IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: JUMA, C.J., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 513 OF 2019

AMOS s/o ALEXANDER @ MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma)

(Ng'umbu, RM EXT. JUR.)

dated the 8th day of October, 2019

in

Criminal Appeal No. 21 of 2019

JUDGMENT OF THE COURT

22nd & 29th October, 2021

MASHAKA, J.A.:

The District Court of Serengeti at Mugumu convicted Amosi Alexander @Marwa the appellant, of the offence of unlawful possession of government trophies 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 sections 57(1) and 60(2) of the EOCCA (Cap 200 R.E. 2002). This was after the evidence adduced before the trial court satisfied it that on the 13th January, 2015 at about 01:00hrs in his dwelling house at

Kisangura village within Serengeti District in Mara region, the appellant was found in unlawful possession of government trophies to wit; two elephant tusks each weighing 18kgs and 19 kgs valued at TZS. 29,600,000.00 the property of Tanzania Government. Upon conviction, the appellant was sentenced to twenty-five years imprisonment. Aggrieved with the conviction and sentence of the trial court, he appealed to the High Court but W.S. Ng'umbu learned Resident Magistrate exercising Extended Jurisdiction under section 45(2) of the Magistrates' Court Act, [Cap 11 R.E. 2019] (the MCA) dismissed his appeal upholding a generalized view that the case against the appellant had been proved beyond reasonable doubt. Undeterred, he has appealed to the Court.

The brief facts giving rise to the appeal as adduced by the prosecution at the trial, were as follows. From the testimony of a total of five witnesses and three exhibits we discern that on the 12th January, 2015 park rangers Robert Mbepwa (PW1), Yohana Mtafya (PW2) and Victor Abbas were informed by their leader to go to the Mugumu Police Station at 17.00 hours to join a team of police officers for a joint task. They met Inspector Danny who directed them to report at the station at 23:00hrs. They reported back at 23:00 hours and met Inspector Danny, Detective Corporal Gerard (PW3) and the appellant who was being held in the lock up of the Mugumu Police

station. Together they went to Kisangura village to conduct a search of the appellant's house. Detective Corporal Gerard testified that the appellant admitted he had in possession two elephant tusks at his house. They arrived at Kisangura village at 00:05hrs, called the neighbours to witness the search of the appellant's house after introducing themselves to the father and family members of the appellant at the father's boma. Game Marwa and Agnes Charles (PW5) were the neighbours and independent witnesses. The appellant led the independent witnesses, police officers and park rangers into his house. Insp. Danny told the appellant to surrender the government trophies he admitted to possess while at the Mugumu Police Station. The appellant knelt on the floor and from under a bed took out two bags; one big sulphate bag and a small nylon black bag. When opened, the big sulphate bag had two elephant tusks and there were fifteen (15) bullets/rounds of ammunition of a sub machine gun (SMG) in the small nylon bag. The appellant was asked if he had a permit to possess the government trophy and the bullets, he did not have one. A record of search was filled by Insp. Danny, listing all the items seized from the appellant's house and both the independent witnesses, the appellant and the police officer signed it. Ultimately the appellant and the exhibits were taken to the Mugumu Police station, a case no. MUG/IR/138/2015 was instituted

against the appellant and finally he was arraigned in court. Detective Corporal Gerard tendered the record of search, which was admitted and marked exhibit P.E.1, while Detective Corporal Shaban (PW4) tendered the two elephant tusks which were admitted in evidence and marked exhibit P.E.2 collectively. The trophy valuation certificate exhibit P.E. 3 and the statement of the independent witness Agnes Charles (PW5) were also admitted in evidence.

In defence, the appellant was the sole witness. He strongly denied the allegations and stated that the independent witnesses were not from his village. He further stated that he was already under arrest on the 13/01/2015.

In this appeal, the appellant's memorandum of appeal to the Court is premised on four grounds of appeal rephrased as follows: -

1. *The two courts below erred in acting on the search and seizure of the alleged government trophies which was predicted on contrived evidence hence lacked credibility to found conviction.*
2. *Both the trial and first appellate courts erred in law and fact to rely on the search which was conducted in the absence of independent*

witness hence uncorroborated evidence produce by prosecution witness which offends the Evidence Act (Cap 6 R.E. 2002).

3. *Both the trial and first appellate courts erred in law and fact to convict and sentence the appellant basing on exhibit P.2 which was identified by JOHN LENDOYANI as government trophies and he was not summoned to testify before the trial court.*
4. *The appellate court erred in law to uphold the decision of the trial court by referring to a provision which was not on the charge which the appellant pleaded before the trial court.*

At the hearing, the appellant was present linked remotely through video conference facility from the Musoma prison and unrepresented. Whilst the respondent Republic was represented by Messrs. Valence Mayenga, learned Senior State Attorney assisted by Yese Temba and Roosebert Nimrod Byamungu, learned State Attorneys. When called upon to argue his appeal, the appellant adopted the grounds of appeal and preferred to let the learned Senior State Attorney respond first on his grounds of appeal, leaving himself to rejoin thereafter.

The learned Senior State Attorney initially supported the appeal advancing different reasons from the appellant's grounds of appeal. Mr.

Mayenga submitted that the judgment at pages 77 – 80 delivered by Hon. Ng'umbu, Resident Magistrate (RM) exercising Extended Jurisdiction (EJ) did not consider the appellant's grounds of appeal as revealed on the petition of appeal. Instead, Ng'umbu, RM (EJ) raised issues for determination of the appeal different from the grounds of appeal lodged by the appellant and composed a judgment, which contravened section 312 (1) of the Criminal Procedure Act, [CAP 20 R.E. 2019] (the CPA) as held in the case of **Simon Edson @ Makundi v. The Republic**, Criminal Appeal No. 5 of 2017 (unreported). That the Court cannot consider the appellant's grounds of appeal which did not originate from the judgment of the first appellate court. Mr. Mayenga urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E. 2019] (the AJA), to nullify the judgment of the first appellate court.

On the way forward, learned Senior State Attorney proposed to us two alternatives, either to remit the record to the first appellate court to compose its judgment afresh according to the law or the Court to step into the shoes of the first appellate court, consider the evidence and decide the appellant's appeal. According to Mr. Mayenga, the second option was justifiable as the trial court at pages 52 – 56 did not consider the defence of the appellant for the trial magistrate failed to provide an analysis of the

said defence raised by the appellant, which contravened section 312 (1) of the CPA and according to the case of **Simon Edson @ Makundi v. the Republic** (supra) the impugned judgment has not satisfied the requirements of the law.

Further, learned Senior State Attorney submitted that, the appellant was charged with one count and the evidence adduced by the prosecution failed to prove the offence beyond reasonable doubt. He argued that the trophy valuation certificate exhibit P.E.3 was tendered into evidence by the public prosecutor against the law at page 49 of the record of appeal. He contended further that the statement of the witness for the prosecution, one Agnes Charles Marwa was tendered under section 34B of the Evidence Act, (CAP 6 R.E. 2019) at page 50 of the record and admitted in evidence as statement of PW5 without following the procedure. That the prosecutor cannot tender exhibits because he was not a witness and did not take an oath to testify before the court. Mr. Mayenga submitted that the procedure for the tendering of a witness statement was clearly explained in the case of **DPP v. Said Shaban Malikita**, Criminal Appeal No. 265 of 2019 (unreported).

He further argued that even if the exhibits had followed procedure, both exhibits P.E.3 and statement of PW5 were not read out before the trial court and the appellant, therefore fatal as held in the case of **Kingolo Limbu @ Tina & Another v. The Republic**, Criminal Appeal No. 445 of 2017 (unreported). He added that even the certificate of seizure exhibit P.E.1 was admitted in evidence but not read out before the court and the appellant. He implored the Court to expunge the said exhibits. He stated that if the exhibits are expunged by the Court, the remaining prosecution evidence against the appellant is weak to prove the offence facing the appellant, he prayed to the Court under section 4(2) of the AJA, to set aside the impugned judgment and the appellant be set free.

The appellant being a lay person, concurred with the submissions by the learned Senior State Attorney and prayed to the Court to set him free.

We rightly agree with Mr. Mayenga that the first appellate court failed to consider the appellant's grounds of appeal. We agree that the first appellate court be it a High Court or Resident Magistrate Court with extended jurisdiction, has the duty to resolve issues raised in the grounds of appeal. The record of appeal shows that the appellant raised three grounds of appeal. However, the judgment delivered by Ng'umbu, RM (EJ)

did not consider the said grounds, instead he drew up issues of his own for determination of the appellant's appeal as reflected at page 78 of the record of appeal. As to the failure by learned RM (EJ) to consider the grounds of appeal and drawing up issues for determination of the appeal, we had this to say in **Malmo Montagekonsult AB Tanzania Branch v. Margret Gama**, Civil Appeal No. 86 of 2001 (unreported): -

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately."*

Similarly, as the above excerpt is derived from a civil appeal, we think it applies as well to criminal appeals. We dealt with a similar scenario in **Nyakwama Ondare @ Okware v. Republic**, Criminal Appeal No. 507 of 2019 (unreported), we echoed that: -

> *"In the instant appeal, we unreservedly note that the first appellate court did not address and determine the grounds of appeal separately or generally. On the contrary, as intimated above, it simply framed*

its own points for the determination of the appeal which did not relate to the appellant's grounds of appeal in the petition of appeal."

The learned Resident Magistrate (EJ) then proceeded to generalize his findings based on the issues for determination of the appeal instead of the arguments made by the parties in relation to the grounds set out in the petition of appeal. It is obvious the first appellate court did not consider the grounds of appeal presented before it, failed to re-evaluate the entire evidence on record in an objective manner and to arrive at its own findings of fact. We need not mince words, the judgment by the first appellate court is not a judgment which the law envisioned as argued by Mr. Mayenga.

Therefore, the law and cases cited above, emphasize that the first appellate court has an obligation to re-evaluate the evidence on record before reaching to its conclusion. The impugned judgment of the first appellate court fell far below the mandatory standard and we find that it was not a judgment known in law, it was a nullity. For the reasons stated, we invoke our revisional powers under section 4 (2) of the AJA to nullify and quash the judgment of the first appellate court in Criminal Appeal No. 29 of 2019.

Earlier on, Mr. Mayenga suggested to us two alternatives, either to remit the record to the first appellate court for it to compose judgment in compliance with the law or to step into the shoes of the first appellate court, to consider the evidence and decide the appellant's appeal. Mr. Mayenga implored us to step into the shoes of the first appellate court and conceded to the appeal though on different reasons from the appellant's grounds of appeal. That due to the apparent defects, to remit the record would become a pointless exercise and not in the interest of justice. He argued that the trial court at pages 52 – 56 of the record of appeal did not consider the defence of the appellant as the trial magistrate failed to provide an analysis of the said defence raised by the appellant. Further he argued that the trophy valuation certificate exhibit P.E.3 and statement of PW5 were tendered in evidence by the prosecutor which contravened the law. Also, the certificate of seizure exhibit P.E.1 was admitted in evidence but not read out before the court and the appellant. Hence, the prosecution evidence failed to prove the case beyond reasonable doubt.

We are settled that we need to step into the shoes of the first appellate court to do what it was supposed to have done. We have decided so because we have found the prosecution evidence materially wanting. In so doing, we shall consider the evidence on record before arriving at a

conclusion whether the evidence adduced by the prosecution proved beyond reasonable doubt the case against the appellant warranting the conviction and sentence.

We will determine this appeal basing on the three grounds of appeal as gathered from the petition of appeal at the first appellate court. The appellant complained that: -

1. *The search and seizure of the alleged government trophies was predicted on contrived evidence so unsafe to base conviction.*
2. *In the absence of independent witness in the search lead to uncorroborated evidence by PW1, PW2, PW3 and PW4 so far as PW5 witness statement, its admission into evidence offended the Evidence Act (Cap 6 R.E. 2002).*
3. *The identification of the alleged government trophies by JOHN LENDOYANI (not summoned to testify) creates reasonable doubt against prosecution case.*

We will commence with the third ground of complaint that one John Lendoyani who identified the government trophies was not summoned to testify and the identification of the trophies creates doubt against the prosecution case. Mr. Mayenga conceded that the trophy valuation

certificate exhibit P.E.3 was tendered by the prosecutor which is in violation of the law and invited us to expunge it. We have held in a number of our decisions that a public prosecutor is not competent to perform the duties of a witness and at the same time prosecute a case. It is clearly evident at page 49 of the record of appeal, that the competent witness the District Game Officer was engaged in other activities and could not be easily found to come and testify in court, the public prosecutor prayed to tender the trophy valuation certificate under section 34B of the Evidence Act, Cap 6 R.E. 2002 and the trial court admitted it in evidence as exhibit P.E.3.

Under the general scheme of the CPA, particularly section 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A public prosecutor is not a witness sworn to adduce evidence and cannot assume the role of a witness; he is not competent to tender exhibits because he cannot ride two horses at the same time, be a prosecutor and a witness at the same time. This course of action is fatal, see: **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic,** Criminal Appeal No. 78 of 2012, **Sospeter Charles v. Republic**, Criminal Appeal No. 555 of 2016, **Tizo Makazi v. Republic**, Criminal Appeal No. 532 of 2017, **DPP v. Festo Emmanuel Msongaleli and Nicodemu Emmanuel Msongaleli**, Criminal Appeal No. 62 of 2017(all unreported).

We have maintained that when a prosecutor tenders an exhibit, he assumes the role of a witness and in the process the prosecutor is not capable of being examined and cross examined – see: **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic,** (supra). In this appeal, the prosecutor could not be examined or cross -examined by the appellant on said exhibit.

Basing on the discussed authorities above, we expunge exhibit P.E.3 from the record of appeal. Similarly, in the second ground of complaint on the PW5's statement, that its admission into evidence offended the Evidence Act (Cap 6 R.E. 2002), the public prosecutor tendered the statement of an independent witness one Agnes Charles Marwa (PW5) under section 34B of the Evidence Act because the prosecutor could not secure her appearance in court to testify for the prosecution case. The same applies to this statement of PW5, the prosecutor cannot be a prosecutor and a witness at the same time as we discussed above. We therefore expunge the statement of PW5 from the record. In our opinion, the issue whether these two exhibits were read out after admission in evidence, becomes redundant. The complaint in the third and second grounds of appeal have merit. We allow them.

On the first ground of complaint that the search and seizure of the alleged government trophies was predicted on contrived evidence so unsafe to base conviction, Mr. Mayenga conceded that the record of search exhibit P.E.1 at page 44 of the record after its admission in evidence, it was not read out before the court and the appellant. This is a fatal error as it does not avail the right to the appellant to know what is in the document exhibit and prepare his cross examination of the admitted document and of the witness. As the same fate befalls the exhibit P.E.1, we take a similar position and expunge it from the record because it was not read out after admission in evidence.

As the crucial exhibits P.E.1, P.E.3 and the statement of PW5 have been expunged, the prosecution case cannot stand to prove that the appellant was found in possession of government trophies. Though two elephant tusks were alleged to have been found in the possession of the appellant, there was no search order which was the legal authority to conduct the search, hence assumed it was an illegal search, there was no evidence of an independent witness who witnessed the said search to eliminate the possibility of false implication onto the appellant and there is no proof of the wildlife warden that the alleged tusks actually came from an elephant and no other animal.

In criminal cases, the burden of proof lies on the prosecution and it never shifts to the accused, in this appeal, the appellant. Under section 3 (2) of the Evidence Act, it is provided that the burden never shifts. We are not satisfied that the remaining evidence on record supports the charge of unlawful possession of government trophy under 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 sections 57(1) and 60(2) of the EOCCA (Cap 200 R.E. 2002). The prosecution has not established the offence beyond reasonable doubt. Cumulatively, all the defects in the evidence lead to the conclusion that the appellant's appeal has merit.

For the reasons discussed above, it is our view that had the trial court properly directed its attention to the evidence adduced by the prosecution, it would have reached at a different conclusion that the evidence was not water tight to find the appellant guilty as charged warranting the conviction and sentence. It ought to have acquitted the appellant.

The above discussion culminates into our finding that the prosecution evidence failed to prove the charge beyond reasonable doubt against the appellant.

For the forgoing reasons, the appeal against the appellant succeeds. We quash the conviction, set aside the sentence and order his immediate release from prison unless he is otherwise lawfully held.

DATED at **MUSOMA** this 28th day of October, 2021.

I. H. JUMA
CHIEF JUSTICE

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021 in the Presence of Mr. Frank Nchanila, State Attorney for the Respondent/Republic, and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

K. D. MHINA
REGISTRAR
COURT OF APPEAL