

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 22 OF 2020

(C/F Economic Case No.10 of 2015 at the Resident Magistrates' Court of Arusha at Arusha)

ALFRED GEORGE SHASHUI @ KALONGO.....APPELLANT

Vs

DPPRESPONDENT

JUDGMENT

Date of Last Order: 30/08/2021

Date of Judgment: 1/11/2021

B.K.PHILLIP, J

At the Resident Magistrates' Court of Arusha at Arusha the appellant herein was charged with three counts to-wit;

1st Count -Unlawful hunting of specified and scheduled Animals without permit contrary to sections 47 (a) and (aa) of the wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (a) of the 1st schedule to the Economic and organized Crimes Control Act (Cap 200 RE 2002) . It was alleged that on 28th January 2015, at Kona Kumi na saba area within Ngorongoro District in Arusha Region, the appellant was unlawfully hunting without permit. He killed three

elephants valued at USD 45,000 equivalent to Tshs 78, 592,050/= using Semi Automatic Rifle (SAR) NO. 20032113

2nd Count- Being in possession of Government Trophy Contrary to sections 86(1), (2) , (c), (ii) of the wildlife Conservation Act No. 5 of 2009 read together with paragraphs 14 (d) of the first schedule thereto and section 57 (1) of the Economic and Organized Crimes Control Act (Cap 200 R.E 2002) . It was alleged that on 28th January 2015 at Kona Kumi na Saba area within Ngorongoro District , in Arusha Region the appellant was found in unlawful possession of three Elephant's tails equivalent to three killed elephants valued USD 45,000 which is equivalent to Tshs 78,592,050/= the property of the Government of the United Republic of Tanzania.

3rd Count - Unlawful possession of weapon in certain circumstances contrary to section 103 of the Wildlife Conservation Act No. 5 of 2009. It was alleged that on 28th January 2015 at kona Kumi na Saba area within Ngorongoro District in Arusha Region the appellant was found in unlawful possession of weapons to wit; a semi Automatic Rifle (SAR) No. 2003113 and 98 round of ammunitions of 9.76 mm.

At the hearing of the case the prosecution paraded four witnesses and tendered exhibits to prove its case. The accused (now appellant)

was unrepresented, thus he defended himself. At the end of the trial, after evaluation of the evidence adduced by both sides the court was satisfied that the prosecution proved its case to the standard required by the law, thus convicted the appellant as charged and sentenced him to three (3) years imprisonment for the first count, thirty (30) years imprisonment for the second count and fine to a tune of Tshs 200,000/= in respect of the 3rd count or one year imprisonment in default.

Aggrieved by the judgment of the lower Court the appellant lodge this appeal on the following grounds;

- a) *That the trial Court erred in law and facts in holding that the evidence tendered by the prosecution witnesses proved the charge against the accused person (now appellant) beyond reasonable doubts.*
- b) *That the trial Court erred in law and facts by relying on the exhibits which were not properly tendered.*
- c) *That the trial Court erred in law and fact by convicting and sentencing the accused person despite the failure by the prosecution to abide with the principles governing the chain of custody and presentation of exhibits.*

d) That the trial Court erred in law and fact when it miserably failed to evaluate the evidence on record as a result it ended up to a wrong conviction and sentence of the appellant.

e) That the trial Court erred in law and fact by convicting and sentencing the appellant while the charge which was preferred against the appellant was defective.

At the hearing PW1 (Police officer) told the court the following ; that the police received information from Ngorongoro Park Rangers and TANAPA that there were poachers at Loliondo area. Consequently, on 27th January 2015 he was called and ordered by the OC-CID of Loliondo to join the Park Rangers in a patrol at Loliondo area. At the patrol he was with one Dahayo and Edwin. At around 00.00 hrs they arrived at Kona Kumi na Saba area, whereby they noticed from a distance that where they were headed to there were flames of fire. They moved very slowly, upon arriving at that place they found the appellant cooking. They apprehend him. He had a weapon make SAR, Registration No.20032113, 88 rounds of Ammunitions which were in the right pocket of his coat, three elephant tails, Cooking oil , 2 kgs of flour , sardines and 10 rounds of ammunitions were in the SAR. They took the appellant to the Anti-Poaching Unit, Arusha together with the items

/exhibits mentioned herein above. The same were handed over to the store keeper (PW4) after filling a certificate of seizure. PW1 tendered in Court the gun (SAR) with Registration No. 20032113, and 98 rounds of ammunitions, three elephant tails, Cooking oil, salt Flour –Dona and sardines which were admitted all admitted as exhibit P1 collectively.

PW2 testified as follows; That he was working at Manyara National Park as a Park Ranger , dealing with protection of the National Park. On 26th January he received information from informers that there were poachers at the Loliondo Game Reserve. He informed the head of department in his section, who informed the Police officer at Karatu , Ngorongoro controlled area and Anti-poaching Unit. Arrangements for undertaking patrol in that area were set and on 27th January 2015, he was in the team which was undertaking a patrol in Loliondo Game reserve at night. When they arrived at Kona Kumi Saba, they saw flames of fire at a distance. They walked towards the same and on arrival at that place they found the appellant sitting. They surrounded him. He attempted to get hold of the weapon he had , but they managed to contain him and finally they arrested him. He had a Semi Automatic Rifle (SAR) which was loaded with 10 rounds of ammunitions, 88 round of ammunitions, cooking oil, flour and salt.

They took the appellant to Anti-Poaching Unit Arusha for interrogations together with the items which were found in his possession. The same were handed over to the store keeper after filling a certificate of seizure. PW2 tendered the certificate of seizure which was admitted as exhibit P2.

PW3 was a Park Ranger at TANAPA, his testimony was similar to the testimonies of PW1 and PW2.

PW4's testimony was as follows; That he was working as a store keeper at the Anti-Poaching Unit , Northern Zone Arusha . He was responsible for issuing valuation forms upon confiscation of Trophies. He tendered in Court Valuation certificate in respect of three elephant tails. The same was admitted as exhibit P3. Moreover, PW4 testified that ~~apart from the elephant tails, he received other the items in the~~ presence of the appellant, to wit; Semi Automatic Rifle (SAR), 88 rounds of ammunitions, flour –Dona, sauce pans and sardines. He was informed by the police officers who arrested the appellant/accused that the above mentioned items were found in possession of the appellant at Kona kumi na saba at Loliondo Game reserve.

In his defence, the appellant stated as follows; That on 18th February 2014 he quarreled with the chairperson of Hamlet Area on the reason

that he demanded to be given his bags of maize and intimated to him that he was going to institute a civil case to claim his bags of maize. The chairperson vowed before appellant that he was going to prove to him that he is a leader. Consequently, on 20th February 2014, around 11.00hours the chairperson of Hamlet Area came to his home with policemen from Oldonyosambu and Samunge who arrested him on allegation that he was giving accommodation robbers. Despite denial of the said allegations he was taken to Loliondo and on 20th of February 2014 was charged of armed Robbery at the District Court of Ngorongoro. Later on, he was discharged. The appellant went on to testifying that on 15th January 2015 at 23.00 hours the chairman of Hamlet Area, came to his home again with persons who were introduced to him as policemen, but he did not identify them clearly. Those policemen took him to Tarangire National Park and later, on 28th January 2015 they took him to Anti-Poaching Unit and Central Police Arusha. On 20th February 2015, they filed an economic case against him, the subject of this appeal. He claimed to have no knowledge about anything concerning the charges in the said economic case.

During the hearing of this appeal, the learned State Attorney Diaz Makule appeared for the respondent whereas the respondent was unrepresented . He appeared in person.

The appellant started his submission by supplying to this court copies of the decision of the Court of Appeal in the cases of **Petro Kilo Kinangai Vs The Republic, Criminal Appeal No. 565 of 2017** and **Geophrey Jonathan@ Kitomari Vs The Republic , Criminal Appeal No. 237 of 2017** (both unreported) .Submitting for the 1st ground of appeal, the appellant argued that the lower Court erred to convict him as the prosecution failed to prove its case against him beyond reasonable doubts.He contended that no sufficient evidence was adduced in court to prove the charge against him to the standard required by the law.

With regard to the 2nd ground of appeal, the appellant argued that the exhibits tendered during the hearing were wrongly admitted as the same were tendered by the prosecutor instead of being tendered by the witnesses . He beseeched this court to peruse page numbers 32, 35 and 39 of the proceedings to see who tendered the exhibits.

Submitting for the 3rd ground of appeal, the appellant argued that the chain of custody of the exhibits was not clearly explained. No

evidence was tendered in court to show that the appellant handed over the exhibits to the police men who arrested him. He contended that there is a great possibility that those exhibits were purposely prepared by the police for the case.

With regard to the 4th ground of appeal, the appellant argued that the Trial Magistrate failed to analyze the evidence adduced properly as a result he arrived at an erroneous decision.

With regard to the 5th ground of appeal, the appellant argued that the charge sheet was defective as it indicated that he was charged under the provisions of section 86 (1),(2) (c) (ii) of the wildlife Conservation Act. He contended that the charge sheet was not supposed to include the above mentioned provisions of the law. The correct provisions of the law which were supposed to be indicated in the charge sheet were section 86 (1) (2) (b) 2 (ii) of the Wildlife Conservation Act. Thus, he insisted that the charge was defective. He implored this court to allow this appeal and set him free.

In response to the 1st and 4th grounds of appeal, the learned State Attorney, Mr. Diaz Makule, argued that the proceedings from page 31 show very well how the appellant was arrested. He contended that the evidence of PW1, PW2, PW3 and PW4 proved that the appellant

was caught ready handed with the exhibits which were tendered in Court. The evidence adduced proved the charge against the appellant to the standard required by the law.

Responding to the 2nd and 3rd grounds of appeal, the learned State Attorney submitted that the proceedings at page 32 shows clearly that the exhibits were tendered by PW1. There was no problem with the chain of custody of the exhibits, that is why the lower court admitted the same. In the alternative, relying on the case of **Petro Kilunga** (Supra) , Mr Makule argued that even if this court finds that there were problems with the chain of custody, the position of the law is that, it is not every time when the chain of custody is broken the exhibits at issue cannot be admitted in evidence has to be taken on the exhibits at issue and the possibility of tampering with the same easily.

Relying on the provisions of section 388 (1) of the Criminal Procedure Act, (Henceforth "the CPA") the learned State Attorney argued that even if it is found out that the charge sheet was defective due to omission of some provisions of the law , such an omission is not fatal as the appellant understood the charge that was facing him. He maintained that the appellant defended himself very well because the charge sheet disclosed all necessary information such as the date the

offence was committed and nature of the offence. To cement his argument he cited the case of **Ally Ramadhani Vs Republic , (CA) Criminal Appeal No. 532/2017** (unreported) in which the Court while deliberating on the legal effect of non-citation of the provision of the law it said that non citation of the provision of the law is curable in terms of section 388 (1) of the CPA.

The learned state Attorney prayed for the dismissal of this appeal.

In rejoinder the appellant maintained that he was not in possession of any of the exhibits tendered in Court and was wrongly convicted.

I have perused the lower court's records and passionately analyzed the rival arguments raised by the parties. Let me start with the appellant's concern on the charge sheet. In short, it is the finding of this court that the charge in respect of the 2nd count was not defective as it indicated the correct provisions of the law for the offence charged, to wit; section 86(1), (2), (c), (ii) of the Wildlife Conservation Act. The provisions of the law cited by the appellant in his submission before this court are not correct.

In addition and without prejudice to my findings herein above, even if there was any omission in citing the provision of the law as alleged by the appellant that won't be fatal. As correctly submitted by the learned

State Attorney, the provision of section 388 (1) of the CPA caters for situations where there is an omission in the citation of the provisions of the laws in a charge sheet. For easy of understanding let me reproduce the provisions of section 388 (1) of the CPA hereunder.

"Subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act, save that where on appeal or revision, the court, the Court is satisfied that such error or omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such order as it may consider just and equitable".

The interpretation and application of the above quoted provision of the law has been made in numerous case, one of them being the case of **Ally Ramadhani Shekindo and another** (Supra) in which the Court of Appeal had to deliberate on the effect of omission of the provision of the law which creates the offence. Citing with approval its decision in the case of **Festo Domician Vs Republic, Criminal Appeal No. 447 of 2016** (unreported) and **Jamal Ally @Salum Vs Republic, Criminal Appeal No. 52 of 2017** (unreported) said the following;

*"... Thus applying the principle propounded in **Jamal Ally's case** (Supra) as adopted in **Festo Domician's case** (Supra) to this case, we are satisfied that the particulars of the offence taken together with the evidence were sufficient to enable the appellants appreciate the nature and gravity of the offence of gang rape they were facing, and that they were not prejudiced by the defect in the statement of the offence. In that regard, we are of the firm view that, such non citation was curable in terms of section 388 (1) of the CPA ..."*

In the case at hand, the appellant's defence shows that he understood the offences he was facing . There is no any doubt that with the particulars of the offence which were read over in court together with the evidence adduced by the prosecution witnesses, the appellant was able to appreciate the nature and gravity of the offences he was charged with.

With regard to the appellant's complaints on the chain of custody, I am in agreement with the learned State Attorney that the chain of custody was not broken. The testimony of PW1, PW2 and PW3 proved that the appellant was found in possession of the exhibits tendered in Court. He was arrested at mid- night and taken straight to Anti- Poaching Unit - Arusha where he arrived in the morning. The exhibits were handed over to PW1 (Store Keeper). PW4 tendered in Court the Valuation

Certificate. The appellant's contention that the chain of custody was broken because there was no document showing that he handed over the exhibits to the police who arrested him is unfounded and misconceived.

In addition, even if it is assumed that the chain of custody was broken, in the circumstances of this case it cannot be fatal because the type/nature of the exhibits in this case (elephant tails and SAR) are not easily available in such a way that there would be a possibility of altering, swapping or tempering with the same easily. In the case of **Petro Kilo Kinangai** (supra), the Court of Appeal had this to say concerning the chain of custody of exhibits;

*"elephant tusks fall within a category of items that cannot change hands easily and thus cannot be easily altered, swapped or tampered with. Thus in appropriate cases, the principle governing the chain of custody will be relaxed whenever an item involved is one that cannot change hands easily –see **Anania Clavery Betela** (supra), **Joseph Leonard Manyota Vs Republic, Criminal Appeal No. 485 of 2015, Issa Hassan Uki Vs Republic, Criminal Appeal No.129 of 2017, ..."***

I will deal with the remaining grounds of appeal conjointly as are all based on analysis and sufficiency of the prosecution evidence in

proving the case against the appellant. In short , I have perused the proceedings and am satisfied that the prosecution proved the case against the appellant beyond reasonable doubts as I will elaborate hereunder.

In their testimonies PW1, PW2 and PW3 were consistent and explained very well how they managed to apprehend the appellant and took him to Anti- Poaching Unit with all the exhibits which were handed over to PW4 (the store keeper) .The testimonies PW1, PW2 and PW3 were supported by the testimony of PW4 who testified that he received the exhibits in the presence of the appellant and tendered in Court the valuation certificate in respect of the exhibits at issue. Also, I have already analyzed the appellant's defence. In my opinion the same is a sham and did not shake the prosecution's case in any way. In his defence the appellant admitted that he was taken to Anti -Poaching Unit and Central police Arusha, however he denied to have been arrested in the Loliondo game reserve, instead he alleged that this case was plotted by the Hamlet leader because he quarreled with him. The appellant failed to give clear explanations on how the Hamlet leader was involved in plotting the case. He did not give any sufficient evidence to prove his allegations.

From the foregoing, I do not see any plausible reasons to fault the lower court's evaluation of evidence as well as its findings.

In the upshot, this appeal is hereby dismissed in its entirety.

Date this 1st day of November 2021.



A handwritten signature in blue ink, appearing to read "B. K. Phillip", with a long horizontal stroke extending to the right.

B. K. PHILLIP

JUDGE.