IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA-SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 157 OF 2022

(Arising from Economic Case No. 05 of 2022 at the

District Court of Arumeru)

GODLIZEN S/O ANDREA _____ APPELLANT

VERSUS

REPUBLIC _____ RESPONDENT

JUDGMENT

26/02/2024 & 05/04/2024

BADE, J.

The Appellant herein was arraigned at the District Court of Arumeru on one count of Unlawful Possession of a Government Trophy contrary to section 86 (1) (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments) (No.2), Act No.4 of 2016 read together with paragraph 14 of the 1st Schedule and Sections 57 (1) and (60) (2) both of Economic and Organized Crimes Control Act (Cap 200 R.E 2019).

The trial court 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.

i) That, the trial court erred in law and in fact for convicting the Appellant while the case was not proved beyond a reasonable doubt, resulted in a wrong and erroneous decision.

ii) That, the trial court erred in law and in fact for holding that the case was proved beyond reasonable doubt despite failure by the independent witness to sign the certificate of seizure nor summon an important witness to testify.

iii) That, the trial court erred in law and in fact for failure to analyze and evaluate the evidence on record resulting in an unfair decision.

iv) That, the trial court erred in law and in fact by holding that the case was proved beyond reasonable doubt while the prosecution side tendered neither the sulfate bag which is alleged to have been used to carry the waterbuck meat nor the panga.

v) That, the trial court erred in law and in facts to hold that the case was proved beyond reasonable doubt while the chain of custody was not properly maintained.

vi) That, the trial court erred in law by having its decision relied on defective certificate of seizure.

vii) That, the trial court erred in law and in fact for holding the case was proved beyond reasonable doubt despite the variance and contradictions of prosecution testimonies and evidence.

A brief review of the contextual background is necessary to be able to appreciate the gist of the matter. It was the prosecution's case that on 12/01/2022 at Arusha National Park, Maksoro Area within Arumeru District in Arusha Region, the Appellant was found in possession of a Government trophy to wit common Waterbuck meat which is equivalent to Tanzania Shillings one million nine hundred sixty-one thousand, eight hundred only (TZS 1,961,800), the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife. That, PW2 together with his colleagues while on a normal patrol found the Appellant in the park with the sulfate bag, they searched the bag, and found what they suspected to be fresh meat of Waterbuck ('Kuro') in Kiswahili language which is one rear leg and a

machete ('panga'). They took the sulfate bag to PW1 who was the exhibit keeper and later sent the bag to PW3 for identification and valuation purposes. After inspection, PW3 discovered that it was a rear leg of an animal known as 'Kuro' a common Waterbuck.

This Appeal was disposed of by way of written submissions after the parties were granted the leave so to do. The Appellant was represented by Mr. Kennedy Mapima, a learned advocate while the Respondent was represented by Ms. Lilian Kowero, State Attorney.

Mr. Mapima combined grounds 1, 2, 4, 5, 6, and 7 arguing them together and submitting on the issue of independent witness that, the law requires an independent witness to sign the certificate of seizure during the search of the Appellant and seizure of the suspected exhibits, supporting his position with section 38 (3) of the Criminal Procedure Act, Cap 20 R.E 2022 and the case of **David Athanas @ Makasi and Another vs The Republic,** Criminal Appeal No. 168 of 2017.

The learned counsel contends that the said requirement of an independent witness was not complied with in this matter during the search and seizure contravening the law. There is no explanation from PW2 why the certificate of seizure was not signed by an independent witness or if they made any effort to find an independent witness. In his

position, it makes him believe the evidence of the Appellant that he was forced to sign the certificate of seizure, referring to this court on page 26 of the typed proceedings of the trial court. To cement his argument, he cited the case of **DPP vs Musa Hatibu Sembe,** Criminal Appeal No. 130 CAT.

Moreover, Mr. Mapima submitted that the colleagues of PW2 who signed the certificate of seizure were interested in the matter which is why they rushed to arrest, search, and seize without involving independent witnesses, arguing that obviously the colleagues of PW2 were not credible and impartial witnesses.

Mr. Mapima also contends that the chain of custody was not maintained, since the chain of custody is established where there is proper documentation of the chronological events in the handling of the exhibits from seizure, control, transfer, analysis, and disposition of evidence, be it physical or electronic, citing the case of **Paulo Maduka and 4 Others vs Republic,** Criminal Appeal No. 110 of 2007, CAT at Dodoma. That, the prosecution evidence is silent on who presented the exhibit in the trial court. The learned counsel pointed out that there is neither documentation nor oral account from the prosecution witnesses regarding the handling of the exhibit after valuation. He argues that

search is the initial stage of the process that sets up the motion in the chain of custody if it is done according to the dictates of the law. In his view, according to how the search was documented in this Appeal, it brings doubts if the exhibit was searched and seized from the Appellant referring to the case of **DPP vs Musa Sembe** (supra). He argues further that the evidence of PW2 is silent on who took care of the exhibit and how it was stored after seizing the same. PW2 only stated that after signing the certificate of seizure, they took the Appellant to the police, not that they carried the exhibit together with the Appellant to the police. PW2 used the word "we" when explaining the handover of the exhibit which, in his opinion, denotes that the said exhibit was in the possession of many persons who then handed it to PW3. This also presupposes that there was no chronological documentation demanded of good handling of an exhibit, adding further that the record is silent on who handed the exhibit to the magistrate for an order of disposal.

Mr. Mapima argues that the sulfate bag was not tendered in court as an exhibit and no explanation was given why it was not tendered. In his view, this brings doubt if there was no tempering of the exhibit, to wit, a leg of waterbuck. He further submitted that the Appellant was not given the right to be heard during the application for disposal of inventory in

court. The prosecution evidence does not disclose if the Appellant was given a chance to be heard before the issuing of the disposal order. No picture was taken and tendered during the trial to show that during the disposal the Appellant was present and the exhibit was disposed. To support his position, he cited the case of **Mohamed Juma @ Mpakama vs Republic,** Criminal Appeal No. 385 of 2017, CAT at Mtwara.

With regard to the contradictions of the prosecution witnesses, Mr. Mapima submitted that PW1 testified that after the disposition of the exhibit, he received the valuation report, and took the Appellant back to the police while PW2 testified that immediately after signing the certificate of seizure he took the Appellant to the police, then instituted the case and later handed over the exhibit to the exhibit keeper. That, the testimony of PW1 is different in the sense that PW2's testimony shows that the case was filed before handling the exhibit on 12/01/2022. The Appellant's counsel further argues that PW1 testified that, the exhibit was disposed of by pouring kerosene oil and then put into a disposal pit while PW2 testified that the exhibit was put into the pit then kerosene was poured and buried. Another contradiction is when PW1 testified that after the disposal of the exhibit, he received a

valuation report from PW3 and then took the Appellant to lockup and prepare a file while PW3 testified that she handed over all the documents to the investigator of the case PW1 after destruction order was issued.

Arguing the 3rd ground of appeal, Mr. Mapima submitted that if the trial court had properly evaluated the evidence it would have found that the evidence of the DW1 is credible and believable. That, the court could have found that the prosecution's case is full of doubts, pointing to the certificate of seizure which did not have the signature of an independent witness, the broken chain of custody, contradictions and variances of testimonies, the disappearance of the sulfate bag, who sought the disposal order and if the person who did was the competent person to do so.

The learned State Attorney Ms. Kowero, wasted no time in joining hands with her learned friend making it clear that she did not support the conviction and sentence of the Appellant by the trial court. She proceeded to submit that, they were in agreement with the advocate for the Appellant that neither PW1, PW2, or PW3 when testified in court disclosed that the Appellant was given a chance to make his comments, remarks or objections as regards the perishable exhibit sought to be

destroyed. Ms. Kowero further added that the magistrate did not record so in the inventory form. In her opinion, the Appellant was not accorded the right to be heard during the inventory procedure. To support her stance, she cited sections 101 (1) and (2) of the Wildlife Conservation Act and paragraph 25 of the Police General Orders (PGO) No. 299 as well as the case of **Buluka Leken Ole Ndidai & Another vs Republic** Criminal Appeal No. 459 of 2020 which laid down the procedures to be followed before disposal of perishable exhibits which includes, the requirement that the prayer to issue the order for disposal of perishable exhibits be made by the investigator or prosecutor before a magistrate in chambers, that the suspect must be present in court at the time of making the prayer, that the suspect must be present in court at the time of making the prayer, that the suspect must be asked for his comments, remarks or objections as regard to the perishable exhibit that ought to be destroyed, and that if the suspect did not make any comments, remarks or objection, then the magistrate must record this fact; and if the suspect makes any comments, remarks or objections, then they shall be so recorded as appropriate on the inventory form.

The learned State Attorney further agitates that in issuing a disposal of perishable exhibit order, it is mandatory to afford the suspect the right

to be heard at the time of issuing the disposal order, and failure to do so renders the inventory form to be illegally procured. To support this argument, she cited the case of **Juma Mohamed Mpakama vs Republic,** (supra), arguing that in the instant case, the inventory form (exhibit P5) cannot be proved against the Appellant because he was not given the opportunity to be heard by the magistrate and the remedy is to expunge it from the record. In consequence, in the absence of the said inventory form, then it becomes legally impossible to charge the Appellant and convict him with the said offence.

In her conclusion, Ms. Kowero prayed that the Court quash the conviction and set aside the sentence imposed by the trial court so that the Appellant could be released.

I have carefully considered the arguments from both sides which appear to tie and are similar in some contents. I think the task before me is to determine whether the prosecution did prove the case against the Appellant beyond the reasonable doubt. This takes me straight to the issue of whether the Appellant was present during the procurement of the disposal order and accorded the right to be heard in the manner guided by the Court of Appeal as regards the exhibits sought to be destroyed.

As demonstrated by the learned State Attorney, the appropriate starting point should be the law relating to the disposal of animals or trophies which is section 101 (1) (a) (i) and (2) of the Wildlife Conservation Act, Cap 283 R.E 2022. The said section provides:

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

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

(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 proof of the matter in dispute before any court during trial."

The import of the provision above is that on its own motion or upon being moved by the prosecution, the court has the mandate to order the disposal of trophies or animals 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 the investigation of the case but before the commencement of the formal proceedings. It is notable that the statute does not provide the procedure for going about

it. It also does not provide as to who should be present during the procedure.

It is in this sense that the Court of Appeal has on numerous times pronounced its position on the issue of the involvement of the suspects at the time of ordering of a disposal of perishable exhibits, and the effect of failure to procure participation of the suspects at the session seeking to secure a disposal order. In the cited case of **Buluka Leken Ole Ndidai & Another,** (supra) which was quoted with approval in the case of **Mohamed Juma Mpakama** (supra) observed that the issue of the presence of the suspect at the session seeking a disposal order is a requirement traceable from the Police General Orders (the "PGO"), and referred to **PGO No. 229 paragraph 25** relating to investigation and exhibits, holding that the presence of a suspect at that time is mandatory. To be precise the said paragraph of PGO 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:

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."

[Emphasis mine]

According to the above-cited cases and provisions of the law, the power to issue disposal orders of a perishable exhibit under section 101 (1) (a) (i) and (2) of the Wildlife Conservation Act must be exercised in observance of the requirements to have the presence of the suspect in respect of whom the exhibit relates under paragraph 25 of the PGO No. 299 providing for several aspects of investigation and exhibits.

With the above understanding of the law, I will now turn attention to what happened in this case, to find out whether the Appellant was present before the magistrate who issued the disposal order, and if he was so present, whether he was actively and effectively involved in the process. In doing that, I have to thoroughly scrutinize the record of appeal, particularly the evidence of PW1, PW2, and of PW3 who presented the perishable exhibit before the magistrate to seek the disposal order. In all three witnesses, it is only PW1 who testified that

they went to the magistrate to procure a disposal order accompanied by the suspect. However, the evidence is silent if the suspect was asked for any comment, remark, or objection as regards the exhibit that was being sought to be disposed of as the inventory form has no record of his comment, remark or observation in that respect. In my view, this proves that the Appellant was not heard and his comments or objections (if any) were not taken at the time the disposal order was being procured. If that is the case, which I am confident it is, it is correctly argued by both counsels, that the inventory form cannot be relied upon to prove the case against the Appellant, as it is ineffectual. So, the mere testimony of PW1 that they accompanied the suspect to the magistrate for the disposal order is insufficient where it is not testified that a suspect was indeed actively and effectively participated in the whole process of securing the disposal order. In my opinion with regards to the issue of affording the suspect the right to be heard at the time of issuing a disposal order, exhibit P5 in this case was illegally procured. Based on this fact, I expunge exhibit P5 from the record. Now in the absence of the inventory form which stands in the place of the destroyed trophies, there is no way that it can be legally proved that the Appellant was

found with the trophy and stand convicted on the offence he was charged with, in the aftermath of discarding exhibit P5.

Having said so, this Appeal is allowed. Because discarding exhibit P5 is sufficient to dispose of the Appeal, I find no need to engage in discussing the remaining grounds of the appeal. The appellant's finding of guilty is quashed, and the sentencing orders are hereby nullified and set aside. In the final analysis, it is hereby ordered that the Appellant be released forthwith from prison unless he is being held there for other lawful causes.

It is so ordered.

DATED at **ARUSHA** this **05th** day of **April 2024**

A. Z. Bade
Judge
05/04/2024

Judgment delivered in the presence of the Parties and/ or their representatives in chambers on the **05th** day of **April 2024**

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
05/04/2024