IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 169 OF 2022

(Originating from the Resident Magistrate's Court of Arusha, Hon. Amalia L. Mushi, SRM, dated 31/08/2021 in Economic Crimes Case No. 16 of 2020)

KOTO PAULO @ SAWANGA ..... APPELLANT

VERSUS

THE D.P.P. ..... RESPONDENT

JUDGEMENT

30/10/2023 & 14/11/2023

KINYAKA, J.:

The Appellant was convicted by the Resident Magistrate Court of Arusha on 31/08/2021 with one count of unlawful possession of government trophies contrary to section 86(1) and (2) (c) (iii) of the Wildlife Conservation Act (herein after, the "WCA") as amended, and sections 57(1) and 60(2) of the EOCCA. On 31/08/2021, the Appellant was sentenced to pay fine of TZS 19,000,000 or in default, to serve 20 years in prison. Aggrieved by the conviction and sentence of trial Court, the Appellant has preferred seven grounds of appeal. Later, on 4th July 2023, the Appellant, preferred three

additional grounds of appeal, making a total of ten grounds of appeal which are reproduced below:

1. That the Honourable Magistrate erred for failure to see that the appellant's constitutional right not to be subjected to torture under Article 13 (6) (e) of the Constitution of Tanzania was violated, as the appellant was kept in police custody for more than one (1) month, from his arrest on 31/12/2019 to when he was presented to Court and arraigned on 12/2/2020. This renders his conviction null and void;

2. That the charge was not proved beyond reasonable doubt;

3. That the Honourable Magistrate erred in law and fact to believe that the case against the Appellant was proved beyond reasonable doubt despite the chain of custody was broken;

4. That the Honourable Magistrate erred to believe that the chain of custody of the trophies was established despite failure by the prosecution to call the said D/SGT PATRIC for unexplained reason. PW4 stated that the trophies he identified and value was given to him by D/SGT PATRIC while prosecution claimed the trophies seized with

the appellant was under custody of PW1. Hence that said D/SGT PATRIC was an important link in establishing the chain of custody. His absence as witness creates doubt which must be resolved in favour of the appellant;

5. That the Honourable Magistrate erred to believe that the case was proved beyond reasonable doubt despite that the appellant was not present when the said trophies was allegedly handed to PW1 for custody, thus creating doubt;

6. That the Honourable Magistrate erred in believing that the appellant committed the charged offence despite the contradictions and inconsistences in the prosecution's evidence; the same casting doubt;

7. That the Honourable Magistrate erred in believing that the appellant was found with Government trophies by basing on an illegal certificate of seizure (Exhibit P3), as there is no evidence that it was read over to the appellant after filing it at the scene before the appellant allegedly signed it;

8. That the appellant was wrongly tried, convicted, and sentenced without jurisdiction, as there is no record that consent of the DPP and

certificate conferring jurisdiction were filed, or endorsed by the trial court, or whether the appellant was made aware of the same. This thereby offended section 12(3) and (4) and section 26(2) of the Economic and Organized Crime Control Act [CAP 200 R.E 2002]; this is fatal;

9. That the charge is defective for being at variance with the evidence on the place where the offence was allegedly committed while the charge alleged that the offence was committed at NGURUDOTO CRATER AREA within Arumeru District Arusha Region, PW2 said NGURUDOTO National Park while PW5 alleged at NGURUDOTO AREA Arusha National Park; and

10. That the trial magistrate erred in law and fact to believe that the appellant was found with Government trophies and convicted him by basing on an irregular inventory which was obtained in contravention with PGO No 229 as there is no record that the Magistrate who allegedly signed the inventory ever had the appellant before the destruction of the Exhibit. This is fatal.

At the hearing of the appeal, the Appellant appeared in person and the Respondent was duly represented by Ms. Alice Mtenga, learned State Attorney.

Submitting in support of the appeal, the Appellant's contention in respect of the first ground of appeal is that, the Respondent committed grave irregularity for holding him in custody for one month and 11 days without arraigning him to court. The Appellant prayed to the Honourable Court to find that the delay was unreasonable, constituted grave irregularity which watered down the prosecution case, citing the decisions **in Laurent Rajab v. R., Criminal Appeal No. 270 of 2012** and **Janta Joseph Komba and 3 Others v. R., Criminal Appeal No. 95 of 2006**.

On ground 8 of the appeal which is additional ground 1, the Appellant contended that the consent of the Director of Public Prosecution (the DPP) to prosecute the appellant under section 26(2) of the EOCCA, and the certificate conferring jurisdiction to the Resident Magistrate's Court to try the appellant on the offence is not reflected in the trial court's proceedings, which vitiates the proceedings before the trial court. To support his submissions, the Appellant cited the cases of **Aloyce Jospeph v. R.,**

Criminal Appeal No. 35 of 2020; **Omary Bakari @Daud v. R., Criminal Appeal No. 52 of 2022**; **John Julius Martin and Another v. R., Criminal Appeal No. 42 of 2020** and **Maganzo Zelamoshi @Nyamazomola v. Republic, Criminal Appeal No. 335 of 2016**.

In respect of the ninth ground (additional ground 2), the Appellant submitted that there is a variance of place of arrest between the charge and evidence of prosecution in that, the charge indicates the offence was committed at Ngurudoto Crater area, but PW2 testified to have arrested the Appellant at Ngurudoto National Park, PW5 at Ngurudoto Area Arusha National Park, and PW3 at Arusha National Park. The Appellant's position is that, the prosecution should have amended the charge but upon its failure, the charge remains unproven. He cited decisions in the cases of **Salum Rashid Chitende v. Republic, Criminal Appeal No. 204 of 2015** and **Michael Gabriel v. R, Criminal Appeal No. 240 of 2017** to cement his submissions.

In support of ground 4, the Appellant submitted that the prosecution failed to call material witness, D/SGT Patric who was handed the trophies by PW1, and who handed the trophies to PW4 to conduct valuation and inventory.

According to the Appellant, failure by the prosecution to call D/SGT Patric entitles the Court to draw adverse inference as the witness was key to testify what he did to the trophies and where he took it upon his receipt. He cited the cases of **Paschal Mwinuka v. R., Criminal Appeal No. 258 of 2019, Pascal Yoya @ Maganga v. R., Criminal Appeal No. 248 of 2017, and R. v. Underle (1938) 5 EACA 58** to support his position.

In ground 10 (additional ground 4), the Appellant contended that the inventory is illegal and unlawful as there has been no evidence to show the trial Magistrate heard the Appellant before ordering disposal of the trophies. The Appellant cited paragraph 25 of PGO No. 229 (Investigation Exhibits) and the Court of Appeal decision in the case of **Mohamed Juma Mpakama v. R. Criminal Appeal No. 385 of 2017** which emphasizes the right of the accused to be present and to be heard by the trial Magistrate. The Appellant prayed for the discounting of Exhibit P6.

In support of ground 7, the Appellant contended that the certificate of seizure admitted as Exhibit P3 is illegal and unlawful on account of lack of evidence that PW2 read it over to the Appellant before the latter's signing, and therefore it should be discounted by the Court.

On ground 3, the Appellant contended that the chain of custody of the trophies was broken, not fully established and could not prove the charge beyond reasonable doubt on account of; failure by the prosecution to call D/SGT Patric to testify what he did to the exhibit and the person whom he handed the trophies, how long the trophies were kept, whether it was sealed, whether it was immediately taken to PW1, and the absence and disassociation of the Appellant when PW3 took the trophies to the store keeper PW1. The Appellant contended further that the fact that it took so long for the Appellant and the trophies to be taken to police station and lack of evidence as to who kept the trophies, and how it was stored before it was handed over to the police, raises uncertainty and doubt on the integrity of the chain of custody of the trophies. To support his position, the Appellant cited the case of **Illuminatus Mkoka v. R. (2003) T.L.R. 245 and Ramadhani Mboya Mahimbo v. R., Criminal Appeal No. 326 of 2019** which held that the improper or absence of a proper account of the chain of custody leaves open the possibility for the exhibits to be concocted or planted. The Appellant concluded by a prayer for the Court to allow the appeal, quash the conviction and set aside the sentence.

In opposing the appeal, Counsel for the Respondent started with attacking the first ground of appeal that although the Appellant was arrested on 31st December 2019 and taken to court for the first time on 12th February 2020, which was more than a month, the omission did not lead to failure of justice. As long as there was no injustice caused to the Appellant, the omission is tolerable and explainable due to the nature of the case which require investigation to be completed before the case is filed in court. Citing the case of **Makenji Kamura v. R., Criminal Appeal No. 30/2018**, Counsel was of the position that the omission was a minor irregularity which cannot vitiate the judgement and proceedings of the trial court.

Opposing the second ground of appeal, Counsel conceded that the case was tried without jurisdiction upon her discovery that the consent and certificate for trial are in the file but they are neither endorsed nor reflected in the trial court's proceedings. Citing the cases of **Aloyce Joseph v. R., Criminal Appeal No. 35/2020 and Fatehali Manji v. R. (1966) E.A. 343**, Counsel prayed for the Court to order a re-trial because the evidence found in the trial court's proceedings was sufficient to convict the Appellant of an offence charged.

In opposing the third ground, Counsel stated that the variance between the charge and the evidence are very minor and does not go to the root of the case as Ngurudoto Crater is found within Arusha National Park and no difference in terms of the area. Counsel attacked the Appellant for his failure to cross examine prosecution witnesses on the aspect. Citing the case of **Issa Hassan Uki v. R., Criminal Appeal No. 129 of 2017**, the Counsel viewed that failure to cross examine a witness on a relevant matter, ordinarily connotes acceptance of the veracity of the testimony.

On the fourth ground, Counsel stated that the law under section 143 of the Evidence Act Cap. 6 R.E. 2022 (herein after, the "Evidence Act"), does not require specific number of witnesses. She stated that the prosecution summoned witnesses necessary to prove the case. She argued that the nature of evidence of D/SGT Patric was covered by PW1 and PW4 and corroborated by Exhibit P1 and P3 which was sufficient to establish the chain of custody.

Counsel for the Respondent argued in opposition to the fifth ground that the record on page 33 and 34 of the proceedings of the trial court, reveal PW4's testimony that the Appellant was present when the application and order for

inventory was made, who had an opportunity to be heard before the order was granted.

The sixth ground of appeal is opposed by the Respondent for being new, and the fact that the Appellant signed the certificate and did not object to the tendering and admission of the certificate of seizure in court, the certificate was properly procured and admitted by the trial court.

On the last ground, the Counsel submitted that the chain of custody was not broken as the prosecution evidence before the trial court established step by step, the manner in which the trophies were handed to D/SGT Patric until when it was taken for inventory.

The Counsel concluded by praying to the Court to sustain the conviction and sentence and dismiss the appeal. In the alternative, Counsel prayed for re-trial if the Court finds discrepancies in the trial court's conviction, judgement and proceedings.

Upon completion of the submissions by the parties, it is the duty of the Court to establish whether the trial, conviction and sentence of the Appellant by the trial court was proper and correct both in law and fact. In determining

the issue, I find it proper to first determine ground 8 (additional ground 1) of the petition of appeal attacking the jurisdiction of the trial court to try, convict and sentence the Appellant without proper consent and certificate of the DPP.

Before the trial court, the Appellant was charged with an offence of unlawful possession of Government trophy contrary to law. Being an economic offence, the consent of the DPP to try the offence was required. Section 26 (1) of the EOCCA provides: -

"26(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.'

Section 12 (3) of the EOCCA concerns power of the DPP or a State Attorney duly authorized by him, where it is deemed necessary or appropriate in the public interest, to order by certifying that a case involving an offence triable by the Court under the EOCCA, be tried by a court subordinate to the High Court. Section 12(5) of the EOCCA requires a certificate issued under section 12(3) of the EOCCA to be lodged in the court concerned, and shall constitute full authority for, and confer jurisdiction upon the court

in which it is lodged, to try the case in question. The provisions above are couched in mandatory terms. Having perused the trial court's file, the consent and certificate of DPP is attached with the charge sheet.

Upon scrutiny of the consent and the certificate, they suffer three anomalies. First, is lack of endorsement by the trial court; second, is that, they are not reflected in the trial court's proceedings, and third, the dates upon which the consent and the certificate were issued are unknown.

In my settled view, since the consent and certificate were not dated, not formally received by the trial court, and not reflected in the trial court's proceedings, the trial Court was not properly clothed with jurisdiction to try the offence against the Appellant. The anomalies oust the jurisdiction of the trial court to try the offence, with a consequence that the entire proceedings are a nullity. Consequently, I nullify the proceedings and quash the resultant judgement of the trial court. The position that I have taken, is fortified by the decision of the Court of Appeal, in the case of **Aloyce Joseph (supra)**, where the Court of Appeal reached at a similar decision and held as follows:

"We have considered the argument made by the learned State Attorney on the point of law at issue. With respect, we were unable

to agree with her that the mere presence of the DPP's consent and the certificate of transfer of the case to the Resident Magistrate's Court of Arusha entails that the appellant was properly charged and that the trial court had jurisdiction.

In the case of ***Maganzo Zelamoshi @ Nyanzomola v. Republic, Criminal Appeal No. 355 of 2016 (unreported)*** *in which a similar point was at issue, the Court agreed with the submission made in that case by the learned Senior State Attorney that, when the consent of the DPP to commence a prosecution and the certificate to confer jurisdiction on the subordinate court are not formally filed in the trial court, the trial becomes a nullity. Similarly, in the case of* ***Maulid Ismail Ndonde v. Republic, Criminal Appeal No. 319 of 2019 (unreported)****, the Court held that: -*

> *".....the consent and certificate signed on 10th April, 2018 were not officially received by the trial court. . . Consequently in the absence of the consent and the certificate of the DPP, the trial court lacked jurisdiction to try this case rendering the entire proceedings a nullity."*

Since in the case at hand, the consent and the certificate were not formally received by the trial court, the trial cannot be said to have been lawfully conducted. The trial court's proceedings were therefore,

a nullity. As a result, we hereby nullify them and quash the resultant judgment. Consequently, the proceedings and the judgment of the High Court, which stemmed from the proceedings which were a nullity, are also hereby quashed."

Having conceded that the trial court was not properly clothed with jurisdiction to try the offence, Counsel for the Respondent prayed to the Court to order a re-trial because in her view, the evidence found in the trial court's proceedings was sufficient to convict the Appellant of the offence charged.

It is a settled position of the law as articulated in the case of **Aloyce Joseph (supra) and Fatehali Manji v. R. (1966) E.A. 343**, that in the instances where the trial court lacks jurisdiction due to lack of endorsement, the Court may order retrial if evidence before the trial court was sufficient to find the accused guilty of the offence charged. However, a re-trial cannot not be ordered in cases of insufficient evidence or for purposes of enabling the prosecution to fill in gaps in its evidence before the trial court.

I now move on to determine, whether the evidence of the prosecution before the trial court was sufficient to justify conviction of the Appellant of the offence charged.

Regarding the Appellant's complaint that the prosecution delayed for more than one month to arraign him in court, I find that the omission was a minor irregularity which could not vitiate the judgment and proceedings of the trial court. The omission did not lead to failure of justice. I am fortified by the decision of the Court of Appeal in **Makenji Kamura v. R., Criminal Appeal No. 30 of 2018**, on page 8 and 9, which quoted its decision in **Jaffari Salum @Kikoti versus v. R, Criminal Appeal No. 370 of 2017** (unreported), where it was held that the omission to delay arraignment of the Appellant to court, was a minor irregularity which could not vitiate the judgment and proceedings of the trial court.

I have read the proceedings of the trial court and noted that the variance alleged by the Appellant between the evidence of PW2 that he arrested him at Ngurudoto National Park, PW5 at Ngurudoto Area Arusha National Park, and PW3 at Arusha National Park. If the same is compared with the charge sheet alleging the offence to be committed at Ngurudoto Crater, I find the

variance are very minor and did not prejudice the Appellant. The witnesses were referring to the same area, the Ngurudoto Crater which is found within Arusha National Park. Further, the proceedings reveal that when PW2, PW3, and PW5 were testifying before the trial court, the Appellant did not cross examine on that aspect. I am fortified by the decision of the Court of Appeal in the case of **Issa Hassan Uki v. R., Criminal Appeal No. 129 of 2017**, and hold that the Appellant's failure to cross examine the witnesses on the place of the alleged commission of the offence, connotes acceptance of the veracity of the testimony that there is no variance between Ngurudoto Crater and Arusha National Park.

The Appellant faults the prosecution to call D/SGT Patric to testify on his role in the chain of custody of the trophies. I find that failure by the prosecution to call D/SGT Patric was not fatal as he was not a key witness to prove the offence against the Appellant. The evidence of PW1 and PW4 were sufficient to establish the chain of custody. It is shown on page 11 of the proceedings that on 06/01/2020, PW1 handed over the trophies to D/SGT Patric where Form PF. 16 was signed by both PW1 and D/SGT Patric. On page 32 of the proceedings, PW4 testified that on 06/01/2020, the same day that PW1 handed the trophies to D/SGT Patric, he went to USA River Police Station

and conducted valuation of the trophies at the police station upon being handed the trophies by D/SGT Patric. PW4 informed the trial court that the handing over of the trophies was done by him and D/SGT Patric signing on a handing over book.

Even if D/SGT Patric was to testify in court, it was expected that his testimony would cover evidence relating to how he received the trophies on 06/01/2020 from PW1 and how he handed the same to PW4 for valuation and how the handling was done through Exhibit P1 and P3. That information were sufficiently covered by the prosecution through the evidence of PW1 and PW4 corroborated by Exhibit P1 and P3 which clearly established the chain of custody of the trophies. Exhibit P1 and P3 has covered the evidence that D/SGT Patric would testify or tender. I find that the chain of custody was intact and had not been broken.

With regard to the alleged illegality of certificate of seizure admitted as Exhibit P3 on the ground that PW2 did not read it over to the Appellant before the latter's signing, I find the complaint to be an afterthought. At no point in the proceedings before the trial court, the Appellant complained or objected to the admission of the certificate of seizure (Exhibit P3) on the

alleged grounds. The Appellant did not object to the admission of Exhibit P3 as reflected on page 16 of the proceedings. Further, the evidence of PW2 on pages 15 to 19 of the proceedings establish that the certificate was legally and procedurally procured. I am guided by the decision in the case of **Hassan Bundala Swaga v. R., Criminal Appeal No 416 of 2014** where the Court of Appeal held:-

'It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal.'

In respect of the procedure of obtaining inventory and subsequent destruction of the trophies, the proceedings reveal that the application and the order for destruction of the trophies, were made in the presence of the Appellant. However, there is no record showing that in that process, the Appellant was heard. I find that it was irregular for the magistrate to order destruction of the trophies without hearing the Appellant. As the Appellant was denied his constitutional right of a hearing, I find that the inventory was not properly and procedurally procured. I therefore expunge the Inventory (Exhibit P6) from the record. In arriving at the decision, I am guided by

paragraph 25 of PGO No. 229 (Investigation Exhibits), and the Court of Appeal decision in the case of **Mohamed Juma Mpakama v. R. (supra)** where it was held that:-

> *".....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 (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO".*

Upon expunging Exhibit P6 which linked the Appellant with the offence of unlawful possession of unscheduled animal without permit, there is no remaining evidence on the record that would justify conviction of the Appellant of the offence charged.

In the circumstance of lack of evidence of the scheduled animal, the evidence of the prosecution cannot establish the offence of unlawful possession of

government trophies alleged to be committed by the Appellant. The remaining evidence of prosecution is insufficient to prove the case beyond any reasonable doubt. I cannot therefore order a retrial in circumstance. Even in the case relied upon by the Respondent's Counsel, the case of **Aloyce Jospeph (supra**), the Court of Appeal had held that a re-trial was not appropriate. In that case, the Court quoted with approval the decision in the famous case of **Fatehali Manji (supra)** which held:

'In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial ..... Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

In the final analysis, I find the prosecution to have failed to prove the offence against the Appellant beyond any reasonable doubt. I find the present appeal to be not a fit case to order retrial. I hereby quash the trial court's conviction against the Appellant, set aside the sentence and order the Appellant's immediate release from prison, unless he is held therein for any other lawful cause.

It is so ordered.

Right of Appeal fully explained.

DATED at **ARUSHA** this 14th of November 2023.

H. A. KINYAKA

JUDGE