IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT IJC MOROGORO

CRIMINAL APPEAL NO. 37692 OF 2023

(Originating from the decision of the District Court of Ulanga at Mahenge dated 19th day of October, 2023 in Economic Case No 13 of 2022 Before Hon, M.R MASIMBI SRM)

AYUBU ZAKARIA @MGEYEKWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

19TH of June,2024.
L. MANSOOR, J,

In the District Court of Ulanga at Mahenge, Ayubu Zakaria Mgeyekwa, the appellant herein was on 19th day of 2023 convicted and sentenced for the offence of unlawful possession of Government Trophy Contrary to section 86 (1), (2), (c) (iii) and (3) of the Wildlife Conservation Act, [Cap 283 R.E 2022] read together with Paragraph 14 of the First Schedule to and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [CAP 200 R.E 2022].

From the particulars in the charge sheet, it was alleged that, on 4th day of November 2022 at Mpasua Area within Nyerere National Park in Ulanga District in Morogoro Region, the appellant was found in unlawful possession of Government trophies to wit; seventy-four (74) pieces of Hippopotamus meat valued at USD 1,500 (United States Dollars One Thousand and Five Hundred) equivalent to Tanzania Shillings Three Million Four Hundred and Eighty-Six Thousands Only (TZS. 3,486,000/=), the property of the Government of the United Republic of Tanzania without the permit from the Director of Wildlife.

The appellant denied the charge and as a consequence, the case proceeded into full trial. Having being satisfied that the prosecution had proved its case to the required standard, the trial court convicted the appellant and thereafter ordered him to pay a fine of Tshs 34,860,000 or in default, serve a term of twenty (20) years imprisonment in jail.

The appellant was disgruntled by the decision of the trial Court hence this appeal. In his petition of appeal, he raised nine grounds of complaint reproduced below:

1. *That, the learned trial Magistrate erred in receiving Consent and certificate of the DPP conferring jurisdiction tendered by S/ Sgt*

Arnold Emmanuel without considering that has NO delegation of power by DPP to prosecute thus Certificate and consent been illegally tendered be expunged from the record/proceedings;

2. *That, the learned trial Magistrate erred in law for failure to notify/ask the appellant who was unrepresented if He needs to re-cross examine PW1 and PW2 before proceeding with PW3 after Prosecution side substituted a new charge after hearing of PW1 and PW2 and occasioned to unfair trial to the appellant;*
3. *That, the learned trial Magistrate erred in law and fact by failing to draw adverse inference against Prosecution failure to call as a witness Coplo Keneth who allegedly received Hippo's meat from PW2 and took to PW4 for Inventory Procedure and called PW4 and PW5;*
4. *That, the learned trial Magistrate misdirected himself in finding that chain of custody was properly maintained without paper trails without observing that PW2, PW5 and Coplo Keneth were Police officers mandated to comply with the Police General Order NO. 229 (P.G.O NO.229) in handling and control of exhibits;*
5. *Without Prejudicing the above ground of appeal, the learned trial Magistrate erred in law and upon fact in relying on exhibit P2 Motorcycle, whereby ownership of the Motorcycle was not proved*

at all and the alleged tenga used to carry meat was not tendered in court and exhibits were not labeled or marked either at the scene of crime or at Police station in order to differentiate them from other exhibits;

6. *That, the learned trial Magistrate erred in law in shifting the burden of proof onto the appellant;*
7. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant in a case that was not investigated at all and appellant was under restraint without being cautioned or interviewed by police officer contrary to section 53 (a) (b) and (c) of the C.P.A CAP 20 RE 2022;*
8. *That, the trial court erred in law and in fact by failure to evaluate the evidence tendered by defence side which raised reasonable doubts as there was no cogent proof that the appellant was arrested in side Nyerere National Park with the alleged wild meat;*
9. *That, the learned trial court erred in both law and upon fact to convict and sentence the appellant while prosecution had failed to prove their case to the required standard.*

As agreed by the parties the appeal was argued by written submissions. Parties herein were represented, while the Learned Advocate Ignas Punge

represented the appellant, the Learned State Attorney, Shabani Kabelwa, entered appearance on behalf of the Republic.

Learned Counsel Ignas Punge filed the submissions in support of the appeal. In his submission, the learned counsel abandoned the fifth and seventh grounds of appeal. He consolidated the third and fourth ground while arguing the first, second, eighth and ninth grounds separately.

As regards to the first ground, Learned Counsel Punge contended that the Consent and Certificate of the Director of Prosecution conferring jurisdiction to the trial court were tendered by a wrong person. He said, as per the trial court's proceedings on 23rd May, 2023, the Consent and Certificate were issued by S/SGT Arnold Emmanuel, who appeared before the Court as a Public Prosecutor. According to him the said Public Prosecutor had no mandate to issue/tender the two legal instruments. He elaborated that, Section 12(3) of the *Economic and Organized Crime Control Act* (Cap. 200, R. E 2022) authorizes the Director of Public Prosecutions or an officer authorized by him to direct such cases to be tried by a subordinate court while on the other hand, the law under section 26(1) and (2) of the same Act provides for a Consent requirement

to prosecute from the Director of Public Prosecutions or an officer authorized by him before such an offence is tried by the subordinate court.

In support of the second ground, the Learned Advocate complained that after the substitution of the charge, the appellant was not addressed on his rights to have the witnesses (PW1 and PW2) who had already testified, to be recalled to either give evidence afresh or be further cross-examined as is evident at pages 26 and 27 of the trial court's proceedings and instead the prosecution continued to parade PW3 for examination. He averred that the omission is a fatal irregularity which vitiates the entire proceedings. To cement his proposition, the Learned Counsel cited the case of **EZEKIEL HOTAY V. THE REPUBLIC, CRIMINAL APPEAL NO. 300 OF 2016 [2018] TZCA 428 (2 October 2018; TANZLII)** where it was held:

> " *.....it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross examined. This was not done. In failure to do* so, *rendered the evidence led by the five prosecution witnesses to have no evidential value."*

He further cited the case of **BALOLE SIMBA V. THE REPUBLIC, CRIMINAL APPEAL NO. 525 OF 2017 [2021] TZCA 380** (17 August 2021; **TANZLII),** where the Court of Appeal underlined that;

> *"...although the substituted charge was read over to the appellant, he was not subsequently addressed on his right to have the two prosecution witnesses who had already testified be recalled so as to give fresh evidence or be further cross examined. On account of the said omission, this rendered the evidence adduced by PWl and PW2 with no evidential value."*

Amplifying the third and fourth ground, the Learned Counsel Punge averred that the chain of custody of the alleged Hippopotamus was broken. He referred the court to the cases of **AZIZI ABDALAH VS REPUBLIC [1991] TLR 71 (CA)** and **WILLIAM MAGANGA @ CHARLES VS REPUBLIC (CRIMINAL APPEAL NO. 104 OF 2020) [2023] TZCA 17742 (6 OCTOBER 2023, Tanzlii)** and said, in as far as the chain of custody is concerned; Coplo Keneth was required to appear before the trial Court as he is alleged to have received Hippopotamus meat from PW2 and handed it over to PW4 for Inventory Procedure.

In relation to the sixth ground, Mr Punge relied on the case of **MWITA AND OTHERS VS REPUBLIC [1977] LRT 54** to front his argument that the prosecution has a burden to prove the case beyond reasonable doubt

and that the accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. On that basis he lamented that the defence case was not considered but rather it was flouted as the trial magistrate dealt with the prosecution evidence alone. He went on citing the case of **HUSSEIN IDD AND ANOTHER VS THE REPUBLIC [1986] TLR 166,** where the Court of Appeal held that:

> *"It was a serious misdirection on part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

Based on the above submission, the Learned Counsel for the appellant urged that this appeal be allowed, conviction and sentence entered against the Appellant be quashed and the Appellant be acquitted.

On his part, the Learned State Attorney Shaaban Kabelwa strongly opposed the appellant's appeal. In his reply submission to the first ground, he attacked the ground for lacking merit since the District Prosecution Officer (DPO) who issued and authenticated the said certificate conferred jurisdiction to subordinate court to try the appellant and the officer is the authorized person under section 26 (2) of the Economic and Organized

Crime Control Act [Cap 200 R.E 2022] read together with paragraph 3(4) of Economic offences (Specification of offence for Consent) Notice, GN 496H of 2021. He submitted further that, the said S/sgt Arnold Emmanuel, the public prosecutor was only submitting the said documents as he had a mandate to appear before the court and prosecute the said case.

On the second ground, the Learned State attorney wholly conceded to the appellant's complaint. He admitted that according to trial court's proceeding at page 26 and 27 the appellant was not addressed as to his right to re-call PW1 and PW2 for further cross-examination after substitution of charge as the court of appeal stated in the case of **Balole Simba vs Republic (Criminal Appeal 525 of 2017) [2021] TZCA 380 (17 August 2021)**. He, however, was of the view that, despite the said omission in court proceedings, the evidence available in records is strong enough, hence prayed for this Honourable court to be guided by the case of **FATEHAL MANJI VS REPUBLIC [1966] EA 341** and order for retrial of the case.

Against the third and fourth grounds, Mr Kabelwa averred that the prosecution's failure to call Coplo Keneth to testify as a witness before the court does not render the whole chain of custody broken. He elaborated

that the evidence on records shows the movement of the said exhibits from PW1, the arresting officer who handed over the said dried meat to Cpl Joseph (PW2) and that PW2 also stated that he handed over the said exhibit to Coplo Keneth who handed it over to Felixian Anthony Kisima (PW3) for valuation and after valuation, PW3 returned the same to Coplo Keneth. He added that, Boniface Charles Okiri (PW4) stated that he received the said dried meat from Coplo Keneth for destruction and he filled an Inventory Form which was admitted as Exhibit P4. He concluded that, as stated in the case of **Jibril Okash Mohamed vs Republic (Criminal Appeal No. 331 of 2017) [2021] TZCA 13 (11 February 2021)**, it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature.

On the sixth ground of appeal, the Learned State Attorney Shaaban Kabelwa made reference to section 100 (3) of the Wildlife Conservation Act [Cap. 283 R.E. 2022] and told the court that it is evident from page 15 and 16 of the trial court judgment that the defence evidence was considered by the trial magistrate.

On the strength of the above submissions the learned state attorney beckoned upon the court to dismiss the appellant's appeal.

I have considered the rival arguments from the Counsels, also I have made a thorough perusal of the lower court's proceedings and judgement, and on the first ground of appeal, the appellant complains that both the certificate and consent issued by the Director for Public Prosecution conferring jurisdiction to the trial court was tendered by a wrong person. I need not delay myself on this ground. The law has made it a mandatory requirement for the for Consent of the Director of Public Prosecution to be issued before trying an economic offence. Section 26(1) of the Economic Organized Crime Control Act, [Cap. 200 R.E. 2019] (the EOCCA) provides;

> *26.-(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*

Undoubtedly, from the above provision, it is only the Director of Public Prosecution who has mandate to issue the said consent, however, the officer subordinate to the DPP may issue the consent to prosecute an

economic offence under subsection (2) section 26 of the EOCCA which reads;

> *"(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions."*

Further, as regards to delegation to issue consent, Paragraph 3(3),(4) of Economic Offences (Specification of Offences for Consent) Notice, 2021 G.N. No. 496H of 2021 published on 30th June, 2021 provides as follows;

> *"3(3) The power to consent to the prosecution of economic offences specified in Part II o f the Schedule to this Notice is hereby delegated to and may be exercised by the Deputy Director of Public Prosecutions or the Director.*
>
> *(4) The power to consent to the prosecution of economic offences specified in Part III of the Schedule to this Notice is hereby delegated to and may be exercised by the Regional Prosecutions Officer of the Region or District Prosecutions Officer of the District where the offence took place or the*

Prosecution Attorney In-charge of the Court of Resident Magistrate or District Court where the economic offence is charged."

In the present appeal the records illustrate that on 3rd of May 2023, one Neema Castor Haule, the Regional Prosecutions Officer, an officer subordinate to the DPP within the ambit of the above provisions was the one who issued the consent for the prosecution of the appellant for the offences he stood charged with. On the same date, the Regional Prosecution Officer acting under section 12(3) of the EOCCA issued a certificate conferring jurisdiction to the trial court to try the appellant. The said section stipulates;

"(3) The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."

On the strength of the foregoing illustrations, I find the appellant's complaint baseless. I hold a firm view that both the Consent and the Certificate were valid as they were issue by a person delegated to do so

on behalf of the Director of Public Prosecution as demonstrated above. Further, as rightly submitted by the Learned State Attorney Kabelwa, I find nothing erroneous with Mr. Arnold's (the Public Prosecutor) tendering of the legal instrument before the court. My holding could have been different in case the records depicted that he was the one who acted under section 26(2) and 12(3) of the EOCCA and issued the said Consent and Certificate at the first place instead of the Regional Public Prosecutor.

In that regard, the first ground is hereby dismissed for want of merits.

I now turn to determination of the second ground which faults the trial court for its omission to afford the accused person with an opportunity to cross examine PW1 and PW2 who had already testified before the substitution of the new charge. I have gone through the trial court proceedings. As rightly pointed out by Counsel Ignas Punge and conceded to by the Learned State Attorney, the trial court glaringly contravened the mandatory provision of sections 234 (1) and (2) of the Criminal Procedure Code, Cap 20, R.E 2022 which requires that when a charge is substituted, the accused person shall among the other things be informed of his right to require a recalling of the witnesses who had testified to either give evidence afresh or be further cross- examined. The provisions read;

" 234 - (1) Where at any stage of a trial it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such term s the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection

(a) The court shall thereupon call upon the accused person to plead to the altered charge;

(b) The accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross – examined by accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re - examine any such witness on matters arising out of such further cross examination..." *Emphasis Added.*

In the present matter, after substitution of the charge nothing indicates that the appellant who was without legal representation was informed of his right to require a recalling of the witnesses (PW1 and PW2) who had already testified for them to testify afresh or be cross examined. From the records, what transpired on the date on which the charge was substituted is as illustrated below;

"17/08/2023
Coram: M.R. Masimbi -SRM
PP: Mr. Constantino Awet
CC: Yasmin Dhirani
Accused: Present
P.P: Mr Constantino for Republic. This matter comes for hearing. Before proceeding with the hearing, I pray to substitute the charge under section 234(1) of the CPA [CAP 20 R.E 2022]
Accused: No objection
Court: C R O E A
Accused: Siyo Kweli
EPNG.
Sgd: M.R Masimbi - SRM
27/10/2017
COURT: Accused entered plea of not guilty to the charge
Sgd: M.R Masimbi - SRM
27/10/2017
PP: I pray to proceed with the hearing.
Accused: I am ready to proceed
PROSECUTION CASE PROCEED

PW3: Felixian Antony Kisima, 44 years oldc, Wildlife officer, Mhehe, resident at Mawasiliano area, Ulanga District, Christian, sworn and states....."

As depicted in the above extract, immediately after the accused person's entering of the plea of not guilty, the court proceeded with hearing of the remaining prosecution witnesses following the prayer that was made to the court by the public prosecutor. That said, the requirement under section 234(2)(b) of the CPA were not complied with thus rendering the evidence adduced by PW1 and PW2 with no evidential value as stated in the case of **Balole Simba vs Republic (Supra)**.

As submitted by Counsel Ignas Punge, the omission is fatal rendering the proceedings that followed after the substitution of the charge a nullity. That was the position in the case of **Abasi s/o Kasian Kilipasi vs Republic (Criminal Appeal No 515 of 2020) 2023 TZCA 134 (22 March 2023)** where the Apex Court underscored that;

"It is the position of this Court that an omission to comply with the provisions of section 234 (2) of the CPA renders the proceedings which followed after the date of substitution of the charge, a nullity -see: the decisions of this Court in the cases of Omary Juma Lwambo v. The Republic (supra); Godfrey Ambros Ngowi v. The

Republic, Criminal Appeal No. 420 of 2016 [2019] TZCA 42; [11 April, 2019, TANZLII] and Omary Salum @ Mjusi v. The Republic, Criminal Appeal No. 125 of 2020 [2020] 7ZCA 574; [27 September, 2022, TANZLII]. It follows then that, since the appellant was not explained his right in terms of section 234 (2) of the CPA, the proceedings of 3rd March, 2019 that followed after the substitution of the charge, were a nullity. We therefore invoke our revisional powers under section 4 (2) of the ADA to nullify the proceedings, quash the conviction by the Court of the Resident Magistrate of Njombe and set aside the sentence. Likewise, we quash the appeal proceedings and set aside the judgment of the High Court as they originated from a nullity."

Likewise, in the present appeal, having been satisfied that the trial court infracted the provision of section *234 (2) of the CPA*, I proceed to nullify the trial court proceedings recorded from 17/08/2024 and afterwards. I further quash and set aside the resultant judgment and sentence imposed upon the appellant.

As to the way forward, the Learned State Attorney Shaaban Kabelwa beseeched this court to order retrial on the reason that the prosecution evidence adduced at the trial was strong enough to warrant the appellant's conviction. On my part, I took pain to go through the evidence

on record in the light of the conditions for ordering a retrial as underlined in the case of **Fatehali Manji V. R [1966]** that;

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*

Having examined the evidence on record, I find it inappropriate to order for retrial due to an apparent discrepancy I have noted in the prosecution evidence as regards to the inventory form relied upon by the trial court to ground the appellant's conviction in relation to the offence he was charged with. In his evidence PW4, one Boniface Charles Okiri, the Magistrate who issued the disposal order against the alleged hippopotamus meat told the court that, he only asked the appellant if he was ready for the exercise, where after the appellant's response, he counted the pieces of meat which

he identified as the same being that of a hippopotamus, and thereafter the magistrate ordered the same to be disposed of. However, his testimony is not supported by Exhibit P4, the inventory form which does not indicate that the appellant was either heard or his comments or objections (if any) taken, before the issuance of the disposal order. That notwithstanding, it was in my view not sufficient enough for the magistrate to ask the appellant of his readiness with the exercise without later on allowing him to further comment or object to the disposal of the meat. In the case of **Mosi s/o Chacha @ Iranga & Another vs Republic (Criminal Appeal No. 508 of 2019) [2021] TZCA 598 (22 October 2021)** the Court of Appeal made the following remarks on affording the accused person the right to be heard before the said disposal order;

> *"As we said in MOHAMED JUMA @MPAKAMA V. R., CRIMINAL APPEAL NO 385 OF 2017 (TANZLII) emphasizes the mandatory right of accused persons to not only be present before the Magistrate but also be heard before the Magistrate issues any order for destruction of perishable government trophies."*

Expounding more on the foregoing, the Court of Appeal in the case of **Buluka Leken Ole Ndidai Another vs Republic (Criminal Appeal**

No 459 of 2020) 2024 TZCA 116 (21 February 2024) had the following to state in regard to the procedures for procuring a disposal order for a perishable exhibit;

> *"...it wili be sufficient for a magistrate before whom an order to dispose a perishable Government trophy or trophies, to make such order, provided that; one, the prayer to issue the order to dispose of perishable exhibits may be made by the investigator or the prosecution informally before a magistrate in chambers; two, if the order is likely to be relied upon in any future court proceedings against any suspect, that suspect must be present at the time of making the prayer and; three, the suspect must be asked as to his comments, remarks or objections as regards the perishable exhibits sought to be destroyed. Four, if that suspect does not make any comments, remarks or objections, the magistrate shall record the fact that, the suspect was invited to make any comments, remarks or objections, but he opted to make none. Five, if the suspect makes any comments, remarks or objections, they shall be recorded as appropriate either on the reverse side of the Inventory Form or on any separate piece of paper or papers and shall be signed by the magistrate."*

Flowing from the above authority, the inventory form that was signed and tendered before the trial court by PW4 is discredited for being prepared in violation of the appellant's right to be heard. It follows that it was wrong

for the trial court to admit and act on it in reaching into its verdict that the appellant was found in unlawful possession of the Government Trophies. As such, I hereby expunge the same from the records.

Undoubtedly, in the absence of the alleged trophies or the valid inventory form, there is nothing left in the prosecution evidence that can warrant the appellant's conviction. In the case of **Ngasa Tambu vs Republic (Criminal Appeal 168 of 2019) 2022 TZCA 455 (21 July 2022)** the Court of Appeal was faced with a similar situation. In its final deliberation the court observed;

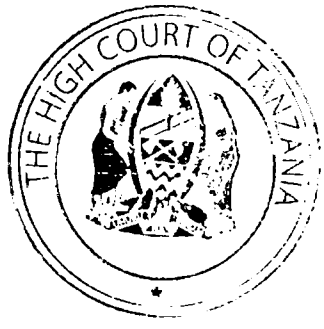
> *"The critical concern is that the only evidence to show that there existed any trophy any time after destroying them is the document called Inventory, containing the order for destroying the trophies. Otherwise, if the offence of unlawful possession of government trophies is not admitted by a suspect, in the absence of both the physical Government Trophies, and an Inventory, a charge of unlawful possession of the trophies cannot be proved."*

With the above pointed out shortcoming in the prosecution evidence, I decline to the Learned Attorney's invitation for this court to order retrial. Consequently, this appeal is allowed on the strength of the second ground

of appeal. In that regard, I find it unnecessary to determine the remaining grounds of appeal.

In the final analysis, I quash and set aside the conviction and sentence passed by the Trial Court, and order the appellant to be released forthwith from the prison, unless held for any other lawful cause.

DATED AND DELIVERED AT MOROGORO THIS 19th DAY OF JUNE, 2024



LATIFA MANSOOR

JUDGE

19.06.2024