

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 520676

REFERENCE NO. 20230816000520676

*(Arising from the decision of the District Court of Tarime at Tarime in
Economic Crime Case No. 51 of 2022)*

BETWEEN

RHOBI S/O MWAIKWABE MWITA 1ST APPELLANT

JOHN S/O MASIAN MWITA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

21th & 21th June, 2024

M. L. KOMBA, J.:

In this case at hand, appellants above were arraigned before the District Court of Tarime at Tarime, charged with two counts which are; Unlawful Possession of Weapons in National Park and **Two**, Unlawful possession of Government Trophies. The offences were contrary to sections 86(1), (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [CAP 200 R.E 2002] as

amended and section 24(1) (b) and (2) of the National Parks Act for both counts respectively.

It was alleged by prosecution that, on 08/12/2022 appellants were arrested at *Daraja mbili* area within Serengeti National Park while in possession of fresh front limb of Zebra valued USD 1200 equivalent to 2,798,400/= the property of Government of United Republic of Tanzania without any permit. On the same date and place they were also in possession of one knife and four trapping wires without permit. GPS of the arrested point was recorded.

Certificate of seizure (Exhibit P.E 1) was filled and appellants were taken to Nyamwaga police station where the case file No. NYG/IR/2610/2023 was opened. Later on, inventory form of claimed government trophy found with the appellants (Exhibit P.E 3) was prepared and presented before the Magistrate who issued the disposal order (Exh PE5).

After a full trial, the trial court found appellants guilty in both counts charged with and proceeded on convicting them and sentenced them to twenty years imprisonment for the 1st count, and to pay fine to the tune of Tsh. 100,000/= or to serve one (1) year imprisonment for the second count.

Dissatisfied by the conviction and sentence meted against him by the trial court, the appellant lodged the present appeal to challenge the same with 5 grounds of appeal.

When the appeal was placed before me for hearing, appellants appeared in person without representation whilst Republic, the respondent was represented by Mr. Tawabu Yahya, the learned State Attorney.

This court addressed parties that while preparing for hearing of this appeal, came across with legal issue on the proceedings while prosecution seeking disposition order before the Magistrate. From that observation I invite parties to address me on the process and record by the Magistrate during hearing of disposition of Government Trophy.

1st appellant informed this court that there was nothing presented during hearing for disposition, that is the said trophy were not before the Magistrate. The same position was presented by 2nd appellant and maintained that they were not found in possession of anything.

State Attorney informed this court that he has read proceedings, the inventory and the disposal order and find irregularities which were analysed in the case of **Buluka Leken Ole Ndidai & Another vs Republic (Criminal Appeal No. 459 of 2020) [2024] TZCA 116 (21 February 2024)** specifically at page 15 where the Court provide

the procedures to be followed in dealing with perishable exhibits. It was his submission that the Court listed five (5) steps to be adhered during disposition of exhibits, steps which, in the present case record were not adhered and, Republic were satisfied that the procedure were not as per law. The proceedings were silent on procedure, this situation make him to believe the procedures were not followed as required. Following that short coming, it was his position that the offence of being found in possession of the Government trophy was not proved to the required standard. He noted and prayed that the conviction on the relevant count to both appellants be quashed and set aside while maintaining that the other count was proved and prayed the appellants to serve the sentence as pronounced to the remaining count.

In this appeal the issue is whether disposition order was issued as per law and guidelines. Disposition of exhibits is governed by paragraph 25 of the Police General Orders and it is done while the case is at the criminal investigation. The paragraph reads;

*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. [Emphasis added].'

The above quoted paragraph 25 envisages any nearest Magistrate may issue an order to dispose of perishable exhibit. **This paragraph 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."**

This excerpt is from the decision of the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama vs Republic (Criminal Appeal No. 385 of 2017) [2019] TZCA 518 (26 February 2019).**

As was observed from the passage above in the case of **Mohamed Juma @ Mpakama (Supra)** hearing of the parties upon disposition of the perishable exhibit is a mandatory procedure and the court has in several time insist on that. See also the case of **Ngasa Tambu vs Republic (Criminal Appeal 168 of 2019) [2022] TZCA 455 (21 July 2022)** and **Buluka Leken Ole Ndidai and another (Supra).**

In the case at hand, PW4 testified at page 24 of typed proceedings that he prepared/ filled up contents of certification of declaration and Magistrate filled up his part. That means the declaration of destruction of Government trophy was filled and marked by two different people;

the Magistrate and PW4. It is through that exhibit where the accused (now appellants) confessed to commit the offence. There are no proceedings showing what happened before the Magistrate, exhibit PE5 was the declaration for destruction in which Magistrate is narrating what happened in court on that day. Magistrate further reported that accused persons admitted without clarified what was admitted. Further, in the said declaration there is no proceedings show accused persons was before the Magistrate and was asked about the offence and the plea. What is recorded is report of what happened, transpired and there is no plea. Narrating that accused admitted is not enough to concluded there was proceeding and there was a plea as it is trite that plea must be unequivocal. See **Mkula Mkama vs Republic (Criminal Appea No. 308 of 2020) [2024] TZCA 458 (13 June 2024)**.

Reading exhibit PE 5 this court find there is no proceedings which was required under paragraph 25 of the PGO. The cited paragraph from, and the analysis done by justices in **Mohamed Juma @ Mpakama vs Republic** (supra) shows appellants were not heard before the disposition order was issued. The way forward is to expunge exhibit PE 5, a declaration to destroy Government trophy which was illegally procured as I hereby do. See **Ngasa Tambu vs The Republic** (Supra).

The remaining evidence are not sufficient to warrant the appellants' conviction on the 1st count. Consequently, I hereby quashed the conviction and set aside the sentence imposed against the appellants regarding the 1st count.

Since the second count was not disturbed, appellants have to complete their sentence as pronounced on 04/08/2024.

The appeal is allowed to the extent above.

DATED at MUSOMA this 21st day of June 2024.



Nk
M. L. KOMBA
JUDGE

Judgement Delivered today in chamber in the presence of Mr. Tawabu Yahya who represented respondent, Republic and before both appellants who were connected form Tarime prison.

Nk
M. L. KOMBA
JUDGE
21st June, 2024