

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 89 OF 2022

*(Originated from Criminal Case No. 169 of 2021 of the District Court of Serengeti at
Mugumu)*

JUMA KITOCHO @ MAHENDE APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

24th & 31th May 2023

M. L. KOMBA, J.:

Appellant and his fellow (who is no part to this appeal) were convicted and sentenced to a maximum of twenty years over three counts charged. It was alleged by prosecution that on 08/11/2021 at Ntami area within Serengeti National Park they were found in possession of weapons and Government trophy contrary to Sections 21(1) (a) and (2) and 29(1) of the National Parks Act Cap 282 as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA).; section 24(1)(b) and (2) of the NPA.; and section 86 (1) and (2)(b) of the Wildlife Conservation Act No. 05 of 2009 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 [Cap. 200

R.E. 2002]. The said Government trophy were disposed by order of the Magistrate. Prosecution has four witnesses and 4 exhibits including inventory to prove their case.

After full trial, Serengeti District Court, found the appellant guilty, convicted and sentenced him to serve a custodial sentence of one (02) year for each offence in the first and second counts and twenty years imprisonment for the offence in respect of the third count, It was ordered the sentence to run concurrently.

Aggrieved by the decision of trial court, the appellant decided to appeal to this Court with four grounds of appeal that;

1. *That, the trial Magistrate erred in laws and facts to conviction and sentence the appellant because during the time of disposing of Government trophies I was not there, because there were not any evidence that supporting that during of disposing of Government trophies I was there as laws says like to take a photographer (Sic).*
2. *That the trial Magistrate erred in laws and Fact to conviction and sentences the appellant because there were no any Exhibit of Government trophies that produced at the trial court during this case (Sic).*
3. *That the trial Magistrate erred in laws and Fact to conviction and sentence the appellant without giving a chance for calling key witness*

for his defense during this case at the trial court because the accused were arrested the village (Sic).

4. *That the trial Magistrate erred in laws and Fact to conviction and sentence the appellant because I did not signed the inventory form that produced at the trial court as exhibit (Sic)*

When the matter was scheduled for hearing, appellant was remotely connected from Musoma Prison, stand solo unrepresented, while Respondent, the Republic was represented by Ms. Natujwa Bakari, State Attorney.

Submitting in support of the appeal, the appellant prayed this court to adopt his petition of appeal which was adopted.

Responding Ms. Natujwa for Republic informed this court that there were two accused who sentenced together but only one appealed. There after she registered respondent position that they contest this appeal before starting her submission.

She merged 1st and 4th ground about inventory form and its disposition. She submitted that PW4 explained during trial how the disposition was done and Exh. P 4 which was inventory was tendered by PW4, this is according to page 30 of typed proceedings. She further submitted that the appellant and the

Exhibit were taken with police officer to Magistrate to seek for disposition order which was issued on 16/11/2021 then the disposition was done in his presence as the names were written in Exh P4 and the disposal proceedings show the Magistrate asked them and they agree as it appears in page 2 of proceedings which is Exh P4 (inventory form) and pray this court to find the ground lacks merit.

She further submitted that the law does not require appellant to be present during disposal. She said Police General Order 225 (28) explain photograph may be taken when possible but it is not mandatory. It was her submission that the appellant did not object tendering of the Exhibit neither question witness. She concluded that failure to ask question or cross examine is taken that the appellant consented on the whole process of disposition as was in **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 (unreported).

On the second ground she submitted that prosecution tendered inventory form which was Exh. P4 and was admitted. Section 101 of Cap 283 is to the effect that the order of disposal shall be reliable proof in court. She succumbed that disposition was done before the appellant and the order was

tendered in court during trial. She prayed this court to find that the Exhibit was tendered before the Magistrate who ordered the disposal.

About right to calling witness which is ground no. 3 she submitted that the right to call his witness was given as revealed at page 32 of the typed proceedings that after ruling out appellant has a case to answer the trial Magistrate informed his right and appellant replied he will not call witness and at page 35 he prayed to close his case after failing to call witnesses.

She prays this court to find the grounds are not meritorious and uphold the decision of the trial court.

In a different note, she prayed that the 1st offence is non-existence as the related section explain no offence and pray the same to be altered. The rest of offences were proved and she prayed to be upheld.

During rejoinder, the appellant submitted that he informed the Magistrate at Serengeti that the meat was not belong to him. That makes the end of submission for both parties.

I have thoroughly gone through the petition of appeal and parties' submissions. It's the duty of this court to determine whether the appeal is meritorious. At the outset, let it be known that in criminal cases, it is upon

the prosecution to prove its case against an accused person beyond reasonable doubt and that each ground raised by the appellant must be dealt with. See **Firmon Mlowe vs. The Republic**, Criminal Appeal No. 504 of 2020 CAT at Iringa.

This being the first appeal, I will preface my determination with the position of the law as to the duty of the first appellate court which is to re-evaluate the entire evidence adduced during trial and subjecting it to critical scrutiny and arrive at its independent decision as held in **The Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura**, Civil Appeal No. 149 of 2017, CAT at Tabora (Unreported).

On first count, just as presented by State Attorney that 1st count is no longer an offence following amendment of NPA made by Misc. Amendment Act no. 11 of 2003 it is just wordings which appears in marginal note but there are no words in a relevant section to make it an offence. This court finds even the second count is not proved by failure to provide GPS of the place where appellant was arrested or failure to provide statutory boundaries of the area. To mention a name of a place (Ntami) is not enough as different places might have similar names and not necessary to be within the National Park. The Court of Appeal in **Dogo Marwa @ Sigana and Mwita vs. Republic**

(supra) insisted the importance of indicating specific area within the statutory boundaries which the appellant is arrested. For that matter the first and second count are hereby discarded from the court record.

Let me now analyse grounds of appeal as paraded by the appellant. Starting with the third ground, appellant was complaining of the right to call witness. I had a time to peruse the trial court proceedings and find at page 32 the trial Magistrate narrated the rights of the appellant and at page 33 appellant replied he don't have witness; he will not have exhibit and that he will defend his case under oath. From the record, this court is satisfied that appellant was given time to call his witnesses but he did not have any.

On first and fourth grounds as joined by the State Attorney. This court join the second ground too. Appellant complain that he did not sign inventory, he did not witnessed disposition and therefore there was no exhibit during trial. On the absence of appellant during disposition of the said trophy, as submitted by State Attorney the law is clear that what is required is when police is seeking for disposition order is the accused (in this case appellant) supposed to appear in person before the Magistrate. Thereafter the law is silent;

'101.-(1) Subject to section 99(2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation be placed at the disposal of the Director.

(2) Where the article in respect of which an order under subsection (1) is made is not an animal or trophy, the court may, if it is satisfied that it would be just to do so, attach to the order a condition that the Director shall not dispose of that article until the expiration of three months from the date of the making of that order.

(3) Notwithstanding the provisions of any written law to the contrary, on the expiration of three months from the making of an order under subsection (1) to which the condition under subsection (2) was attached, the order of the court shall be final and shall operate as a bar to any claim by or on behalf of any person claiming ownership of, or any interest in the article by virtue of any title arising before the order was made.'

Because it is not the requirement of the law, then nonparticipation of the appellant during disposition is not fatal. However, reading proceedings at the Magistrate when the Police officer was seeking for disposal order I find;

Court- Both accused persons are asked whether they have been found in possession of Government trophies mentioned in this inventory within Serengeti National Park;

Signed

RM

Both accused person-it is true we were found in possession of the Government trophies mentioned in the inventory form within Serengeti National Park.

Thumb sign of 1st accused and thumb sign of the 2nd accused

Court- both accused person admits to have been found in possession of.....

Signed

RM

The section of 'proceedings' as referred by the State Attorney was found in the case file, as an exhibit P4. Reading it repeatedly I don't find answer of the first accused neither the second accused. With due respect, what is written is a recorded speech of what the accused answered the Magistrate but not the narration of what transpired before the Magistrate. Intention of taking the accused person to Magistrate is for him to be satisfied that the

trophy before the Magistrate was actually seized from person(s) appeared before him. In the case at hand, Magistrate did not conduct proceedings and record what was said by the accused squarely to the requirement of the law under section 210 of the Criminal Procedure Act, Cap 20. Appellant complained he denied before the Magistrate to be found in possession of the trophy. This create doubt on whether appellant appeared before the Magistrate and was asked about the said Government trophy.

That being not enough, PW4 (H. 1409 DC CPL Revocatus) informed the trial court that he prepared the inventory and took accused persons to Magistrate for disposition order. Inventory was tendered and admitted as Exh P4. Reading Exh P4 closely, I find it was prepared by Epimark M. Mwijage-SP. The issue now is who prepared the inventory as one document cannot be prepared by two people. How can this court trust PW4 while Exh P4 don't have his name. The Court of Appeal in the case of **Mohamed Said vs. The Republic**, Criminal Appeal No. 145 of 2017 held that a witness who tell a lie on a material point should hardly be believed in respect of other points. See also **Zakaria Jackson Magayo vs. The Republic**, Criminal Appeal No. 411 of 2018, CAT at Dar es salaam.

On making sure that the offence was proved to the required standard, I read testimonies of witnesses. **PW2** (Wilbroad Vicent) is wildlife officer at page 21 of typed proceedings informed the trial court that he was ordered by DC Revocatus to conduct valuation of the said trophy. He valued the trophied worth Tsh, 2,790,000/ being the value of the one zebra and that the trophy valuation certificate was handled to DC Revocatus. On the other hand, **PW4** (H. 1409 DC CPL Revocatus) informed the trial court at page 30 that valuation was done by PW3. This is confirmed even in hand written proceedings. Another doubt is raised by prosecution witness, who did valuation of the said trophy.

In this case, I find difficult to believe testimonies of PW2 and PW4 as they contradicted each other on important point of valuation of the trophy. This makes their testimonies to contain lying at some points. See **Mohamed Said vs. The Republic** (supra).

Moreover, PW2 in his testimony he informed the court he was given two hindlimb of zebra and his conclusion was one zebra was killed (page 22 of the proceedings) and provide its value. His duty was to identify and value. He identified two limbs but he did not tell the court those limbs were of which

side of zebra (left or right), was it both right limbs or both left limbs or left and right one each. If both limbs were right limbs, then number of zebra killed will differ. Some information is missing which helped PW2 to conclude that it was one zebra who was killed.

This court finds one area with contradicting information and three areas with doubts hence making prosecution case to be tinted with irregularities and doubts which was not cleared. These includes Proceedings during acquisition of disposition order, preparation of inventory which was Exh. P4, preparation of valuation report and the valuation itself of Government trophy which had no specification of type of limbs.

Generally, from above analysis the prosecution case is tinted with irregularities and or doubts. The offence cannot be said to be proved while there some questions remained unanswered to the moment prosecution is closing their case. These doubts have to benefit the appellant. see **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 Of 2010 (July 2013) CAT at Mwanza.

From the above analysis this appeal is allowed, I hereby quash the conviction and set aside the sentence against the appellant **JUMA KITOCHO @ MAHENDE**. This court is aware that Economic case No. 169 of 2021 had two

accused persons. Because the appeal is succeeded on technicalities then the other accused too should benefit on this as it will be unjust for him to remain under custody as the effect of Economic case No. 169 of 2021 as he will be illegally restrained. Therefore, I order **JUMA KITOCHO @ MAHENDE** and **DANIEL MAHIRU @ MAGIGE** to be released from prison unless lawfully held.

DATED in **MUSOMA** this 31st Day of May 2023.



NK
M. L. KOMBA
Judge

Judgement delivered in chamber while the appellant was connected from Musoma Prison and in the absence of the State Attorney.

NK
M. L. KOMBA
Judge

31 May, 2023