

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)**

**CRIMINAL APPEAL NO. 18 OF 2021**

**JUMA MGENDWA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Arusha)**

**(Kobero, RM - Ext. Jur.)**

**Dated the 10<sup>th</sup> day of October, 2020**

**in**

**Criminal Appeal No. 65 of 2018**

**-----**

**JUDGMENT OF THE COURT**

12<sup>th</sup> & 23<sup>rd</sup> February, 2024

**MGEYEKWA, J.A.**

The appellant was charged and convicted on a single count of unlawful possession of a Government Trophy contrary to the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act (the Act) read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (the EOCCA). It was alleged that on 28<sup>th</sup> April, 2019 at Mrara Juu Area within Babati

District in Manyara Region, the appellant was found in possession of a Buffalo meat valued at Tanzania Shillings 4,370,000/= the property of Tanzania Government without a permit from the Director of Wildlife.

The appellant denied the charge and as a result, the prosecution paraded a total of six (6) witnesses namely; Inspector Emmanuel Gomela (PW1), Genji Bura (PW2), Emmanuel Ngoshashi (PW3), E.4615 CPL Mondu (PW4), Samwel Daniel Bayo (PW5) and D/Cpl E. 6749 Donald (PW6). The substance of their evidence is that on 28<sup>th</sup> April, 2019, while on patrol in Mrara area, PW1, received a tipoff that, at Mrara area, the appellant had meat of a wild animal. PW1 headed to the appellant's house and found his wife, whom he ordered to call the appellant. After a while, the appellant arrived and PW1 called independent witnesses; Genji Bura (PW2) and one Juma, to witness the search. Later, Emmanuel Elias Ngoshashi (PW3) arrived at the appellant's house. Then, they conducted a search into the appellant's vehicle but they did not find anything. Then, they proceeded to search his house and found a fresh wild meat in the freezer. On realizing that the appellant did not have a permit, they seized the trophy vide a certificate of seizure (exhibit PI). Subsequently, the appellant was conveyed to Babati Police Post for interrogation and investigation. The

meat was handed over to PW4, the exhibit keeper, he prepared a handing-over report (exhibit P2). Sometime later, the seized items were examined and analyzed by Samwel Bayo (PW5), a game officer who identified the Government Trophies as Buffalo meat and assigned the value of Tshs. 562,175/=. The valuation certificate was admitted as exhibit P3. PW6 drew a sketch map (exhibit P4), and since the trophy was a perishable exhibit, an order was issued for destruction of the trophy. An inventory form was tendered during trial as exhibit P5. PW6 also prepared and tendered a weigh report (exhibit P6). Based on the above prosecution evidence the appellant was accordingly charged.

The appellant protested his innocence, contending that, on the material day, he was with Sgt Emmanuel Ngoshashi driving from Kimotoro Camp to Kuro Camp within Tarangire National Park. Later, he received a call from his wife, who told him that police officers arrived at his house and wanted to search his premises. When he arrived at his premises, he found police officers. They searched his vehicle but they did not find anything. Then they entered into his house, and when he followed them, he heard them saying, "*Mboga si hii hapa.*" He was arrested and taken to Babati

police station. On 29<sup>th</sup> April, 2019, he was released on bail. On 9<sup>th</sup> May, 2019, he was arraigned before the trial court.

The trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt. Subsequently, he was convicted of the charged offence and sentenced to an imprisonment term of 20 years.

Dissatisfied with the conviction and sentence meted by the trial court, the appellant preferred an appeal to the High Court which was transferred to the Resident Magistrate's Court of Babati at Babati before the Resident Magistrate with extended jurisdiction. His attempt to reverse the decision through an appeal fell to naught as his appeal was dismissed. The first appellate court found nothing blemished in the trial court's verdict. Hence the instant appeal to the Court.

In an appeal to this Court, the appellant has filed a memorandum of appeal containing four grounds of appeal. In addition, on 31<sup>st</sup> January, 2024, he filed a supplementary memorandum of appeal containing five more grounds of appeal. However, for the reasons which will be apparent shortly, we do not intend to consider all grounds of appeal, only ground

one of the supplementary memorandum of appeal and ground three on the memorandum of appeal, in the circumstances of this matter are sufficient to dispose of this appeal. For reasons that will become apparent in due course, we will not reproduce them.

When the appeal was called on for hearing on 12<sup>th</sup> February, 2024, the appellant appeared in person and fended for himself, while, Ms. Tusaje Samwel, learned State Attorney assisted by Ms. Eunice Makala, learned State Attorney represented the respondent.

The appellant was first to kick the ball rolling. On ground one appearing on the supplementary memorandum of appeal, the appellant argued that the case was not proved to the hilt because the consent of the Director of Public Prosecutions (DPP) went missing. He stressed that the DPP is the one who is required to issue the said consent; instead, the Regional Prosecutor Officer issued the said consent. He added that since there was no valid consent against the preferred charge facing an accused person, thus, both lower courts' decisions were fatal. To augment his stance, he referred us to section 26 (3) of the EOCCA and cited the case of

**Peter Kongoli Maliwa & 4 Others v. The Republic**, Criminal Appeal No. 253 of 2020.

On the third ground on the memorandum of appeal, the appellant contended that the alleged Government Trophy was not tendered in court and the Inventory Form (exhibit P5) was procured illegally. He contended that procuring and disposing of the Government Trophy requires the trial magistrate to involve the person caught in possession of the trophy. He spiritedly argued that he was not present when the trial magistrate ordered the disposal of the perishable exhibit, and the content of exhibit P5 was not read in court. To reinforce his submission, he cited the case of **Mohamed Juma @ Mpakama v. The Republic**, Criminal Appeal No. 385 of 2017. Hence, he urged the Court to expunge exhibit P5 from the record.

On the strength of the above submission, the appellant beckoned upon the Court to allow his appeal, quash the judgment of both lower courts, set aside the sentence and set him free.

Responding, Ms. Samwel, supported the appeal. She anchored her support on legal grounds, which she found pertinent. She combined and argued together grounds number 1 of the memorandum of appeal and 3 of

the supplementary memorandum of appeal which fault the defective consent of the DPP and the procurement of exhibit P5. From the outset, she admitted that the consent to the prosecution of the appellant, which was issued by the Regional Prosecution Officer of Manyara Region under section 26 (1) of the EOCCA, is fatally defective for which the consent of the DPP was not given to prosecute the appellant in economic offences. In support of this line of argument, he referred us to a decision of the Court in **Chacha Marungu v Republic**, Criminal Appeal No.364 of 2020 (unreported). As a consequence, the trial court lacked jurisdiction to try the appellant for the economic offences, charged.

Having so done, the learned State Attorney did not opt for a fresh trial; her reason was founded on the third ground of the supplementary memorandum of appeal that there were some evidential shortcomings. She argued that, in the record, PW6 testified to the effect that he fully participated in the procurement session of the order to dispose of the perishable exhibit (exhibit P5) in the absence of the appellant. To reinforce her submission, she referred us to page 37 of the record of appeal. Ms. Samwel continued to submit that, it is plain that, the appellant was not involved in the whole process of disposing of the said exhibit. For that

reason, the disposal order was procured contrary to the law, as a result, the conviction against the appellant cannot stand. Therefore, she urged the Court to expunge exhibit P5 from the record. Ms. Samwel illustrated that after its expungement, the remaining evidence on record cannot sustain a conviction for unlawful possession of Government Trophy against the appellant.

In the circumstances, she implored the Court to invoke its revisional powers bestowed upon it to revise the proceedings of the trial court, quash the conviction and set aside the sentence.

On his part, the appellant offered no rejoinder, except that he conceded to the submission made by Ms. Samwel.

We have carefully considered the submissions from the appellant and the learned State Attorney who agree that the appeal before us is merited. At the outset, we think, this appeal can be disposed of by our determination of the legal point on whether the trial court was properly clothed with jurisdiction to hear and determine the economic offences. In doing so, we will consider ground one of the supplementary memorandum of appeal and



ground three of the memorandum of appeal together because they are interconnected.

To start, we will determine the issue whether the trial court was clothed with jurisdiction to determine the matter. It is noteworthy that any court other than the Corruption and Economic Crimes court would be clothed with jurisdiction to try an economic crimes case if there is consent to by the DPP or State Attorney duly authorized by him to issue the consent. That is a requirement of section 26 (1) of the EOCCA, which reads:-

*"Subject to the provision 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."*

As alluded to above, failure by the DPP to issue a proper consent left the subordinate court not clothed with jurisdiction to hear and determine an economic offence against the appellant. For that reason, we are constrained to find that the proceedings before the trial court in Economic Case No. 4 of 2019 and High Court Criminal Appeal No. 111 of 2019 were nothing but a nullity.

Since this aspect escaped the attention of the first appellate court, it is now our solemn duty to allow the first ground of appeal and nullify the proceedings of the trial court, quash the conviction, and set aside the sentence meted out against the appellant. Likewise, the proceedings before the first appellate court are hereby nullified, the judgment quashed and orders upholding the conviction and sentence and orders are set aside.

On the way forward, the learned State Attorney stated that the fatal procedure in the conduct of the trial weakened the prosecution case and ordering a retrial will not serve the interest of justice. We are at one with the learned State Attorney that, in the circumstance of this case, a retrial will not serve the interest of justice because the perishable exhibit which was the subject matter of this appeal was disposed of without adhering to the law. The destruction procedure of the perishable exhibit is governed by paragraph 25 of Police General Orders (PGO) 229, whose substance stipulates:

***"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]*

From the plain meaning of paragraph 25 of PGO 229 which has been reproduced above, it is mandatory for an accused to be present to witness the disposal of an exhibit which cannot be preserved. In the present case, it is plain that, the destruction procedure was not adhere to. Since the appellant's conviction was solely based on exhibit P5, there is no gainsaying that, the effect of expunging that exhibit renders the prosecution case to lack a leg to stand on. The learned State Attorney urged us to expunge exhibit P5 from the record, which we hereby do.

After its expungement, we are at one with Ms. Samwel that the remaining evidence for the prosecution would be too weak, such that a retrial order is not appropriate in this case, as the same, be a waste of time because there is trophy and there is no inventory. Discernibly, this finding suffices to dispose of the appeal. The said two grounds are sufficient to dispose of the appeal and for that reason we do not deem it appropriate to deal with the remaining grounds of appeal in the memorandum of appeal and supplementary memorandum of appeal placed before the Court.

For the aforesaid reasons, we allow the appeal and order the appellant to be released from custody unless he is otherwise held for other lawful cause (s).

It is so ordered.

**DATED at ARUSHA** this 22<sup>nd</sup> day of February, 2024.

S. A. LILA  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Judgment delivered this 23<sup>rd</sup> day of February, 2024 in the presence of the appellant appeared in person and Ms. Neema Mbwana, learned State Attorney for the Republic/Respondent, is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**