IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 40809 OF 2023

RICHARD CHANGEI NG'OMBE

VERSUS

THE REPUBLIC

JUDGMENT OF THE COURT

04/04/2024 & 24/04/2024

Kafanabo, J.:

This is an appeal that emanates from the decision of the District Court of Serengeti in Economic Case No. 112 of 2022 dated 3rd October 2023 (Hon. J.M. Mwita, RM).

The appellant herein, Richard Changei Ng'ombe, was arraigned in the District Court of Serengeti and charged with three offences. The first offence was the unlawful entry into the game reserve contrary to sections 15(1) and (2) of the Wildlife Conservation Act [Cap. 283 R.E 2022]. The second offence was the unlawful possession of weapons in the game reserve contrary to section 17(1) and (2) of the Wildlife Conservation Act [Cap. 283 R.E 2022], read together with paragraph 14 of the First Schedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act [Cap. 200 R.E 2022]. The third offence was the unlawful possession of government trophies contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act [Cap. 283 R.E 2022] read together with paragraph 14 of the First

Schedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act [Cap. 200 R.E 2022].

In the trial court, it was alleged by the Respondent that on 13/8/2022, at Jiwe la Nairobi area in the Ikorongo Game Reserve, within the Serengeti District, in the Mara Region; the Appellant unlawfully entered into the Game Reserve without a permit of the Director thereof, previously sought and obtained.

It was further alleged by the Respondent that the Appellant was found in unlawful possession of weapons to wit; one *panga* (a machete) and eight animal trapping wires without a permit, and failed to satisfy an authorized officer that the same were intended to be used for purposes other than hunting, killing, wounding or capturing of wild animals.

Moreover, the Respondent alleged that the Appellant was also found in unlawful possession of the two fresh forelimbs of Zebra conjoined with the ribs and head with the skin thereof, being a Government trophy worth Tanzania Shillings 2,779,200/= the property of the United Republic of Tanzania.

The Appellant denied all three charges, pleas of not guilty were entered on all counts, and thus full trial was conducted. The Appellant's defense was that on Thursday, 12th August 2022, at around 6.00 p.m., he was arrested by the game rangers along the road when he was heading to his home, carrying his gallon of liquor and nothing else. He said that his arrest was disguised as a ride because the game rangers gave him a ride in their car and promised to drop him near his home. However, he was taken to the

game rangers' station/camp, where he was assaulted and demanded by the game rangers to divulge information regarding the unlawful hunters to whom he was selling his liquor. He told the game rangers that he did not know the alleged unlawful hunters. Moreover, on 13/08/2022 he was taken to the Mugumu Police Station, and on 17th August 2022, he was arraigned in court and charged with the offences mentioned hereinabove, which he denied committing.

After a full trial, the Appellant was found guilty of all three offences and was sentenced to serve one year of imprisonment as regards the offence of unlawful entry into the game reserve. He was also sentenced to serve twenty (20) years of imprisonment for the offence of unlawful possession of weapons in the game reserve and the same punishment was imposed as regards the offence of unlawful possession of government trophies. However, after due consideration of the time already spent in remand by the Appellant, the trial court ordered the Appellant to serve nineteen (19) years of imprisonment and was discharged from serving a one-year sentence as regards the first offence.

The Appellant being dissatisfied by the said decision appealed to this court against the conviction and sentence of the judgment dated 03/10/2023 based on four grounds of appeal. Given the manner in which grounds of the appeal have been written, and for comprehension purposes, the substance of the said grounds of appeal is provided herein below, as follows:

1. *That the trial magistrate erred in law and facts by convicting and sentencing the Appellant because during the disposal of the*

government trophies, the Appellant was not there, and no photograph was taken to prove his presence during the disposal of government trophies as required by law.

2. *The trial magistrate erred in law and facts by convicting and sentencing the appellant because there was no exhibit of a government trophy that was tendered by the prosecution during the trial of this case.*
3. *The trial magistrate erred in law and facts by convicting and sentencing the Appellant as the court admitted the wrong exhibit because PW1 and PW2 forced the Appellant to sign the certificate of seizure without being given a chance to explain/without being given explanation.*
4. *That the trial magistrate erred in law and facts by convicting and sentencing the Appellant because the prosecution did not prove the case beyond a reasonable doubt based on the testimony of PW1, PW2, PW3, and PW4.*

When the appeal was called for hearing, the Appellant was unrepresented and was in custody in the Mugumu Prison in the Serengeti District, and the proceedings, as regards the Appellant, were conducted remotely through teleconferencing as the Appellant's personal or physical presence could not be procured without unnecessary delays. The Appellant was consulted on the situation and was ready and agreed to conduct the proceedings via teleconferencing. The Mugumu Prison official telephone number was used and the Appellant was under the care of the prison warder - Chacha Magabe with Force No. B646 of the Mugumu Prison. The Respondent was represented by Ms. Joyce Godfrey Matimbwi, the learned State Attorney. The

proceedings were conducted in compliance with Rules 4 and 5 of the **Judicature and Application of Laws (Remote Proceedings and Electronic Recording) Rules, Government Notice No. 637 of 2021**.

The Appellant, in addressing the grounds of appeal, submitted generally that on Thursday of 12/08/2022, at around 6.00 p.m., he was arrested by the game rangers along the road when he was heading to his home, carrying his gallon of liquor. He submitted that the said arrest was disguised as a ride because the game rangers gave him a ride in their car and promised to drop him near his home.

However, contrary to the Appellant's expectation, the game rangers drove directly to their station not far from the Appellant's residence. They remanded him until the morning of 13/08/2022 when he was beaten by the game rangers because they accused him of selling alcohol to unlawful hunters, the accusation which the Appellant denied. The game rangers demanded to know places where the Appellant was usually selling the liquor to the said hunters.

It was further submitted by the Appellant that on 13th August 2022 in the evening, at around 6.00 p.m., he was taken to Mugumu Police Station in the Serengeti District and he was with his gallon of liquor when he was handed over to the Mugumu Police Station. He was then remanded there until 17/08/2022 in the morning when he was taken to the Serengeti District Court without any exhibit.

Then he was sent to the Mugumu Prison in the Serengeti District where he is remanded to date. It was the Appellant's submission that he was convicted

and imprisoned improperly without knowing the reason. He pleaded his innocence in the trial court and demanded the trial court to show him a photograph of him in the game reserve with the alleged wires or the alleged government trophy but none was produced.

It was the Appellant's submission that he was not found with any exhibit and none was tendered in court. And that the prosecution did not prove their case beyond reasonable doubt. He also submitted that all his grounds of appeal be considered as submissions in support of the appeal.

In response to the Appellant's submissions, Ms. Matimbwi, the learned State Attorney, commenced her reply submissions by opposing the appeal generally and concurred with the decision of the trial court. The learned State Attorney preferred arguing against the grounds of appeal by combining grounds one and two, and by submitting on grounds three and four together.

As regards grounds one and two of the appeal, the learned State Attorney submitted that it is not a legal requirement that a photograph should be taken during the disposal of an exhibit in order to prove that the accused was found with a government trophy. It is also not a legal requirement that the accused should witness the disposal of the government trophy. However, section 101 of the **Wildlife Conservation Act [Cap. 283 R.E. 283]** provides that where there is an application for disposal of a government trophy that cannot be preserved for a long time, the court shall order disposal of the trophy and the disposal order shall be evidence during the hearing of the matter.

Moreover, the learned State Attorney submitted that paragraph 25 of **PGO 229** provides for a procedure as regards exhibits that cannot be preserved for a long time. It is provided that the accused may be taken before a Magistrate together with an exhibit; and, where possible, a photograph may be taken. In the proceedings of the trial court, on page 40, a witness of the prosecution Detective Corporal Said, in paragraph 3, explains that on 15/08/2022 at 8.00 a.m., he took the Appellant with the exhibit/government trophy to the Magistrate to obtain a disposal order of the government trophy because it could not be preserved for a long time. Therefore, it was the learned counsel's submission that the Appellant witnessed when the disposal order of the exhibit was given, and he was heard during the issuance of the said order. It is not necessary that the accused should witness, or be present during disposal of the exhibit.

Ms. Matimbwi further submitted that the exhibit of the government trophy could not be tendered in court because it was disposed of according to law. An inventory form was tendered as an exhibit P4, and it proved that the Appellant was found in possession of the government trophy. Exhibit P4 was also sufficient evidence that the Appellant witnessed when the disposal order of the exhibit was given. The fresh meat could not be tendered in court as it was subject to speedy decay and was disposed of according to law. The Respondent prayed that grounds one and two of the appeal be dismissed for want of merits.

As regards grounds three and four, the learned counsel for the Respondent submitted that in proving the offences against the accused, the prosecution called five witnesses and tendered five exhibits all of which were admitted.

The 1st witness explained that the Appellant was arrested in the game reserve with eight (8) animal trapping wires, a machete, and a government trophy (to wit forelimbs of the Zebra conjoined with ribs and the head). GPS coordinates of the place of arrest of the accused were taken with reference No. 36M 0629945 UTM 9770872. The accused admitted that he had no permit to enter the game reserve, and thereafter a certificate of seizure was filled, signed, and admitted by the trial court as exhibit P1. Also eight (08) animal trapping wires and a machete were admitted as exhibit P2. The accused did not cross-examine the witness, and there were several decisions of the court on the implication of not cross-examining a witness. The case of Martin v. Republic, Criminal Appeal No. 428/2016 was cited in buttressing the Respondent's counsel's submissions.

The Respondent's counsel also submitted that the 2nd witness of the prosecution (the valuer of government trophies) is the one who did the valuation of the government trophy and explained that he received a government trophy (forelimbs of the Zebra and conjoined with the ribs and the head) from the police as indicated in page 31 of the proceedings. Thereafter, he did the valuation, and the value of the animal was found to be USD 1200. He prepared the valuation report which was tendered and admitted by the trial court as exhibit P3.

It was also submitted for the Respondent that the 3rd witness's (PW3's) testimony was as that of the 1st witness as they were together during the incident, and PW3 identified exhibits P1 and P2 as indicated on page 36 of the trial court's proceedings.

The learned State Attorney also submitted that the 4th prosecution's witness (PW4) was the detective who investigated the matter and his testimony is available on pages 39-42 of the proceedings. He is the one who took the accused to the Magistrate requesting the disposal order. He also instructed the valuer of the trophy and later took the accused to court. The inventory form was admitted in court and the issuance of the disposal order was witnessed by the Appellant.

The Respondent's counsel further submitted that the 5th witness (PW5) was Amani Joseph, and his testimony is available on pages 44-46 of the trial court's proceedings. He was a cartographer who was called by the investigator (PW4) and asked to draw a map of the area at which the accused was arrested. He was given a GPS code with reference number *36M 0629945 UTM 9770872*. In drawing the map, he used the Geographical Information System. He adhered to all the standards to be followed in drawing the map. It was also indicated that the area at which the Appellant was arrested is a game reserve. The map was tendered and admitted as exhibit P5.

It was the Respondent's counsel's further submission that it is not true that the Appellant was not arrested in the game reserve, the map is conclusive evidence that the accused was arrested in the Ikorongo Game Reserve, therefore, 1st offence was proved. The accused was found with the weapons (a machete and 8 animal trapping wires) in the game reserve and thus the 2nd offence was proved. The 3rd offence of being found with a government trophy was also proved because exhibit P4 showed that the Magistrate saw

the government trophy the Appellant was arrested with, and the Appellant was duly heard.

As regards, the allegation that the Appellant was forced to sign the certificate of seizure, the Respondent's counsel dismissed the same being not true because the other officers who witnessed the arrest signed the certificate and the Appellant himself signed the certificate of seizure.

Finally, the learned counsel submitted that the offences were proved beyond reasonable doubt and thus prayed that the conviction and sentence as imposed by the trial court be upheld.

Having heard the parties' submissions for and against the appeal, it is noted that they all boil down to the major ground of appeal that the Respondent did not prove his case beyond reasonable doubt. Therefore, the said grounds of appeal will be considered together with a view to determining whether the Respondent proved the offences against the Appellant beyond a reasonable doubt.

In the grounds of appeal as reproduced hereinabove, the Appellant faults the procedure adopted during the disposal of the government trophy on the ground that the Appellant did not witness the disposal of the government trophy, and that no photograph was taken to prove his presence during disposal of government trophy as required by law. He further submitted that no exhibit was tendered and admitted in proving offences leveled against him. It is also the Appellant's submission that he was forced to sign a seizure certificate and argued generally that the Respondent failed to prove the offences against him beyond a reasonable doubt.

As rightly submitted by the counsel for the Respondent, it is not a legal requirement that an exhibit should be disposed of in the presence of the accused so long as the accused is duly heard by a Magistrate before the disposal order is given and that the disposal order is given in the presence of the accused. It is not necessary that a photograph should be taken to prove the presence of the accused during the disposal of the trophy. However, the law requires, where possible, a photograph of the exhibit should be taken before its disposal. The court also agrees with the counsel for the Respondent that the seizure certificate was signed by the Appellant and the arresting officer in the presence of four witnesses and thus the issue of being forced to sign the same does not arise given that it was not proved by the Appellant during the trial.

Moreover, it is important to recall that exhibit P1 (the seizure certificate), exhibit P2 (One (01) Panga and Eight (08) animal trapping wires), exhibit P3 (Trophy valuation certificate), exhibit P4 (the inventory form and disposal proceedings thereof), and exhibit P5 (Geographical Map of the arresting area) were tendered and admitted in the trial court for the purpose of proving that the Appellant entered unlawfully into the Ikorongo Game Reserve. It was also for the purpose of proving that the Appellant was found in unlawful possession of a government trophy and unlawful possession of weapons in the game reserve.

Now, comes the major question, ***did the Respondent prove beyond a reasonable doubt the three offences charged against the Appellant?*** To answer this question, this court, being the first appellate court, is compelled to make a fresh analysis of the evidence on record. In

the case of **Kaimu Said vs Republic (Criminal Appeal 391 of 2019) [2021] TZCA 273** (7 June 2021) the Court of Appeal held that:

> *'In the event, a trial court fails to perform its duty under the law to consider the defence evidence, a High Court, being a first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact.'*

After a thorough analysis of the evidence on record, this court noted various key evidential issues that would need to be addressed by the parties for the court to satisfy itself on whether the case against the Appellant was proved beyond reasonable doubt.

The court asked the parties to address the matters/issues stated herein below which came up in the course of composing this judgment. The issues/matters were addressed by the parties on 3rd April 2024 after the same were laid bare to them. In light of the evidence on record, and submissions of the parties, the relevant matters are discussed herein below.

1. *In light of the proceedings before the trial court and the evidence on record, who, amongst the five officers (namely Ndalahwa Shija Alex, Willbroad Mgassa, Selemani Kinoko, Matiko Joseph Matiko, and Mwita Philimon) all allegedly present during the arrest of the appellant, had the expertise of taking the coordinates and who took the same at the time and place of the Appellant's arrest?*

Counsel for the Respondent submitted that the proceedings of the trial court did not specifically state who took the coordinates at the point of arresting the Appellant, but the coordinates were taken by PW1 and PW2 who have

wildlife education. It was further submitted by the learned counsel that the coordinates were taken when the Appellant was arrested and at the place where he was arrested. The Appellant simply submitted that he was not arrested in the game reserve, instead, he was arrested along the road heading to his residence and had not much to say on the point, understandably so, as taking the coordinates is a technical matter.

It is a firm view of this court that the coordinates are part and parcel of electronic evidence in terms of section 64A(3) of the **Evidence Act, Cap. 6 R.E. 2022,** read together with section 3 of the **Electronic Transactions Act, 2015.**

Moreover, section 18(2) of the **Electronic Transactions Act, 2015** provides that:

> *(2) In determining* ***admissibility and evidential weight of a data message****, the following shall be considered-*
>
> > *(a****) the reliability of the manner in which the data message was generated****, stored, or communicated;*
> >
> > *(b) the reliability of the manner in which the integrity of the data message was maintained;*
> >
> > *(c)* ***the manner in which its originator was identified;*** *and*
> >
> > *(d) any other factor that may be relevant in assessing the weight of evidence.*

Section 3 of the **Electronic Transactions Act, 2015** defines an originator as follows:

> *"originator"* ***means a person from whom the electronic communication purports to have been sent or generated****;*

The issue above which the parties addressed requires the identity of the officer who took the coordinates *(who, in terms of section 3 of the Electronic Transactions Act, is the Originator)*, and whether the coordinates were taken by the person with a prerequisite expertise. The court also, before admitting electronic evidence and according weight to the same, should consider the factors mentioned in section 18(2) of the **Electronic Transactions Act** as reproduced above. Moreover, the decision of the Court of Appeal in **Stanley Murithi Mwaura vs Republic (Criminal Appeal 144 of 2019) [2021] TZCA 688 (22 November 2021)** is relevant.

Turning to the evidence on record, the Respondent neither led nor adduced any evidence regarding the person who took the coordinates when arresting the Appellant, at the place where the Appellant was arrested. The trial court's proceedings, on page 23, indicate that PW1 testified that after they had arrested the accused they took GPS coordinates of the area with reference number *36M* ***0629945*** *UTM* ***9770872.*** However, PW1 did not mention who, amongst five of them, took the relevant coordinates of the Appellant's point of arrest.

The same applies to the testimony of PW3 available on page 37 of the trial court's proceedings, where he testified that, after they had arrested the appellant they took GPS coordinates with reference number *36M* ***0229045***

UTM ***9770872***, again no body is specifically mentioned to have taken the coordinates. The obvious and deplorable is that these two sets of coordinates, even though were meant to refer to the same geographical point of the Appellant's arrest in the game reserve, yet, they are different, I will return to this shortly in the items below.

Moreover, given the sensitivity and fundamental role of GPS coordinates in identifying the geographical location of the Appellant's arrest, or any other suspect as the case may be, and taking into account the fact that the said coordinates are used to prepare maps upon which conviction of the accused/suspect is based on offences committed within the national parks and/or game reserves; their manner of taking, when taken, devices used to take them, the workability and accuracy of recording of the relevant devices, knowledge and expertise of persons using the devices, and taking the coordinates cannot, in any manner whatsoever, be underestimated, instead, they are of paramount importance. Otherwise, letting loose the grip, would be to allow and accept haphazard and arbitrary working methods by law enforcement agencies which is tantamount to blatant disregard of proper administration of justice.

In the case of **Mohamed Enterprises (Tanzania) Limited vs Tanzania Railways Corporation and Another (Civil Case 7 of 2021) [2023] TZHC 17953 (24 May 2023)** this court (his Lordship Mambi, J.) held that:

> *"In my view the manner of authenticating electronic evidence depends on the type of evidence and the availability of witness with knowledge.*

In other words, ***the authenticity of computer-generated records or any electronic evidence is generally shown through the testimony of a witness with knowledge of how the records are recorded, stored and maintained***."

In light of the above authorities and as observed hereinabove, no evidence was given by any witness who took the coordinates, or with knowledge as to who and how the coordinates were taken. It is, therefore, this court's view that the coordinates whose originator (taker and recorder) was not identified, and thus unknown, cannot be relied upon as evidence against the Appellant. The said coordinates are also unreliable and could not be the basis upon which a map was drawn and later used as an exhibit in court. It follows that the coordinates allegedly taken by the said five officers are unreliable and have no evidential value.

2. *According to the proceedings before the trial court by which device the coordinates were taken and how were the coordinates recorded?*

As already intimated in item (1) above, the Respondent's evidence, as captured in the trial court's proceedings, does not show what kind of device was used to take and record the coordinates. Moreover, the evidence does not show how the said coordinates were recorded for safekeeping in order to ensure that they remain intact and integral.

The learned State Attorney submitted that the coordinates were taken by using a 'GPS.' However, it is important to note that the long form of the 'GPS' is the Global Positioning System. It is also common knowledge that GPS is

not a device, but a system *(see https://www.civil.iitb.ac.in/~dhingra/ce152_files/ce152_MNK.pdf, accessed on 23/04/2024 at 09.00 p.m.)*. There are GPS devices used to take GPS coordinates and are of various kinds, but generally known as GPS receivers or GPS navigation devices. The importance of a device that is used to take and record electronic evidence is stated in section 18(3) of the **Electronic Transactions Act, 2015** which provides that:

> *(3) The **authenticity of an electronic records system in which an electronic record is recorded or stored shall,** in the absence of evidence to the contrary, be presumed where-*
>
> > *(a) **there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly** or, **if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system**;*
> >
> > *(b) **it is established that the electronic record was recorded or stored by a party to the proceedings** who is adverse in interest to the party seeking to introduce it; or*
> >
> > *(c) **it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.***

Moreover, in the case of **Stanley Murithi Mwaura vs Republic (Criminal Appeal 144 of 2019) [2021] TZCA 688 (22 November 2021)** the Court of Appeal held that:

> *"In the circumstances, we hold that tendering exhibits P10, P11 and P16 was proper in terms of sections 64A (2) and 78A (2) of the Evidence Act read together with section 18(2) of the ETA* ***especially after the banking officials had testified on the soundness of their respective banking computer systems from which the documents were electronically stored and mechanically generated from by printing****"*

Based on the foregoing legal requirements, and since the Respondent did not lead any evidence on the soundness of the devices used to take the said coordinates or the operating computer systems thereof, and taking into account the fact that there is no evidence on how the coordinates were taken and recorded and who recorded them, it was unsafe and improper for the trial court to have relied on the coordinates improperly taken in convicting the Appellant for the offences he was charged with.

3. *What is the audit trail and/or chain of custody of the coordinates taken to prove the area of the Appellant's arrest?*

When the learned state attorney was called upon to address the issue of the coordinates' audit trail, she submitted that the record is silent on how coordinates were kept after being taken. This court agrees with the learned State Attorney because the Respondent's evidence is silent on how the

coordinates were passed from the five officers, all allegedly present at the point of arrest, to other officers including PW4 (the case investigator) and PW5 (the cartographer).

PW5, who also did not testify about his expertise in drawing geographical maps, testified to have drawn the geographical map of the Appellant's arrest based on the coordinates given to him by PW4, an investigator of the case, who was not at the point/place where the Appellant was, allegedly, arrested. There is no evidence on how the said investigator came to know the purported coordinates whilst he was not at the place where the Appellant was arrested.

Section 18(2) of the **Electronic Transactions Act**, **2015** provides that:

> *(2) In determining* ***admissibility and evidential weight of a data message****, the following shall be considered-*
>
> > ***(a) the reliability of the manner in which the data message was generated, stored or communicated;***
> >
> > ***(b) the reliability of the manner in which the integrity of the data message was maintained;***
> >
> > ***(c) the manner in which its originator was identified; and***
> >
> > ***(d) any other factor that may be relevant in assessing the weight of evidence.***

In light of the above section, the law requires the manner in which coordinates were generated, stored, and communicated from one person to

another to be established. Also, the manner in which the integrity of the said coordinates was maintained and the manner in which its originator was identified should be categorically provided. All of which their reliability must also be tested. In the present case, no evidence was led to prove any of the above requirements as regards the determination of admissibility and evidential weight of the relevant coordinates. This means that the whole audit trail of the coordinates allegedly taken by the respondent's witnesses was not established in the trial court.

In addition, section 19 of **the Electronic Transactions Act**, provides that:

> ***An electronic communication shall be treated to be from originator if it is sent by-***
>
> ***a) the originator;***
>
> ***(b) a person who is duly authorised by the originator to communicate in electronic form in respect of that data message; or***
>
> ***(c) computer system programmed by or on behalf of the originator to operate automatically.***

As intimated earlier, the trial court record does not indicate that the Respondent identified the originator of the coordinates. It follows that the Respondent failed to show that the coordinates were communicated from the originator, or by a person duly authorized by the originator to communicate the coordinates to any of the Respondent's witnesses. Further, there was no explanation as regards any computer system programmed by

the originator to operate automatically that would send the coordinates to the Respondent's witnesses including PW5 who drew the geographical map.

In the case of **Mohamed Enterprises (Tanzania) Limited vs Tanzania Railways Corporation** (supra), it was held that:

> *"It is trite law that the authenticity of computer-generated and computer-stored information as part of electronic evidence* ***is potentially open to security vulnerabilities in operating systems and programs that could give rise to threats to the integrity or authenticity of the digital information. In order for evidence such as electronic evidence to be admissible in court, the proponent/witness of the evidence must establish that no aspect of the evidence is suspect of untrustworthy****."*

It was further held that:

> *"In my view,* ***for electronic evidence to be deemed reliable, there must be nothing that casts doubt about how the evidence was collected and subsequently handled****."*

This court fully subscribes to the above holding as regards electronic evidence. Consequently, in light of the above statutory provisions and case law, it is safe for this court to conclude that the Respondent failed to establish that the coordinates were procured by the originator, and there is no proof that the said coordinates were sent from the originator to the Respondent's witnesses. It is also crystal clear that there is no reliable

information on how the said coordinates were generated, recorded, stored, communicated, and maintained for them to be accorded weight as evidence proving the arrest of the Appellant in the game reserve.

Therefore, it is harmless to settle that no proper coordinates were taken during the Appellant's arrest, and even if were properly taken, which is not the case in this matter, there is no established audit trail, or rudimentarily, there is no chain of custody of the said coordinates that was established by the Respondent. This casts serious doubt on the Respondent's case.

4. *The coordinates mentioned by PW1 (i.e. 36M 0629945 UTM 9770872, see page 23 of the proceedings) and PW3 (i.e. 36M 0229045 UTM 9770872, see page 37 of proceedings) are different.*

The learned State Attorney submitted that the correct coordinates are those indicated on the map, exhibit P5, and the coordinates mentioned by PW3 were simply slips of the pen. The Appellant, being a layperson, left the issue to the court for determination.

This court is of the view that the Respondent's counsel's submission is acerbic to swallow, taking into account the fact that PW2 testified to have been given the coordinates by PW4 (D/Cpl Said) who did not explain how the said coordinates landed in his knowledge whilst he was not the originator.

Moreover, as intimated in item 1 above, PW1 and PW3, who both testified to have taken the coordinates of the area where the Appellant was arrested, could not provide the same set of coordinates in their testimony. It is appalling that these two coordinates, even though referring to the same

point of the Appellant's arrest, yet, they are different and thus could not be relied upon in generating a map upon which the conviction was based.

This difference in coordinates by the officers who testified to have been at the point of the Appellant's arrest at the time of arrest casts even more doubt on the veracity/accuracy of the coordinates and the whole aspect of the audit trail/chain of custody of the coordinates from the point of arrest to the cartographer (PW5). It also raises doubts as to whether the Appellant was arrested in the alleged Ikorongo Game Reserve.

The demonstrated variation in coordinates regarding the Appellant's area of arrest takes us back to what has been discussed above on how the said coordinates were generated, recorded, stored, communicated, and maintained for them to be accorded weight as evidence.

It is thus the conclusion of this court that the said coordinates are unreliable and there is no way the court could choose much more reliable coordinates between that mentioned by PW1 and the other one mentioned by PW3 given that both witnesses were present during the alleged Appellant's arrest, then arrested the appellant and they took the alleged coordinates.

5. *The first set of coordinates be it mentioned by PW1 or PW3 is not, at all, in the area covered by the Geographical Map (Exhibit P5) used to prove that the appellant was arrested in the Ikorongo Game Reserve*.

The Respondent's learned counsel submitted that the coordinates provided by the witnesses are for the area available in the game reserve, and the map shows that the Appellant was arrested in the game reserve. However, the

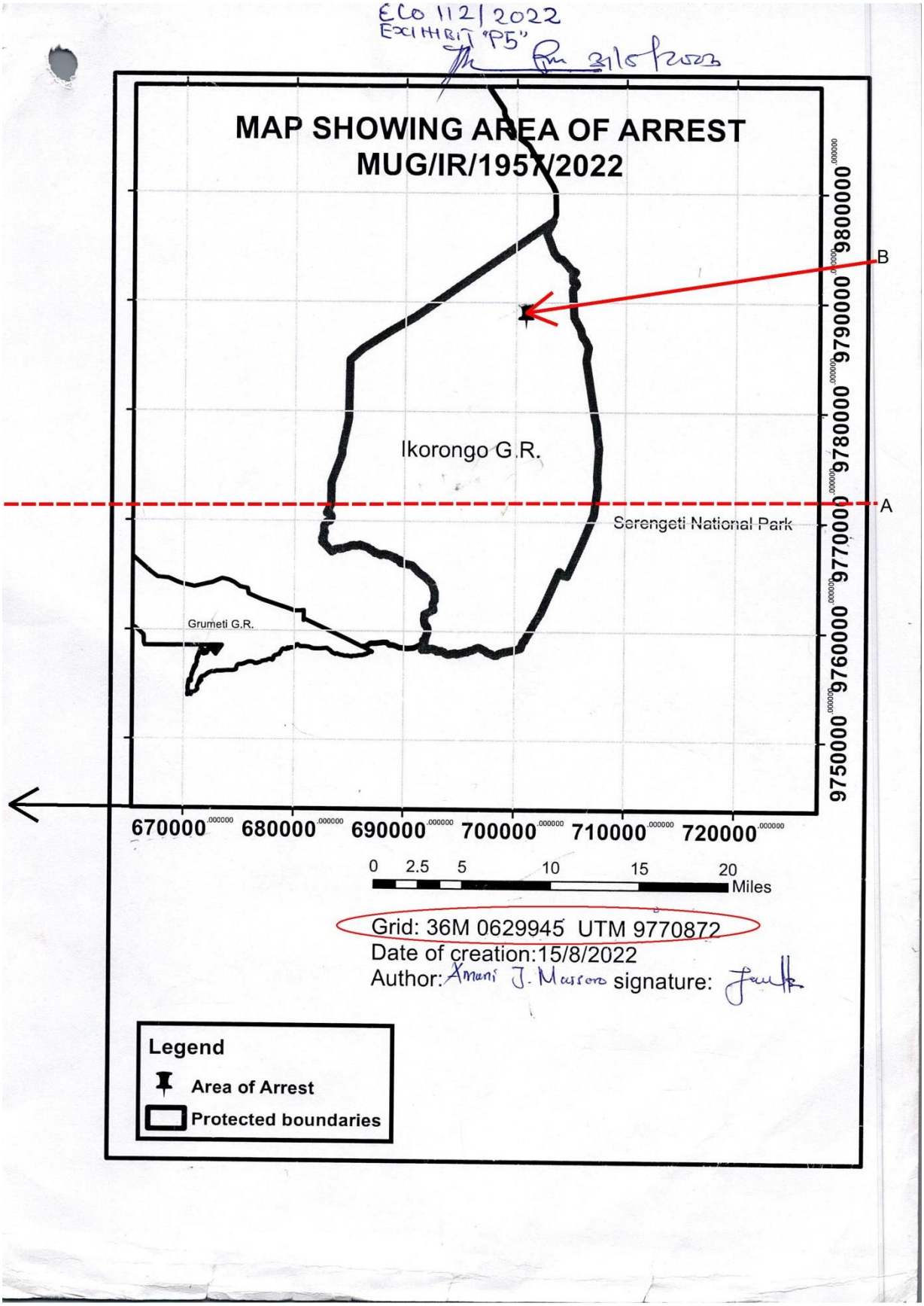
learned counsel submitted that she was not in a position to explain the contents of the map because she had no expertise. The Appellant, on the other hand, left the matter for the court to determine.

Given the nature of the matter, for clarity purposes and in the interest of justice, this court is compelled to discuss the said coordinates. The relevant coordinates used by PW5 to generate a geographical map (exhibit P5) are *36M* ***0629945*** *UTM* ***9770872***.

In the said coordinates 36M stands for the zones in the Global Positioning System and the UTM stands for the Universal Transverse Mercator, a system that is designed to provide a means of representing each point on the Earth by using a set of coordinates. (see *https://www.researchgate.net/publication/317847985_Issues_with_Extending_a_UTM_Zone*, accessed on 22/04/2024 at 12:30).

The first set of coordinates is *36M* ***0629945*** *representing the longitudes and the second set is UTM* ***9770872*** *representing the latitudes*. As alluded herein above, 36M and UTM are indicators of zones and systems used in identifying the coordinates. The remaining digits that are ***0629945*** *and* ***9770872*** represent the specific coordinates as they appear on the map, and if properly traced will lead the map reader to a meeting point of the two sets of coordinates. The point where the lines of latitude and longitude meet, as narrowly stated by PW5 in his testimony, becomes the point of the Appellant's arrest. For ease of reference and comprehension, the relevant exhibit P5 is reproduced herein below.

ECO 112/2022
EXHIBIT "P5"
31/8/2023



Before proceeding with the analysis of the geographical map (exhibit P5) it is vital to point out that the dashed line marked 'A' and the arrow marked 'B' have been introduced by the court for demonstration purposes and not part of the map as an exhibit.

Now, reverting to and looking at exhibit P5 (the geographical map) reproduced above, the relevant coordinates (as regards the first set of coordinates) commence with coordinates with digits 670000 and end with digits 720000 *(see the digits at the bottom of the map)*. Moreover, all coordinates of the first set, as indicated in the map, have six (6) digits. To the contrary, the evidence on record shows that coordinates 36M **0629945** is the first set of *coordinates used to draw the map*, but in exhibit P5 there are no coordinates commencing with or about to match coordinates 0629945 allegedly used to generate the geographical map, and yet, it has seven digits which is quite different from the coordinates available on the geographical map.

Moreover, if we have to follow the said coordinates used to generate a geographical map as indicated on the map *(see the circled digits below the map),* the relevant set of coordinates will meet outside the whole area covered by the purported map. This is due to the fact that tracing coordinates 0629945, if at all it exists, in the global positioning system would require an inclination to the western part of the area which is not covered by the map *(see an arrow at the bottom left of the map).* This is because, as earlier observed hereinabove, the coordinates (especially the longitudes) covering the mapped area commence with coordinates with reference numbers 670000 and end with 720000. Therefore, the area to be located by

coordinates 0629945 is, by far and without a doubt, different from the mapped area.

Further, the coordinates representing latitudes, that is *9770872* are available far below the area pinned on the map as the point of arrest *(i.e. the area around the dashed line marked 'A' on the map)*. The area of arrest as marked on the map is a line with latitudes commencing with coordinates number 9790000 which is much in the northern part of the map *(see the point tagged by an arrow and marked 'B' on the map)*, but the area with the actual coordinates (i.e.*9770872) is on the southern part of the map as indicated by the dashed line marked 'A').*

This inaccuracy of coordinates as indicated on the map is extreme, and it does not make sense how a person whose duty and/or profession is drawing geographical maps can make such a blatant mistake whilst knowing that the person's liberty is at stake. In light of the evidence adduced in the trial court, it is crystal clear that the map was negligently prepared. The serious mistakes committed in preparing the geographical map do not require a cartographer, or a surveyor to notice that the purported area of the arrest as marked in the map is, by far, different from what would have been the point of arrest if the proper map would have been drawn as per the alleged coordinates as identified by the arresting officers. To say the least, the geographical map (admitted as exhibit P5 in the trial court) is a sham. Therefore, the same should not have been relied upon by the trial court in convicting the Appellant.

Under the circumstances, and in light of the above considerations and discussions in items 1, 2, 3, 4, and 5 above, all the coordinates admitted by the trial court as part of the Respondent's evidence are hereby expunged from the record for being inaccurate and unreliable.

6. *Given the doubts surrounding the coordinates allegedly used to draw a map, and the map being electronic evidence, what is the authenticity of the map relied upon by the trial court in proving the appellant's area/point of arrest?*

The Respondent's counsel submitted that the records of the trial court are silent on the authenticity of evidence of coordinates and the map itself as electronic evidence, and could not explain the same at the stage of appeal. The Appellant, on the other hand, left the matter for the court to determine.

This court is of the view that it is clear that the coordinates, the basis of which a map was generated, were taken electronically by an electronic device. Then the relevant coordinates were processed through software installed in a computer and generated a map. As testified by PW5, the map was made by using a Geographical Information System, this makes it undoubtedly clear that a geographical map was electronically generated and thus electronic evidence in terms of section 64A(3) of the **Evidence Act, Cap. 6 R.E. 2022** read together with section 3 of the **Electronic Transactions Act, 2015.**

However, PW5 did not adduce evidence on the validity, accuracy, and reliability of the coordinates used to generate the geographical map he prepared. Moreover, PW5 did not explain how the coordinates were used to

determine/establish the Appellant's area of arrest on the map. That is, what reliable process was undertaken electronically to generate an authentic map to be relied upon as electronic evidence?

As already discussed earlier in this judgment, the trial court proceedings do not indicate how the said coordinates that were used to prepare exhibit P5, a geographical map, were generated, recorded, stored, communicated, and maintained for them to be accorded weight as evidence. This means that the coordinates were taken in violation of sections 18(2), 18(3), and 19 of the **Electronic Transactions Act, 2015** and their authenticity is questionable.

In the case of **Mohamed Enterprises (Tanzania) Limited vs Tanzania Railways Corporation** (supra), the term authenticity in electronic evidence was defined as follows:

> *"Briefly, the term "authenticity" in an electronic environment is used to describe whether* ***the document or data is genuine or the document (in the case of digital evidence/data) matches the claims made about it.*** *In other words,* ***authenticity is the capacity to prove that the digital object or evidence is what it purports to be****.* ***This means that authenticity is related to an assentation that data has not been altered/manipulated, replaced, or corrupted.*** *In other words,* ***the authenticity of a digital document is a test checking whether the document is, in fact, what it claims to be and this test is a pre-condition to the goal of admissibility.*** *In this regard,* ***Trustworthiness of e-evidence is built on the foundation of two qualitative***

dimensions, namely, reliability and authenticity of such evidence."

In light of the above definition which is fully subscribed to, there is no iota of doubt that the authenticity of the coordinates used to prepare a map. exhibit P5, is highly questionable given the discussions in items 1, 2, 3, 4, and 5 above. The said coordinates were either altered/manipulated, replaced or corrupted. It goes without saying that the map prepared on the basis of unauthentic coordinates is also not authentic and should not have been admitted as an exhibit.

Moreover, since exhibit P5, was prepared on the basis of the incorrect and unreliable coordinates, the Respondent through PW5 was, at least, supposed to comply with section 18(4) of the **Electronic Transactions Act, 2015** which provides that:

(4) ***For purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored,*** *with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record.*

PW5, however, did not explain any set of standards or procedures on how the relevant coordinates were subjected to, for them to be considered reliable. He did not explain how the geographical map was made, and how

coordinates which seem to meet outside the area covered by the map, eventually met on the area covered by the map to establish the purported Appellant's area of arrest.

It was therefore unsafe to rely on the said exhibit P5 in convicting the Appellant whilst the process undertaken to generate the map and identify the area of arrest was not properly explained.

Following the above, exhibit P5 is hereby expunged from the record for being unreliable as it was prepared and admitted in clear violation of the law.

7. *The inventory form (Exhibit P4) relied upon by the Respondent and the trial court to prove that the Appellant was arrested with a government trophy in the Ikorongo Game Reserve contradicts Exhibits P1 and P5 and the oral testimonies of PW1, PW3, and PW5.*

It was submitted by the Respondent's counsel that it is true that the inventory form (exhibit P4) indicates a place of arrest different from that mentioned by the witnesses. The proceedings on the inventory form indicate that the Appellant was arrested in the Serengeti National Park, but witnesses testified that the Appellant was arrested in the Ikorongo Game Reserve. The learned counsel further submitted that the Ikorongo Game Reserve is within the Serengeti National Park. It was the Respondent's view that the different place of arrest indicated in Exhibit P4 was a human error made by the Magistrate who recorded the proceedings for the disposal order of the government trophy. The Appellant simply submitted that he was not arrested in the game reserve and was not arrested with any government trophy.

It is this court's view that the proceedings regarding the disposal of a government trophy on the overleaf or reverse side of the inventory form (exhibit P4), before the Magistrate, indicates that the Appellant was found with a government trophy mentioned in the inventory form in the Serengeti National Park, not at Jiwe la Nairobi in the Ikorongo Game Reserve as described in the charge sheet. The fact that the accused was found in possession of the government trophy in the Serengeti National Park was observed and mentioned three times in the relevant proceedings, and there was no mention at all of the name of any game reserve. Under the circumstances, the issue of human error as suggested by the learned state attorney does not arise.

Therefore, the inventory form contradicts the contents of the charge sheet which indicates that the Appellant was arrested with weapons and the government trophy at Jiwe la Nairobi in the Ikorongo Game Reserve.

The said inventory form (exhibit P4) also contradicts the contents of the seizure certificate (exhibit P1) which also indicates that the weapons and the government trophy were seized at Ikorongo-Jiwe la Nairobi.

Exhibit P4 also contradicts exhibit P5, the geographical map of the area where the Appellant was arrested. The map shows that the accused was arrested within the Ikorongo Game Reserve whilst exhibit P4 indicates that the appellant was arrested in the Serengeti National Park.

Exhibit P4 also contradicts the testimonies of PW1 who testified that the Appellant was arrested at a place known as Jiwe la Nairobi in the Ikorongo Game Reserve. PW3's testimony was vague in respect of the area where the

Appellant was arrested. He testified that on 13/08/2022 at 22.00 hours they (himself and other officers mentioned earlier in this judgment) were at Ikorongo and Grumeti reserves and they saw a person in the bush they surrounded the bush and arrested the Appellant. He did not say in which game reserve between Ikorongo and Grumeti the Appellant was arrested and the exact area of arrest was not stated.

PW5's (the cartographer's) testimony also indicates that the Appellant was arrested in the Ikorongo Game Reserve according to the map he drew. Therefore, there is a contradiction between the Respondent's witnesses and the relevant exhibits on the exact area of the Appellant's arrest. The cumulative effect of the contradiction and inconsistencies of evidence will be demonstrated shortly in item (08) below.

8. *The testimonies of PW1, PW3, and PW4 have inconsistencies on the government trophy found with the appellant, that is Zebra and Wildebeest.*

As already observed above, PW1 testified that the Appellant was arrested with two fresh forelimbs of Zebra still conjoined with ribs and head with the skin thereof, and on 15/08/2022 he was called by a police officer from the Mugumu Police Station by the name 'Said' and he went to the police station and took the government trophy (two fresh forelimbs of Zebra still conjoined with ribs and head with the skin thereof) to the National Park where he disposed them by scorching.

However, PW3 testified that they were called by a police officer from the Mugumu Police Station by the name Said and he went to the police station,

and the government trophy (two fresh forelimbs conjoined with ribs and the head of wildebeest) was handed over to them for disposal.

PW4 testified that after noting that a government trophy was part of the exhibits, on the same day around 09.00 he called the expert of trophy valuation and identification and the government trophy was Wildebeest valued at TZS 2,779,200/=.

The learned State Attorney when invited to address the court on inconsistencies of the evidence, submitted that the testimony of PW2, the trophy valuer, should be given weight because he is the expert in identification and valuation.

Conversely, as noted above, there is a very clear inconsistency of evidence on the type of government trophy the Appellant was arrested with; was it Zebra or Wildebeest? Further, the evidence of PW2 is not reliable because the trophy valuation was done over the government trophy given to PW2 by PW4 who was investigating the case, the said investigator testified to have handed over a wildebeest to PW2. The said government trophy was taken to and handed over to the police by PW1 and PW3 who arrested the Appellant but they differed on the type of animal the Appellant was arrested with, whilst both were present during the Appellant's arrest.

In the case of **Matera Simango @ Masana vs Republic (Criminal Appeal 517 of 2019) [2021] TZCA 621 (29 October 2021)** it was observed by the Court of Appeal that:

> *'Similarly, we entertain no doubt that the descriptive inconsistencies and contradictions in the testimonies of the prosecution witnesses as*

reflected in the evidence reproduced above, is material and went to the root of the prosecution case. It is indeed, unfortunate that the two courts below did not thoroughly address those 10 inconsistencies and contradictions which are apparent in the prosecution witnesses' evidence and resolve it as required by law. By way of emphasis on the importance of resolving contradictions and inconsistencies, we wish to reiterate what the Court stated in ***Mohamed Said Matula v. Republic [1995] T.L.R. 3*** *that: -*

> *"Where the testimony of witnesses contains inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter. "*

It was further held that:

> *'In the final analysis, considering the variance between the allegation in the charge and the evidence; the material inconsistencies and contradictions in the prosecution evidence, and the unreliability of the exhibits as we have alluded to above, it cannot be concluded that the case against the appellant was proved beyond reasonable doubt as found by the trial court and confirmed by the first appellate court.*

Given the inconsistencies and contradictions of the Respondent's witnesses on the kind of the government trophy the Appellant was arrested with, and what was the area of his arrest as demonstrated in item (07) herein above,

and on the strength of the above authority, it is view of this court that the inconsistencies and contradictions are material and go to the root of the Respondent's case. Therefore, it was unsafe for the trial court to convict the Appellant for the offence of unlawful possession of the government trophy based on the evidence on the record as it is clouded with grave doubts.

9. *The proceedings for the disposal of the government trophy/exhibit written on the overleaf/reverse side of the inventory form and dated 15/08/2022 do not show that the alleged government trophy was presented to and made available in court during the proceedings for the disposal of the government trophy. Under the circumstances, was the Appellant properly heard before the disposal order of the exhibit was issued by the Magistrate?*

The learned State Attorney submitted that, as regards the proceedings for disposal of a government trophy, section 101 of the **Wildlife Conservation Act [Cap. 283 R.E. 283]** does not prescribe the procedure to be followed. The practice is that the accused is taken to the Magistrate and the accused is asked whether it is true that he was found with the government trophy. It was further submitted that there is a lacuna in the **Wildlife Conservation Act** (supra) on how to conduct those proceedings. The case of **Buluka Leken Ole Ndidai & Another vs Republic (Criminal Appeal No. 459 of 2020) [2024] TZCA 116** (21 February 2024) was cited in support of the submission. The Appellant on the other hand, as intimated earlier, had left the matter for the court to determine.

The relevant section 101(1)(a) of the **Wildlife Conservation Act** (supra) provides as follows:

101.-(1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-

(a) prior to commencement of proceedings, order that-

(i) any animal or trophy which is subject to speedy decay; or

(ii) any weapon, vehicle, vessel or other article which is subject of destruction or depreciation,

and is intended to be used as evidence, be disposed of by the Director;

In light of the said section, this court agrees with the counsel for the Respondent that the said section does not prescribe the procedure that would lead the court to grant a disposal order of the government trophy. However, that should not be the excuse justifying the violation of the suspect's right to be heard.

In the case of **Buluka Leken Ole Ndidai & Another vs Republic (Criminal Appeal No. 459 of 2020) [2024] TZCA 116,** the Court of Appeal of Tanzania had an opportunity to consider a situation whether the person accused of being found with the government trophy has to be present when the prosecution/investigator seeks disposal order of the government trophy from a Magistrate. The Court of Appeal held that:

Nonetheless, it is worthwhile to note that indeed, there is a lacuna in the law. Presently, there is no statutory procedure providing for the proceedings to put into effect the requirements of section 101(1) and (2) of the WCA and paragraph 25 of PGO No. 229, which provisions

are necessary for procuring a disposal order for a perishable exhibit. In our view, as an interim measure pending promulgation of any rules of procedure for that purpose, it will be sufficient for a magistrate before whom an order to dispose of a perishable Government trophy or trophies, to make such order, provided that; ***one,*** *the prayer to issue the order to dispose of perishable exhibits may be made by the investigator or the prosecution informally before a magistrate in chambers;* ***two****, if the order is likely to be relied upon in any future court proceedings against any suspect, that suspect must be present at the time of making the prayer and;* ***three,*** *the suspect must be asked as to his comments, remarks or objections as regards the perishable exhibits sought to be destroyed.* ***Four,*** *if that suspect does not make any comments, remarks or objections, the magistrate shall record the fact that, the suspect was invited to make any comments, remarks or objections, but he opted to make none.* ***Five,*** *if the suspect makes any comments, remarks or objections, they shall be recorded as appropriate either on the reverse side of the Inventory Form or on any separate piece of paper or papers and shall be signed by the magistrate.*

This court now is faced with almost a similar situation as regards procedure providing for the proceedings to put into effect the requirements of section 101(1) and (2) of the **Wildlife Conservation Act** (supra) and paragraph 25 of PGO No. 229, which provisions are necessary for procuring a disposal order for a perishable exhibit.

However, there is a distinction between the above-referred case, as decided by the Court of Appeal, and the present case. In this case, the proceedings before the Magistrate before whom the exhibit's disposal order was sought and obtained, indicate that the suspect was present before the Magistrate, then questioned by the Magistrate and his responses/comments were recorded.

Conversely, in this case, the proceedings as regards disposal of the government trophy do not indicate that the relevant exhibit (a government trophy) was presented to the Magistrate in the presence of the suspect when the suspect was being questioned as regards the said exhibit. Paragraph 25 of **PGO 229** provides that:

> *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*.

The above provision requires that perishable exhibit(s) together with the suspect/accused should be brought before the Magistrate for noting before a disposal order is given.

After being probed by the court, the learned State Attorney submitted that the proceedings are silent on whether the government trophy was presented to the Magistrate and made available during the proceedings that were

conducted with a view to obtaining a disposal order for the said government trophy.

It is undoubtedly clear that exhibit P4 is the inventory form with the particulars of the government trophy allegedly found with the Appellant when he was arrested, and also contains the proceedings for the disposal of the said exhibit. According to the testimony of PW4, on 15/08/2022, the Appellant was taken by PW4 to the Magistrate who issued the disposal order of the government trophy.

Nevertheless, as earlier observed, it is not stated in the said exhibit P4 whether the government trophy was presented to the Magistrate and made available during the proceedings for the Appellant to see the government trophy which the learned Magistrate was about to order its disposal. (See the cases of **Samuel Saguda @ Sulukuka & Sahili Wambura vs. Republic, Criminal Appeal No. 422 "B" of 2013 (unreported) and Mohamed Juma @Mpakama vs Republic (Criminal Appeal 385 of 2017) [2019] TZCA 518 (26 February 2019**))**.** This means that the Appellant was not in a position to verify that the government trophy, allegedly brought to the Magistrate, was the same as that he was allegedly arrested with.

Moreover, it was important that the Appellant had to be given a right to satisfy himself that the government trophy presented before the Magistrate matched the particulars of the government trophy as filled in the inventory form. Likewise, the Magistrate should have ensured and certified that the particulars of the trophy as presented before him/her, in the presence of the

accused, matched the exact records of the inventory form as filled by the investigator, prosecutor, or any other relevant officer. However, that does not feature in the relevant proceedings.

Besides, the purported proceedings for the disposal of the government trophy allegedly found with the Appellant were not preceded by any factual background from the investigator who presented the accused before the Magistrate. The factual background was crucial in the proceedings because the same would have made the learned Magistrate understand the background of the matter and thus be in a good position to inquire into the matter and properly examine the Appellant whilst armed with the knowledge as to why the Appellant was before the court.

The learned Magistrate simply started asking the Appellant a question about whether he was found in possession of a government trophy mentioned in the inventory form within the Serengeti National Park. How did the learned Magistrate know that the suspect/appellant was arrested within the Serengeti National Park with a government trophy? It is not clear. This means that the learned Magistrate considered the extraneous matters not formally on record because the investigator did not, albeit briefly, address the Magistrate on the preceding events leading to presenting the Appellant before the Magistrate, taking into account the fact that the inventory form (exhibit P4), as filled by the investigator, did not indicate the place where the Appellant was arrested.

It is this court's view that the Appellant was not properly heard before the learned Magistrate who issued the disposal order for the government trophy.

The proceedings were simply dictated by the Magistrate without letting the suspect/appellant know the nature of the proceedings before him and the consequences thereof. It is not indicated who initiated the proceedings before the Magistrate and for what purpose and no explanation was given to the suspect/Appellant.

It is also important to point out that, it is the right of the accused, and it is just and fair if the accused is taken to a Magistrate for purposes of seeking a disposal order of an exhibit, the accused should be well informed of the nature of proceedings before him and consequences of the same. This should include the fact that once the Magistrate orders disposal of an exhibit, the same will not be tendered in court as an exhibit later in the proceedings, and will not be available anywhere as an exhibit. Save that, the inventory form, the proceedings, and the relevant order for the disposal of the exhibit shall be tendered for admission in court as proof that the accused was found in possession of the disposed exhibit.

However, that was not done in the proceedings that led to the disposal of the government trophy allegedly found with the Appellant in the present case. This was a serious omission and, therefore, vitiates the proceedings for the disposal of the government trophy. It further renders the said proceedings of the disposal of the government trophy a nullity as the right to be heard was violated. The Court of Appeal decision in **Mary Mchome Mbwambo & Amos Mbwambo vs Mbeya Cement Company Ltd (Civil Appeal 161 of 2019) [2022] TZCA 179 (4 April 2022)** is relevant.

Next in line is whether the said exhibit P4 continues to be part of the court's record. In the case of **Buluka Leken Ole Ndidai & Another vs Republic (Criminal Appeal No. 459 of 2020) [2024] TZCA 116,** the Court of Appeal after observing that the Appellant's right of appeal was violated, held that:

> *Finally, in view of this Court's consistent position as regards affording the suspects the right to be heard at the time of issuing a disposal order, exhibit P5 in this case was illegally procured. In* ***Juma Mohamed @ Mpakama (supra),*** *we said* ***"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." Based on that authority, we expunge exhibit P5 from the record.*** *In the absence of the Inventory Form, which stands in the place of the destroyed trophies, there is no way legally conceivable, that the appellants can still legally remain blameworthy of the offence charged, in the aftermath of discarding exhibit P5****.***

In light of the above authority, this court expunges exhibit P4 from the record, and since the said exhibit P4 stood in the place of the alleged government trophy, the offence of being found with the government trophy in the game reserve could not be proved.

After addressing the rationale of presenting the exhibit sought to be disposed together with the accused before the Magistrate, and taking into account the guidance of the Court of Appeal in the case of **Buluka Leken Ole Ndidai**

(supra) which this court is bound to follow, and given the distinctive nature of the issue addressed above (not presenting the exhibit in the presence of the accused before the Magistrate), additionally, it is important to observe the following in the proceedings seeking disposal orders of perishable exhibits:

First, the presiding Magistrate should, albeit briefly, be given factual background of the relevant events preceding the appearance of the accused and the presentation of the relevant exhibit before the Magistrate, so that the Magistrate is acquainted with the facts of the matter before examining/hearing the suspect/accused.

Second, the factual background should be part of the proceedings for the disposal of the exhibit and should be given in the presence of the accused/suspect.

Third, the accused and the relevant exhibit should be brought to the Magistrate, or if the exhibit cannot be easily moved without unnecessary delay or unreasonable costs, the Magistrate may be requested to visit the place where the exhibit is located. The accused/suspect must also be present and heard throughout the proceedings.

Fourth, the Magistrate should be given the inventory form properly filled as per the requirement of the law and must ensure that the particulars of the exhibit as filled in the form match the particulars of the exhibit presented before him for noting.

Fifth, the Magistrate should record his observation of the exhibit against the particulars of the inventory form.

Sixth, the Magistrate should not consider any extraneous matters before asking for the suspect's comments and before issuing a disposal order.

10. In light of the proceedings before the trial court there is no established chain of custody of the alleged government trophy or weapons as described in exhibit P4(inventory form) and P1(seizure certificate).

The prosecution-led evidence (PW1's testimony) in the trial court, indicates that the Appellant was, when arrested, found in possession of the government trophy, to wit, two fresh forelimbs of Zebra conjoined with ribs and head covered with the skin thereof. The Appellant was also allegedly found with a machete and eight (08) animal trapping wires (hereinafter the 'weapons'). However, the Respondent did not establish a chain of custody of the said government trophy and the weapons from the day and time of the Appellant's alleged arrest in the Ikorongo Game Reserve to the day the government trophy was disposed of, and to the day the alleged weapons were tendered and admitted in court.

PW1 testified that on 13/08/2022 after they (PW1 and his colleagues) had arrested the accused with the government trophy and after filling the seizure certificate, they (PW1 and his colleagues) took the Appellant to the Mugumu Police Station and handed over the *Appellant and the exhibits* to the police officer on duty. After the police file was opened, they (PW1 and his

colleagues) were given a case number (MUG/IR/1957/2022). Then, *they* (PW1 and his colleagues) *handed over the exhibits to the police exhibits keeper* and then *they (PW1 and his colleagues) labeled the exhibits as per case number.*

On page 25 of the trial court's proceedings, PW1 also testified to have taken the exhibits from the police to the Court. He further testified that on 15/08/2022 he was called by a police officer from the Mugumu Police Station by the name 'Said' and he went to the police station *and took the government trophy* (two fresh forelimbs of Zebra still conjoined with ribs and head with the skin thereof) to the National Park where he disposed them by scorching.

The testimony of PW3 was not far off PW1's testimony but differed from PW1's testimony on what transpired on 15/08/2022. PW3 testified that they were called by a police officer from the Mugumu Police Station by the name 'Said' and they went to the police station and a government trophy (two fresh forelimbs conjoined with ribs and the head of *Wildebeest),* not Zebra, was handed over to them and they took the same to the national park where they disposed the same by fire.

PW4 testified that on 14/08/2022 he was assigned to investigate the case by the OCCID of the Mugumu Police Station. After observing that a government trophy was part of exhibits on record, on the same day around 09.00 Hrs., he called the expert of trophy valuation and identification, and the government trophy was that of *Wildebeest* valued at TZS 2,779,200/=. He filled out the inventory form and filed the same. He further testified that

on 15/08/2024 at 08.00 Hrs., *he took the suspect and the government trophy* to the Magistrate who ordered the disposal of the same as it was subject to speedy decay. He later called PW1 for the disposal of the government trophy.

In the testimonies of PW1, PW3, and PW4 there is no any sort of documentary or oral chain of custody as regards the government trophy and other exhibits. The transactions and movements involving the said exhibits by the said law enforcement officers were, in a polite observation, simply in shambles. It was like they were exchanging products for self-amusement, and not exhibits which were likely to land the Appellant a sentence of 20 years of imprisonment. It is just appalling and deplorable for law enforcement officers to handle exhibits and investigations in such an unprofessional manner whilst knowing that it is the heart and crucial part of criminal justice. Under the circumstances, it was unsafe for the trial court to rely on the evidence of a government trophy and weapons whose chain of custody was not established at all. It follows that the seizure certificate of the exhibits, admitted as exhibit P1 in the trial court, cannot be accorded any evidential weight in the absence of the said exhibits' chain of custody.

In the case of **Paulo Maduka & Others vs Republic (Criminal Appeal 110 of 2007) [2009] TZCA 69 (28 October 2009),** the Court of Appeal held that:

> *'By* ***"chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis, and disposal of evidence, be it physical or electronic. The idea behind recording the***

chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty*. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*

In the case at hand, unfortunately, this salutary guiding principle in criminal investigations, was not observed and enforced. *As a result, there was no linkage between the money seized from the appellants and the one sent to the Chief Government Chemist, and therefore the money robbed from the hospital. Without this linkage, the entire prosecution case was bound to crumble.'*

In light of the holding by the Court of Appeal in the above authority, and as already observed by this court herein above, as regards the Respondent's failure to establish the exhibits' chain of custody, the Respondent, under the circumstances of this case, had failed to prove that the Appellant was found in possession of the government trophy. The Respondent had also failed to prove that the Appellant was found in possession of the weapons in the game reserve.

Before retiring, this court deems it necessary to comment, generally, on what has been observed with respect to the conduct of some law enforcement officers when discharging their duties, especially in light of the manner in

which the whole aspect of investigation and prosecution was handled in this case.

This court cannot stand aside and turn a blind eye to what seems to be 'a tolerable and not uncommon unprofessional conduct' by some law enforcement officers in wildlife management, or any other sphere of the criminal justice system when handling the arrests of suspects and the seizure of exhibits. It is 'a tolerable and not uncommon unprofessional conduct' because some law enforcement officers do not seem to care that they are not doing it right, or they do not know what they are supposed to do while wasting public resources.

This unprofessional conduct amounts to the abuse of mandate, curtailing the liberty of the suspects who are deemed innocent until proven guilty (see Article 13(6)(b) of the **Constitution of the United Republic of Tanzania, 1977** as amended from time to time), and thus occasioning a miscarriage of justice. It is high time for the relevant law enforcement agencies to take the necessary steps to improve the handling of arrests, investigation, and prosecution of wildlife cases and criminal investigation in general.

In the final analysis, and in light of the foregoing, this court finds that the Respondent failed to prove all three offences leveled against the Appellant beyond a reasonable doubt. As the night follows the day, the Appellant's findings of guilty are quashed, convictions as regards the offences of unlawful entry into the game reserve, unlawful possession of the government trophies, and unlawful possession of weapons in the game

reserve are hereby nullified, and the consequential sentences thereof are hereby set aside.

The Appellant should immediately be released from the prison facility where he is currently detained and be set at liberty, unless he is held for any other lawful cause.

It is so ordered. Right of appeal explained.

Dated at **Musoma** this 24th day of April 2024.

K. I. Kafanabo
Judge

The Judgment delivered in the presence of Ms. Joyce Godfrey Matimbwi, State Attorney, representing the Respondent, and in attendance of the Appellant via teleconferencing currently in custody in the Mugumu Prison in the Serengeti District.

THE HIGH COURT OF TANZANIA
MUSOMA

K. I. Kafanabo
Judge
24/04/2024