect of the grounds of appeal, the 1st appellant one NKUBA DAMIAN, raised two important points of concern. One, he faulted the trial court's findings of guilty unto them while it acquitted

them in the second count of unlawful entry into the National Park. He wondered as to why were they convicted if the location where the purported government trophies and instruments of the commission of crime were seized is not known.

Another point of concern which was raised by the 1st appellant is that the inventory and the chain of custody forms were illegally admitted as he was never conveyed to appear before the Hon. Magistrate during disposal of exhibit. He concluded his submission beseeching this appeal to be allowed.

On his part, the second appellant one DATIUS FAUSTINE did not have much to submit. He rather prayed the grounds of appeal to be considered as, according to him, the case against them was fabricated.

From the respondent's side, Mr. JAMAL ISSA did not oppose this appeal. He raised two points supporting their stance, one that although the prosecution of economic offences requires the certificate and consent of the DPP or that of officers' subordinate to him, in the present matter, the certificate excluded the non-economic offences which ought to be included. He said that since the offences alleged to be committed by the appellants included economic and non-economic then exclusion of the non-economic offences in the certificate dents the prosecution's case as it makes the said certificate invalid thus, he said, the whole proceedings is a nullity.

The second point addressed by Mr. JAMAL is the Inventory which, according to him should to be expunged for failure to convey the appellants before the Hon.

magistrate when the trophies were being destroyed. In support to that point, he cited the case of BULUKA LEKEN OLE NDIDAI & 1 ANOTHER V. THE REPUBLIC, CRIMINAL APPEAL NO. 459 OF 2020. He then prayed the present appeal to be allowed.

Summarily, that was the submission in support of the present appeal from both sides and the issue for determination is whether this appeal is meritorious.

To provide answers to the said issue this court is going to delve into two issues which are certificate conferring jurisdiction to the subordinate court to try economic offences and illegality tainting the exhibit P.6, the inventory of found and unclaimed property. This is so because the same are capable to dispose of this matter.

From the records, the appellants were arraigned for committing three offences, to wit, unlawful possession of government trophy, unlawful entry into the National Park and Unlawful possessions of instruments of commission of offence. Since unlawful possession of government trophy is economic offence triable by the High Court, which is an economic court, the trial of the said case subordinate court cannot proceed without certificate conferring jurisdiction to the subordinate court to try the same and consent of the DPP. In this matter, there is no DPP's consent which is fatal and even the certificate by the by the district Prosecution's officer conferring jurisdiction on subordinate court to try economic offence did not include the charging provision for offences on

unlawful entry into the National Park and Unlawful possessions of instruments of commission of offence i.e. are non-economic offences. It is trite principle that when accused persons are arraigned for economic and non-economic offenses, the DPP should file a certificate conferring jurisdiction to subordinate court to try both offences. This is by virtue of Section 12(4) of The Economic and organized Crime control Act, [CAP 200 R.E. 2019] which read:

“S. 12(4) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High court and which involves a non-economic offence or both an economic and a non-economic offence be instituted in the court.”

From the foregoing, failure to include non-economic offences in the said certificate make the said certificate incompetent thereby making the whole proceedings a nullity.

As for Consent of the DPP or DPO, the law has it that no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of the Public Prosecutions, the powers which may also be exercised by officer(s) subordinate to him. This is in line with section 26 (1) and (2) of the Economic and organized Crime control Act, [CAP 200 R.E. 2019]. Since the

trial court tried the case in question without the said consent then the whole proceedings are a nullity.

Regarding the second point of concern by the appellants on the failure to involve them at a time when the inventory (exhibit P.6) was prepared; this court went through the record and noted the following. As it is depicted in the charge sheet, apart from being arraigned for possession of instruments for commission of offence, the appellants were also arraigned for unlawful possession of government trophies contrary to section 86(1) and (2) (b) 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) of the Economic and Organized crime control Act [Cap 200 R.E 2019]. In the particulars to this offence, the prosecution alleged that on 05th day of July 2020 at Burigi-Chato National Park within Karagwe District in Kagera Region the appellants were jointly and together found in possession of Government Trophies to wit, eight (08) legs and two pieces of dry meat of Zebra value at TZS 5,635,200/= the property of the United Republic of Tanzania ,without a valid licence from the director of wildlife previously sought and obtained. It was the evidence of PW.3, that being the investigator of the case in question he interrogated the appellants who, having denied any involvement in the alleged crime, he filled an inventory for two pieces of dried meat and eight legs of Zebra before both, the inventory and the meat and legs were conveyed before Kayunga Primary Court for disposal by the order made by the magistrate. In his evidence, although he testified

that both the exhibits and the appellants were conveyed to Kayunga Primary Court for disposal of exhibits, PW.3 did not give any explanations on what exactly transpired during the disposal of the said exhibits. With such failure it is apparent that the whole disposal exercise was in contravention of Sections 101(1) and (2) of the Wildlife Conservation Act, [CAP 283 R. E 2019] and PGO 229 as envisaged in BULUKA LEKEN OLE NDIDAI & 1 ANOTHER VERSUS THE REPUBLIC, CRIMINAL APPEAL NO. 459 OF 2020, CAT(Unreported). In that case, the Court while emphasizing the urge to afford the suspects the right to be heard at the time of issuing a disposal order, held inter alia that:

“...it will be sufficient for a magistrate before whom an order to dispose a perishable Government trophy or trophies, to make such order, provided that; **one**, the prayer to issue the order to dispose of perishable exhibits may be made by the investigator or the prosecution informally before a magistrate in chambers; **two**, if the order is likely to be relied upon in any future court proceedings against any suspect, that suspect must be present at the time of the making the prayer and; **three**, the suspect must be asked as to his comments ,remarks or objections as regards the perishable exhibits sought to be destroyed. **Four**, if the suspect does not make any comments, remarks or objections, the magistrate shall record the fact that, the suspect was invited to make any

comments, remarks, or objection, but he opted to make none.

Five, if the suspect makes any comments, remarks, or objections, they shall be recorded as appropriate either on the reverse side of the Inventory Form or on any separate piece of paper or papers and shall be signed by the magistrate.” [

Emphasis added]

In the present appeal, since the appellants were not afforded the right to be heard at the time of issuance of a disposal order as envisaged above, exhibit P.6 was thus illegally procured, and it is thus expunged from record. In the absence of the inventory form and based on fact that the present suit was tried without the consent and certificate of the DPP/DPO, there is nothing remained to point accusing fingers unto the appellants.

That said, this appeal is allowed, conviction is quashed, and the sentences passed are set aside. It is further ordered that both the appellants be released forthwith from prison unless they are held for other lawful cause.

It is so ordered.


A.Y. MWENDA
JUDGE
22.03.2024

Judgment delivered in chamber under the seal of this court in the presence the Mr. Nkuba Damian and Mr. Datus Faustine appellants and in the presence of Ms. Matilda Assey learned state attorney for the respondent (republic).

 *A. Y. Mwenda*
A. Y. MWENDA
JUDGE
22.03.2024