IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 19 OF 2022

(Originating from Manyoni District Court in Economic Case No. 60 of 2017)

1. SIMON NDONI CHAULAYA.....1ST APPELLANT

2. KENNETH BAHATI @ CHIWANZA..... 2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 11/12/2023

Date of Judgement: 09/02/2024

LONGOPA, J.:

Simon Ndoni Chaulaya and **Kenneth Bahati @ Chiwanza,** the first and second appellants were charged and convicted of two offences namely being found in unlawful possession of Government trophies c/s section 86(1) and (2)(b)(ii) of the Wildlife Conservation Act and unlawful dealing in Government trophies c/s 80(1) and 84(1) of the Wildlife Conservation Act, Cap 283. The appellants were sentenced to serve twenty years each for first count and three years each for the second count.

The appellants were aggrieved by the decision both conviction and sentence thus preferred to appeal against the decision on the following grounds of appeal, namely:

1. *That, the trial court was erroneously in convicting the appellants while the prosecution side failed to prove its case beyond reasonable doubts.*
2. *That, the learned trial court magistrate erred grossly for admitting and considering on evidence of recent possession as regards on exhibit P 1 on which the guiding principles were not proved conclusively.*
3. *That, the learned trial court magistrate erred in law and in fact in holding that the appellants were sufficiently identified at the scene of the crime.*
4. *That, the learned trial court magistrate erred in law and in fact in conducting the criminal case unprocedurally.*
5. *That, the learned trial court magistrate erred in law and in fact when ignored his legal duty to scrutinize and evaluate the purported caution statement of the 1st appellant.*
6. *That, the learned trial court magistrate erred in law and in fact when he failed to consider the appellants defence together with (Exhibit P2).*

The appellants prayed for this Honourable court to quash the conviction and set aside the sentence thereafter order release of the appellants from the prison.

On 11/12/2023, the parties appeared before me to argue their respective cases. The appellants were present enjoying the legal services of Mr. Amon Ezekiel, learned advocate while the Republic was represented by Mr. Francis Kesanta, learned State Attorney.

In support of the Appeal, Mr. Ezekiel learned advocate abandoned the 2nd, 3rd and 5th grounds of appeal and opted to submit on the 1st, 4th and 6th grounds of appeal only. On the fourth ground of irregularly conducting the proceedings by trial court, Mr. Ezekiel submitted that there were two main irregularities. First, there was failure to adhere to procedures of tendering exhibits. Second, issues regarding examination of witnesses especially failure to afford right to cross examine prosecution witness, especially testimony of PW 1.

It was submitted that in tendering the documents, exhibits were supposed to be tendered by respective witnesses. To the contrary, all the exhibits namely Exhibits P1 to P8 inclusively were tendered by a State Attorney who was prosecuting the case. It was argued that State Attorney assumed the role of a witness while he was not affirmed or sworn in as a witness. According to appellants, the case of **Haruna Mtasiwa vs**

Republic, Criminal Appeal No. 206 of 2018, Court of Appeal at Iringa District Registry cements this point.

Also, it was submitted for the appellants that some of those exhibits were not read out in court upon being admitted except for Exhibits P 7 and P8. The case of **Robinson Mwanjisi and others vs Republic** (2003) T.L.R 218 was cited to support the effect of the failure to read the contents of the exhibits so admitted. This court was urged to expunge all exhibits for contravening the mandatory legal procedure of tendering the exhibits.

Further, it was argued that the appellants were not afforded the right to cross examine the prosecution witness, namely PW 1. This failure amounts to condemning the appellants unheard thus contravening section 146 of the Evidence Act that an opposite should be afforded a right to cross examine a witness. Thus, testimony of PW 1 ought to be expunged from the record for violating this fundamental right to be heard.

In respect of failure to prove the case at the required standard, it was argued that having expunged all the exhibits for being unprocedurally admitted, there is nothing on record to support conviction of the offence of being found in possession of government trophies for both 1st and 2nd appellants. It was argued further that 2nd appellant was arrested on 30/9/2017 at his residence and there is nothing on record indicating that he was found in possession of any trophy whatsoever.

It was reiterated that for the offence of unlawful dealing in Government trophies, there was no single evidence indicating the manner of any dealing including sale, transfer, transport, import or export thus this offence was not proved as well. A case of **David Athanas Makasi and Another vs Republic**, Criminal Appeal No. 168 of 2017, CAT was cited to reiterate a position that failure to prove the elements of the offence of unlawful dealing with government trophies amount to the offence standing unproved.

Last point to address by the appellants was the failure to consider the defence testimony. It was argued that throughout the judgment there is no even a single line referring to the defence evidence even though 2nd appellant testified to have not been at the scene of crime on material date as he had travelled and produced a ticket to that effect. The trial magistrate summarized the prosecution evidence alone, cited the legal provisions and proceeded to convict the appellants without any analysis on defence case. This was equally denial of the appellants right to be heard, according to submission by the appellants.

In response, Mr. Kesanta argued that regarding tendering of the exhibits what was done by prosecution at the trial court is a normal practice and it does not affect the truth contained in respective exhibits. The Court was urged to apply an overriding objective principle as courts are enjoined to avoid technicalities as what prosecuting State Attorney did was to repeat what the witness had already requested to tender.

In respect to failure to read out the exhibits upon being admitted, it was argued that some of the exhibits in particular Exhibits P.7 and P.8 were read out upon being admitted. It was reiterated that Exhibit P.8 being an admission of the 1st appellant regarding participation in commission of alleged offences remains intact thus all lamentations have no value whatsoever. The case of **Chande Zuberi Ngayaga vs Republic**, Criminal Appeal No. 258 of 2020, CAT at Mtwara, at pp.13-14 stated that accused person who confesses to have committed an offence is the best witness.

Regarding proof the case to the required standard, it was submitted on strengths of Exhibit P.8 and decision in **Chande Zuberi Ngayaga** case, the confession of the 1st appellant established both counts of unlawful possession of government trophies and unlawful dealing in government trophies.

Also, it was reiterated that there was corroboration for 2nd appellant's participation in the commission of the crimes charged. PW 2 stated to together with his fellow police officers had met the 1st and 2nd appellants prior to the incident where they agreed to buy the trophies from the appellants. It was thus argued that 2nd appellant had knowledge of the trophies save that he escaped arrest.

Moreover, it was submitted that having agreed to sell the trophies to the police officers when they met in the afternoon, both appellants had participated in the offence of dealing with government trophies unlawfully which was proved too.

Further on failure to consider the defence evidence, it was argued that this Court being the first appellate court is empowered to step into shoes of the trial court to evaluate available evidence and reach on its findings. It was submitted that where the prosecution has proved its case beyond all reasonable doubts it is not fatal to the appellate court to re-evaluate such evidence. In fact, there is nothing in defence evidence to cast any doubts to the prosecution case.

In rejoinder, it was stated that repetition of a prayer to tender exhibits is not a normal legal procedure and practice. It is that practice that the Court of Appeal has held to be inappropriate, unlawful and unacceptable in law.

It was argued also that overriding objective principle cannot apply to thwart legal procedures that are mandatory in nature thus it does not apply to rescue irregularities. Further, there is no legal requirement to the effect that appellants must show how they have been affected by the unprocedural admission of exhibits. Adherence to legal provisions being mandatory in nature fundamentally goes to the root of the case if it is not observed.

Regarding the Exhibit P.8 and the decision in **Chande Zuberi Ngayaga vs Republic**, it was reiterated that both suffer the same consequences of being expunged for irregularities in its admission. Thus, that decision would be inapplicable as there is nothing existing on record

as admission or confession in the circumstances to warrant the same being regarded as the best witness evidence.

Further, it was the proposition of the appellants that there is no evidence at all regarding communication between appellants and police officers to warrant participation in commission of the crimes alleged. Specifically, there is nothing at all for 2nd appellant to have participated in anything at all. The expunging of all exhibits leaves no cogent evidence on record to warrant conviction.

It was reiterated that knowledge of the 2nd appellant of existence of unlawful possession of the government trophies or unlawful dealing in government trophies is not among the elements of the crimes the appellants were charged with thus inapplicable to this case.

In totality, it was the prayer of the appellants that the case against them was not proved to the required standard of proof beyond all reasonable doubts thus should be set at liberty.

Having heard both sides in their arguments, perused the record from the trial court and judgment thereon, this Court is called upon to determine whether this appeal has merits. The analysis shall focus on three main grounds that were argued, namely irregularities on admission of evidence, failure to prove the case to the required standards and the failure to analyse and include defence testimony in the judgement.

The first point of determination shall be on irregularities. The irregularities relate to admission of documentary evidence and exhibits and the failure to accord right to cross examine prosecution' witnesses. I will commence to address the effect of failure to adhere to proper requirements of admission of the exhibits. The first limb is on who tenders documentary evidence in the proceedings. To start with, it is important to note that evidence is normally tendered by witnesses and such production of evidence depends on the nature of the proceedings to determine the law regulating such evidence. The Evidence Act, Cap 6 R.E. 2022 states as follows:

> *144. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and, in the absence of any such law, by the discretion of the court.*

The matter at hand is a criminal in nature thus the governing law regarding the admission of evidence is the Criminal Procedure Act, Cap 20 R.E. 2022. It provides in section 198(1) of the Act that:

> *198.-(1)* ***Every witness in a criminal cause or matter shall****, subject to the provisions of any other written law to the contrary,* ***be examined upon oath or affirmation*** *in accordance with the provisions of the Oaths and Statutory Declarations Act (****Emphasis added****).*

This provision requires that for evidence to be considered valid and have weight in respect of criminal cases, the person adducing evidence should be examined on oath or affirmation. It is only a person who testifies on oath or affirmation whose evidence is considered to have probative value as a rule.

That being the legal position, documentary evidence or other exhibits being part of evidence should be tendered by that respective witness who is the author, in possession of the document/exhibit, or custodian of such exhibit.

In the case of **Christian Ugbechi vs Republic** (Criminal Appeal 274 of 2019) [2021] TZCA 3539 (23 December 2021), Court of Appeal on pages 33-34 emphasized on the need for custodian of document/exhibits to tender the same. It stated that:

> *In the current case, exhibit P7 was prepared to certify that PW3 who was the exhibit keeper received 56 pellets from PW5.* ***Both witnesses signed it and the same was tendered during trial by the custodian of exhibits to prove that he received them.*** *Likewise exhibit P9,* ***the observation form was tendered by an eyewitness who saw the appellant defecating three pellets.*** *The said form was signed by all the eyewitnesses together with the appellant himself who apart from signing, he thumb printed it against his signature.*

In criminal proceedings, duties of the prosecuting officer are clearly distinguished from those of a witness. Each of them should discharge his duties within legal boundaries. One party cannot assume the role of the other person without adhering to mandatory provisions guiding discharge of those responsibilities. As such in the case of **Thomas Ernest Msungu @ Nyoka Mkenya vs Republic** (Criminal Appeal 78 of 2012) [2013] TZCA 440 (18 June 2013), at pp. 3-4, the Court of Appeal observed succinctly that:

> *Under the general scheme of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act), particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In tendering the report the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198(1) of the Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report. Ideally, it is good practice that a document should be produced in evidence by its maker or author. We say so because the maker or author will always be better placed to explain what the document is all about, the intricacies, if any, relating to the said document, etc. In the process, the said*

witness could always be examined and cross-examined on the said document.

It can be rightly concluded that prosecutor whether a State Attorney or any other designated person as public prosecutor is not entitled to tender exhibit or documentary evidence unless he is sworn or affirmed as a witness. In the instant case, it was the prosecuting State Attorney who prayed to tender the exhibits namely Exhibits P1 to P8 inclusively.

I concur with the appellants' submission that what transpired in the case at hand falls squarely on the transgression that the Court of Appeal considered to be unlawful and unacceptable practice in **Haruna Mtasiwa vs Republic** (Criminal Appeal 206 of 2018) [2020] TZCA 230 (15 May 2020), at pp. 15-16, the Court of Appeal reiterated that:

As can be seen in the proceedings reproduced above, the witness prayed for the document to be tendered in evidence and the learned Senior State Attorney prayed to tender it. That was inappropriate. The Senior State Attorney, not being a witness, was not legally competent to tender the document.

It is lucid that all exhibits in the instant case, namely Exhibits P1 to P.8 inclusively suffer from the same legal impediment that the prosecuting State Attorney is the one who tendered each of the exhibits thus contravened the law.

There is a second limb on these exhibits based on failure to read out the admitted documentary evidence during the trial. The law is settled that any documentary or exhibits must undergo three processes in tendering them. In the case of **Robinson Mwanjisi and Three Others vs. R.** [2003] T.L.R. 218, at 226, the Court of Appeal stated that:

> *Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out.*

Reading out the contents of the document so admitted is an important stage of the trial in the sense that it avails the accused with the right to prepare its defence well beforehand. It explains all or some of the ingredients of the offence for which the accused stand charged.

In the case of **Erneo Kidilo & Another vs Republic** (Criminal Appeal 206 of 2017) [2019] TZCA 253 (21 August 2019), at pp.11-12, the Court of Appeal addressed the importance of reading out the contents of the exhibits so admitted. It stated that:

> *We do not agree with the learned Senior State Attorney for the respondent for suggesting that the appellants must be taken to have known the facts contained in exhibits P4 (Inventory Form), P5 (Trophy Valuation Certificate), and P6 and P7 (the appellants' confessional statements) which were not read out in court. Contents of these exhibits carry detailed facts which affect ingredients of the counts*

*preferred against these appellants. The case of **LACK KILINGANI VS. R. (supra)** is relevant to our proposition that where an accused person pleads guilty to an offence, the obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them and change his plea to NOT GUILTY.*

In other words, an unequivocal plea of guilty cannot be sustained where contents of admitted exhibits were not read out to any person charged with an offence.

Further, the importance of reading out the contents of a document and its legal implications once the same is not adhered to have been articulated in different case laws. In the case of **Jumanne Mondelo vs Republic** (Criminal Appeal 10 of 2018) [2020] TZCA 1798 (6 October 2020), at pp.15-16, the Court of Appeal held that:

*It is now settled law that once a document has been cleared for admission and admitted in evidence, it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice. The essence of reading the tendered document was succinctly stated in the case of **Joseph Maganga and Dotto Salum Butwa***

v. The Republic, *Criminal Appeal No. 536 of 2015 (unreported) thus: "The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity."*

Accordingly, Exhibit P1 ought to be and we do hereby proceed to expunge it from the record because there was a flouting of procedures in tendering and admitting it.

Also, in the case of **Geophrey Jonathan @ Kitomari vs Republic** (Criminal Appeal 237 of 2017) [2021] TZCA 17 (16 February 2021), the Court of Appeal emphasized that:

It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, clearing the document for admission, actual admission and finally, to ensure that the same is read out in court. The effect of the omission... is to expunge the documents from the record. The position is the same where the document is admitted without being cleared for admission as it happened in this case. In the circumstances, we agree with the learned Senior State Attorney that exhibits P1 - P3 which were wrongly

admitted in evidence deserve to be expunged from the record and thus we accordingly hereby do so.

In effect, the Exhibits P1, P2, P3, P4, P5, and P6 have suffered from this legal infraction of failure to be read out the respective documentary evidence before the trial court. The implication is clear that all these exhibits lack probative value and are hereby expunged from record of the court.

The third limb of procedural irregularities is on the right to cross-examine especially for PW 1. It is not indicated anywhere on record that testimony of PW 1 was subjected to cross-examination. The trial court's failure to afford appellants to cross examine the witness denied them the right to be heard as cross-examination of a witness is crucial aspect on the party against whom the evidence was tendered. Affording opportunity to cross examine ensures that fair hearing is observed, and the parties would feel that justice has been done.

In the case of **Ex-D.8656 CPL Senga s/o Idd Nyembo & Others vs Republic** (Criminal Appeal 16 of 2018) [2020] TZCA 381 (7 August 2020), at pp.13-15, the Court of Appeal emphasizes on the need to afford right to cross examine in the following terms: -

Failure of the trial magistrate to give each of the appellants the opportunity to say whether they objected or otherwise to the admission of exhibit and to cross-examine

witnesses breached the rule of natural justice, which entails that justice must not only be done but must manifestly be seen to be done. Indeed, the right of hearing is not only a fundamental procedural aspect in the court proceedings, but it is also a fundamental constitutional right in Tanzania by virtue of Article 13(6) (a) of the Constitution. In the circumstances of this case, we are settled that the proceedings, findings and judgment of the trial court were invalid having occasioned miscarriage of justice due to the glaring irregularities we have demonstrated above.

This analysis on unprocedurally conducting of the criminal proceedings in this case by the trial court points out that it is correct that trial court failed to adhere to mandatory procedural requirements. Thus, the 4th ground of appeal is found to be in the affirmative.

The second aspect of appeal focuses on the failure to analyse the evidence of defence in the judgment of the trial court. Parties are at one that indeed the trial court magistrate failed to include even a single line of the defence evidence in course of composing the court's judgement.

The only point of departure is on the effect of such failure. It is a submission by the appellants that such failure is fatal as it goes to the root of the case as it amounts to condemning the appellants unheard.

Accordingly, such action is violative of the right to be heard which is among the fundamental rights. The respondent is of the view that omission is not fatal, and this court can step in to re-evaluate the evidence and come up with its own findings. After all, there is nothing n the defence testimony that raises any reasonable doubts on the prosecution case.

In the case of **Leonard Mwanashoka vs Republic** (Criminal Appeal 226 of 2014) [2015] TZCA 294 (24 February 2015), the Court of Appeal noted that:

> *We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction.*

This guidance by the Court of Appeal is critical to the matter at hand. There is no even a single line of the defence evidence summarized nor

considered in the judgment of the trial Court. It was totally ignored by the trial magistrate even though 2nd appellant had appeared to have raised a defence of *alibi*.

It is important to summarize and analyze evidence of both sides as though evidence of defence might not establish the innocence of the accused, but it may raise reasonable doubts on the prosecution evidence thus impairing the proof of the case to the required standard.

I decline to the invitation by the learned State Attorney to hold that failure of the trial court to consider the defence evidence did not impair the prosecution case. I am of the settled view that failure by the trial court to consider and analyse the defence evidence in the judgement did violate and infringe the right of the appellants to be heard. The defence evidence would cast some reasonable doubt on the prosecution's case.

However, in respect of a call for this Court to re-evaluate the evidence and come up with its own finding supporting the finding of the trial court, I agree that noble duty is important to undertake. It is true that this Court being a first appellate court is empowered to re-evaluate the evidence of trial court and come up with its own findings. This is in line with the decision in the case of **Haika d/o Chesam Mgao vs Republic** (Criminal Appeal No. 37 of 2021) [2024] TZCA 6 (4 January 2024), where the Court of Appeal, at pp. stated that:

In our view, the High Court made an obvious error by declining to re-evaluate the evidence, because that is the duty of the first appellate court. We consider this to have been a misapprehension of the law, justifying us stepping into the shoes of the High Court. And when we do so, we find the three issues raised under the fourth ground of appeal to be of great essence. For one, we doubt PW1's credibility in that he did not explain how Anthony Philemon who features even in the seizure certificate, disappeared into thin air. In view of the appellant's account that she was an innocent passenger having been offered a ride, the omission to charge her companion raises eyebrows. We have once rebuked double standards in treating culprits when we said in Richard Wambura v. Republic, Criminal Appeal No. 167 of 2012 (unreported), that "justice must never be rationed at all".

It has been evidently demonstrated in the foregoing analysis that testimony of PW 1 as well as all exhibits (Exhibit P1 to P8 inclusive) were admitted in contravention of the law thus remaining evidence on record is disjointed, lack credibility and is not sufficient to establish with certainty within the required standards the alleged offences of unlawful possession of Government trophies and illegal dealing with Government trophies.

A decision based on one sided evidence cannot be allowed to stand in circumstances that in effect such decision affect the rights to the parties involved thereon. As the appellants are incarcerated in prison based on analysis of the prosecution case alone, I am of the view that it is a fit case to set them at liberty at opportune moments. As such, the 6th ground of appeal has merits and I uphold it.

The last set of the grounds is on whether standard of proof of the case against the appellants was met in prevailing circumstances. The learned State Attorney argued that Exhibit P.8-Cautioned Statement of the 1st appellant remained intact as it complied with all the admission requirements. According to him, this evidence if considered in light of **Chande Zuberi Ngayaga vs Republic case** that emphasizes on the best witness evidence to come from the accused who confesses to have committed the crime, the prosecution managed to prove its case to the required standard of proof beyond all reasonable doubts. The appellants have a different view altogether. They are of the view that having expunged Exhibits P1 to P8 inclusive, there is no evidence whatsoever on record that can support conviction of the appellants. What remains on record cannot establish the ingredients of the offences the appellants stood charged before the District Court of Manyoni.

It settled legal position that it is the duty of the prosecution to prove a case against an accused person beyond all reasonable doubts. The prosecution is normally considered to have prove a case to the required

standard if it manages to establish through evidence that all ingredients of a particular offence exist in the case and that it is the accused who committed such offence.

In a case of **Maliki George Ngendamkumana vs. Republic,** Criminal Appeal No. 353 of 2014 [2015] TZCA 295 TanzLII, the Court of Appeal illustrated this principle. It held that:

> *It is a principle of law that, in criminal cases the duty is two folds, one to prove that the offence was committed and two, that it is the accused person who committed the offence.*

Having found that **Exhibits P1 to P8** inclusively were admitted in contravention of the law on two reasons, that a person who tendered them was not a witness and that some of them were not read out after being admitted, the fate of all these exhibits is to be expunged from the record. Also, evidence of PW 1 deserves to be discarded for failure to have afforded right to cross examine to the appellants. The remaining evidence on record is scanty and disjointed to establish two offences of being found in unlawful possession of the government trophies and unlawful dealing with government trophies. Nothing remains on record to establish elements of these two offences.

As such remaining evidence on record is insufficient to establish the alleged offences against the appellants. There is nothing to connect the

appellants with the alleged offences. It is my finding that the insufficiency of the evidence to establish criminal liability of the appellants concludes the fact that a case against appellants was not proved to the standard required of proof beyond all reasonable doubt. Thus, the first ground of appeal is meritorious.

On those grounds, the appeal has merits as there is nothing cogent to support the conviction based on the remaining evidence of the prosecution. I uphold the appeal. The conviction on both offences against the 1st and 2nd appellants was marred with illegalities thus it is hereby quashed, and the sentence thereof is set aside. I order that both 1st and 2nd appellants be set at liberty immediately unless they are held otherwise for other lawful cause.

It is so ordered.

DATED at **DODOMA** this 9th day of February 2024

E.E. LONGOPA
JUDGE
09/02/2024.