

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TABORA SUB- REGISTRY

AT TABORA

CONSOLIDATED DC CRIMINAL APPEAL NO. 44 & 45 OF 2023

(Arising from the decision of the district Court of Kaliua at Tabora in Criminal Case No. 15 of 2022)

ZABRON S/O SAMSON NDULU.....1ST APPELLANT

MUSA KASHINJE MUSA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last order: 04/03/2024

Judgement date: 23/05/2024

MANGO, J

The Appellants, Zabron s/o Samson Ndulu and Musa Kashinje Musa were jointly charged with the offence of; Unlawful Possession of Government Trophy c/s 86(1) and (2) (b) of the Wildlife Conservation Act, No. 5/2009 read together with paragraph 14 of the 1st Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap.200 R.E 2019].

It was averred in the particulars of the offence that, on 23/09/2022 at Kangeme village within Kaliua District in Tabora Region the appellants were jointly found in possession of Government trophy to wit; 188 pangolin scales

valued at Tshs. 2,234,880 being the property of the Government of the United Republic of Tanzania without a valid permit.

After a full trial, the appellants were found guilty as charged. They were convicted and sentenced to serve 20 years imprisonment. Aggrieved with the decision of the trial Court the Appellants lodged separate petitions of appeal. Zabron Samson @Ndulu filed DC Criminal Appeal No. 44 of 2023 while Musa Kashinje @ Musa filed DC Criminal Appeal No. 45 of 2023. On 4th March 2024, the Court consolidated the two appeals. The gist of their dissatisfactions contained in their respective petitions of appeal can be deduced to form five major grounds as follows;

1. The prosecution failed to prove the offence against the appellants beyond reasonable doubt.
2. There is no proof of value of the government trophy to be 2,234,880 because the valuer (PW6) did not tender any document to prove that he is a qualified valuer.
3. The prosecution breached the chain of custody of the exhibits, the evidence is contradictory as to the number of pangolin scales.
4. The prosecution unnecessarily included the second appellant in the charge because during arrest and interrogation the first appellant did not deny possession of the trophy and did not implicate the second Appellant.
5. The trial court erred in law and fact to convict and sentence the appellants without giving them option of paying fine contrary to the considering that they are first offenders.

During hearing of the appeal, the Appellants appeared in person while Mr. Dickson Swai learned State Attorney appeared for the Republic. The Appellants adopted their grounds of appeal and prayed the same to be considered by the court.

Mr. Swai learned State Attorney supported conviction and sentence meted by the trial Court against the Appellants. He proceeded to submit on the second ground of appeal as raised by the first appellant in which the appellant challenged the capacity of the witness, PW6 who tendered valuation report to conduct valuation of the trophy. Mr. Swai averred that, the witness introduced himself as a Wildlife Officer Grade One and he gave evidence regarding his knowledge and skills as a wildlife officer. He is of the view that, PW6's official rank as a Wildlife Grade One makes him competent to conduct valuation of government trophy according to the provisions of the law to wit, section 86(4) of the Wildlife Conservations Act.

He also highlighted the fact that, the 1st Appellant did not challenge PW6's competence during trial especially during cross examination. It was his contention that, the 1st Appellant's failure to cross examine PW6 implies that he admitted the contents of his testimony. He referred this Court to the case of **Nyerere Nyague vs R**, Criminal Appeal No. 67/2010 and the case of **Issa Hassan Uki v R**, Criminal Appeal No. 129/2017.

On the third ground of appeal as raised by the first Appellant, Mr. Swai argued that the chain of custody was not broken as there is oral testimony of the witnesses on how the exhibits changed hands. He stated that, PW1 explained well the manner under which government trophy was seized from

the Appellants. He submitted that, seizure certificate and chain of custody form were tendered and admitted without objection from any of the Appellants. He also referred the court to the testimony of various witnesses who he consider that, their evidence establishes chain of custody of the exhibits from search, seizure to their production before the Court as evidence. He mentioned PW1 who seized the items from the appellants, PW5 the exhibit keeper, who testified how he received and stored the exhibits. PW4 an independent witness who witnessed the search and seizure and PW6 who conducted valuation of government trophy. He argued that, in absence of documentary evidence, oral evidence can be used to prove chain of custody of exhibits as it was held in the case **Issa Hassan Uki *supra***. He is of the opinion that, oral evidence adduced by the witnesses he mentioned, proved chain of custody of the exhibits that were seized from the Appellants.

The learned State Attorney also acknowledged the discrepancy of evidence given by PW4, PW5 and PW6 regarding number of scales that were seized from the Appellants and those tendered as exhibits before the trial Court. According to him, the discrepancy was cleared by PW7 who testified that, scales were kept in a bag and since they are delicate and prone to breakage, the possibility of breaking is high.

On the 5th ground of appeal as raised by both Appellants, Mr. Swai argued that the sentence imposed by Court is in accordance to the law, Section 60 (2) of the Economic and Organized Crimes Control Act which provides for a custodial sentence of 20 years with no option to fine payments.

On the fourth ground of appeal Mr. Swai argued that, the prosecution case is assessed and determined on its strength and not weakness of the defence case. It was his averment that, the offence against the appellants is unlawful possession of government trophy and not unlawful killing of government trophy. He added that, the appellants were all found in one room which was searched and government trophy was found therein thus, they were all in possession of government trophy without any authorization.

On the 1st ground of appeal Mr. Swai submitted that, the prosecution managed to prove its case through testimonies of witnesses and documentary evidence whereas the appellants failed to establish the legality of possession of government trophy. He further argued that, the appellants did not deny to have had a bag in which the government trophy were found and in their testimonies, they allege to be conducting a business which they didn't disclose. It was his observations that, the prosecution managed to establish that the appellants were all found in one room at the guest house which upon being searched, government trophy was found there in thus, the trial Court correctly convicted and sentenced the Appellant

In rejoinder the 1st appellant prayed for this court to consider the contradictions in number of scales as it appears in the testimony of PW4, PW5 and PW7. On his part the 2nd respondent insisted that, the bag and what was contained were not his nor did he possess the bag at the time of arrest or at any point in time. He alleged that, he was only escorting his uncle to the bus stop, while on the way someone called his uncle and asked to meet him. He decided to escort his uncle to the place where he was to

meet the person who called him. They were then arrested at that meeting place. He insisted that, he is not involved in the offence charged with.

I have dispassionately considered the rival arguments by the parties to this appeal, record of appeal, the grounds of appeal as well as the substance of the oral submissions during hearing of the appeal. I can now determine the grounds of appeal raised by appellants. I will start with the second ground of appeal in which the 1st appellant challenges competence of PW6 to conduct valuation of government trophy for failure to tender the document establishing his qualification as a valuer. Court record show clearly that, PW6 mentioned to be working as a Wildlife Officer Grade One, responsible for among other duties, making valuation of trophy. The law, section 86(4) of the Wildlife Conservation Act [CAP. 283 R.E. 2022] provides for two officers who can sign valuation certificate of a government trophy. The officers mentioned by the cited provision are the Director or wildlife officers from the rank of the Wildlife Officer. The relevant provision, section 86(4) of the Wildlife Conservation Act reads;

*"In any proceedings for an offence under this section, a certificate signed by the Director or **wildlife officers from the rank of wildlife officer**, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein."*(emphasis added)

Valuation report which was admitted as exhibit P9 during trial, indicates that, it was prepared and tendered by PW6. The official rank of PW6 is indicated in exhibit P9 to be a Wildlife Officer I. The fact that the

valuation report was prepared by PW6 who is a Wildlife officer Grade One establishes that, the certificate of valuation was prepared by a competent officer as required by the cited provision. PW6 expertise cannot be questionable unless proved to the contrary. In that regard, I agree with the State Attorney that, this ground of appeal meritless.

The third ground of appeal challenges chain of custody of the exhibits and contradictions in number of pangolin scales that were found in possession of the Appellants. On the contradictions regarding number of scales, Court record establishes existence of the said contradictions. Initially the number of scales were mention by PW4 to be 172 and later same scales were mentioned to be 188 by PW6 who conducted valuation of the scales. As correctly submitted by the State Attorney, the contradiction was cleared by the testimony of PW7 who explained the fragile nature of the scales, the manner they were store that is, they were kept in a bag. The witness stated clearly that, the manner they were stored exposed the scales to breakage. I understand the necessity of ensuring exhibits are managed by qualified officers who understand the manner of managing a particular type of exhibit and preserve the same from being damaged or any how affected. However, the damage that allegedly occurred in this matter is not serious and it does not negate the fact that, the appellants were found in possession of government trophy. It is my considered view that, the contradictions are very minor and it has been cleared by PW7, thus, this ground of appeal is also dismissed.

On the issue of chain of custody, Court record indicates that, the prosecution paraded witnesses who testified on how the exhibits moved from

the hands of one officer to another. PW1, Inspector Makwaya stated that he handled the exhibits to PW5, F.6776 D/CPL Julius who was the exhibit keeper of Kaliua Police station. PW5 admitted to have received the exhibits from PW1. PW6 Majonga Juhudi Chambi testified to the effect that, he conducted valuation of the trophy at Kaliua police station thus, he did not move with exhibits to any other place.

Chain of custody record, exhibit P4, was tendered and it was not objected by the appellants. The record indicates that the exhibits were taken from the exhibit store on 11th January 2023 at 11:10am by Insp. Makwaya for purposes of being tendered before the Court. Court record indicate that on the same date, the items seized from the appellants were tendered and admitted by the Court as exhibit P1 and P2.

In addition, I observed that, the items were seized properly as indicated in the certificate of seizure and testimonies of the witnesses. Seizure certificate was signed by independent witnesses who witnessed the search and seizure in this matter. The witnesses are Zahoro Mohamed Kakoto Chairman of Kangeme village and Mere Christopher the guest attendant of Kasuya guest house where the appellants were arrested and searched. The certificate was also signed by the appellants. Therefore, it is my considered view that this ground of appeal is an afterthought.

The 5th ground of appeal will not detain much this Court because the law does not give the Court discretion in imposing sentences for economic crimes. Offences under Part XI of the Wildlife Conservation Act are among scheduled offences under Economic and Organised Crime Control Act and

the penalty thereto is imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under the Act. The offence on which the appellant was convicted with, is an economic crime, thus the punishment given to the appellant is proper.

On the fourth ground of appeal which originates from the 2nd and 3rd grounds of appeal as raised by the 2nd appellant, challenges prosecutions failure to establish the offence against the 2nd Appellant beyond reasonable doubts. It is not disputed that, the 2nd appellant was found together with the 1st appellant during arrest. The 2nd Appellant stated that he was merely escorting his uncle who visited their home. His testimony was not challenged by the first appellant. Even the prosecution did not produce any evidence that contradicts the testimony of the second appellant.

Throughout the prosecution evidence, there is no piece of evidence that establishes involvement of the 2nd appellant with the offence charged. PW1, the arresting officer stated clearly that, he was communicating with one old man who was dealing with government trophy unlawfully. According to him, even his informer told him about existence of one old man living at Kangeme who was looking for a customer to buy pangolin shells and other parts of pangolin. There is nowhere the second accused is mentioned or anyhow implicated except his presence together with the first appellant during arrest. It is my considered view that, evidence in record does not establish direct involvement of the 2nd appellant with the offence charged.

On the 1st ground of appeal the appellants claimed that the prosecution failed to prove the case beyond reasonable doubts. From the analysis above it is clear that, prosecution managed to prove the case against the 1st appellant beyond reasonable doubts but failed to prove the case against the 2nd Appellant.

For those reasons, I do not find any basis to fault the findings of the trial court in respect of the 1st Appellant, Zabron Samson Ndulu. Thus, the 1st appellant's appeal is dismissed while the appeal preferred by the 2nd second Appellant, Musa Kashinje Mussa, is hereby allowed. The second Appellant, Musa Kashinje Musa should be released from prison custody immediately unless, he is lawfully held for other reasons.

Dated at Tabora this 23rd day of May 2024



A handwritten signature in black ink, appearing to read 'Z.D. Mango'.

**Z.D. MANGO
JUDGE**