**IN THE UNITED REPUBLIC OF TANZANIA**

**IN THE HIGH COURT OF TANZANIA**

**IN THE SUB-REGISTRY OF MTWARA**

**AT MTWARA**

**CRIMINAL APPEAL NO. 100 OF 2023**

*(Arising from the decision of the Court of the Resident Magistrate of Lindi at Lindi in Economic Case No.9 of 2022).*

**GEROLD JOSEPH MBAI ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*07th March, 2024 and 15th April 2024.*

**DING'OHI, J.**

In the Court of the Resident Magistrate of Lindi at Lindi (the trial court), **Gerold Joseph Mbai**, the appellant herein was charged on one count of unlawful possession of a Government trophy, contrary to Section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 as amended by the Written Laws Miscellaneous Amendment Act No. 2 of 2016, 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]. At the end of the trial, the appellant was convicted of that charge. He was sentenced to serve twenty (20) years imprisonment.

The charge laid down against the appellant at the trial court states that on the 17th day of March 2022, at Mitumbati Village within Nachingwea District in Lindi Region, he was found in unlawful possession of a Government trophy to wit, ten (10) pieces of elephant meat valued at TZS 34,755,000/=, the property of the United Republic of Tanzania without the permit from the Director of Wildlife.

It was the prosecution case that, on the material day, the Wildlife Conservation Officers while on patrol were told that there was a person who was illegally in possession of a Government trophy. On 16.03.2022 at 22.00hrs Francis Petro Chacha (PW2), the Wildlife Officer working at Nyera Kipelele Forest in Liwale district and other officers decided to go to the reported area where they arrived at 00:00hrs on 17.03.2022. They proceeded to the WEO one Emmanuel Sunnh Ndunguru (PW3) before they went to the house of the present appellant. When they arrived at the house of the appellant, the PW3 searched the Wildlife officers before they were allowed to enter the house of the appellant. PW3 (WEO) and other two Wildlife officers namely, Aron Rukiza Kayungi and Mabula Salum Malimi

witnessed the search in the house of the appellant. The result of the search was that ten (10) pieces of cooked elephant meat in the pan (sufuria) were found in the appellant's house.

Pieces of cooked elephant meat being the Government trophy were seized because the appellant had no permit to possess the same. The certificate of seizure (Exhibit P2) was issued and signed by two Wildlife officers, the appellant, and one independent witness (WEO). The appellant was arrested. He was taken to Nachingwea police station with the seized trophy. There, the police case file vide No. IR/LWL/IR/225/2022 was opened. Immediately thereafter, a Wildlife Conservation Officer from Selous Game Reserve -TAWA one, Sweetbert Joel Haishi (PW1) was summoned to identify and value the trophy found at the appellant's house. The PW1 identified the seized meat to be a Government trophy to wit, elephant meat valued at TZS 34,755,000/= (Per the Trophy Valuation Certificate - Exhibit P1). As to how he could identify the elephant meat the PW1 told the trial court that he identified it by its skeletal muscles, strong fibers, and no fat which makes the elephant meat even when boiled still have the fibers.

No. G.1247, DSTG Edger (PW4) prepared the Inventory Form and sought the order for disposing of the trophy before the magistrate. The Inventory Form (Exhibit P4) was tendered in evidence to supplement PW4's oral testimony.

In his defence, the appellant told the trial court that he was arrested in connection with the economic offence. That, he was searched but the search could not find anything in his possession. That notwithstanding, on 17th March 2022, he was charged with the count of being in unlawful possession of a Government trophy. He contended that he was forced to sign a document he did not know. It was the appellant's stance that the prosecution side in the trial court had not proved the charge against him.

As hinted somewhere herein above, the trial court was impressed that the economic charge was proved beyond a reasonable doubt. It proceeded to convict the appellant as charged and sentenced him as is indicated herein above. In his petition of appeal, the appellant had five grounds for complaint against the decision of the trial court. However, in reflection, all grounds are premised on one complaint that; the prosecution case against him was not proved beyond all reasonable doubts.

In this appeal the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. **Edson Laurence Mwapili**, the learned state attorney. The appeal was disposed of by way of written submissions per the schedule set by the court.

In determining this appeal, I will not reproduce the submissions by the parties, rather will refer to the relevant submissions in the cause of traversing substantive issues. I shall address the grounds of appeal generally.

I have critically gone through the trial court's record and assessed the proceedings, judgment, and submissions for and against the appeal. This Court will proceed to discuss the appeal based on the substantive issue of whether the prosecution side proved its case beyond a reasonable doubt. The underlying principle is that any doubt about the prosecution's case ends in the benefit of the accused. Further, this being the first appeal, I am inclined to re-evaluate the whole evidence adduced before the trial court to satisfy myself on whether the trial court's findings may still be left to stand. The position was made clear by the Court of Appeal of Tanzania in the case of **Michael Joseph vs Republic** (Criminal Appeal No 506 of 2016) [2019]

TZCA 624 which quoted with approval the case of **Siza Patrice v The Republic**, Criminal Appeal No. 19 of 2010 (Unreported). It was held that;

> *"The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary....."*

It is common ground that the prosecution case was based on the oral testimonies of PW1, PW2, PW3, and PW4 and five exhibits. Upon re-evaluation of the evidence adduced by the prosecution, I have pre-eminent the following; First, regarding the issue of inventory, the appellant contended that there was no court order to prove that the said meat was ordered to be destroyed. On his part, Mr. Mwapili expostulated that on 22.03.2022 PW4 prepared the inventory form which was admitted before the trial court as Exhibit P4. He further submitted that the appellant was brought before the primary court magistrate and the hearing was conducted for the destruction of the said meat.

I have respectively considered submissions by both sides on that issue. It is my settled view that in the disfigurement of the Government trophy, the accused must be heard before the exhibit is destructed by the order of the magistrate. Such a requirement is provided for under paragraph 25 of the

Police General Orders (PGO) which governs the disposal of exhibits that are under the custody of the police. The said provisions reads: -

> *"Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."*

That procedure of disposal of the exhibits was intensified by the Court of Appeal of Tanzania in the landmark case of **Mohamed Juma @ Mpakama vs Republic** (Criminal Appeal 385 of 2017) [2019] TZCA 518, where it was observed *inter alia* that;

> *"While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate."*

I have examined the complained inventory form in this case and found that the same was purported to have been made under the PGO (supra). The law is very clear that an inventory should be prepared after the court has given a disposal order. In this case at hand, there is no court order, and there's no evidence that shows that the appellant was present and had an opportunity to air his comment before the purported order to dispose of the trophy was issued. Though the appellant is alleged to have signed on the said inventory form, in my view that alone cannot give a guarantee that the appellant was involved during the whole process of destruction of the said Elephant meat.

In the case of **Buluka Leken Ole Ndidai & Another vs Republic** (Criminal Appeal No. 459 of 2020) [2024] TZCA 116, the Court of Appeal observed that:

> *"In our view, that simple linear statement is insufficient. Because it leaves many more questions unanswered, in view of this Court's authorities we referred to above. Such queries are like; **one**, if suspects were present before the magistrate, where it is indicated in the inventory, that the suspects were present? **two**, were*

*they asked for any comment, remark or objection as regards the exhibit which was being sought to be disposed of? If yes, where is the record of their comment, remark, or observation in that aspect? In our view, the void and emptiness left by the above questions lead to only one conclusion, namely, that the appellants were not heard and their comments or objections (if any) were not taken, at the time the disposal order was being procured. If that is the case, which we are confident, it is, the inventory cannot be relied upon to prove any case against the appellants, for as against them, it is ineffectual."*

Following the authorities cited above, it is my settled view that since there is no evidence that the appellant was present and was involved in the session which resulted in the disposal order, the inventory, in this case, was made in contravention of law. Under that circumstance, the trial court was wrong to consider the complained inventory evidence in finding a conviction of the appellant. It follows, therefore, that Exhibit P4 has to be expunged from the record, as I hereby do.

Having expunged the inventory form, I find no other evidence on record that may support the prosecution's case since even the PW1 (Sweetbert Joel Haishi) who has prepared a trophy valuation certificate, his testimony was based on personal information. He said he could identify the elephant meat by its skeletal muscles, it has strong fibers, and it has no fat. As an expert, we expected him to have not ended there. He would have given his scientific analysis showing that the mentioned features may only be obtained in the alleged seized elephant meat and not in any other animal.

In the case of **Maria Emirio Ngoda vs Jamhuri**, Rufaa Jinai No. 37116/2023, Mahakama kuu ya Tanzania, Masijala ndogo ya Iringa iliyopo Iringa, mbele ya I. C. Mugeta, J, it was observed that;

> *"Wanyama wa kufugwa wanaoliwa ni Pamoja na sungura na ng'ombe. Ni hakika nao pia wana mbavu. Wakati mbavu na misuli ya swala ni minene kuliko ya sungura, kamwe haiwezi kuwa minene kuliko ya ng'ombe. Hivyo siyo kweli kwamba mbavu na misuli ya wanyama pori wote ni minene kuliko Wanyama wa kufugwa. Swala hawezi kuwa na mbavu nene kuliko ng'ombe.....Kwa mtaalamu tunategemea maelezo yanayozingatia taaluma*

*husika badala ya maelezo ya kiujumla. Ndugu Mkude alishindwa katika hilo. Hivyo, Ushahidi wake wa unene wa mbavu na kuwepo kwa Ngozi, kwa maoni yangu hautoshi kuthibitisha kwamba nyama ile ilikuwa ya swala pale ambapo hakumtaja mnyama wa kufugwa aliyemtumia kulinganisha mbavu na kueleza sifa za Ngozi ya swala kitaaluma kwa lengo la utambuzi."*

In the explicit above, I find that the appellant was not properly convicted of the charge he faced in the trial court. It follows therefore that the conviction and sentence meted out to him can not be sustained. They are hereby quashed and set aside.

The demanding issue now is whether, under the circumstances of this case, I may end up there and proceed to set the appellant free or I have to order a retrial. The law is now settled that a retrial should not be ordered to enable the prosecution party to fill in gaps in their evidence. In **Fatehali Manji v R [1966] EA341** the then Court of Appeal of East Africa laid down the principle governing retrial. It stated;

*"In general, a retrial may 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 purposes of enabling the prosecution to fill in gaps in its evidence at the first trial....."*

In this case, I find that if the retrial is attempted, will enable the prosecution side to recompose their evidence to fill up the identified gaps in the evidence. There, we will be committing injustice. Under the circumstances of this case, therefore, I will hastate to order a retrial.

In the upshot, the appeal is allowed. As I had already quashed the conviction and sentence imposed on the appellant, I now proceed to order the immediate release of him from custody unless otherwise lawfully held in connection with another cause.

**Dated at Mtwara** this 15th day of April 2024.

THE HIGH COURT OF TANZANIA

**S.R. Ding'ohi**

**Judge**

**15/04/2024**

**COURT:** Judgment delivered this 15th day of April 2024 in the presence of Mr. Edson Laurance Mwapili State Attorney for the Republic, and the Appellant who appeared in person.


**S. R. DING'OHI**

**JUDGE**

**15/04/2024**