IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 63 OF 2020

HAMISI JUMA @ SELEMAN @ ISAYA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)
(Luvanda, J.)

dated the 8th day of November, 2019
in
Economic Crime Case No. 6 of 2019

.....

JUDGMENT OF THE COURT

9th & 14th February, 2023

LEVIRA, J.A.:

The appellant, Hamis Juma @ Seleman @ Isaya was tried in the High Court of Tanzania Corruption and Economic Crimes Division at Arusha on one count of being found in unlawful possession of government trophy contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act. No. 5 of 2009 (the WCA) read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) both of the Economic and Organized Crimes Control Act, Cap. 200 R. E. 2002 as amended by sections 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 (the

EOCCA). He was convicted and sentenced to serve a term of twenty (20) years in prison and to pay a fine of TZS. 336,262,500.00.

Aggrieved, the appellant has preferred the current appeal challenging both the conviction and sentence on five grounds of appeal, to wit, **first** that the trial judge failed to realise that the evidence on record was too short and contradictory hence casting doubt on the allegations; **second**, that the trial judge erred in law and fact in convicting the appellant without proper evaluation of the evidence and exhibits admitted in the course of hearing of the case; **third,** that the trial judge failed to notice the variance between the charge sheet and the evidence on record; **fourth**, that the appellant was convicted in the absence of evidence of Police Officer who investigated the case; and **fifth** that, there was no proper evaluation of evidence on record and hence the charge against the appellant was not proved beyond reasonable doubt.

The prosecution called four witnesses and produced six exhibits to prove what was alleged in the particulars of the offence that on 17th day of June, 2017 at Ngososi area within Monduli District in Arusha Region, the appellant was found in unlawful possession of one head and two limbs of giraffe which were equivalent to one killed giraffe valued at

USD. 15,000 equivalent to Tanzanian Shillings Thirty-three Million Six hundred twenty-six and two fifty (33,626,250.00) only, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

It is on record that on the fateful day (17th June, 2017) Fedrick Flugence Mbwambo (PW2), Frank Samwel Moshi (PW3), both park rangers and their fellow ranger (who did not testify) were on normal patrol as part of their duties within Ngososi area. In the process they saw four people each riding a bicycle towards their direction. They suspected them to be poachers and on reaching close they ordered them to stop but they did not obey, instead, they abandoned their bicycles and ran away towards different directions. It occurred that, PW2 was able to identify all of them; they were, Hamis Juma (the appellant) Nassoro, Aguu and Kaero Nohe. PW2 and his fellows gave chase and ultimately apprehended the appellant who had been stuck in a bush. The appellant's partners in crime disappeared.

The appellant was taken back to the place where the bicycles were abandoned and the arresting rangers saw three bundles on the bicycles, which when inspected, they found giraffe meat inside; one bundle had a head of giraffe and other two bundles had legs of giraffe. Upon being

interrogated by PW2 and his fellows, the appellant admitted that he went there for hunting but had no permit. He was asked to identify his bicycle and he identified the one which had a bundle containing the head of giraffe. The bicycles (Exhibit P3) and the trophy (exhibit P2) were seized and a seizure certificate was filed (exhibit P4). On the same day PW2 sent the seized exhibits to one James Kugusa (PW1), a Game Warden, Anti-Poaching Unit Northern Zone Arusha. PW1 labelled the bicycles and stored the meat and head of giraffe in a refrigerator.

On 19th June, 2017, the seized exhibits were handed over to Solomon Jeremiah (PW4) and the handing over certificate was filed (exhibit P1). PW4 conducted valuation of the trophy and during trial he tendered trophy valuation certificate (exhibit P5) and inventory form (exhibit P6).

In his defence, the appellant denied to have been arrested on the material date (17th June, 2017) and place (Ngososi area). Instead, he said he was arrested on 15th June, 2017 while coming from his farm back home (Mto wa Mbu). He saw a motor vehicle and requested for a lift which he was granted. However, instead of being dropped where he was going, they proceeded to Mto wa Mbu Police Post, he was kept in

custody for ten days and later taken before the court, charged, convicted and sentenced as introduced above and hence this appeal.

The appellant appeared before us unrepresented at the hearing of the appeal. On the other side, it was Ms. Lilian Aloyce Mmassy, learned Senior State Attorney assisted by Ms. Penina Ngotea and Ms. Eunice Otto Makala, both learned State Attorneys. The appellant who had a right to start the ball running did not exercise it, instead, he preferred first to hear from the learned State Attorney as he reserved his right to make a rejoinder.

Upon taking the floor, Ms. Mmassy opposed the appeal straightaway. She argued the first and fourth grounds of appeal together, the second and fifth and the third ground separately.

As regards the **first** and **fourth** grounds of appeal, Ms. Mmassy submitted that the appellant's claims in these grounds are unfounded. This she said, is because upon reading the entire record and the decision of the trial court, she did not find any contradiction. Referring to the information at page 42 of the record of appeal, she stated that the appellant faced the charge of unlawful possession of government trophy, the particulars of which alleged that the offence was committed on 17th June, 2017 at Ngososi area. According to Ms. Mmasy, the

testimonies tallied with what was alleged in the charge sheet. She went on submitting that PW2 and PW3 explained on how the appellant was arrested and found in possession of government trophy, that the appellant was found with a head of giraffe in the National Park. Apart from that, PW1 the custodian of exhibits explained on how he kept the exhibits which were seized from the scene of the crime and PW4 explained on how he received the exhibits and made valuation. Therefore, Ms. Mmassy reiterated that there were no contradictions alleged by the appellant. She cited the case of **Matata Nassoro & Another v. Republic,** Criminal Appeal No. 329 of 2019 (unreported).

Regarding the appellant's complaint that the investigator was not called to testify, Ms. Mmassy submitted that there was no need to call him as he was not at the scene when the offence was being committed. After all, she said, there is no specific number of witnesses required to prove a fact in terms of section 147 of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act.) Thus, she argued that the appellant's complaint that the prosecution evidence was short is invalid.

Submitting on the **second** and **fifth** grounds of appeal that the trial judge failure to evaluate the evidence adduced at trial. Ms. Mmassy argued that the appellant's claim is baseless. She referred us to pages

86 to 97 of the record of appeal where the impugned judgment is found and stated that she had gone through the same. At page 89 the trial judge raised issues for determination, to wit, whether meat of giraffe, one head and two legs were seized from the appellant, and whether the chain of custody was properly maintained. He analysed the evidence of both sides. She went on submitting that at page 87 of the record of appeal, the trial judge analysed the issues and concluded that the appellant was guilty. Ms. Mmassy concluded that the analysis was made thoroughly contrary to what was alleged by the appellant.

Responding on the third ground of appeal, Ms. Mmassy submitted that the alleged variance between the charge sheet and the evidence on record by the appellant does not exist. According to her, what was alleged in the charge sheet was proved by the four prosecution witnesses who adduced evidence during trial and thus, this ground of appeal is baseless.

When prompted by the Court to submit on propriety or otherwise of the appellant's sentence, Ms. Mmassy submitted that the appellant was sentenced to serve a term of 20 years in prison and to pay a fine of TZS. 336,262,500.00. However, she said, in terms of section 60 (2) of the EOCCA the appellant was only required to serve a sentence between

20 to 30 years without any option of fine. She urged us to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to impose a proper sentence to the appellant.

Finally, she prayed that this appeal be dismissed.

In rejoinder the appellant had nothing useful to submit in relation to his appeal, he only said that there were no exhibits tendered in Court during trial.

Having heard the parties' submissions and carefully examined the record of appeal, we now move to determine the grounds of appeal which in essence raise a crucial issue as to whether the charge against the appellant was proved beyond reasonable doubt.

The appellant was charged with unlawful possession of government trophy contrary to section 86 (1) and (2) (c) (ii) of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) both of the EOCCA. Section 86 (1) of the WCA creates the offence as it provides the following:

> *"Subject to the provisions of this Act, a person shall not be in a possession of, or buy, sell or otherwise deal in any government trophies."*

According to the above provision, it is unlawful for a person to possess, buy, sell or deal in any government trophies. Section 3 of the WCA defines trophy as follows:

> *"Trophy means any animal alive or dead, and any horn, ivory, tooth, bone, claw, hoof, skin, meat, hair, feather, egg or* ***other portion of any animal*** *and includes a manufactured trophy."* [Emphasis added].

In terms of the above provision, any portion of an animal is a trophy. The particulars of the offence as per the charge sheet indicated that on 17th June, 2017 at Ngososi area the appellant was found in unlawful possession of one giraffe head. During trial PW2 and PW3 testified to the effect that on the fateful date (17th June, 2017) they were at Ngososi area on patrol. In the process they managed to apprehend the appellant who had carried a head of giraffe on his bicycle without a permit from the Director of Wildlife. They seized it and filled seizure certificate. Thereafter, the said head of giraffe was handed over to the custodian of exhibits (PW1) and the handing over certificate was issued (Exhibit P1). PW1 testified on how he stored the exhibits including the head of giraffe which was kept in the refrigerator. On 19th June, 2017 Solomon Jeremiah, game warden (PW4) took the exhibits from PW1 for the purposes of conducting valuation and inventory. PW1

filled a handing over certificate (exhibit P2). In his evidence, PW4 explained on how he assessed the value of the trophy and filled the valuation form (exhibit P5). Thereafter, he took the exhibit together with the appellant to the Resident Magistrate's Court, Arusha where eventually a disposal order was issued. Tracing the handling of the trophy from the time it was seized from the appellant to the time of tendering it in court, it is clear that the chain of custody did not break. This means that, the trophy which was seized from the appellant at the scene of the crime was the one which its inventory was admitted in court as exhibit P6. As demonstrated above, since the appellant was found in possession of government trophy and he confirmed that he had no permit, we agree with Ms. Mmassy that the prosecution proved the charge against him to the required standard.

In the circumstances therefore, the appellant's complaint in the first ground of appeal that the prosecution evidence was short and contradictory is unfounded. It has to be noted that whether the evidence was short is immaterial. What is required is for anyone who claims the existence of a certain fact and desires the court to give judgment, must prove that those facts do exist (see: sections 110 and 111 of the Evidence Act) as it was done by the prosecution in the current case. Besides, we have carefully gone through the record of

appeal but we could not locate any contradiction in the prosecution evidence alleged by the appellant. It is quite unsurprising that even the appellant himself failed to identify any of the contradictions allegedly existed in prosecution evidence. In short, we agree with Ms. Mmassy that this ground of appeal is baseless and thus we dismiss it.

The second ground of appeal is about failure of the trial judge to properly evaluate the evidence on record and exhibits admitted during trial. This ground of appeal was vehemently opposed by Ms. Mmassy who submitted, rightly so in our view, that the trial judge analysed the prosecution evidence against that of the appellant and arrived at a conclusion that the appellant was guilty and proceeded to convict him. We wish to point out that we perused the record of appeal and the decision of the trial court in particular and we were satisfied that proper evaluation of evidence was done by the trial court. The trial judge analysed the prosecution evidence against that of the appellant which in essence was a general denial. While making a rejoinder the appellant alleged that exhibits were not tendered during trial which we do not agree. We have demonstrated above that the prosecution tendered six exhibits and therefore we dismiss this ground of appeal for lacking in merits.

In the same vein, we wish to restate that we have gone through the record of appeal, but we could not locate any variance between the charge sheet and the evidence on record complained about in the third ground of appeal. Unsurprisingly, even the appellant was unable to show it. We therefore agree with Ms. Mmassy that this ground of appeal is as well baseless and we dismiss it.

The appellant's complaint in the fourth ground of appeal is that the investigator was not called to testify. We cannot dwell much on this ground as we have already stated that it is immaterial how many witnesses are called to testify but what is relevant is the weight attached to the evidence. Section 143 of the Evidence Act provides in clear terms that no particular number of witnesses which is required in proving a certain fact but the weight of evidence and credibility of a witness. Besides it is the prosecution that have the right to choose which witnesses to call so as to give evidence in support of the charge. (See **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015 (unreported). In our understanding and that is how it is in law, an accused person does not assume responsibilities of a prosecutor and the choice of witnesses remains solely under the domain of prosecution otherwise, proof of cases may turn to be impracticable exercise. We agree with Ms. Mmassy that since the investigator was not at the scene

of the crime to witness what had happened, he was not a material witness in the circumstances of this case. On the basis of the foregoing, we find the fourth ground of appeal without merits. We dismiss it.

The complaint in the fifth and last ground of appeal is that the trial judge failed to evaluate the evidence adduced during trial to realise that, the charge against the appellant was not proved beyond reasonable doubt. We have already dealt with the issue of evaluation of evidence while determining the second ground of appeal. We do not intend to make a repetition. Suffices here to restate that we are satisfied that the charge against the appellant was proved beyond reasonable doubt. This ground of appeal is without legal basis and thus we have no other option but to dismiss it as we accordingly do.

When we prompted Ms. Mmassy to address us in relation to the appellant's sentence, she submitted to the effect that in terms of section 60 (2) of EOCCA he deserved a sentence of twenty years in prison without a fine. As we intimated earlier, the appellant was charged with an economic offence, prosecuted and convicted in the Economic Division of the High Court.

Section 60 (2) of the EOCCA provides as follows:

"Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measures provided for under this Act;

Provided that, where a law imposes penal measures greater than those provided by this Act, the court shall impose such sentence."

Subsection (7) of section 60 the EOCCA provides for factors to be considered in assessing the sentence where mitigation is among them unless circumstances of the case do not allow. In the current case, the punishment provided under section 86 (2) (c) (ii) of the WCA under which the appellant was also charged with is not greater than what is provided under the EOCCA and thus as submitted by Ms. Mmassy, the appellant ought to have been sentenced under section 60 (2) of the EOCCA to imprisonment term of twenty years being a first offender as the prosecution had no previous criminal record on him. This term falls squarely within twenty to thirty years imprisonment provided by the law. In the premises, we find that it was an oversight on the part of the trial judge to sentence the appellant to pay fine of TZS. 336,262,500.00

together with imprisonment term. In exercise of our revisional powers under section 4 (2) of the AJA, we hereby substitute the appellant's sentence for a term of twenty years in prison.

In the upshot, save for the adjusted sentence, the appeal stands dismissed.

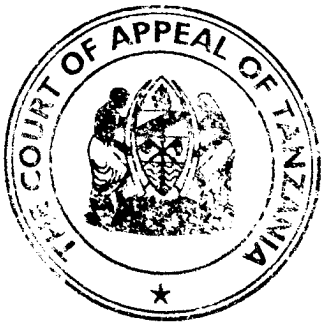
DATED at **ARUSHA** this 13th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2023 in the presence of the Appellant in person and Ms. Penina Ngotea, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL