

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**CRIMINAL APPEAL NO. 94 OF 2023**

(Originating from the RMS' Court of Mwanza in Economic Case No. 7 of 2022)

**JAPHET KENEDY @ MAPESA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

15/2/2024 & 5/4/2024

**ROBERT, J:-**

The Appellant, Japhet Kennedy @ Mapesa, appeals against his conviction and sentence for the offence of Unlawful Possession of Government Trophies contrary to the provisions of the Wildlife Conservation Act, No. 5 of 2009, Cap. 283 as amended, and the Organized Crime Control Act, Cap. 200 R.E. 2019.

The Appellant stood charged at the Resident Magistrates' Court of Mwanza in Economic Case No. 7 of 2022 for possessing one elephant tusk valued at TZS 34,738,350/= without the requisite permit from the Director of Wildlife. The prosecution's case rested on the alleged possession of this

trophy on the 5th day of July, 2022, at the Chakechake – shede area within the District of Nyamagana in Mwanza region. Subsequent to trial, the trial court convicted the Appellant on the primary count while acquitting him on the alternative count, subsequently imposing a penalty of ten times the value of the alleged trophy or a twenty-year prison term, alongside the forfeiture of the confiscated elephant tusk.

The Appellant raised several grounds of appeal primarily revolving around procedural irregularities, purported errors by the trial Magistrate, and the prosecution's failure to substantiate the case beyond reasonable doubt. The specific grounds of appeal shall be scrutinized herein.

The Respondent, represented by Ms. Sabina Chogogwe, Mr. Sileo Mazullah and Ms. Grace Francis, State Attorneys, defends the trial Court's decision, arguing that proper procedures were followed, and the evidence overwhelmingly supports the Appellant's guilt.

Starting with the first ground, the Appellant asserts that several exhibits pivotal to his conviction were improperly admitted into evidence without proper identification and reading out of their contents. The Appellant contests the admissibility of exhibits P1, P3, P5, P6, P7, P8, P9, and P10.

In rebuttal, the prosecution averred that the procedures for admitting and disclosing exhibits were duly followed. Ms. Chogogwe pointed out specific instances of proper identification and reading out of exhibit contents during trial proceedings in each exhibit admitted. However, she conceded that Exhibit P6, the Chain of Custody document, was admitted without the contents being read out, necessitating its expungement from the court records. The Court concurs with this position and expunges Exhibit P6 accordingly.

Moving to the second ground, the Appellant impugns the trial Court's conviction, citing inadequacies in establishing the chain of custody. He referred the Court to the case of **Paul Maduka and others vs Republic**, Criminal Appeal No110 of 2007, CAT at Dodoma (unreported).

Conversely, the prosecution maintained that although the chain of custody document (Exhibit P6) has been expunged, the oral account of how the exhibit passed in various hands is sufficient in establishing the chain of custody as decided in the case of **Chacha Jeremiah Murimi vs Republic**, Cr. Appeal No. 551 of 2015, CAT, (unreported).

The prosecution argued that, the chain of custody was properly maintained through oral testimony of PW1 who informed the Court that Exhibit P2 (elephant tusk) was seized and taken to exhibit keeper at Nyamagana police station. It was marked MNZ by PW1. Exhibit keeper Rashidi (PW5) marked the said exhibit as Exh. 60/2022. Thereafter, exhibit keeper (PW5) gave the exhibit to PW4 in order to take to the valuer, PW6. The valuer after valuation submitted it to PW4 who took it back to exhibit keeper as indicated at page 33 of the typed proceedings. From there, PW5 (exhibit keeper) gave the exhibit to Kenyatta (PW4) on 25/10/2022 in order to give it to PW1 who tendered it as evidence in Court on the same day.

After thorough examination of testimonies, this Court is satisfied that the chain of custody was adequately established through oral testimony, notwithstanding the expungement of exhibit P6. I therefore find no merit in this ground.

The third ground avers that the prosecution failed to summon independent witnesses, thereby impugning the credibility of their case. However, upon review, the Court affirms the presence and testimony of an independent witness, PW3, during the relevant proceedings, thereby rejecting this ground.

The fourth ground alleging the trial Magistrate's failure to append signatures after recording each witness's evidence is dismissed upon finding that the magistrate indeed signed after each testimony.

On the fifth ground, the Appellant contests the legality of the search and seizure, arguing that the search officer lacked authority to conduct the search without a warrant. The prosecution claimed the search was justified under section 42 of the Criminal Procedure Act due to an alleged emergency. However, upon review, the Court finds the search lacked proper authorization as mandated by Section 38(1) of the Criminal Procedure Act, raising doubts about its legality. Having scrutinized the evidence of PW1 and PW2, the Court notes that the police had prior knowledge of the situation dating back to May 12, 2022, implicating the Appellant in the alleged offence. Despite this, they conducted the search on July 5, 2022, rendering the emergency search provision inapplicable. Consequently, the search is deemed illegal, as per the precedent set in **Shabani Said Kindamba v Republic**, Criminal Appeal No 390 of 2019. Consequently, exhibits seized during this illegal search, namely exhibits P1, P2, P3, P4, and P7, are expunged from the record, leading to the sustaining of this ground.

The sixth ground contests the phraseology "Hence I enter conviction forthwith to this count" employed by the trial court in entering the conviction. However, after perusing the trial records, the Court finds no deficiency in the language used, dismissing this ground. The Court finds that the trial court's language clearly indicated an intent to convict the Appellant. Therefore, the Court dismisses this ground of appeal, finding it to be without merit.

The seventh ground challenges the admission of exhibit P2 (elephant tusk) under the Economic and Organized Crime Control Act. The Court concurs that the seizure was not in compliance with Section 22(2) of the said Act, leading to the expulsion of exhibit P2 from the evidence.

The eighth ground asserts that the trial magistrate erred significantly in both law and fact by neglecting to summarize and assess the defense evidence, which consequently led to erroneous and biased conclusions, resulting in a miscarriage of justice.

The prosecution has conceded to this ground, acknowledging that while the magistrate did recount the defense evidence, there was a failure to analyze and articulate why it did or did not cast doubt on the prosecution's evidence. Nonetheless, they argue that, as the first appellate court, this court




possesses the authority to step into the shoes of the trial court and reevaluate the tendered evidence.

This court affirms the argument put forth by both the appellant and the prosecution. However, despite the court's ability to step into the shoes of the trial court, it must be noted that the evidence connecting the appellant to the offence has been expunged from the record thereby rendering further analysis unnecessary. Consequently, the court finds merit in the last ground wherein it is asserted that the prosecution failed to prove the alleged offence beyond reasonable doubt.

In conclusion, this Court finds merit in the appeal and quashes the conviction and sentence of the Appellant. Consequently, the Appellant is ordered to be immediately released from prison unless held for any other lawful cause.

It is so ordered.



  
K.N.ROBERT  
JUDGE  
5/4/2024

