IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRICT)

AT ARUSHA

CRIMINAL APPEAL NO. 71 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Economic Case No. 47 of 2019)

HAMIDU MKUMBI SEIFU ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

29th August & 7th October 2022

Masara, J.

Hamidu Mkumbi Seifu (herein after "the Appellant"), filed this Appeal challenging the decision of the Resident Magistrates' Court of Arusha (hereinafter "the trial court") which convicted and sentenced him on a charge containing nine counts, the particulars of which were shown in the charge sheet. In the 1st, 2nd, 3rd and 4th counts, he was charged with the offence of Unlawful Hunting in a Game Controlled Area, contrary to section 19(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 (hereinafter "WCA"), read together with paragraph 14 of the 1st Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E 2002] (hereinafter "EOCCA"), as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous

Amendments) Act No. 3 of 2016. In the 5th, 6th, 7th and 8th counts, the Appellant was charged with the offence of Unlawful Possession of Government Trophies, contrary to sections 86(1) and (2) of the WCA, read together with paragraph 14 of the 1st Schedule to, and Sections 57(1) and 60(2), of the EOCCA, as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. In the 9th count, he was charged with the offence of Unlawful Possession of Weapons in a Game Controlled Area, contrary to sections 20(1)(b) of the WCA.

Briefly, the facts of the case are as follows: On 25/04/2019, at about 01:00am, Michael Msokwa (PW3) and Emmanuel Pius (PW4) together with other wildlife officers, were in their normal patrol at Gidavashi within Kitwai Reserved Area, in Kilindi District, Tanga Region. They met the Appellant who was riding a motorcycle and stopped him. The motorcycle had registration numbers T124 BTR, make Fecon with a black fuel tank. The Appellant was armed with one local gun, commonly known as gobore. He also had a luggage with him. On inspecting him, they retrieved various government trophies such as lesser kudu meat weighing 60kg, one giraffe tail, one eland tail and eight carcases of dik-dik. The Appellant was also

found in possession of one knife, one bush knife, 50gms of gun powder and six muzzle of load pellets.

PW3 filled in the certificate of seizure which was signed by PW4 and the other wildlife officers. The Appellant also signed. The certificate of seizure was admitted in court as exhibit P5. They took the Appellant to the Village Executive Officer by the name of Yona Myono who did not know the Appellant. The Appellant was taken to Arusha Central Police and the exhibits were handed to F 7335 CPL Evance, the exhibits' keeper (PW2).

PW2 testified that on 25/04/2019 at about 2100hrs he received the exhibits from PW3 for safe keeping in the exhibit room. These are: Lesser kudu meat, carcases of dik-dik, one eland tail, one giraffe tail, one gobore gun, muzzle loader pellets, 50 grams of gunpowder, one bush knife, one knife and a motorcycle with registration number T124 BTR, make Fecon. During the handover of the exhibits, PW2 and PW3 signed the chain of custody form which was admitted as exhibit P3. One motorcycle T 124 BTR, six muzzle loader pellets, one knife, one bush knife, 50grams gun powder, eland tail and giraffe tail were admitted as exhibits P4 collectively. On 29/04/2019, PW2 handed over lesser kudu meat, 8 dik-dik carcases, one eland tail and one giraffe tail to Naonawelu Michael Mkali (PW1) for valuation and identification. The handover of the exhibits from PW2 to

PW1 was through signing of the chain of custody form. They also signed special handover forms, which were admitted as exhibit P2.

PW1 identified the types of animals killed, whose value was ascertained by PW1 to be TZS 48,990,000/=. He filled the trophy valuation certificate and prepared an inventory form which was signed before a magistrate and an order to dispose the perishable trophies made thereon. The trophy valuation certificate and the inventory form were admitted as exhibit P1 collectively. After identifying and disposing the perishable trophies, PW1 returned the elephant and eland tails to PW2 for storage. The handover was through signing of exhibit P2.

In his affirmed defence, the Appellant denied involvement in the commission of the offences. He accounted that he was arrested on 23/04/2019 at Ng'ombe junction while in Mkindi village heading to Masalala village. He was arrested by two people who asked him direction to Shaban Ally's shop. He did not know the said Shaban Ally. He was taken in the car, assaulted and taken to police station. On 25/04/2019, he was taken out of the police station. He found a police officer who asked for his particulars and forced him to sign papers which the Appellant did not know. He was taken back to lockup until 23/05/2019 when he was arraigned in court.

After full trial, the trial magistrate was satisfied that the charges against the Appellant were proved to the hilt. He was convicted on all nine counts and sentenced accordingly. Each count had separate punishment, but the maximum sentence was payment of a fine to the tune of TZS 345,000,000/= or in default to serve custodial sentence of a maximum of 20 years, as the sentence would run concurrently. The Appellant was discontented by both conviction and sentence. He preferred this appeal on 14 grounds of appeal; however, during his submissions in Court, he dropped the 4th, 7th, 10th, 11th, 12th, 13th and 14th grounds of appeal. The remaining grounds of appeal are renumbered as grounds 1 to 7 respectively as follows:

a) *That, the Appellant's conviction offended article 13(6)(a) of the URT Constitution as he was subjected to torture for being kept in police custody for almost one month;*
b) *That, the Honourable Magistrate erred in believing the Appellant committed the charged offences without considering the fact that the trial court had no jurisdiction to hear and determine the case;*
c) *That, the Honourable Magistrate erred for failure to observe that the charge was defective for being at variance with the adduced evidence regarding the place where the offences were committed;*
d) *That, the trial Magistrate erred in convicting the Appellant basing on the certificate of seizure which was made in contravention of section 38(3) of the CPA;*

e) *That, the trial Magistrate erred in convicting the Appellant basing on the inventory form which was issued in the absence of the Appellant;*

f) *That, the trial Magistrate erred in convicting and sentencing the Appellant despite failure by the prosecution to call key witness, one Yona Myono; and*

g) *That, the trial Magistrate erred in believing that the chain of custody was intact without noting that there was no special mark on the exhibits alleged to be seized from the Appellant.*

Based on the above grounds of appeal, the Appellant prays that this Court find merits in the appeal and allow the same by quashing the conviction and setting aside the sentence imposed on him. At the hearing of the appeal, the Appellant appeared in Court in person, unrepresented. The Respondent Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was heard orally.

The Appellant commenced his submissions with the 5th ground of appeal, which is the 4th ground as above arranged. The Appellant contended that PW3, in his testimony, stated that after arresting the Appellant they retrieved from him government trophies and filled certificate of seizure, exhibit P3. In his view, the witness (PW3) did not comply with section 38(3) of the Criminal Procedure Act, Cap. 20 [R.E 2019] (hereinafter "the CPA"), which requires him to issue the Appellant with a receipt entailing the description of the seized property. To reinforce his argument, he relied

on the Court of Appeal decision in **Shaban Said Kindamba vs Republic, Criminal Appeal No. 390 of 2019** (unreported).

Submitting on the 3rd ground, the Appellant averred that the trial magistrate failed to note that there were discrepancies between the charge and the evidence adduced, specifically regarding the crime scene. He fortified that while PW3 testified that the Appellant was arrested at Koloneli Dish net the same witness testified that they arrested him at Resend Area.

Regarding the 8th ground, which is renumbered as ground number 6, the Appellant contended that while PW3 stated that after arresting the Appellant they met VEO by the name of Yona Myono, that such person ought to have been called as an independent witness but he was not. He added that such witness's testimony would have resolved doubts on whether the Appellant was arrested in possession of the trophies. To support his contention, the Appellant relied on the Court of Appeal decision in **Daniel Matiku vs Republic, Criminal Appeal No. 450 of 2016** (unreported).

Regarding the 6th ground (the 5th ground above), the Appellant faulted the trial court for convicting him based on the inventory form while he did not attend before the magistrate who issued the disposal order. He

maintained that he did not participate in the whole process leading to disposal of the exhibits. That in his testimony, PW1 admitted that he went in court alone. In addition to that, PW1 did not inform the court the name of the court which allowed disposal of the exhibit. To press on the importance of the accused's attendance during disposal process, the Appellant referred me to the Court of Appeal decision in **Mohamed Juma @Mpakama vs Republic, Criminal Appeal No. 385 of 2017** (unreported).

Expounding on the 9th ground of appeal (the 7th ground as the renumbered), the Appellant contended that PW2, the exhibit keeper, did not state to have put any identifiable mark on the exhibits he received. He also did not state where he kept them, rendering the chain of custody broken from the time of receiving the exhibits to the time of tendering them in court. He intimated that due to a broken chain of custody, it cannot be said that the exhibits allegedly retrieved from the Appellant are the same as those tendered in court, adding that it was wrong for the trial magistrate to admit them in evidence.

Submitting on the 1st ground, the Appellant contended that he was convicted contrary to Article 13(6)(e) of the Constitution because he was in custody undergoing torture for approximately one month. According to

the Appellant, he was arrested on 25/04/2019, but he was arraigned before the trial court on 25/05/2019. Thus, his constitutional rights against physical torture were violated. He made reference to section 29 of the EOCCA which requires that a person arrested of an economic offence to be arraigned in court within 48 hours from arrest.

On the 2nd ground of appeal, the Appellant submitted that the trial court had no jurisdiction to hear and determine the case, since the Appellant was arrested in Kilindi, Tanga Region, hence, in terms of section 113(2) of the WCA, the Resident Magistrates' Court of Arusha lacked jurisdiction to hear and determine the case. He further submitted that failure to include the above provision in the charge sheet, renders the charge defective. To buttress his argument, he implored the Court to be guided by the Court of Appeal decision in **Jumanne Leonard Nagana @ Azori Lenard Nagana & Another vs Republic, Criminal Appeal No. 515 of 2019** (unreported). The Appellant prayed that the appeal be allowed.

On her part, the learned State Attorney supported the appeal on two grounds. In the first concession, she faulted the inventory form stating that it did not comply with the law. She amplified that the Appellant's rights were abrogated as he did not participate in the inventory preparation and disposal. Further, that exhibit P1 lacks the Appellant's

signature to prove whether he admitted or objected to the trophy seizure. According to Ms Tusaje, without an inventory it is difficult to assert that the charge was proved to the hilt. To support her contention, she referred me to the case of **Ngasa Tambu vs Republic, Criminal Appeal No. 168 of 2019** (unreported).

According to the learned State Attorney, counts No. 5 and 7 were also not proved, because the charge sheet shows that the Appellant was arrested at Kitwai Game Controlled Area-Kilindi, Tanga while PW3 stated that the area of arrest was Kidavashe area. The area is also reflected in exhibits P1 and P5. It was Ms Tusaje's further submission that, since there was variance between the charge and the evidence adduced, conviction could not be sustained with such defective charge. Another shortfall in the charge according to the learned State Attorney is that it lacks signature of the State Attorney. She maintained that it is possible the trial court proceeded with unsigned charge sheet.

I have succinctly considered the trial court records, the grounds of appeal and the submission of the Appellant and the learned State Attorney's submissions on the appeal. I should state at the outset that notwithstanding the learned State Attorney's concessions, it is trite that this Court makes a determination whether the case against the Appellant

was proved to the required standard. In so doing, I will determine the grounds of appeal, though not in a chronological order.

I will start with ground number three, which faults the propriety of the charge sheet. According to both the Appellant and the learned State Attorney, the charge is defective on two folds: One, there is variance between the charge and the evidence regarding the crime scene and two, the Charge Sheet was not signed by the drawer.

I have perused the trial court records, specifically the charge sheet that was filed in the trial court on 08/10/2019, the last date the charge was substituted. The charge in all nine counts shows that the offence was committed at Kitwai Game Controlled Area at Sanyi Village within Kilindi District, Tanga Region. That is also the place where the Appellant is said to have been arrested. However, as correctly submitted by both the Appellant and Ms Tusaje, while testifying, PW3 and PW4, who were the arresting officers, stated that the Appellant was arrested at Kidavashi, in Kitwai Reserved Area in Kilindi District. It is also reflected in exhibit P5 (the certificate of seizure), that the Appellant was arrested at Kidavashi-Kitwai within Kilindi District, Tanga Region. Bearing that fact in mind, it is crystal clear that Kidavashi area where PW3 and PW4 stated to have

arrested the Appellant with the trophies is not the same place reflected in the charge sheet. This is fatal.

In the circumstances of this case, it was necessary for the Prosecution to amend the charge because the evidence did not support the charge regarding the place where the offence was committed. The Court of Appeal in its decisions has consistently held that where there occurs variance between the charge and the evidence adduced, the charge must be amended, failure of which renders the charge defective. In the case of **Michael Gabriel vs Republic, Criminal Appeal No. 240 of 2017** (unreported), while referring its previous decision in **Noel Gurth a.k.a Bainth & Another vs Republic, Criminal Appeal No. 339 of 2013** (unreported), the Court held *inter alia* that:

> *"... where there is a variation in the place where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected, the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."*

Going by the above stated position of the law, I find that the variance stated rendered the Prosecution's case unproved beyond reasonable doubts. Since circumstances of the appeal under consideration are similar to those in the case of **Michael Gabriel** (supra), the Prosecution ought

to have substituted the charge, short of which the charge remains defective and the Appellant is entitled to an acquittal.

Furthermore, as stated by Ms Tusaje and verified by the court records, the charge sheet was unsigned by the State Attorney. This again, renders the charge defective. I entirely agree with the learned State Attorney that the charge was defective, hence it was unsafe to ground a conviction in it. On the premises, the third ground has merits, it is accordingly allowed.

Ordinarily, the findings on ground 3 above suffices to determine this appeal. However, I consider it imperative to gauge another pertinent legal issue raised in ground 5 of the Appeal. Both the learned State Attorney and the Appellant faulted the trial magistrate for relying on exhibit P1, the inventory form, to convict the Appellant. They submitted that the Appellant did not participate in the preparation of the inventory and disposal of the exhibits.

I have perused the trial court records, specifically the evidence of PW1 who prepared the inventory form. I do agree with the submission of the learned State Attorney and the Appellant on the following ground. When asked by the trial court for clarification, PW1 is recorded to have said: *"The witness who signed the handling over is Lembris Mollel who is a*

Wildlife officer. ***I went to court by myself with inventory form...***" (Emphasis added).

From the quote above, the Appellant was not involved in the preparation of the inventory form and the disposal of the perishable trophies. Awkwardly, PW1 did not substantiate the type of trophy whose order for disposal was sought. As submitted by the Appellant, the court that issued the disposal order and the name of the magistrate issuing the order were not disclosed.

It is the requirement of the law that the accused person be present before the magistrate when an order to dispose of perishable exhibit is being sought. The case of **Mohamed Juma @Mpakama** (supra) cited by the Appellant is instructive in this respect. Likewise, in the case of **Michael Gabriel vs Republic** (supra), it was further held that:

> *"Normally, a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case* ***after being taken before him in the presence of the accused person.***" (Emphasis added)

Since the Appellant was not involved in the preparation of the inventory, the inventory (exhibit P1) and the whole process of securing an order for disposal of the perishable meat, contravened the law. The Appellant, who

retained a right to comment on the disposal process was denied the right to be heard on the same. I therefore expunge exhibit P1 (the inventory form) from the record, for being improperly procured.

Having expunged the inventory form from the court records, there is no other evidence that can be relied upon to prove that the Appellant was found in possession of the government trophy, considering the fact that the charge has been rendered defective. Ground number five is also merited.

The last point that I deem appropriate to tackle in this appeal relates to what was contended in the 2nd ground of appeal. This ground faults the trial court for entertaining the case against the Appellant while it had no jurisdiction to do so. It must be emphasized that our courts are courts of law and they assume jurisdiction as conferred by law. This position has been emphasized consistently by the Court of Appeal in numerous decisions including its decision in the case of **Misezoro @Minani vs Republic, Criminal Appeal No. 117 of 2006** (unreported), where it categorically stated that: *"Our Courts are a creature of statutes and they have such powers as are conferred upon them by statute."*

A court, therefore, should not hear a case unless it is satisfied that the matter before it falls within its jurisdiction. Failure to do so, entails lack of

diligence on the part of the person presiding over a case in that court. The above position applies in the appeal under consideration. In this case, the aspect of lack of jurisdiction was raised with reference to section 113(2) of the WCA. The said section provides:

> *"(2) Notwithstanding the provisions of other written law,* ***a court established for a district or area of Mainland Tanzania*** *may try, convict and punish or acquit a person charged with an offence committed in any other district or area of Mainland Tanzania."* (Emphasis added)

The Court of Appeal in the case of **Director of Public Prosecutions vs Pirbaksh & 10 Others, Criminal Appeal No. 345 of 2017** (unreported), was faced with an akin situation. Facts in that case are that the Respondents (accused persons in the trial court), were charged with eleven counts. Some of the counts related to being found in unlawful possession of Government Trophies. The Respondents were arrested at Mnadani area, in Chunya District where it was alleged that the offence was committed. They were charged and arraigned in Manyoni District Court, where they were tried. After full trial they were acquitted. On a second appeal to the Court of Appeal, the issue of jurisdiction was raised. The Court held that the District Court of Manyoni lacked jurisdiction to try the case because in order to vest itself with jurisdiction, section 113(2)

ought to be reflected on the statement of offence in the charge sheet. The Court insisted that failure to cite the provision of section 113(2) of the Wildlife Conservation Act, No. 5 of 2009, ousted the trial court jurisdiction to adjudicate on the said counts of the charge. The appeal was dismissed because the trial court had no jurisdiction to try the case. At the end it was held: *"In conclusion we find that one, the trial court did not have jurisdiction to try the charges preferred against the respondents in count 2, 3, 4, 5, 6 and 7."*

Circumstances of that case are similar to the appeal under consideration. The Appellant was arrested at Sanyi village in Kitwai Reserved Area, Kilindi-District, Tanga Region. He was charged and arraigned in the Resident Magistrates' Court of Arusha at Arusha. In the charge levelled against the Appellant, section 113(2) of the WCA which would have conferred jurisdiction to the trial court, was not cited on the statement of offence. This leads me to the conclusion that the trial court lacked jurisdiction to try the case, hence conviction and sentence meted on the Appellant was unlawfully anchored. One may further argue that even if the Prosecution had made reference to Section 113(2) of the WCA, the Arusha Resident Magistrate Court of Arusha would not have jurisdiction over the matter as it is not ***a court established for a 'district or area'***

of Mainland Tanzania. This determination, however, is not necessary in the circumstances of this Appeal. It is therefore my conclusion that the Appellant's trial before the Arusha Resident Magistrate Court was a nullity for being entertained by a court that had no jurisdiction.

In so far as the court lacked jurisdiction to try the case, the Appellant's conviction and sentence cannot be left to stand. Furthermore, since the findings in the 5th, 3rd and 2nd grounds sufficiently dispose of the appeal, I see no reasons to deal with the other grounds of appeal. In conclusion, it is the decision of this Court that the proceedings and decision of the trial court were a nullity for being entertained by a court that lacked requisite jurisdiction. Likewise, the trial court wrongly proceeded with the matter pegged on defective charge and inventory form.

As a result, both conviction and sentence met against the Appellant are hereby quashed and set aside. The Appeal is accordingly allowed. I hereby order and direct the release of the Appellant from custody forthwith, unless he is held for some other lawful cause.

HIGH COURT OF TANZANIA

Y. B. Masara,

JUDGE

7th October 2022