IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

CRIMINAL APPEAL NO.131 OF 2023

(Arising from Economic Case No.03 of 2019, before Bariadi District Court)

1. GAMBUNA MSINGI
2. MRUNJU GWALUGWA **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

8/4/2024 & 22/4/2024

F.H. MAHIMBALI, J

The appellants were arraigned before the trial Court charged of two different counts namely; unlawful possession of weapons with intent to commit an offence C/S 103 of the Wildlife Conservation Act No.5 of 2009 read together with paragraph 14 of the first schedule and section 60 (2) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002 as amended by Act No 3 of 2016, Unlawful possession of government trophies C/S 86 (1)(2) (c)m (ii) of the Wildlife Conservation Act No.5 of 2009 as amended by Act No. 4 of 2016 read together with paragraph 14 of first schedule to and section 57 (1) and 60 (2) Economic and Organized Crimes Control Act, Cap 200 RE 2002 as amended by Act No 3 of 2016.

It was alleged that the on 4/1/2019 around 17:45 hours at Longalombogo village within Itilima District in Simiyu region the accused person were found in unlawful possession of weapon to wit; one spear, ttwo knives, one panga and thus on the same date the accused persons on the similar material date and place were found in unlawful possession of Government trophies to wit; one head of warthog valued at Tshs USD.450 equivalent to Tshs 1,003,500/= the property of the Government of the United Republic without permit from the Director of Wildlife.

After a full trial, the trial Court convicted the accused persons and sentenced them to suffer two years imprisonment for the first count, and twenty years imprisonment for second count.

The appellants were aggrieved by such decision, they have then appealed before this Court based on three grounds of appeal namely;

1. *That the trial magistrate erred both in law and in facts to convict us without being arraigned before the Court to defend with the offence which we were charged.*
2. *That the trial magistrate erred in law and in facts to pass sentence while the case was not proved beyond reasonable doubt.*

3. *That the exhibit brought before the court totally was fabricated and made to incriminate thus should not be considered.*

During the hearing, the respondent/republic had legal representation of Ms Caroline Mushi learned State Attorney and the appellants appeared in person and unrepresented. Arguing for the appeal the appellants prayed for their grounds of appeal to be adopted to form part of their submission. They also prayed for acquittal.

On the side of the respondent Ms Caroline Mushi resisted the appeal. She contended that the conviction and sentences meted out by the trial court be upheld by this court.

On the second and third grounds of appeal, Ms. Mushi stated that the argument that the evidence is not water tight is not true. The charged offences were both established beyond reasonable doubt. The appellants were charged with two offences: unlawful possession of weapons and unlawful possession of government trophies. In establishing the charges, the prosecution brought a total of two witnesses. PW1 testified well how he arrested the appellants being in possession of the alleged weapons and trophies unlawfully. As they had no any permit authorising possessing them, they were arrested and sent to police Itilima. PW2 testified how the

appellants were arrested by PW1 on commission of the alleged offences. He being VEO, he says he had gone up to the scene and saw the appellants arrested. He took them with the said weapons and trophies to his office and then informed police. PW3 had identified the said trophies and valued them accordingly (P2 exhibit).

She also added that the appellants had not given their defense testimony as they jumped bail and disappeared to unknown. Thus, the argument that the alleged evidence (exhibits) is fabricated holds no water. Thus, should not be given any weight.

As regards to the first ground, that they were convicted in absence, Ms Mushi admitted being a true fact. But considering the fact that the appellants had already pleaded not guilty to the charge, and their post conduct of jumping bail, they knew what charge they were facing, thus, had to blame themselves for not attending their trial. Ms. Mushi further averred that despite the case being heard in absentia, as per proceedings in record, upon their arrest (on page 35 and 36 of the trial court's proceedings), when asked by the trial court as to where had they been after they were charged, the reasons advanced by each one did not persuade the court if the same were genuine reasons. As per law, i.e section 226(1) & (2), is very clear on when the conviction and sentence

meted out can be set aside by the trial court only on reasonable grounds. As there had been none, the trial court was justified to reach that finding. She pressed for the appeal to be dismissed.

This Court in the course of hearing, identified one legal issue to be addressed by the parries that; whether the appellants were present when the inventory proceeding was being conducted as per legal requirements emphasized in the case of **Mohamedi Juma Mpakama.**

Responding to that issue Ms Caroline Mushi stated that as per trial court's proceedings, it is evident that exhibit P2 (disposal order), the inventory proceedings are silent on the involvement of the appellants at the inventory proceedings. However, relying on section 169 of the CPA, in her considered view she submitted that such a violation, didn't prejudice the appellants. Thus, the circumstances of this case go away with the legal requirements as echoed by the Court of Appeal in the case of **Mohamed Juma Mpakama** as the appellants in this case were not prejudiced.

The appellants had nothing to address other than pressing denial on committing the alleged offence and that the offence was not proved beyond reasonable doubts.

Having heard both parties on merit of the appeal and upon scanning the trial court's records, my deliberation of this appeal to the best, I find the major contention between the parties is on the burden of proof and standard of proof. On this point, it is a trite law that, prosecution bears the burden to establish and prove the offence beyond reasonable doubt. Section 3 (2)(a) of The Evidence Act.

Likewise, section 110 of The Evidence Act, also provides in a clear manner as quoted hereunder: Section 110 (1)

> *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

These sections received breath by the Court of Appeal in the case of **Anthony Kinanila Enock Anthony Vs. R,** Criminal Appeal No. 83 Of 2021 when it held:

> *"As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove ail the ingredients of the offence beyond*

reasonable doubt and here, one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in ***Wooimington Vs. DPP*** *[1935] AC 462 from where our present general principles of criminal law and procedure emanate"*

Now, starting with legal issue raised by the court suo moto, it is apparent that section 101 of the WCA can only apply to perishable government trophy when the court with requisite jurisdiction is already seized of the matter, and does not extend back to the period when the police are still carrying their investigations over the same matter. The relevant section 101 states:

"101 (1)-Subject to section 99 (2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any government trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation be placed at the disposal of the Director."

The phrase at any stage of the proceedings in section 101 of the WCA implies the proceedings are already in court with requisite jurisdiction over the matter. Again, the phrase "be placed at the disposal of the Director' in the same section seems to indicate that the end result of the order of the court over perishable Government is to hand over the exhibit to the Director of Wildlife for disposal.

According to paragraph 2 (a) of the Police General Orders (PGO), the Police Force recognizes the above duty to protect every exhibit, perishable or otherwise, which comes into their possession:

> *"2. (a) The police are responsible for each exhibit from the time it comes into the possession of the police, until such time as it is admitted by the Court in evidence, or returned to its owner, or otherwise disposed of according to instructions "*

Concerning the way the Police are required to handle perishable exhibit when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states:

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner Of any} so that the Magistrate may note the exhibits and order immediate disposal. Where*

possible, such exhibits should be photographed before disposal."

The above paragraph 25 envisages any nearest Magistrate, may issue an order to dispose of perishable exhibit.

This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard.

In the instant appeal, the appellants were not taken before the Senior Resident Magistrate -Bariadi who purportedly issued disposal order and be heard before the magistrate issued the disposal order (exhibit P 2). Despite the fact that the records reveal that the appellants were absconded, yet the proceedings could have reflected the requirements procedure if was it complied with. This only suffices to vitiate the proceedings of the trial court for its irregularity.

While the (PW3), was fully entitled to seek the disposal order from the Resident Magistrate, the resulting Inventory Form (exhibit P2) cannot be proved against the appellants because they were not given the opportunity to be heard by the Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO.

My conclusion on evidential probity on Exhibit P2 cannot be relied on to prove that the appellants were found in unlawful possession of Government trophies mentioned in the charge sheet. See the case of: **Mohamed Juma @Mpakama vs R, Criminal Appeal No.385 of 2017(CAT).** Thus, offence in count two cannot stand.

As if that is not enough, it has been further averred that the prosecution's case was not proved beyond reasonable doubts. I will discuss this ground specifically in relation to the first count of unlawful possession of weapons with intent to commit an offence under the Wildlife Conservation Act No.5/2009 read together with paragraph 14 of the First Schedule to and section 60(2) and (3) of the Economic and Organised Crime Act [Cap 200 RE 2002] as amended by Act No. 3 of 2016. I say so because the offence in the second count having not complied with the requirement of the law on presence of the appellants at the inventory proceedings collapses as per the firm legal stand in the case of **Mohamed Juma Mpakama** (supra). It is the prosecution's allegation that the possession of the alleged weapons, to wit: one spear, two knives, and one panga in circumstances that raise a reasonable doubt that they have used them to kill animals and obtain trophies. Digesting the testimony of the prosecution's case on this, it is abundantly clear that, this offence is far

away from its legal proof. I say so, on the basis that a mere possession of these domestic weapons per se is not conclusive to be an offence unless only if one is found in circumstances that raise doubts as having been used to kill the said wild animals. In scanning the prosecution's evidence on this fact, apart from this mere allegation that they possessed the said weapons in circumstances that raise a reasonable doubt that they have used them to kill animals and obtain trophies, there has been no any clear evidence that the appellants used the said weapons to kill the alleged animals after the second offence had not been established. It is my finding that, the unlawful possession of weapons only becomes an offence if it is established that there has been unlawful possession of government trophies. Otherwise, there ought to have been a scientific corroborating evidence by DNA that the said weapons really had some remains of the alleged killed weapons. Short of that, there is a hard proof for this court to arrive to that guilty conclusion.

On the concern that the trial court convicted the appellants without giving them a right to defend the case against them.

The trial Court's records reveal that the appellants absconded and thus the matter proceeded in their absentia pursuant to section 226 of the Criminal Procedure Act, Cap 20 RE 2022.

Section 226 of Cap 20 (supra) provides for the procedures on how to deal with the convicts where convicted in their absence. The same it reads;

" *226.-(1) Where at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused person were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused person with or without costs as the court thinks fit.*

(2) Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit. (emphasis added)

(3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension and the person effecting such apprehension shall endorse the date thereof on the back of the warrant of commitment.

(4) The court, in its discretion, may refrain from convicting the accused person in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court "

In the case at hand, on 27/8/2021 the appellants were apprehended and brought before the trial Court, the records are silent as to what the appellants were asked to address for, we only see the 1st appellant's answer.

Accused: my wife was sick, that's why I did not come to court

Court: section 227 (1) of CPA Cap 20 RE 2019 c/W.

See at page 34 of the trial court's proceedings.

In my considered view it was wrong for the trial magistrate to hold such. He was required to specify as to what the appellants are supposed to address and record it, there after he could make a ruling in respect to what was adduced by the appellants. Thereupon the trial court could asses whether the absence was due to reasonable cause or was in a sheer flagrant violation of section 311 of the Criminal Procedure Act (supra).

It is the findings of this Court that, the law that a right to give defence on merits, applied to the accused who was heard conclusively on

his defence to give mitigation to the conviction passed in the absentia. Where the trial court is satisfied with the mitigation factor, it can even reduce the sentence. There is ample analysis by the Court of Appeal of Tanzania which is uncontroversial on the same point. That the Court has insisted on affording right to be heard to the re -arrested accused persons who were convicted and sentenced in absentia. See **Adam Angelius Mpondi vs The Republic, Criminal Appeal No,180 of 2018.**

With all these observations, conviction and sentences meted against the appellants are hereby quashed and set aside. I find this appeal to have been brought with sufficient cause, I allow it and order the appellants' immediate release from custody unless otherwise lawfully held.

Right of appeal explained.

DATED at Shinyanga this 22nd day of April, 2024.

F.H. Mahimbali

Judge