**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 39 OF 2020**

(C/F Economic Criminal Case No. 42 of 2018 at Arusha Resident Magistrates Court)

**JAMES YASSIN LATI..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

4.8.2022 & 8.09.2022

**MWASEBA, J.**

The appellant and another accused person who is not party of this appeal, were convicted with two counts of Unlawful possession of Government trophy and one count of Unlawful possession of Weapons in certain circumstances and they were sentenced to twenty (20) years imprisonment by the Resident Magistrates' Court of Arusha at Arusha.

Aggrieved by that decision the appellant lodged this appeal based on six grounds as depicted from his petition of appeal.

The prosecution alleged before the trial Court that on 19th day of May, 2018 at Orkiu-Ngaboro area within Kiteto District and Region of

Manyara, the appellant and other accused person were found in unlawful possession of dik-dik meat equivalent to one killed dik-dik valued at TZS 563,500/=, Greater Kudu meat equivalent to one killed Greater Kudu valued at TZS 4, 958,880/=the property of the Government of Tanzania without any permit from the Director of Wildlife, and they were also found with unlawful possession of weapons to wit, one Panga and one (1) slasher n a circumstance which raised reasonable presumption that they were used in a commission of offences under the **Wildlife Conservation Act** No. 5 of 2009.

To prove its case against the appellant, the prosecution paraded five witnesses and tendered five (5) exhibits. The testimonies of the prosecution witnesses gave the following story.

On 19/05/2018 when they were undertaking a regular patrol at Ngabor area (Olkiu Ngabor), Kiteto District during the night hours, PW3 (Hassan Haruna), PW5 (Abdul Aziz Athuman) together with Sungura Msindawi, Meriaki Njudu, and Kiambwa Masai received information that there were some poachers who were poaching. They went at the scene with a motor vehicle and saw suspicious people. They surrounded them and they were able to arrest five people having meat suspected to be of a Greater Kudu (Tandala Mkubwa) and dik-dik meat together with its

head. They also found them with a machete and "slasher". PW3 testified further that after the arrest they filled a certificate of seizure which was signed by the accused persons including the appellant. There was no independent witness because of the surrounding area. Thereafter they took the appellant and other four accused person to KDU Arusha, handled over the meat and the weapon to PW2 (Custodian) who tag them and kept the meat in a fridge after filling a handing over form (Exhibit P3) which were signed by both of them. Thereafter, the accused persons were taken to Arusha Central Police Station

On 21/05/2018 PW1 (Fredrick Meshack Muyumbirwa) who is a valuer at KDU offices was instructed to evaluate the said meat. He went to PW2 who gave him the meat after signing a handing over certificate (Exhibit P2), after evaluation he confirmed that they were dik-dik and Greater Kudu's meat as per exhibit P1 (Trophy valuation). Thereafter, the meat was taken to Hon. Magistrate who filled inventory form and allowed the meat to be buried. Later on, the accused persons were arraigned before the court. After being bailed out, three (3) of them jumped bail and two of them remained including the appellant herein.

On the other hand, the appellant denied to have committed the offence and alleged that they were arrested by Masai People having charcoal

bags and robes. Masai people called KDU office and informed them that they arrested poachers then a vehicle came and took the appellant and others to Arusha police station, thereafter they were arraigned before the court.

At the hearing of this appeal, Mr. Richard Manyota, learned counsel represented the appellant whereas the learned State Attorney for the Respondent defaulted appearance without notice and therefore the court proceeded to determine the appeal ex-parte.

Arguing in support of the appeal, on the 1st and 4th grounds of appeal, Mr Manyota complained that the trial court in its judgment did not analyse the ingredients of the offence as required by Section 86 (1) and (2) (a) and (c) of **the Wildlife Conservation Act**, No. 5 of 2009. Further to that, the evidence revealed that an offense was committed by five persons; however, there was nowhere the appellant was mentioned by the prosecution witnesses. Also, the trial court failed to narrate if it was the appellant who was found with the weapons.

On the 2nd and 3rd ground of appeal, Mr Manyota alleged that there was no proper chain of custody to warrant the conviction of the appellant. On the trial court Judgment Hon. Magistrate failed to narrate how the meat was found, who kept it and how it found its way before the court,

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how it was valuated and who valuated it. He added that Section 38 (3) of the **Criminal Procedure Act**, Cap 20 R.E 2022 was violated regarding the seized property. Further to that, there was also no independent witness to witness the act of seizing the said meat from the appellant. To bolster his arguments, he cited the cases of **Paulo Maduka and Others Vs Republic**, Criminal Appeal No. 107 of 2007 (Unreported) and **David Athanas Makasi and Another Vs Republic**, Criminal Appeal No. 168 of 2017 (CAT-unreported).

Lastly, on the 5th and 6th ground of appeal, Mr Manyota argued that the evidence was not properly evaluated by the trial court or given the weight it deserves the defence evidence. The trial court did not discuss the evidence of the appellant but rather, it based only on the prosecution case and found it correct. He cited the case of **Sabas Kuziriwa Vs Republic**, Criminal Appeal No. 40 of 2019 where CAT insisted that the act of not considering the defence evidence is the same as depriving their right to be heard. He added that in this case the defence evidence was ignored at the trial court and cited the case of **Amir Mohamed Vs Republic**, (1994) TLR No. 138 to support his argument. He prayed for these grounds to be accepted, the trial court's decision be quashed and set aside and the appellant be set free.

Having gone through the submission made by the counsel for the appellant, and the record before me, the issue for determination is whether the appeal has merit.

Starting with the 5th and 6th ground of appeal, the respondent's counsel alleged that the trial court did not properly evaluate the evidence before reaching the decision and the defence evidence was not considered in its judgment.

Having revisited the trial court's Judgment, this court noted that the trial magistrate after raising three issues at page 10 last paragraph, and the 2nd paragraph of page 11 the trial court's judgment reads as follows:

> *"The prosecution evidence reveals that the accused persons together with their colleagues who ran away, that is, the 1st, 2nd and 3rd accused persons were unlawful found with Great Kudu meat together with dik dik meat as evidenced by Pw3 and Pw4.*
>
> *This was also evidenced by Pw1 and Pw2 as per court records. The above two issues which are the 1st and second issue are answered affirmatively.*
>
> *Regarding the 3rd issue of whether the accused persons were unlawful found with weapons in certain circumstances, this issue is also answered in the affirmative due to the evidence at hand. This was also*

*proved by Pw3, Pw4 who went to the scene of crime and Pw1 and Pw2 who received the said weapons for custody."*

After summarizing the evidence adduced by both parties the trial court Magistrate based on the cited paragraphs convicted the appellant to serve twenty (20) years in jail in respect of the three counts as charged. It is apparent that the trial magistrate did not thoroughly evaluate the evidence. As it was held in the case of **Mkulima Mbagala Vs R**, Criminal Appeal No. 267 of 2006 (Unreported) that:

"*For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.*"

In the instant case the decision of the trial court does not contain the reasons for the decision, however, the said error of not analysing the evidence can be cured in the course of the court's evaluation of the evidence on record. As it is a settled principle that the first appellate court is duty bound to re-evaluate the entire evidence before the trial

court on record by reading it together and subjecting it to a critical scrutiny. This was well stated in the case of **Philipo Joseph Lukonde Vs. Faraji Ally Saidi** (2020) TLR, 576 the Court of Appeal held that:

> *"This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions."*

Being guided by the above decision, this being the first appellate court will go through the entire evidence on the record and come to the conclusions. And the said evaluation will be done as we proceed with determination of the remaining grounds of appeal.

Coming to the 1st and 4th grounds of appeal, Mr Manyota alleged that the prosecution case was not proved beyond a reasonable doubt. The appellant's counsel alleged that the trial court did not indicate elements of the offence to see if they were proven or not, further to that he alleged that all the witnesses neither mentioned the name of the appellant as the one who committed the offence along with the other accused persons nor he was found with the weapons found at the scene of crime.

In order for this kind of offence to be proved there must be possession of Government trophy and absence of permit from the Director of

Wildlife. The evidence of PW3 and PW5 who went at the scene and arrested the accused person mentioned the appellant as the one who was also arrested on that day and they found them with a sulphate bag containing the dik-dik meat, the Greater Kudu's meat and weapons-machete and slasher. And later on, after evaluation PW1 found that they were government trophy and during the arrest the appellant did not submit any permit to prove that he had one from the Director of Wildlife as required by the law.

And for the allegation that the appellant was not mentioned by PW3 and PW5 to have been involved in the alleged offence is not correct and both PW3 and PW5 mentioned the name of James as one of the persons they arrested on that night. And when the appellant was given a chance to cross examine them; he said he had no question a situation which proved that he agrees to what was submitted by the prosecution's witnesses. Raising an alarm at this juncture is an afterthought. As it was held in the case of **Martin Misara Vs Republic**, Criminal Appeal No. 428 of 2016 (CAT-Unreported) that:

> *"It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an*

*afterthought if raised thereafter _ see: Damian Ruhele v. Republic, Criminal, Appeal No. 501 of 2007, Cyprian Athanas Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992, George Maili Kembogev. Republic, Criminal Appeal No. 327 of 2013'*

As for the 2nd and 3rd ground of appeal, the appellant alleged that there was no proper chain of custody regarding the exhibits tendered and admitted before the court as exhibits and that there was no independent witness who witnessed the search and seizure of the alleged meat and weapons found with the appellant.

In relation to failure by the prosecution to call an independent witness, I have read the provisions of **Section 106 of the Wildlife Conservation Act**, No. 5 of 2009. It provides that an independent witness is required if the search is being conducted in a dwelling house. It is a manifest on record that the accused was arrested in a remote area. Under the circumstances, it was impossible for the game warden to have an independent witness.

As for the issue of chain of custody, the respondent's counsel complained that the trial Magistrate did not explain in her judgment the chronological order of the exhibits on how they found their way before the court and regarding the issue of who valuated it and its valuation.

Thus, it was his submission that since the impugned judgment is silent on its evaluation regarding the chain of custody then the chain of handling the said trophies was broken.

In the case of **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No. 551 of 2015 [2019] TZCA 52 at www.tanzlii.org it was held and I quote:

> *"In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in Paulo Maduka and Others vs. R., Criminal Appeal No. 110 of 2007and followed by Makoye Samwel @ Kashinje and Kashindye Bundala, Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in Paulo Maduka (supra) would be relaxed."*

In our case when PW3 and PW5 arrested the appellant and other accused person, a certificate of seizure was filled and they both signed it together with the appellant and the other 4 accused persons as it is

evidenced at exhibit P6 ( Certificate of seizure), thereafter they went at KDU offices in Arusha where the said meat alleged to be government trophy were handed over to PW2 ( Elidaima Akyoo) where a handing over certificate was filled as evidenced by Exhibit P3 which was also signed by PW2, PW3, PW5 and the appellant together with other accused persons, and he kept the meat in a fridge. Thereafter, on 21/05/2018 he was instructed by his head of station to give those exhibits to PW1(Fredrick Myumbilwa) for evaluation, he filed a handing over certificate form as evidenced by Exhibit P4 which was signed by PW2 and PW1. The other exhibits tendered before the court was the weapons suspected to be used to kill the wild animals which are two machetes as per exhibit P5.

After the evaluation PW1 found it was government trophy as suspected and filled a trophy valuation and certificate which included the trophy and its value as evidenced by exhibit P1 (valuation form). Thereafter, he filled an inventory form and took the said form to the Resident magistrate's court for an order to destroy them as evidenced by Exhibit P2. The court gave its order on the same date and the meat was buried as per the order of the court. As it is provided under **Section 106 (3) of the Wildlife Conservation Act**, No. 5 of 2009 that:

*"Any person detained or things seized under the powers conferred upon the authorised officer by this Act may be placed in custody and shall be taken as soon as possible before a court of competent jurisdiction to be dealt with according to law."*

See also **Section 101 (1), (2) & Subsection 3 of the Wildlife Conservation Act**.

Thus, based on the chain as stated herein this court is satisfied that there was a proper chronological or trail of the chain of custody. From the foregoing, I do not see any plausible reason to fault the decision reached by the lower court.

In the upshot, this appeal is hereby dismissed in its entirety for want of merit. The decision of the trial court is upheld.

It is so ordered.

**DATED** at **ARUSHA** this 8th day of September, 2022.

HIGH COURT OF TANZANIA

**N.R. MWASEBA**

**JUDGE**

**08.09. 2022**