IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 50 OF 2023

(Originating from the District Court of Mlele in Economic Case No. 13 of 2022)

FURAHA KASIMBALALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Before the trial court, the appellant was arraigned for the offence of unlawful possession of Government Trophy contrary to Section 86 (1) and (2)(c)(iii) of the Wildlife Conservation Act Cap 283 R. E. 2022 read together with paragraph 14 of the first schedule to, Sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act Cap 200 R. E. 2022.

It was the prosecution's case that on the 07th day of August, 2022 at Chamalendi village within Mlele District in Katavi Region, the appellant was found in possession of Government Trophy to wit 20kgs of Buffalo meat valued at USD 1900 which is equivalent to Tshs. 4,427,000/= the

property of the Government of Tanzania without a permit from the Director of Wildlife.

This offence was read and explained to him in the language he understood the most and in his own words, he pleaded not guilty, hence full trial. Unfortunately, after the full trial he was found guilty of the charged offence against him and therefore he was convicted and sentenced to serve the term of twenty (20) years imprisonment.

Aggrieved by that decision, the appellant opted for an appeal to this court in which he had five grounds in his Petition which are as reconstructed hereunder;

1. *That, the trial court erred at law to convict the appellant depending on police search which was conducted and procured contrary to the law.*
2. *That, the trial court erred at law to admit and work upon it the record of search and seizure which was procured contrary to the law.*
3. *That, the trial court erred at law to convict the appellant without proof of either issuance of a receipt by the seizing officer acknowledging the seizure or production and admission of a warrant of search.*

4. *That, the trial court erred at law by its act of ignoring and not working upon the appellant's defence.*
5. *That, the trial court erred at law to convict the appellant for an offence which was not proved beyond reasonable doubt.*

As this matter was scheduled for hearing, the appellant appeared for himself as he had no legal representation meanwhile the respondent, Republic enjoyed the services of Ms. Atupele Makoga learned State Attorney.

As the hearing was verbal, the appellant submitted first that as he filed this appeal consisting of five grounds of appeal, he prays for his grounds to be considered and that this appeal be allowed.

In opposing this appeal, Ms. Makoga submitted that in response to the appeal, she will submit on the 1st and 2nd ground together. That, the grounds have no merit. She explained that, the search was conducted according to law. That, at page 18 of the proceedings, paragraph 2, PW3 testified how the search was conducted in the presence of Village Executive Officer (VEO) and how they were able to find the trophies.

She added that, the evidence adduced was supported by the evidence by PW5 who was an independent witness. That, he is a local leader of

Chamalendi area; in fact, he is a Ward Executive Officer (WEO). She then insisted that, after the search, the certificate of seizure was prepared and the appellant signed to acknowledge that he was found with the Government trophy.

Ms. Makoga then added that while the case was being heard the appellant did not object to the tendering of the exhibits. We pray that the 1st and 2nd ground of appeal be dismissed as the search was conducted according to law.

The learned State Attorney then submitted against the third ground of appeal by insisting it also has no merit. She stated that it is not mandatory for the search officer to issue a receipt. That, the appellant signed a certificate of seizure which shows he acknowledged that he was found with the trophy. The learned counsel then referred the case of **Song Lei vs DPP and DPP vs XIGO Shaodan & 2 Others,** Consolidated Criminal Appeals No. 16"4" of 2016 and 16 of 2017, Court of Appeal of Tanzania at Mbeya at page 20 where it was stated that;

> *"Having signed the certificate of seizure which in our considered view was valid, he acknowledged that the horns were actually found in his motor vehicle".*

She added by citing the case of **Swalehe Ngoma & Another vs The Republic,** Criminal Appeal No. 04/2021 Court of Appeal of Tanzania at Arusha at page 7 stated that: -

> *"...where a certificate of seizure is issued and is signed by the accused person, the same constitutes evidence even without a receipt".*

Submitting against the 4th ground of appeal, she agrees that the trial court did not evaluate the defence evidence, and since this is the 1st appeal and according to the case of **Nyakama Ondare @ Okware vs The Republic,** Criminal Appeal No. 507 of 2019 Court of Appeal of Tanzania at Musoma where it was held that: -

> *"The trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives to the conclusion of the case for and against the issues framed for determination. Indeed, if this task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion, more so where failure to consider the appellant's defence is remarkably an issue in a given appeal".*

The learned State Attorney then stated that she invites this court to do so.

Coming to the fifth ground of appeal, the learned State Attorney submitted that her side has the opinion that the prosecution proved the case against the accused/appellant to the required standard. That, their duty was to prove that the appellant is the one who was found with Government trophy she referred this court to page 19, 20 to 25 of the proceedings. She then prayed that this ground be dismissed and that the whole appeal be dismissed for want of merit and uphold the trial court's decision.

As there was no any rejoinder by the appellant, and the submissions from both sides have been considered including the records of appeal, it is in my fortified reasoning that ground **four** as seen in the Petition of Appeal suffice to dispose this appeal amicably, as it is the only ground of appeal that MS. Makoga openly agreed that the trial Magistrate erred. As the matter of fact, the determinant issue in this appeal will be ***whether the failure to consider defence evidence deems to be fatal.***

I have read carefully the judgment of the trial court and I am 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 is taken by the legal fraternity to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to a wrong and/or biased conclusions or inferences resulting in miscarriages of justice.

It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction as it was the holding in the case of **Venance Nkuba & Another vs Republic,** Criminal Appeal No. 425 of 2013 (unreported) where the court held that: -

> *"**This infraction alone would have sufficed to quash the conviction** but as we shall shortly demonstrate, the case for the prosecution was similarly undermined by some other disquieting factors".*
>
> **[Emphasis is Mine]**

In his defense, the appellant attempted to shake the prosecution's evidence by testifying that the police officers did go to his residence while he was asleep with his wife, and they demanded him to reveal a firearm in which he did not possess. He added that, he was tortured together with his wife, and the police officers came with a person known to him as Nestory and that it was this person who had the wildlife meat and that the appellant blames Nestory for naming him. He concluded that, he and his wife were taken to

Majimoto Police post, and that he was taken to the Primary Court Magistrate where he denied to have been found in possession of the said wildlife meat.

It is unfortunate that the trial learned Magistrate failed to consider this evidence in which it would have alerted him to re-evaluate the prosecution evidence before concluding his determination of the matter at hand.

It is my holding that, had the trial learned Magistrate considered the defence of the appellant and given the scenario of this matter at hand, that the information given to PW3 (key witness) did not require an emergency search, and that some details contradicted PW5 testimony which was pointed out by Ms. Makoga to be corroborative to the testimony of PW3; the appellant's evidence most likely would have been believed. After all, an accused person has no duty to prove his innocence.

As I hinted earlier that, the fourth ground suffices to dispose this appeal amicably, as I do declare that failure to consider the defence evidence is fatal, as it usually vitiates the conviction. See, **Hussein Idd & Another vs Republic [1986] TLR 28, Elias Steven vs Republic [1982] TLR 31** (just to mention a few).

I therefore find no need of dealing with other grounds of appeal as I proceed to allow the fourth ground which has undoubtedly disposed this appeal as I promised earlier.

Consequently, I hereby allow this appeal and proceed to quash the conviction of the appellant, and the sentence meted on him is set aside. I thus proceed to order his immediate release from custody unless he is being held therein for another lawful cause.

It is so ordered.

Dated at Sumbawanga this 21st day of May, 2024.

T. M. MWENEMPAZI

JUDGE

Judgment delivered this 21st day of May 2024.in Judge's chamber in the presence of the appellant and Mr. Jackson Komba, State Attorney for the Respondent.

T. M. MWENEMPAZI

JUDGE

21/05/2024