

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 44 OF 2017

(Originating from the District Court of Babati at Babati Economic Case No. 08 of 2015)

KIDUA MAFYEKO APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI,J:

The appellant herein along with two others were charged with the offence of unlawful possession of Government Trophy contrary to Paragraph 14(d) of the 1st Schedule to and Section 57(1) and 60(2) of the Economic and Organised Crimes Control Act, Cap. 200 R.E 2002 read together with Section 86(1) (2) (c) (ii) of the Wildlife Conservation Act, Cap 283. At the trial it was alleged that the three accused were found in unlawful possession of two cokes hartebeest horns valued at Tshs. 1,157,000/- and Wildebeest tail carcasses valued at Tshs. 3,026,000/- total valued at Tshs. 5,340,000/- the property of the Tanzania Government. At the conclusion of the trial the appellant was convicted and sentenced to serve an imprisonment term of 20 years while the other two accused persons were acquitted. Aggrieved by the said conviction, the appellant lodged this appeal raising six grounds of appeal that:

1. The trial court erred in law and in fact by admitting exhibits P1,P2,P3 which were tendered by the public prosecutor.

2. The trial court erred in law and in fact when it held that the appellant found guilty of unlawful possession of government trophy while there was no evidence on record to warrant the conviction of the appellant.
3. The trial court erro in law and in fact by not finding that the appellant was brought before the court beyond the prescribed period of time.
4. The trial court erred in law and in fact when it failed to inquire about the search warrant and since the same was no tendered in court as an exhibit.
5. The trial court erred in law and in fact when it failed to inquire about the search warrant and since the same was no tendered in court as an exhibit.
6. The trial court erred in law by finding that the case for the prosecution against the appellant was proved beyond reasonable doubt.

The appellant prayed that this appeal is allowed by quashing the conviction, setting aside the sentence and letting him at liberty. On the day of the hearing the appellant was unrepresented and the respondent, the Republic was represented by Ms. Rose Sule, learned State Attorney who supported this appeal.

The appellant's submission was that EXP1 And EXP2 have been wrongly tendered as it was the Prosecutor who prayed to tender those exhibits in court and not the prosecution witnesses. He referred the Court to pages 20, page 26 and page 30 of the typed proceedings and argued that it was wrong for the prosecutor to have dual position on the trial, that of a prosecutor and at the same time a witness.

The appellant submitted further that the trial court erred in not taking into consideration that he had objection to the tendering of EXP1 whereby he was duty bound to conduct a trial within trial. He submitted further that the prosecution side alleged to have searched him and found him with government trophy but they failed to tender the search warrant as exhibit before the court.

The appellant submitted further that there is a clear contradiction which was not taken into consideration by the trial court. That the prosecution PW2 said that he came to his house with the Chairman called Selemani Mwiru. He argued that this was not supported by the evidence of PW5 who introduced himself as Selemani Mohamed, the Hamlet Chairman who witnessed the search. That it clearly shows that the PW2 mentioned another person Selemani Mwiru who is not a witness in this case. That PW3 on his part alleged that the Chairman who witnessed the search was Selemani Mwiru. He argued further that the prosecution witnesses were lying in court and that is why they could not tender the exhibits fearing that he will cross examine them on those exhibits and some truths will be revealed.

The appellant prayed that the Court allows his appeal and quash and set aside the judgment and conviction and finally set him free.

On her part, Ms. Sule submitted that having gone through the records of the trial court, the evidence warranting conviction of the appellant is weak she hence supported the appeal. Her submission was that the appellant was convicted with the offence of Unlawful Possession of Government Trophy, however, the evidence shows that after he was searched a search warrant was issued and the same was received as EXP1, but the exhibit

was tendered by the prosecutor. She argued that this shows that the prosecutor was at the same time a witness to the trial which is against the law.

Ms. Sule submitted further that the offence that the accused is charged with requires that a certificate of seizure should be tendered and in the absence of that, there is no proof that the appellant was found with a trophy. That in the absence of a certificate, the remaining evidence is that of PW4 who tendered EXP2, the exhibit which was again tendered by the prosecutor. Ms. Sule pointed out further that even EXP3 was tendered by the prosecutor. She argued that as a matter of law, the exhibits are not part of the records hence they have no evidence against the appellant.

Ms. Sule submitted further that at page 16 of the proceedings, the court did not show the plea of each accused after the charge sheet was read over who were 3, the plea is generalized against all the accused persons.

I have gone through the records of the trial court, the grounds of appeal and the submissions thereto, the determination of the appeal shall begin with the ground raised by both parties on the irregularities observed while receiving prosecution exhibits. As clearly pointed out by both the appellant and the respondent, the record is clear that it was the Prosecutor who prayed to tender all the three prosecution exhibits, EXP1, EXP2 and EXP3. The law is very clear on who should tender exhibits in Court, it is the witness and not the prosecutor/advocate. The duty of the prosecutor is to lead the witness to tender the exhibit in court and not for himself to step into the shoes of the witness and tender them. By doing so, he turns himself into a witness which is wrong. As for our current case, the record is clear that it was prosecutor who prayed to tender all the three

exhibits EXP1, EXP2 and EXP3. As it was held in the case of **Frank Massawe Vs. R, Criminal Appeal No. 302/2012 (unreported)**, the result is that since he was not a witness in court, the exhibits are as good as if they were never tendered at all hence they are expunged from the court records.

Having so expunged the exhibits from the court records, we are remained with the evidence of prosecution which is not supported by any document. The alleged search of the appellant's house required a search warrant which is not on record. Furthermore, the certificate of seizure, a crucial document in economic cases is not part of the record either so is the valuation certificate. The evidence remaining has no any corroboration and in the absence of those important documents, the prosecution evidence is too weak and with a lot of reasonable doubt. It cannot hence suffice the conviction of the appellant at the trial.

Having made those findings, I allow this appeal. The conviction of the appellant at the trial is hereby quashed and the sentence so passed against him set aside. The appellant shall be released from custody henceforth unless he is otherwise lawfully held.

Appeal Allowed



Dated at Arusha this 03rd day of August, 2017


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S. M. MAGHIMBI
JUDGE