THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 50 OF 2023

EZEL KASENEGALA @DEGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the District Court of Iringa at Iringa)

(Hon. S.A. Mkasiwa - PRM)

dated the 17th day of June, 2022

in

Economic Crime Case No. 09 of 2020

JUDGMENT

Date of Last Order: 26/02/2024 &
Date of Judgment: 08/03/2024

S. M. Kalunde, J.:

EZEL KASENEGALA @DEGE, the appellant in this appeal, was charged and convicted before the District Court of Iringa sitting at Iringa in Economic Crime Case No. 09 of 2020. He was arraigned for the offence of unlawful possession of Government trophies. According to the charge, the appellant was alleged to have violated the provisions of sections 86(1) & (2)(c)(ii) of **the Wildlife Conservation Act, No. 5 of 2009 [Cap. 283 R.E. 2022]**

read together with paragraph 14 of the first schedule to, and sections 57(1) and 60(1) & (2) of **the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2002] [now R.E. 2022] ("the EOCCA")**. Upon full trial, the appellant was found guilty and convicted as charged. He was consequently sentenced to 25 years imprisonment.

The facts material to the case before the trial court were that: on the 12th day of May, 2020, at Ipogolo Area within the District and Region of Iringa, the appellant was found in possession of Government trophies to wit; two leopard skins valued at Tshs. 16,367,779.00, being the property of the Government of the United Republic of Tanzania without any permit or licence thereof.

The appellant denied the charge. The prosecution marshalled five witnesses in the bid to prove the charge against the appellant. Insp. Credo Mwakakusyu (**Pw1**), Yakub Mohamed (**Pw2**), Mkunde Tengeru (**Pw3**), F.3907 DCPL James (**Pw4**) and Razak Mgoba (**Pw5**). Together with witness testimonies, the prosecution tendered in evidence two exhibits; the two leopard skins admitted as **Exh.P1** and the certificate of search and seizure, **Exh. P2**. The appellant fended for himself. After full trial, the trial court

found him guilty as charged and convicted him accordingly. As indicated above, he was sentenced to 25 years imprisonment.

Being aggrieved by that decision, the appellant has preferred the present appeal. In this appeal, the appellant initially filed a memorandum of appeal containing six grounds of appeal which may be paraphrased as follows:

> *"1. That, the learned trial magistrate erred to convict and sentence the appellant without considering that it was not proved that he was found in possession of the trophy;*
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> *2. That, the learned trial magistrate erred in shifting the burden of proof to the appellant to prove his innocence;*
>
> *3. That, the learned trial magistrate erred in replying on Pw2 (VEO) testimony which was admitted contrary to the requirements of law;*
>
> *4. That, the learned trial magistrate erred in convicting and sentencing the appellant on the basis of communication which were not proved before the court;*
>
> *5. That, the trial court wrongly to convict and sentence the appellant without considering the defence case;*

6. *That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt."*

Thereafter, on the 17th day of July, 2023, the appellant requested for leave to file a supplementary memorandum of appeal. The prayer was not objected by the respondent and thus it was granted. On the same day, the appellant lodged a supplementary memorandum of appeal containing five grounds of appeal as follows:

"1. *That, the trial Magistrate erred in law to convict and sentence the appellant without considering that the memorandum of undisputed facts was not read and explained to the appellant contrary to section 192 (3) of CPA [Cap. 20 R.E 2022];*

2. *That, the learned trial Magistrate erred in law to proceed with this case without addressing properly the appellant since the case was transfer from one magistrate to another contrary to section 214 of the CPA [Cap. 20 R.E 2022];*

3. *That, the learned trial magistrate erred in law to convict and sentence the appellant by relying on caution statement without considering that the same was recorder/taken contrary to section 50 and 53 of the CPA [Cap. 20 R.E 2022];*

4. *That, the learned trial magistrate erred in law by accepting the chain of custody record which was tendered by the witness who is incompetent to tender it since he is not a storekeeper; and*

5. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant based on contradictory and uncorroborated evidence adduced by prosecution witness.*

In view of the above list of grounds of appeal, in the memorandum of appeal and supplementary memorandum of appeal, the appellant prayed that the appeal be allowed, quash the conviction and set aside the sentence meted by the trial court. He also prayed for an order of his immediate release from prison.

Before the court for hearing of the appeal, the appellant appeared in person, unrepresented whilst the respondent, Republic was represented by Mr. Simon Masinga, learned State Attorney.

Arguing in support of the appeal Mr. Masinga submitted that the respondent was supporting the appeal on the strength of the sixth ground of appeal that the charges against the appellant were not proved beyond reasonable doubt. The learned counsel argued that, there was no dispute

that the appellant was charged with the offence of unlawful possession of Government trophies to wit two leopard skins valued at Tshs. 16,367,779.00. he argued that, in light of the charges, it was incumbent upon the prosecution to prove, in evidence, that the appellant was found with two leopard skins. He stated that, to do so the prosecution had to parade an expert who will in turn adduce evidence to establish that what the appellant was found with were actually leopard skins. The learned counsel submitted that, in the instant case, Pw3, a wildlife officer, at page 32 of typed proceedings gave an insufficient description of how he was able to identify that what the accused was found with were in deed leopard skins.

The learned state counsel added further that, during tendering of the trophy valuation report (Exhibit P5) the witness (Pw3) indicated that he identified the trophy by its color and nails. The learned counsel pointed out that that was an insufficient description and that it was not issued at the identification phase. Ms. Masinga opined that in wildlife cases it was important that a comprehensive and correct description of the distinctive features of a trophy is given so that a court may be placed in a position to ascertain that an accused was found in possession of a government trophy. Short of that the offence is not established. To support his argument, he

cited the decision of the Court of Appeal in the case of **William Maganga @ Charles vs. The Republic**, Criminal Appeal No. 104 of 2020 (unreported).

Mr. Masinga concluded that in absence of a full and sufficient description of how the key witness managed to identify the trophy, it cannot be stated with certainty that the prosecution case was proved beyond reasonable doubt. On the strength of that, the learned state attorney advised that the appeal be allowed.

This is a first appeal, it is trite in a first appeal the entire evidence at the trial court must be treated as a whole to a fresh and exhaustive scrutiny and the first appellate court must draw its own inferences, findings and conclusions. Mindful of that, I shall proceed to resolve the appeal.

It is in evidence that the appellant was charged with an offence of being found in unlawful possession of Government trophies in violation of the provisions of sections 86(1) & (2)(c)(ii) of the WCA, read together with paragraph 14 of the first schedule to, and sections 57(1) and 60(1) & (2) of the EOCCA. For ease of reference sections 86(1) & (2) of the WCA provides as follows:

"86.- (1) Subject to the provisions of this Act, **a person shall not be in possession of,** or buy, sell or otherwise deal in **any Government trophy.**

(2) **A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-**

(a) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy does not exceed one hundred thousand shillings, to imprisonment for a term of not less than five years but not exceeding fifteen years or to a fine of not less than twice the value of the trophy or to both; or

(b) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both;

(c) **in any other case-**

(i) where the value of the trophy which is the subject matter of the charge does not exceed one hundred thousand shillings, to a fine of not less than the amount equal to twice the value of the trophy or to imprisonment for a term of not less than three years but not exceeding ten years;

(ii) **where the value of the trophy which is the subject matter of the charge exceeds one**

hundred thousand shillings but does not exceed one million shillings, to a fine of not less than the amount equal to thrice the value of the trophy or to imprisonment for a term of not less than ten years but not exceeding twenty years or to both; *or*

(iii) where the value of the trophy which is the subject matter of the charge exceeds one million shillings, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount."

[Emphasis added]

It is also not disputed that under section 86(4) of the WCA, in proceedings under the respective section, a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be ***prima facie*** evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein.

That said, it is important to note that, to prove an offence under sections 86(1) & (2)(c)(ii) of the WCA it must be established, in evidence that: one, the accused person was found in possession of a government

trophy, and two that he did not have authorization or permit for that purpose.

To prove the first limb of the offence, the prosecution had to present concrete proof or evidence that the appellant was found in possession of a government trophy, two leopard skins in the instant case. To do that, they had to procure an expert or experienced person in wildlife management to provide evidence of identification of the said trophy. The said witness would describe some unique features of the skin such as; skin and fur texture or any other scientific criteria, but not mere aesthetic features. The need to provide scientific criteria was highlighted by the Court of Appeal in the case of **Sylivester Stephano vs Republic** (Criminal Appeal 527 of 2016) [2018] TZCA 306 (03 December 2018) TANZLII; where the Court (Lila, J.A) stated:

> *"Worse still, as rightly argued by Mr. Mweteni, PW4, a Wildlife Officer, allegedly possessing a twenty years' experience told the trial court that Exh. PE2 was hippopotamus teeth. He simply told the trial court where the teeth are located. Having gone through the record* ***we are unable to find sufficient evidence on how he was able to recognize them. There was an overriding need to describe the distinct features of hippopotamus teeth and elephant tusks which enabled him to correctly recognize Exh. PE1. Mere location of hippopotamus teeth was insufficient.*** *We subscribe to the position set in the persuasive decision of the High court in the case of* ***Republic Vs. Kerstin Cameron***

(supra) cited by the learned State Attorney that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence. ***In that case the judge went further to rightly hold that since the evidence of an expert is likely to carry more weight than that of an ordinary witness, highest standards of accuracy and objectivity are required from him. That he should provide independent assistance to the court by way of objective unbiased opinion in relation to matters of his expertise and should never assume the role of an advocate. Evidence meeting those requirements, in the present case, is lacking.*** *Without elaborating the scientific criteria, PW4 asserted that he recognized Exh. PE1. That was insufficient. It was a mere bare assertion. The recognition was highly suspicious and unreliable and the certificate of value (Exh. PE3) issued was, for that reason, also unreliable."*

In the case under consideration, it is on record that the two leopard skins were tendered in evidence as **Exh.P1** by Insp. Credo Mwakakusyu (Pw1). Before requesting to have the skins admitted in evidence the witness is recorded to have made the following statement (at page 24 of typed proceedings):

"PW1 CONTINUES:

These are skin of Leopard it contains black dots that appear of skin of Leopard but it faints as per storage and time spent from when we seized it. These are nail

of the Leopard. I pray to tender the skins of Leopard as an exhibit.

Accused: *I have an objection. Your honour, I was not arrested in possession of skin of Leopard. It is not a skin of Leopard.*

PP: *Your honour, the objection is based on facts and not emanate from legal basis.*

Accused: *Your honour I don't agree the skins to be admitted as an exhibit.*

Court: *Objection was ruled as it founded on the facts and not legal based two skins of Leopard admitted collectively as an exhibit P1.*

Sgd: S.A. Mkasiwa, PRM

08/06/2021"

Thereafter, on the 06th day of June, 2021, Mkunde Tengeru (**Pw3**), a wildlife officer testified in court and tendered the trophy valuation certificate (Exh. P5). As indicated above, in accordance with section 86(4) of the WCA, in proceedings under section 86, a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be ***prima facie*** evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein.

In line with section 86(4) Pw3 stated that he conducted an evaluation of two leopard skin before preparing the certificate. After tendering the trophy valuation certificate, Pw3 proceeded to identify the two leopard skins which he had examined before preparing the certificate his evidence was that:

> ***"PW3: CONTINUES:***
>
> *I can I identify the two skins from which I make valuation. I can identify from it is color and claws. The skins where tied with banana tree leaves, I can be able identify through mustache. This is the same skin from which I make valuation. These are claws. There are banana tree leaf and it is color.*
>
> ***Court:*** *PW3 identified the two skins of Leopard admitted as an exhibit P1.*
>
> **Sgd: S.A. Mkasiwa, PRM**
> **06/07/2021"**

Regarding how he was able to identify the leopard skins, Pw3 is recorded to have stated thus:

> ***"PW3: CONTINUES:***
>
> *I identified it is skin of Leopard due to the white dots had thin claws. The claw of Leopard is thinner as compared*

with cheater and lion. Leopard does long and third mustache as compared with cheater."

It would appear that the appellant was not satisfied with the witness's description of how he was able to identify the alleged trophy, thus during cross examination he asked the witness how he was able to recognize the two skins as being of leopards. In his response, Pw3 stated:

"XXD BY ACCUSED:

Leopard was brown or white black in color with black dots. Leopard has thin claws as compared to dogs. I was provided by my boss with two skins of leopard for valuation. The skin became fainted as they were kept for long time"

With those comments and responses from prosecution witnesses, the question remains whether Pw1 and Pw3 issued sufficient description of how they managed to identify the alleged trophies. I hasten to say at the outset that they failed to discharge that obligation. I say so because Pw3, who was supposedly an expert in the area of wildlife management, failed to provide sufficient evidence on how he was able to recognize the two skins as those of a leopard. A description that he was able to identify the two skins because they had wide dots and thin claws was not sufficient and certainly there was

no science or expertise in the testimony of Pw3. Certainly, any person would provide a similar and perhaps a better description of the physical outlook of a leopard's skin.

I have also pointed out earlier that the appellant raised a question to Pw3 as to the distinction between leopard skin and claws with that of a dog. Pw3's response was that the leopard skin was "brown or white black in color with black dots". This was a basic response, almost everyone can say that a leopard skin is brown in color with black and white dots. There is no expertise on that aspect. Besides how many animals that are known to have similar or resembling features? Obviously, many animals have similar or resembling skins including; the hyenas, jaguar, cheetah, lynx, cougar, African golden cats, serval, margay just to mention a few. The description by Pw3 is therefore capable of different interpretations and thus insufficient.

In the case of **William Maganga @ Charles** (supra) the Court (Galeba, J.A) considered similar sweeping statements in identifying trophies and observed that such generalized statements were not acceptable, because anybody can make such sweeping statements. Having said that, the Court stated:

"In wildlife conservation related cases, identification of a particular specie of the animal affected or part of it in relation to an offence charged, is a matter of considerable significance. That aspect of the case, is provable by tendering a properly filled in Trophy Valuation Certificate, which is a standard form document created under the Wildlife Conservation (Valuation of Trophies) Regulation 2012, (Government Notice No. 207 of 2012). Tendering of that certificate must go hand in glove with a proper explanation of a wildlife expert detailing the distinctive features of a given anima. Such oral explanation or description may be based on animal science or the witness's experience in wildlife conservation and management."

Similarly, in the case of **Evarist Nyamtemba vs Republic** (Criminal Appeal 196 of 2020) [2021] TZCA 294 (12 July 2021) TANZLII, the Court observed that the evidence provided by a prosecution witness (Pw5), who was supposedly an expert in wildlife management, offered general statements regarding how he managed to identify a trophy. Having observed as such, the Court stated:

"The testimony of PW5 lacked all these information. As rightly submitted by the learned State Attorney, PW5 gave a generalized statement that Exhibit PI was elephant tusks with no further explanation as to the peculiar features of it that led him to conclude that Exhibit PI was truly elephant tusks hence a Government Trophy."

Mindful of that, since in the instant case the oral descriptions given by Pw3 were not based on animal science or his experience in wildlife

conservation and management they are as good as a guess. He was considered an expert in the field; thus, his evidence carried more weight than that of an ordinary witness, in the circumstances a highest standard of certainty, accuracy and objectivity was required from him. unfortunately, he did not live up to the expectations. Under those circumstances, it was not proved that the appellant was found in possession of a leopard skin.

That said and done, I agree with Mr. Masinga that the sixth ground of appeal is merited; and that the charge against the appellant was not proved beyond reasonable doubt.

For the above reasons, I find merit in the appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order his immediate release from prison unless held for other lawful reasons.

The appeal is disposed accordingly.

DATED at **IRINGA** this **08TH** day of **MARCH, 2024.**

S.M. KALUNDE

JUDGE