

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 61 OF 2023

*(Appeal from the Judgment of the District Court of Same at Same dated in 11th
November, 2024 Economic Case No. 5 of 2022)*

MOHAMED JUMANNE MKWAZU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

12th & 21st March 2024.

A.P. KILIMI, J.:

The appellant mentioned hereinabove was charged, convicted and sentenced to pay fine of Tshs. 60,476,000/= or in default serve twenty years imprisonment at Same District Court for the offence of Unlawful Possession of Government Trophy contrary to section 86(1) and (2)(b) 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 2019].

The particulars of arraigned charge to the appellant at the trial stated that on 7th day of March,2022 at Njoro Stand area within Same District in Kilimanjaro Region the appellant was found in unlawful possession of fresh meat of One (1) killed lesser kudu valued at 2600 USD equivalent to six million and forty thousand and six hundred Tanzanian shillings (6,047,600/=) the property of the United Republic of Tanzania without permit from the Director of Wildlife.

To prove the offence at the trial court, the prosecution paraded six witnesses and further tendered six exhibits which are handing over certificate (Exhibit P.1), two buckets (Exhibit P.2), Motorcycle MC 120 BYZ (Exhibit P.3), Certificate of seizure (Exhibit P4), The Inventory form (Exhibit P5) and valuation certificate (Exhibit P.6) to prove their case. While the accused defended himself and passionately denied to commit the said offence.

Before I proceed, I wish at this point, to revisit the background of the case which led to the appellant's conviction. Ngorisa Rokoine (PW2) accompanied with Felix Laurent Njowoka (PW4) are Conservation Rangers stationed in Mkomazi National Park, on 7/3/2022 at morning hours being on duty, they were informed that at Njoro area there was a person who

was selling government trophy, they rushed to the destination and surrounded the house where they found the appellant who was about to unload two buckets from a motorcycle .They searched the buckets and recovered six pieces of fresh meat, they consequently seized the said two buckets, six pieces of fresh meat and motorcycle with registration number MC 120 BYZ make Fekon and took accused and those items at police station.

Later, Thomas Bayona Katunzi (PW5) a wildlife warden identified the said six pieces of meat to be of a lesser kudu. He then filled an inventory form after valued the trophy at total Tshs. 6,047,600/= which he derived from value in USD whereby a single lesser kudu was worth USD 2600 as per Trophy Valuation Regulations also filled the trophy valuation certificate. The said inventory form and trophy valuation certificate were admitted as exhibits P5 and P6 respectively.

In his defence, the appellant denied the charge. He explained that on the material date, he was arrested at his garage while working on people's defective motorcycles. There at the arresters seized one motorcycle carried two buckets which he did not know the owner, later it was revealed the said buckets had meat, he was arrested and sent to police station and later

charged for the offence stated above. At the end of the trial, the appellant was convicted and sentenced as shown above.

Aggrieved by the trial court decision and sentence, the appellant knocked the door of this court by way of appeal basing on the following grounds as follows:-

1. That the learned trial magistrate grossly erred both in law and fact in failing to note that the alleged search and seizure which was allegedly conducted in the appellant's premises was unprocedural executed as independent witnesses were called after the arrest of the appellant therefore being highly possibility for the alleged seized wild animal's meat been panted there fraudulently to make the appellant appear guilty.
2. That the learned trial magistrate grossly erred both in law and in fact in failing to note that the disposition of the alleged wild animal's meat was illegally executed and the said inventory form (Exh.P5) derived from it is an unreliable since the same was supervised and witnessed by incompetent person (PW3) who had no jurisdiction to perform such duties.
3. That the learned trial magistrate grossly erred both in law and in fact in failing to note that there were no photos of the alleged seized wild animal's meat taken and subsequently tendered in evidence as exhibit so as to prove that indeed the alleged wild animal's meat real existed.
4. That the learned trial magistrate grossly erred both in law and in fact in failing to note that, the prosecution never proved whether the appellant signed in Exhibit P4 (certificate of seizure) and inventory form (Exh.P5) since, the appellant vehemently denied to have signed the same.

5. That the learned trial magistrate grossly erred both in law and in fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt and to the required standard by the law as against the appellant.

At the hearing of this appeal, the appellant was unrepresented while Ms. Imelda Mushi learned State Attorney appeared for the respondent. In support of his first ground of appeal the appellant submitted that the alleged search and seizure was un-procedurally executed because the said independent witnesses were called to witness the said search after the appellant had already been arrested and after the area being under control of the arresting officers. He argued that in such circumstances, the possibility of concocting evidence against the Appellant was high. He was of the view that the arresting officers ought to have secured the independent witnesses and go with them to the Appellant's premises to witness the exercise from the beginning, i.e. from the arrest, search and seizure because they had an ample time to prepare themselves as they had an early information.

Submitting on the second ground of appeal which challenged the admission of the inventory form (Exhibit P5) into evidence, the appellant

argued that the said exhibit was illegally acquired, tendered and admitted in evidence. The appellant further contended that apart from failure by the prosecution to summon the unknown and undisclosed Magistrate who ordered the disposition of the alleged wild animal's meat, but also the Appellant was never given an opportunity to be heard before or after the disposition of the said wild animal's meat. Furthermore, he argued that no photos of the alleged wild animal's meat were taken and tendered in evidence so as to prove whether the said wild animal's meat real existed.

To support the above the appellant referred P.G.O. No. 229 paragraph 25. and the case of **Arobogast Augustino @shayo and 2 Others vs. Republic** (Consolidate Criminal Appeals 24 of 2022) [2023] TZHC 16788 (TANZLII) which cited the Court of Appeal in **Mohamed Juma @ Mpakama vs. Republic** [2019] TZCA 518 (TANZLII)

The appellant further challenged the evidence of PW5 that he did not explain the involvement of the Appellant during the disposition of the said trophies and whether he was heard. For that reason, argued that Exhibit P5 should be expunged from the record, and since was the foundation of the case, no any remaining evidence to sustain his conviction, thus prayed his appeal be allowed.

Briefly responding to the submission above, Ms. Mushi learned State Attorney submitted in respect to the first ground of appeal that there is no law which requires independent witness to be present at the time of arrest, but they only needed during search and seizure. To buttress her stance, she referred the case of **Chacha Chiwa Marungu vs. Republic** [2020] TZHC 1734 (TANZLII).

In respect to the second ground, Ms. Mushi contended that according to law, it does not show who is required to be present during disposition process but the law provides for person. Therefore, since PW3 did not illegalise the said disposition, thus she argued that the ground lacks merit because anyone can witness the disposition of trophy.

On the third ground which challenged the failure by the prosecution to bring a photo of the alleged wild animal's meat as evidence, it was Ms. Mushi' submission that the prosecution is not barred from bringing other evidence which prove their case.

Moreover, contending the fourth ground where the appellant complained that he did not sign certificate of seizure, Ms. Mushi submitted that at page 15 of proceedings when PW2 tendered certificate of seizure,

the appellant said he had no objection. She insisted by doing so the appellant complied with the rule that a party who fails to cross examine is deemed to have accepted that matter.

In respect to fifth ground where the appellant complained that the prosecution did not prove the charge, the learned State Attorney simply said that the charge was proved. Further she said that the appellant has raised a new ground on her submission that he was not heard during the disposition, she thus submitted that the court should not consider this ground because it is new.

Having gone through the records of proceedings, grounds of appeal and parties' submission, I now proceed to examine grounds of appeal in order to know whether the appeal has merit or otherwise.

To start with the first ground, wherein the appellant has complained that the search and seizure was not procedurally conducted because the independent witnesses were called after the appellant had already been arrested. Having gone through the trial court's record it revealed as follows. That it is undisputed fact that the appellant was arrested by Mkomazi Conservation Rangers PW2 and PW4 who received information from an

informer who told them that someone was dealing with selling government trophy at Njoro, upon reach the scene, before search they called a ten-cell leader and a Neighbour (PW6) who testified and confirmed to witness the said search. In my view, basically the independent witness job was to witness the search and not the arrest. For the foregoing, I am of settled opinion this ground has no merit and I proceed to dismiss it forthwith.

On the second ground as stated above, the appellant challenges the procedure in which the alleged wild animal was disposed. Wherein he alleges that he was not given an opportunity to be heard before or after the disposition and further that no photos of the alleged wild animal's meat was taken and tendered in court as evidence. There is no dispute the said meat seized was perishable.

In this purpose, I find it pertinent to highlight the law in respect to disposition of perishable exhibits. According to the record the appellant was arraigned at the District court on 10/3/2022 while the inventory form exhibit P5 was signed for purpose of disposing the said trophy by a magistrate on 7/3/2022, this means that the disposition was made at investigation stage before the case reached the trial district court.

In **Mohamed Juma @ Mpakama vs. Republic** (supra) at page 21, the Court observed that:

"The police, while carrying out investigations have a very different procedure for handling perishable Government trophies. This different procedure is provided for under the Police General Orders (PGOs)."

Further the court at page 22 had this to say:

*"Concerning the way the Police are required to **handle perishable exhibits when still at the stage of criminal investigation**, paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states: 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 Court of Appeal further proceeded to interpret the above quoted paragraph 25 of PGO no. 229 at page 23 and expounded that;

*"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 be heard before the magistrate issued the disposal order**"*

[Emphasis added]

I have examined the record which reveals how the disposal order in relation to the procedure provided by the law above in order to see if the appellant's complaint has merit. Looking at the above provision and authority above, the same clearly provides that the presence of the prisoner or suspect during the process as it was in this case is mandatory. In this matter at the trial the records reveal that the appellant was present during the disposition of said inventory, however what is not seen in the record is as to whether he was given an opportunity to be heard. There is no evidence that the appellant was afforded that right to be heard when he

was taken before the magistrate who ordered for the disposition of the alleged wild animal's meat.

To show what transpired at the trial court, I find it apposite to reproduce testimonies of two witnesses who witnessed disposing order made by Magistrate and burial of the said trophy. First is PW3 Neema Ponsian Kimolo, court clerk and personal secretary at the said District court, at page 18 of the typed proceeding testified that;

"On 7/3/2022 around afternoon hours I was at my work station, meanwhile four people came to wit one police officer game officer, conservation ranger and one accused. They needed a disposal order for meat which they said is government trophy. I directed them to Magistrate later the Magistrate ordered me to go and witness the trophy disposal by way of burial. Then we went to the court backyard where a pit way dug and the trophy was buried"

Second witness was PW5 Thomas Bayona Katunzi, wildlife officer, at page 25 of the typed proceeding testified that;

"At the court the clerk welcomed us and led us to Magistrate to which the Magistrate saw the trophy and ordered disposal by burial which we complied. We buried it outside the court in presence of court clerk, Sgt. Richard, me and the accused herein before the court. After disposal I left for my normal routine."

In response to the above, the learned State Attorney contended that right to be heard was raised as a new ground. I have considered this defence, in my view I think, despite the fact that the issue above of right to be heard is in compliance with the cited law of disposing perishable items stated above, still this is the fundamental rights which in my view cannot be denied in any administration of justice, thus it is my considered opinion this right cannot be ousted by any way. However, this court as the first appellate court is empowered by law to re-evaluate afresh evidence adduced at the trial court and if find there is misapprehension of evidence can come up with its own decision.

Notwithstanding the above, it is noteworthy the above paragraph 23 of PGO 229 provides where possible, such exhibits should be photographed before disposal. In my interpretation this means it is not mandatory but discretionary, however, I think to exercise this discretion judiciously, the

prosecution could have evidenced why it was not necessary or impossible to take photograph of the said government trophy. Another prove of evidence by prosecution I see wanting, is when arresting officers PW2 and PW4 said they found the said motorcycle at appellant compound loaded two buckets which therein after search they found meat, but they did not bother to prove who was the owner of the said motorcycle to know whether it belong to the appellant or he hired it. In my view, the circumstances allow any other person to come within the said compound with the said motorcycle. To cut off this environment, I think the prosecution was required to fill all gaps which may cause doubt for any unscrupulous person to take advantage of the opportunity.

Nevertheless, neither the evidence does show whether that appellant signed the said inventory at police station nor at the court before the magistrate, therefore taking regard appellant himself did not admit in his defence that he signed in the presence of Magistrate, there is no how it can be concluded that he was afforded an opportunity to be heard as the law above requires.

In the circumstances, and in considering the above cited authority, I am of considered view that, it was mandatory for the prosecution to prove

that the appellant was not only present during the process of disposing but also was afforded the right to be heard. In absence of such evidence, thus it means the procedure was flawed and that has tainted the prosecution case. Hence, I am settled that the said admitted inventory form cannot be relied on to prove that the appellant was found in unlawful possession of the Government Trophies mentioned in the Charge Sheet. Having found so, it is my opinion and with no doubt that this ground is indeed meritorious and is therefore allowed, and its consequence I hereby expunge the said inventory form (exhibit P5) from the record.

The next point for consideration which I have asked myself is that, having expunged the above exhibit is there any evidence remained to warrant the appellant conviction. In my view, I have considered the remaining evidence as per record of the trial court, there is no other evidence which supersede the trophy which were destroyed illegally, also couples with doubts highlighted above, the evidence left is too flimsy to enhance the prosecution side prove to the standard required in criminal case. In the circumstances, I find that the determination of this ground on merit is sufficient to dispose of the appeal and I find no need to consider and determine the remaining grounds of appeal.

In the premise, the above I have endeavoured to discuss and taking the evidence on the record as a whole, I am settled to hold that the prosecution did not prove the case against the appellant beyond reasonable doubt in respect of the charged with.

I therefore hereby allow this appeal with an order that the appellant be released from jail forthwith and set to liberty unless, he is held in custody for any other lawful cause not related to the matter that gave rise to this appeal.

It is so ordered.

DATED at **MOSHI** this 21st day of March, 2024




A. P. KILIMI
JUDGE

Court: Judgment delivered today on 21st day of March, 2024 in the presence of appellant and Ms. Imelda Mushi, State Attorney for the respondent absent.

Sgd: A. P. KILIMI
JUDGE
21/03/2024

Court: Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

21/03/2024