

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MTWARA**

**AT MTWARA**

**CRIMINA APPEAL No. 108 OF 2023**

*(Originating from, the Resident Magistrate's Court of Lindi at Lindi, Economic Case  
No. 5 of 2022)*

**MOHAMED JUMA MBACHO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

12<sup>th</sup> & 29<sup>th</sup> February, 2024

**MPAZE, J.:**

The Resident Magistrate's Court of Lindi at Lindi on 23<sup>rd</sup> March 2023 convicted and sentenced the appellant to a term of 20 years imprisonment for the offence of unlawfully possession of Government Trophy contrary to section 86 (1) and (2) (b) of Wildlife Conservation Act, No 5 of 2009 as amended by Written Law ( Miscellaneous Amendment) Act No. 2, Act of 2016 read together with paragraph 14 of the first schedule and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [CAP. 200 R.E. 2009].

The background facts of the case were brief that, on 16<sup>th</sup> March, 2023, at 22:00hrs Francis Petrol Chacha (PW1) a wildlife officer while in patrol with his fellow officers at Kaingara forest, received information from

their informer, that there were persons who possessing game meat at Mtumbati area in Nachingwea District.

Upon that information, they arrived at around 00:00hrs at the house believed to contain the mentioned meat, accompanied by the Ward Executive Officer (WEO). The house owner was Gerold. After the introduction, they searched and recovered 10 pieces of elephant meat. They seized the meat and fulfilled a certificate of seizure, which was signed by all present at the scene.

According to PW1, Gerold informed them he got the meat from Mohamed, he led them to the house where Mohamed was. Upon arrival, the WEO knocked on the door, and the Village Executive Officer (VEO), a tenant in the house, received them. After introducing themselves, the VEO connected them with the landlord, Peter Boniface Milanzi (DW2), who was the second accused in this case but was acquitted of the charges.

They explained their purpose for being there and inquired about the presence of Mohamed Mbacho. After waking him up, they began the search, during which they recovered 10 pieces of raw meat from a bucket in one of the rooms. While, behind the house, they found 67 pieces of boiled meat in a pan covered with a platter, totaling 77 pieces.

Additionally, they discovered a red motorcycle with registration number 152 CKX behind the house, and its carrier had bloodstains. They

seized these items. The certificate of seizure and motorcycle were admitted as Exhibits 'P1' and 'P2' respectively without any objection.

The facts allege further that upon interrogating the appellant, told them he got the meat at Liwale Nyakipele forest. PW3 confirmed this fact as stated by PW1.

PW2 examined the meat alleged to be elephant meat where he confirmed the meat was not from any other animal but from an elephant. After the identification, he conducted valuation and prepared a Trophy Valuation Certificate which was admitted as Exhibit P3 without objection.

The suspects were taken to Liwale police station for further formalities.

In his defence, the appellant denied being found in possession of the said meat. Furthermore, he refuted any acknowledgement that the said meat belonged to him.

Dissatisfied with the conviction and sentence, the appellant has come to this court by way of appeal. He has advanced ten grounds of appeal which have been condensed into three as follows:

1. That the prosecution failed to prove the case beyond reasonable doubt.
2. That the procedure for search, tendering, and admission of exhibits was not complied with.

3. That the trial court erred in law and fact in convicting the appellant without considering his defence.

During the hearing of this appeal, the appellant appeared in person, unrepresented, whereas the respondent, the Republic, was represented by Mr. Justus Zegge, assisted by Ms. Frolence Mbamba, the State Attorneys. The State Attorneys contested the appeal.

When the appellant was invited to argue his appeal, he prayed the court to adopt the grounds stated in his petition of appeal and reserved his right to rejoin if any after the submission by the Republic.

Contesting the appeal, Mr. Zegge State Attorney argued together the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> grounds of appeal, relating to proving the case beyond a reasonable doubt. He submitted that the case was indeed proven beyond reasonable doubt. He highlighted that the prosecution, through witnesses PW1, PW2, and PW6, provided consistent and credible evidence establishing the appellant's possession of illegal meat.

Mr. Zegge pointed out that PW2 specifically identified the meat found in the appellant's possession as belonging to no other animal than an elephant. He highlighted that the identification of the species was crucial in proving that what was found in the appellant's possession was nothing but a government trophy. To support this, he referred to the case

of **William Maganga @Chales v. Republic**, Criminal Appeal No 104 of 2020, Tanzlii, page 9, where the Court held;

*'In wildlife conservation-related cases, the identification of a particular species of an animal affected or part of it with an offence charged is a matter of considerable significance.'*

Mr. Zegge further argued that the evidence presented by the prosecution witnesses was sufficient to prove the case beyond a reasonable doubt, as all witnesses paraded were material witnesses. To reinforce this point, he cited the case of **DPP v. Sharifa Mohamed Athuman & 6 Others**, Criminal Appeal, 74 of 2016 page 9, where the Court stated;

*'A material witness is a person who has information or knowledge of the subject matter, which is significant to affect the outcome of the trial.'*

Based on his submissions regarding this ground, Mr. Zegge requested the court to find that this ground is unfounded and should be dismissed.

The appellant's complaints on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> centres around the procedure of search, tendering, and admission of exhibits, asserting non-compliance and failure to prove the appellant's possession of a government trophy. Specifically, the appellant contends that the

certificate of seizure was received in violation of section 38(3) of CAP 20 R.E. 2022, as no acknowledgement receipt was tendered in court during the exhibit's admission.

In response, Mr. Zegge acknowledges the requirement of a receipt under section 38(3) of CAP 20 R.E. 2022 but avers that the absence of the said receipt, as clarified in the case of **Ramadhan Idd Mchafu v. Republic**, Criminal Appeal No 328 of 2019, Tanzlii, page 15, is inconsequential in establishing possession. The court in that case stated;

*'The absence of an official receipt is inconsequential in establishing that the appellant was not found in possession of government trophy; the omission to issue a receipt was therefore not fatal.'*

According to Mr. Zegge, the prosecution, through the testimony of PW1, testified that the appellant was found in possession of the alleged meat, and the certificate of seizure was appropriately prepared, and signed by both PW1, PW3, and the appellant. Therefore, he argues that the failure to tender an acknowledgment receipt does not weaken the prosecution case.

Addressing the claim that the trial court erred in convicting and sentencing the appellant based on an illegal search, Mr. Zegge contends that the circumstances described by PW1 support the legality of the emergency search under sections 42 of the CPA [CAP 20 R.E. 2022] and

106 of the Wildlife Conservation Act. He prays for this claim to be found baseless as well.

To the complaints about the admission of Exhibits 'P1' to 'P5', alleged to be contrary to the law and lacking an Exhibit Register, Mr. Zegge, argued that the trial magistrate adhered to the Exhibit Management Guidelines of 2020. He emphasized that the witnesses who tendered the Exhibits laid down the foundation before tendering the same. The objections raised by the appellant were overruled, as such all exhibits were admitted in compliance with the law.

To support his stance, he referred to pages 22 to 32 of the typed proceedings and cited the case of **Nyerere Nyague v. Republic**, Criminal Appeal No 67 of 2010 Tanzlii, on page 6, where the Court stated;

*'As a matter of general principle, the appellate court cannot allow matters that were not pleaded in the lower court to be raised on appeal.'*

Mr. Zegge urged the dismissal of this ground for lack of merit.

Regarding the complaint that the trial court did not consider the appellant's defence, the Republic contended that a careful review of the typed judgment on pages 18 to 19 reveals that the trial magistrate did consider the appellant's defence. A comparison with the defence of the

second accused revealed discrepancies contributing to the guilty verdict against the appellant.

Concerning the complaint about the sentence, where the appellant argues a failure to observe the mandatory requirement of section 86 (2) of the Wildlife Conservation Act, Mr. Zegge expressed the view that the trial court did consider this section, and the imposed sentence was within the stipulated legal framework. Additionally, he pointed out that section 60 (2) of the Economic Organized Crime Act empowers the trial magistrate to impose a severe sentence if deemed necessary.

In conclusion, Mr. Zegge insisted that the case against the appellant was proven beyond a reasonable doubt, urging the court to uphold the conviction and sentence while dismissing the appeal against the appellant.

In rejoinder, the appellant did not have anything useful to submit merely reiterating his assertion of innocence and earnestly requesting that the appeal be allowed and set him free.

Based on the proceedings in this court and the trial court, it is clear that both parties are not in dispute that 77 pieces of elephant meat were discovered in the residence of Peter Boniface Milanzi, the 2<sup>nd</sup> accused in the trial court. It is also undisputed that on the specific day, the appellant, PW3, and two other tenants who were not awakened on that day were



asleep in the house of DW2. The dispute centres around the question of who possessed the aforementioned meat.?

As the first appellate court, it has a duty to re-evaluate and thoroughly examine all the evidence on record, subjecting it to critical scrutiny to arrive at an independent decision, if necessary. This is precisely what this court will undertake.

The appellant's main grievances centre around the issue that the case against him was not proven beyond a reasonable doubt. He contested both the search procedure and the admission of Exhibits, asserting non-compliance with the law. Additionally, he argued that the evidence presented by the prosecution witnesses failed to establish his guilt.

In addressing the appellant's complaints, this court will focus on determining whether the prosecution successfully proved their case beyond a reasonable doubt. This central question will guide the resolution of other peripheral issues.

Starting with the search procedure, a thorough examination of the trial records and the evidence presented reveals that PW1 explained the sequence of events leading to the appellant's residence. They received information from Gerlod at 00:00hrs, who was found in possession of elephant meat and implicated the appellant as the supplier.

Acting on this information, they reached the appellant's home by 02:00hrs. Given these circumstances, it can be argued that an emergency search was unavoidable.

After establishing that the emergency search was inevitable, I now turn my attention to the contested Exhibits, starting with Exhibit P5. This is an Inventory Form, in which PW5 ordered the destruction of the 77 pieces of elephant meat.

The procedure leading to the issuance of the order to destroy perishable government trophies is clearly explained under paragraph 25 of the Police General Orders (PGO) No. 229, which reads;

*'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.'*

The applicability of this paragraph has been elucidated in various decisions of this court and the Court of Appeal. In the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, published on the website [www.tanzlii.go.tz](http://www.tanzlii.go.tz) TZCA, the court made the following observations;

*'The above paragraph 25 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**. In the instant appeal, the appellant was not taken before the primary court magistrate and heard before the magistrate issued the disposal order (exhibit PE3)'. Emphasis added.*

Again, in the case of **Nyamhanga Mwise Muhere v. Republic**, Criminal Appeal No. 304 of 2020, published on the website [www.tanzlii.go.tz](http://www.tanzlii.go.tz) TZCA, and quoting with approval what was stated in **Mohamed Juma's @ Mpakama** case (supra), the court articulated:

*'In light of the above position of the law, we think that the learned State Attorney was correct that, while PW3 was fully entitled to seek and obtain a disposal order from the primary court magistrate, the Inventory Form (exhibit P3), which came out **cannot be proved against the appellant because he was not allowed to be heard by the primary court magistrate at the time of making the order to dispose of the exhibit**'.*

In dealing with a similar issue in the case of **Maria Emirio Ngoda dhidi ya Jamuhuri**, Rufaa ya Jinai Na. 37116 ya 2023, my brother,

Mgeta J, effectively applied the principles from the two aforementioned cases. He elucidated that the essence of what was conveyed in those cases is as follows;

*'kwa tafsiri rahisi mahakama inasema kwamba fomu ya kuharibu mali iliyotayarishwa bila mtuhumiwa kusikilizwa maoni yake na hakimku haiwezi kutumika kama ushahidi dhidi ya mtuhumiwa huyo.'*

Additionally, in the case of **Mosi Chacha @ Iranga v. Republic**, Criminal Appeal No. 508 of 2019 (unreported), the Court observed that;

*'...the mandatory requirement is not only the presence of the suspect but also affording him a right to be heard before the disposal order is given.'*

Upon examining these decisions, it becomes evident that it is not only enough for the accused to be brought before the magistrate at the time of issuing the disposal order for an Exhibit, but also the accused should be allowed to be heard before the disposal order is made. If the accused is not given the opportunity to be heard and have their opinions considered, then the order made becomes ineffectual.

It is noteworthy that Exhibit P5 signifies that the items found in the appellant's possession, specifically the 77 pieces of elephant meat, were

disposed of through an order issued by PW5. PW5 provided evidence to this effect, stating as follows;

*'...on 22/3/2022, I remember at 14:30hrs came police officers telling me that there were offenders who were apprehended with meat by wildlife officers, so I was required to look on the meat and give the order for destruction.*

*They arrived with the accused persons Boniface and Mohamed, cooked meat on pan/sufuria, 67 pieces and 10 pieces in orange bucket. They told me the meat was elephant meat but it was decaying.*

*Following the nature of the meat, I gave the order that the meat be destroyed under the supervision of the police officers and wildlife officers... I gave the order through the form which I signed and stamped. I can identify the form by my handwriting, name and my signature, the accused put their signature on the form as well.'*

During cross-examination by the 2<sup>nd</sup> accused, on page 30 of the typed proceedings, PW5 responded, '***I did not ask who is the owner of the containers found with meat.***'

Despite PW5's evidence indicating that the accused were present when asked to issue an order for the disposal of the alleged meat, her

testimony and cross-examination do not reflect any effort to elicit an opinion from the accused regarding the 77 pieces of meat before the issuance of the disposal order.

After observing these recurring mistakes, the Court of Appeal, in the case of **Buluka Liken Ole Ndidai & Another v. Republic**, Criminal Appeal No. 459 of 2020 published on [www.tanzlii.go.tz](http://www.tanzlii.go.tz) TZCA 116, has provided guidance and a procedure to be followed when requesting a disposal order. The Court stated as follows;

*'In our view, as an interim measure pending promulgation of any rules of procedure for that purpose, it will be sufficient for a magistrate before whom an order to dispose of 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.'*

In light of the legal precedents, it is evident that PW5's failure to involve the accused, who were brought before her, in providing any statements or opinions concerning the meat, deprived them of their right to be heard before the disposal order was made.

Based on procedural irregularities in issuing the disposal order without affording the appellant's right to express his opinion before the order was made, this court concludes that the order made vide Exhibit P5 related to the disposal of the alleged 77 pieces of government trophy was vitiated and cannot be relied upon. Consequently, Exhibit P5 is expunged from the records.

Exhibit P5 now being expunged, implies that the government trophy alleged to have been found in possession of the appellant was not tendered in evidence. In the case of **Buluka Liken Ole Ndidai & Another**(*supra*), stated;

*'In the absence of the Inventory Form, which stands in the place of the destroyed trophies, there is no way legally conceivable, that the appellants can still legally remain blameworthy of the offence charged, in the aftermath of discarding exhibit P5.'*

With the expunging of Exhibit P5, the remaining evidence cannot therefore, substantiate the charge against the appellant of being unlawfully found in possession of a government trophy, as such the court determines that this sole ground is sufficient to resolve the entire appeal, leading to its success. The court proceeds to grant accordingly, as such there is no necessity to delve into a discussion of any other grounds of appeal.

Finally, the finding of guilt against the appellant is annulled, and the resultant conviction is declared null and void. Furthermore, the sentence imposed on him is entirely annulled. Eventually, it is hereby ordered the appellant be released from prison immediately unless he is held for other lawful cause.

It is so ordered.

**Dated** at Mtwara this 29<sup>th</sup> February 2024.



**M.B. MPAZE**

**JUDGE**



**Court:** Judgment delivered in Mtwara on this 29<sup>th</sup> day of February, 2024  
in the presence of the appellants and Mr. Justus Zegge State  
Attorney for the Republic.



  
**M.B. MPAZE**

**JUDGE**

**29/02/2024**