

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 50 OF 2022**

*(Arising from the decision of the District Court of Serengeti at Mugumu in  
Economic Case No. 10 of 2020)*

**BETWEEN**

**WANKYO S/O ISSA @ MAGIGE ..... APPELLANT**

***VERSUS***

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

**JUDGMENT**

26<sup>th</sup> & 26<sup>th</sup> July, 2023

**M. L. KOMBA, J.:**

*"Concerning the way the Police are required to handle perishable exhibit when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states:*

*25. 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. [Emphasis added].*

The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. **This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is**

**in custody or out on police bail) to be present before the Magistrate and be heard.”**

This excerpt is from the decision of the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama vs. Republic (Criminal Appeal No. 385 of 2017) [2019] TZCA 518 (26 February 2019)**.

In this case at hand, the appellants together with one **MWITA S/O KIMENDI @ MAKABARA** who is not a part to this appeal, were arraigned before the District Court of Serengeti at Mugumu, charged with three counts to wit; **One**, Unlawful entry into the Game Reserve, **Two**, Unlawful Possession of Weapons in Game Reserve and **Three**, Unlawful Possession of Government Trophies. The offences were contrary to the relevant sections of the laws in Wildlife Conservation Act No. 5 of 2009 and Economic and Organized Crime Control Act [CAP 200 R.E 2002].

In a nutshell, the prosecution evidence was to the effect that, on 21<sup>st</sup> day of March, 2020 at about 1700hrs the appellant together with one **Nyamhanga S/O Magweiga Nyasena** (co convict) were arrested at Getamweka area within Ikorongo/Grumeti Game Reserve without any permit. They were also found in possession of one torch, one knife and one government trophy to wit, a carcass of Impala valued at Tshs. 897,000/=.

Certificate of seizure (Exhibit P.E 1) was filled and the appellants were taken to Mugumu police station where the case file No. MUG/IR/803/2020 was opened. Later on, the Inventory of claimed government trophy found with the appellants (Exhibit P.E 4) was prepared and presented before the Magistrate who issued the disposal order.

After a full trial, the trial court found the appellants guilty in all counts charged with and proceeded on convicting them and sentenced them to 1 year imprisonment for the 1<sup>st</sup> count, 2 years imprisonment for the 2<sup>nd</sup> count and 20 years imprisonment for the 3<sup>rd</sup> count.

Dissatisfied by the conviction and sentence meted against them by the trial court, the appellant lodged the present appeal to challenge the same. The appellant filed a total number of five (5) grounds of appeal of which the 4<sup>th</sup> ground states that;

*'That the trial court erred in law and procedure in admission of inventory form and procedure of disposal of the said Government trophy in the absence of the appellants.'*

When the appeal was placed before me for hearing, the appellant was fended for himself whilst on the other hand the respondent was represented by Mr. Isihaka Ibrahim, the learned State Attorney.

Before the parties started to swim into deep water, this court, after noticed that there were no proceedings showing that the appellants were heard during the disposition of the Government trophy, ordered the parties to address on the anomaly first.

The appellant did not have much to submit, he only prayed the court to consider his grounds on a petition of appeal he filed. On the other hand, Mr. Isihaka submitted that after he perused the trial court file, he discovered that there are no proceedings conducted by the Magistrate who issued the disposal order. He proceeded further that, there must be proceedings which show accused persons appeared before the Magistrate who issued the disposal order and accorded the right to be heard over the items seek to be disposed of. Mr. Isihaka was of the opinion that, the remedy available is to expunge the exhibit P.E 4 (Inventory form), and that after expunging the said exhibit there are no evidence remaining to prove the 3<sup>rd</sup> count. Regarding the 1<sup>st</sup> and the 2<sup>nd</sup> counts, Mr. Isihaka submitted that he founded there is no need to deal with them as the appellant has already completed his sentence against them.

After the parties' submission, I find the pertinent issue to deal with is whether the appellant and co convict were present and accorded the

right to be heard when seeking the disposition order of the Government trophy.

As was observed from the passage above in the case of **Mohamed Juma @ Mpakama (supra)** hearing of the parties upon disposition of the perishable exhibit is a mandatory procedure. See also the case of **Ngasa Tambu vs. Republic (Criminal Appeal 168 of 2019) [2022] TZCA 455 (21 July 2022)**.

In the case at hand, before the trial court PW4 a police officer H 3802 DC Yunus, testified that he prepared the Inventory form of claimed property and presented the same before the Magistrate who issued the disposal order in presence of the appellant and co convict. The witnesses did not testify on any procedure conducted. (see page 4 of the trial court proceedings).

Lacking the proof of the hearing of the appellant and co convict during seeking of disposition order of the exhibit, convincing me to believe the appellants argument that they were not present during the issuance of the disposition order.

As rightly submitted by Mr. Isihaka, the only way forward is to expunge exhibit P.E 4 which was illegally procured as I hereby do. See **Ngasa Tambu vs. The Republic (supra)**. Once again as submitted by Mr.

Isihaka, the remaining evidence are not sufficient to warrant the appellant's conviction on the 3<sup>rd</sup> count. Consequently, I hereby quashed the conviction and set aside the sentence imposed against the appellant regarding the 3<sup>rd</sup> count.

Since the appellant and co convict have already completed their sentence in respect of the 1<sup>st</sup> and 2<sup>nd</sup> counts, I order **WANKYO S/O ISSA @ MAGIGE** and **MWITA S/O KIMENDI @ MAKABARA** to be immediate released unless held on some other lawful cause.

It is so ordered.

**DATED** at **MUSOMA** this 26<sup>th</sup> day of July 2023.



*NK*  
**M. L. KOMBA**  
**JUDGE**