

**IN THE HIGH COURT OF TANZANIA
AT TANGA**

CRIMINAL APPEAL NO. 73 OF 2023

(Arising from the Judgment in Economic Case No. 7 of 2022 from Korogwe District Court)

ALLY ATHUMANI NGAIRE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

K. R. Mteule, J

16/4/2024 & 18/4/2024

Ally Athumani Ngaire (The Appellant) is aggrieved by the decision of the District Court of Korogwe at Korogwe (the trial Court), in **Economic Case No. 7 of 2022**. In the trial Court, the Appellant and one Miraji Rashid Mohamed who is not a party in this appeal were charged with Unlawful Possession of Government Trophy contrary to **section 86 (1) and (2) (c) (ii) and (3) (b) of the Wild Life Conservation Act No. 05 of 2009** read together with **paragraph 14 of the First Schedule to Section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (Cap 200 R.E. 2019)**. The second accused person was acquitted having been found with no case to answer. The Appellant was found guilty and sentenced to serve twenty years in prison. Being

aggrieved by the conviction and sentence, the appellant preferred the instant appeal asserting error in the decision of the Trial Court basing on four grounds which can be paraphrased into the following points; -

1. Lack of Impartial witness to the searching and seizing exercises.
2. Trial Court reliance on cooked evidence of Prosecution witnesses.
3. Unestablished chain of custody of the exhibits
4. The case against the appellant not proved beyond reasonable doubt.

In this Appeal the Appellant appeared in person, the Republic being represented by Mr. James Rugaimukamu, Learned State Attorney. On 19th March 2024, Parties were ordered to argue the Appeal by a way of written submissions, and each was assigned a date to file the submissions. When the matter was called on 16th April 2024 for checking with the compliance to the schedules, the Respondent's Attorney raised an issue on the timeliness of filing of the written submissions. He faulted the appellant for having filed his written submissions out of the time fixed by the order of the court. The Court confirmed that the Appellant indeed, wrongly filed his submissions out of time and hence decided to disregard it. The court further noted that the Respondent as well filed his submissions out of time and consequently they were as well

disregarded. The Court proceeded with the determination of the Appeal only basing on the grounds of appeal as I do hereunder.

In the first ground of Appeal, the Appellant is challenging the trial court for convicting him while there was no impartial witness to the searching and seizing.

I had a look into the evidence of PW1 and PW2 who testified to have been involved in the arrest, search and seizure in respect of the alleged possession of trophy. There is no evidence that the arrest, search and seizure was witnessed by someone apart from the police officers who were on patrol. Even the certificate of seizure (Exhibit P1) tendered in the trial court was just signed by two witnesses who were both Police Officers who were present at the time. The issue is question is whether the two police officers qualified to be independent persons to the search and seizure.

The requirement of having an independent person to witness search and seizure is provided for under **Section 38 of the Criminal Procedure Code Cape 20 of 2022 RE** (CPA) For ease of reference, I reproduce the provision hereunder:

"38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, Criminal Procedure Act [CAP. 20 R.E. 2022] 44 5 of 1988 s. 4; 5 of 1993 Sch. Cap. 4 s. 8 box, receptacle, or place-

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

In **Samwel Kibundali Mgaya vs Republic (Criminal Appeal 180 of 2020) [2022] TZCA 342 (14 June 2022)**, the Court of Appeal expounded on the interpretation of section 38 in the following words:

*Deducing from the quoted provisions of law, no search of a premises shall be effected without **one**; search warrant, **two**; the presence of the owner of the premises, occupier or his near relative at the search premises, **three**; the*

*presence of an independent witness who is required to sign to verify his presence and **four**; issuance of a receipt acknowledging seizure of property.*

In the meaning of the position of the Court of Appeal in the above cited case, presence of an independent witness is a mandatory requirement in searching for a premise. However, the search in the instant matter was not done in a premise. In the prosecution evidence in the trial court, according to PW1 and PW2, the Appellant was arrested when the police officers on patrol became suspicious of the appellant when they saw him running away with another person. That According to PW1 and PW2, the officers managed to arrest the Appellant with a motorcycle carrying a basket filled with a meat where the Appellant told them that he run away because he had a meat from a wild animal, and they took him to the main road to fill the seizure certificate (Exhibit P1). From this scenario, it is apparent that there was no other person who witnessed the searching apart from the police officers who were on patrol.

From this evidence, it appears that the arrest, search and seizure were all done on emergence situation which in law, is governed by the provisions of **section 42 of the CPA**. Under these circumstances, the existence of an independent witness is not a mandatory requirement. It

is distinguishable from the situation the appellant wants to establish in ground No. 1. The arrest and search done on emergence should not necessarily be supported by an independent witness but rather the strength of other pieces of evidence are to be taken into account to establish the case. This discussion makes ground No 1 unsuccessful.

Ground number two, three and four covers issues relating to sufficiency of prosecution evidence to prove the case against the Appellant. All the three grounds are combined to see if there was sufficient evidence which was sufficiently evaluated to prove the case in the trial court.

To start with the issue of chain of custody, I have examined the trail of the of custody of the alleged trophy said to have been found in possession of the Appellant. It is on evidence according to PW1 and PW2 that they found the Appellant with a meat wrapped in a blue nylon bag kept in a local basket (tenga). That after seizing it, they took it to the Exhibit keeper (PW5) for safe custody and that on the next date, PW3 who is the Wildlife officer, went to examine the trophy. His explanation could not tell exactly who handed the said trophy to him at the Police station. He mentioned two investigative police officers as the persons who gave him the meat but without specifying the names of those officers. It remained unknown as to whether such officers were

the exhibit keepers or not. Taking into account that PW1 testified that he surrendered the seized Exhibits to Sgt Semkunde and not to two officers. Nevertheless, PW3 did not state whether he received such meet from the said Sgt. Semkunde.

One Sendunde Mgonja (PW5) testified to be the exhibit keeper who received the trophy. According to his testimony, he as well, apart from mentioning the description of the said meet being wrapped in a blue nylon bag kept in a basket, did not give further description of the reference number of any other label which could be used to identify the trophy. In my view, this is a serious breakage in the chain of custody.

At this juncture, I wish to quote the following passage from the Court of Appeal decision in **Jumane Mpini@ Kambilombilo and Rabani Hamisi Vs Republic Criminal Appeal No. 195 Of 2020, CAT**, At Kigoma. The Court of Appeal stated:-

*"This Court has, in numerous decisions including the famous case of **Paulo Maduka and Others v. Republic, Criminal Appeal No. 110 of 2007** and **Joseph Leonard Manyota v. Republic, Criminal Appeal No. 485 of 2015** (both unreported), expounded the need to have*

chronological documentation or paper stream, showing the paper trail custody, control, transfer, analysis, and disposition of evidence. For instance, in Joseph Leonard Manyota (supra). The Court stated that: -

"The reason why the evidence of this nature must be handled in a scrupulously careful manner is to prevent possibilities of tampering with it, possibilities of contaminating it, or fraudulently planted evidence. This is in the interests of justice."

Admittedly, in this case, the appellants were neither issued with a certificate of seizure acknowledging seizure of the elephant tusks nor was the Exhibit Book Register tendered in court to authenticate their movement.

The scenario which featured in the keeping of the trophy alleged to have been seized from the appellant has not by any standard met what is described in the above words from the Justices of Appeal. The said exhibit left a possibility of being tampered with as it is not known how it moved from PW5 the exhibit keeper to PW3 the wildlife officer who had

such an important role of examining it to ascertain as to whether it is a trophy and the valuation of it.

The above scenario creates a serious doubt which answers the 3rd ground of appeal that there may be a chance of having cooked evidence against the appellant and the 4th grounds of appeal that there is a reasonable doubt which remains uncleared in the prosecution evidence. The Trial Court should not have convicted the Appellant on this evidence which is full of shortfalls which leaved reasonable doubt.

Basing on the above reasoning, I find the Appeal with merit, and it is allowed. The Judgment, conviction and sentence of the District Court of Korogwe in Economic Case No. 7 of 2022 are hereby quashed and set aside. The Appellant is released unless held for another offence.



Dated at Tanga this 13th Day of May 2024

A handwritten signature in blue ink, appearing to be "Kj", is written above the judge's name.

KATARINA REVOCATI MTEULE

JUDGE

13th Day of May 2024

Court:

Judgment delivered this 13th Day of April 2024 in the presence of the Appellant and Mr. James Rugaimukamu, Learned State Attorney for the Respondent.



A handwritten signature in blue ink, appearing to be "Ks", is written above the judge's name.

KATARINA REVOCATI MTEULE

JUDGE

13th Day of April 2024