

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA-SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 27 OF 2023

(Arising from Economic Case No. 01 of 2023 at the

District Court of Longido at Longido)

CHARLES S/O SOIKAN @ MOLLEL _____ APPELLANT

VERSUS

REPUBLIC _____ RESPONDENT

JUDGMENT

04/03/2024 & 19/04/2024.

BADE, J.

The Appellant herein was arraigned at District Court of Longido and charged on a single count of Unlawful Possession of Government Trophy Contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act, [Cap 283 R.E 2022] read together with paragraph 14 of the 1st Schedule to and Sections 57 (1) and (60) (2) both of Economic and Organized Crimes Control Act [Cap 200 R.E 2022]. According to the particulars of offence in the information which was presented to the Trial Court, on the 18th January 2023 at Makao Area in Lerang'wa Village within Longido

District in Arusha Region, the Appellant was found in unlawful possession of government trophy to wit; eland meat cut with skin which is equivalent to one killed eland valued at 1700 USD equivalent to Tanzania Shillings Three Million Nine Hundred Seventy-one Thousand Seven Hundred Ten (TZS 3,971,710/=) only, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The Trial Court after hearing the evidence of both sides found him guilty and sentenced him 20 years in prison. Aggrieved by the aforesaid conviction and sentence, he lodged this Appeal on the following grounds.

- 1) That, the Trial Magistrate erred in law and in fact in holding that the Appellant was found in unlawful possession of government trophy.
- 2) That, the Trial Magistrate erred in law and in fact in holding that the Appellant's defense is nothing but a pack of lies.
- 3) That, the Trial Magistrate erred in law and in fact, in holding there are facts which were not disputed.

- 4) That, the Trial Magistrate erred in law and in fact in holding that the charge against the Appellant was proved beyond any reasonable doubt.

The brief facts giving rise to the present appeal may be summarized as follows in the context of the prosecution; on 18th January 2023, while on patrol in Olmolog at Enduiment Wildlife Management Area (Enduement WMA) one Nedula Rakoi (PW1) a game warden received information from a confidential informer that there was bush meat in the house at Makao Hamlet in Lerang'wa Village. Together with one Baraka Mollel (PW2), Baraka Landalam, Happyness Ezekiel Mollel, Mapi Melubo and Saitoti Ndobii, PW1 proceeded to the scene of the crime. Still, while on the way, PW1 received another call from the same confidential informer who intimated to him that there was a motorcycle that had already taken the said meat from that house, and gave them the direction in which the motorcycle was heading. They went up the road where the motorcycle was expected to pass and waylaid it by putting a barrier, True to the tipoff, the motorcycle came and they stopped it. They inspected the motorcycle and found a parcel containing some meat which they suspected to be that of an Eland. The suspect simply told them the place where he got the said meat, and they proceeded to the

said place. As soon as they arrived at the house they saw people running, and they managed to apprehend one woman who was introduced to them by the name of Potania Peter, and was found with some meat suspected to belong to an Eland. The Appellant together with Potania were arrested and sent to a Police Station. While there they handed over the said meat to PW4, a police officer who was the exhibit keeper, who in turn handed the said exhibit to PW3 one Ray Shoo, a Wildlife Conservation Officer for identification and valuation purposes. PW3 identified the said meat to be that of an Eland worth USD 1700 which is equivalent to TZS 3,971,710. That was the end of the prosecution case.

On the defense side, the Appellant denied having committed any offence. While he admits that he was found in possession of the meat, he claimed that he was on his way to take his child to school, and on reaching Potania House, he met some youths who asked him to send their parcel of meat to Lerag'wa Village. The said youths told him that it was some meat from a cow which died a day before. He agreed with their prayer and they put their parcel on his motorcycle in the presence of the said Potania Peter. He proceeded with his journey but on the way, he met two people who introduced themselves as police officers. They

stopped him and asked what he was carrying, he replied that it was cow meat. They inspected it and asked him where he got it, to which he responded that he got it from the house of Potania. They required him to take them to the said house, and upon approaching it, the said youths saw them and started to run, one of the game wardens managed to arrest Potania, they searched her house and retrieved some meat from her kitchen and from the main house. After arresting Potania he begged them to release him but they refused and sent both of them to the police station.

This appeal was disposed of by way of oral submission. The Appellant was represented by Mr. Materu, a learned advocate, while the Respondent was represented by Ms. Lilian Kowero, a learned State Attorney.

On the ground that the prosecution failed to prove the charge against the Appellant beyond a reasonable doubt, Mr. Materu submitted that, the search was done without a search warrant, neither was there any independent witness at all. The only witnesses were police officers. That, the certificate of seizure (exhibit P1) does not show if it was signed by a free agent. Mr. Materu argues that this is in contravention of

section 38 (1) (3) of the Criminal Procedure Act (the "CPA") and Order 226 of the Police General Orders (the "PGO").

That, exhibit P1 was obtained unlawfully. He prayed the same be expunged off the record, adding that if exhibit P1 is expunged, then there will not be any evidence to support the prosecution case that the Appellant was found in possession of government trophy, which goes to lack of proof on the side of prosecution. It is Mr. Materu's further contention that when inventory was conducted as per exhibit P4 the Appellant was not accorded an opportunity to comment anything about the exhibit.

Moreover, Mr. Materu argues that there is a contradiction in the evidence on the place where the Appellant was apprehended as well as the weight of government trophy. That, PW1 stated that it was in Makao Hamlet while PW2 testified that it was Mkao hamlet. Mr. Materu insisted that these are two different places. That, discrepancy in the place of apprehension is fatal as it shows that the offence was not proved. On the weight of the meat found with the Appellant, Mr. Materu argues that on the charge sheet it indicates that its 25kg but PW3 testified that the Appellant was found with 15kg. Another argument was on the date the Appellant when the Appellant was apprehended, explaining that the

charge sheet states that the Appellant was apprehended on 18/01/2023 but in his defense the Appellant testified that he was arrested on 19/01/2023.

He further argues that, the Trial Court relied on the weakness of the Appellant's defense to convict him instead of relying on the strength of the prosecution's case, referring this court to page 7 of the typed judgment. In his view the Trial Court was supposed to rely on the strength of the prosecution's case to convict the Appellant and not on the weakness of the defense case. Mr. Materu further argues that, On page 1 and 7 of the typed judgment, the Trial Magistrate did not convict the Appellant on the charge but rather on the basis of charges and offences created by court.

Replying, the Republic supported the Appeal. Ms. Kowero submitted that the disposition of the inventory was not properly conducted as per the law, reasoning that the law that governs the disposition of perishable exhibits is section 101 and 102 of the Wildlife Conservation Act as well as Paragraph 25 of PGO no 229. Ms. Kowero added that the case of **Buluka Leken Ole Ndidai and Another vs R**, Criminal Appeal No. 459 of 2020 is very explicit on the procedure which was enumerated while procuring a disposal order for perishable exhibits, and those

procedures are enumerated as one; the prayer to issue the order has to be done by the investigator or the prosecutor before the court (magistrate), second; the accused or suspect must be present during the inventory disposition hearing, third; the suspect must be asked by the court for their comments, remarks or objection if any referring to the inventory that is requested to be disposed, and lastly; the magistrate should have recorded the proceeding, and record the comments or remarks by the accused, and if the person does not remark or comment then the same should be recorded as well.

She submits that in this Appeal, PW3 requested to dispose the inventory in presence of the accused person. But it is not recorded that the accused was accorded any opportunity to comment or object or remarked anything. Also, in the inventory form Exhibit P4, it is not recorded in it that the accused commented or remarked anything about the disposal of the inventory. Failure to do so amounts to denying the accused the right to be heard, effect of which makes Exhibit P4 to have been illegally obtained, with consequences of it having to be discarded off the evidence.

She argues that this fate makes the accused not to be connected to the offence of being found with unlawful possession of the government

trophy. It also means the prosecution was unable to prove the case against the the Appellant.

Ms. Kowero argues that on the basis of this ground which is enough to dispose the Appeal, she rests her case, praying to have the Appeal allowed, quash the conviction and set aside the sentence.

After going through the court's record, grounds of appeal and submission by parties I think the task before me is to determine the issue on whether the prosecution proved the case against the Appellant beyond the reasonable doubt.

As already explained above the Respondent conceded the Appeal on the ground that they failed to follow procedures provided by the law during the Application for the order of disposal of the trophy which was allegedly found in possession of the Appellant and this is in contravention of section 101 (1) (a) (i) and (2) of the Wildlife Conservation Act and PGO 229 Paragraph 25. I do agree with learned State Attorney as well as the counsel for the Appellant that the prosecution did not follow the laid down procedure that is provided by the law during procurement of the disposal order. I reproduce the cited section for ease of reference:

"101 (1) The court shall, on its own motion or upon application made by the prosecution in that behalf-

(a) Prior to commencement of proceedings, order that-

(b) (i) any animal or trophy which is subject to speedy decay;

and is intended to be used as evidence, be disposed of by the director;

(2) The order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial."

Hence, under the above provision, prior to commencement of formal proceedings which may be mounted for purposes of trial, on its own motion or upon being moved by the prosecution, the court has mandate to order disposal of an animal or trophy whose nature is perishable and susceptible to speedy decay. As indicated above, the statute provides for the time to make that order, that is any time during investigation of the case but before commencement of formal proceedings, but the statute does not provide the procedure of going about it. Also it is not provided as to who should be present at the session. However, the Court of Appeal had on multiple occasions pronounced its position on the issue of involvement of the suspect or suspects at the time of ordering disposal

of perishable exhibits, and the effect of failure to procure participation of the suspects at the session seeking to secure order. See the cited case of **BuLuka Leken Ole Ndidai** (supra). In the case of **Mohamed Juma @ Mpakama vs R, Criminal Appeal No. 385 of 2017** it was held that the issue of presence of the suspect at the session seeking a disposal order is a requirement traceable from the PGO no. 229 paragraph 25, relating to investigation and exhibits and the court held that the presence of a suspect at that time is mandatory.

Paragraph 25 of PGO no. 229 provides:

"25 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."

In the case of Mohamed Juma @ Mpakama (supra) it was held that:

"..... paragraph 25 of the PGO envisages any nearest magistrate, who 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."

As a consequence, the court at page 23 observed;

"... while the police investigator, Detective Corporal Simon (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."

With the above understanding on the law, I will now turn to the record, in order to find out whether the the Appellant was present before the magistrate who issued the disposal order or not and whether he actively and effectively participated in the process. This entails a thorough scrutiny of the prosecution's evidence particularly the evidence of PW3 who presented the perishable exhibit before the magistrate to seek a disposal order. At page 18 of the typed proceedings, PW3 testified that the accused, one police officer and himself went together to Longido District Court before Hon. Mvungi who asked the accused if he was the owner of the meat, where the accused admitted to be the owner, and the said magistrate ordered for the disposal of the said meat and they

destroyed it by burning it in the presence of the accused person and the Magistrate.

As seen above, I indicated that PW3 testified that at the time of seeking a disposal order, the suspect was present and the Magistrate asked him if he is the owner of the said exhibit. In my view, that statement is insufficient as it is not supported by the inventory form. The inventory form only bears his name. The inventory form does not contain the signature of the suspect nor any remarks he made on the exhibit, it is only containing the signature of PW3, the Magistrate's remarks on exhibit and her signature. So, a mere statement by PW3 that the accused was present and confessed that the meat was his leaves many more questions unanswered, in the view of the above authorities that I have referred, such as one, if the suspect was present before the Magistrate why did he not sign the inventory form to indicate his presence? two, was he asked for his comments, remark or objection as regards the exhibit which was being sought to be disposed off? If yes, where is the record of his comment, remark or observation in that respect?, and if he did not, the record does not say so either, where it should.

In my view, the void and emptiness left by the above questions leads to logical conclusion as the one arrived by the Court of Appeal as they guided, namely, that the Appellant was not heard and his objections comments (if any) were not taken at the time the disposal order was being procured. In that case, I am confident that the inventory form cannot be relied upon to prove any case against the Appellant as it is ineffectual. In short, the Appellant was not heard at the time the Magistrate was making an order to destroy the trophy.

Based on the above explanation, I expunge exhibit P4 from the record. In the absence of the inventory form, which stands in the place of the destroyed trophies, there is no legally conceivable way that the Appellant can still remain blameworthy of the offence charged in the aftermath of discarding exhibit P4.

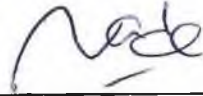
Having yielded to discarding exhibit P4, I find it sufficient to dispose of the Appeal, which I will allow. I find no pressing need to engage in discussing any other concerns raised by the counsel for the Appellant.

Lastly, the Appellant's finding of guilty is hereby quashed. Consequently, the respective orders of his conviction are nullified, and sentences meted upon him set aside. In the final analysis, it is hereby ordered that

the Appellant be released forthwith from prison unless he is held there for other lawful cause.


It is so ordered.

DATED at ARUSHA this 19th day of April 2024



A. Z. Bade
Judge
19/04/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **19th** day of **April 2024**



A. Z. BADE
JUDGE
19/04/2024