IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A And ISSA, J.A.)

CRIMINAL APPEAL NO. 155 "B" OF 2023

AMIRI ALLY SHABAN.....1st APPELLANT

JUMA MOHAMED MAGAWA.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Court of Resident Magistrate of Arusha with Extended Jurisdiction)

(Massam, RM, Ext.Jur)

dated the 15th day of January, 2021

in

Criminal Appeal No. 51 of 2020

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JUDGMENT OF THE COURT

9th & 14th February, 2024.

FIKIRINI, J.A.:

This is a second appeal. The appellants, Amiri Ally Shaban and Juma Mohamed Magawa were charged and convicted of one count of unlawful possession of a government trophy. They were found guilty, convicted, and sentenced to serve twenty (20) years in prison, in Economic Case No. 8 of 2018, before the District Court of Babati at Babati. It is against the decision the appellants unsuccessfully preferred an appeal to the High Court in Criminal Appeal No. 59 of 2020, before the case was transferred and

registered as Criminal Appeal No. 51 of 2020 in which a Resident Magistrate with Extended Jurisdiction dealt with it. Protesting their innocence, the appellants have preferred the present appeal.

The charge before the District Court of Babati at Babati was that the appellants were found in unlawful possession of a government trophy contrary to section 86(1)(2)(b) of the Wildlife Conservation Act, Cap. 283 (the WCA), read together with paragraph 14 (d) of the First Schedule to, and section 57(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 (the EOCCA). It was alleged that the appellants on 19th November, 2018 at Chubi Village within Kondoa District in Dodoma Region, were found in possession of giraffe meat valued at TZS 34,671,000/= the property of the Tanzania government without a permit from the Director of Wildlife. The appellants denied the charge levelled against them.

The material background facts leading to the appellants' arrest, prosecution, convictions, sentences, and the present appeal, gathered from the seven (7) prosecution witnesses paraded including Philimoni Dafi Gitabalee (PW1), Gervas Kayombo (PW2), Seleman Rashid Mwiru (PW3), Jamal Rashid (PW4), Beatrice Modest Ndanu (PW5), E 4615 CPL Mondu

(PW6) and DC Donald (PW7), and several exhibits tendered and admitted, certificate of seizure - exhibit P1, three jackets, blue jeans, a t-shirt, bush knife (panga) and knife - exhibit P2, trophy valuation certificate - exhibit P3, chain of custody document - exhibit P4, and inventory form - exhibit P5, is as follows: that on 19th November, 2018 about 11.00 hrs, PW1 was on patrol with PW2, and others who were not called as witnesses, namely Hamza Lema, Peter Semtoe and Hamisi Maguya. PW1 testified receiving a call from an informer that at Chubi farms a giraffe had been killed. Right away, PW1 and his colleagues using a motor vehicle under their authority went to the crime scene. On arrival, they found the appellants and the killed giraffe with its parts comprising of the head, half the skin, a tail and a leg. The appellants tried to escape but were put under restraint. The 1st appellant had a knife while the 2nd appellant had a bush knife (panga). Also, found were clothes including jackets, t-shirt and blue jeans covered with blood.

Upon interrogation by PW1, the appellants admitted that they did not have a permit to kill the animal. This prompted the arresting officers to go and fetch the Village leaders, of which they managed to find PW3 and PW4. On arrival at the crime scene, PW3 identified the appellants as

members of his village. PW1 proceeded to prepare a certificate of seizure (exhibit P1) which was signed by PW1, PW2, PW3 and the appellants who used their thumb prints to sign. The appellants and the seized items were later taken to Babati Police Station. At Babati Police Station the seized items were handed to PW6 the exhibit keeper. PW2, PW3 and PW4 in their testimonies reiterated what PW1 described and how they witnessed the arrest of the appellants and seizure of the items found in possession of the appellants including giraffe parts, a knife, a panga, jackets, jeans and t-shirts.

PW5 came later when she was summoned to identify and evaluate the seized government trophy. She testified to have identified and confirmed that the seized meat was that of a giraffe, valued at USD 15,000. And with an exchange rate of TZS 2,311.40, the value of the killed giraffe totalled TZS 34,671,000.00.

PW7 a Police officer assigned to the Criminal Investigation Department stationed at Babati Police Station, prepared an inventory for disposal of the giraffe meat which was in the exhibit room at the time on 20th November, 2018. The inventory form with number 21/2018 (exhibit

P5) and the meat was taken to the Magistrate for endorsement and disposal order.

After the close of the prosecution case and the court was satisfied that a *prima facie* case had been established it called upon the appellants to mount their defence. In their defence, the appellants denied having committed the offence. The 1st appellant specifically stated that he was arrested while on his way to the farm and was taken to the forest where the killed animal was. The 2nd appellant on his part, claimed to be a guard at Rasul Bakari's farm and simply stated to have been arrested on his way home in Getakuru area and asked to go into a motor vehicle where he met the 1st appellant. Together, they were taken to Babati Police Station. He also admitted that at the crime scene, they signed on exhibit P1 in the presence of PW3 and PW4.

At the end of the trial, the court was satisfied that the charge had been proved against the appellants and proceeded to convict and sentence them. As indicated above they unsuccessfully appealed to the High Court and hence the present appeal consisting of thirteen grounds. Eleven were

in the main Memorandum of Appeal whereas two were in the Supplementary Memorandum of Appeal.

The grounds of appeal in the Memorandum of Appeal lodged on 15th July, 2022 can be paraphrased as follows: **one,** that the provision of section 26 of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019 (The EOCCA) was contravened. **Two,** the 1st appellate court erred in law and fact by upholding the appellants' conviction whereas the new charge was not read to the appellants. **Three,** the 1st appellate court ignored sections 29 (1) of the EOCCA and 50 (1) (a) (b) and 51 (1) (a) (b) of the CPA. **Four**, there was a variance between the charge and the evidence adduced. **Five**, that exhibit P2 was wrongly admitted. **Six,** that section 38 (3) of the CPA was contravened and the 1st appellate court did not pay attention. **Seven,** the prosecution case was not proved beyond reasonable doubt since it was full of contradictions. **Eight,** the 1st appellate court failed to expunge PW5's evidence as she was not listed during the Preliminary Hearing (Phg). **Nine,** the 1st appellate court failed to comply with section 113 (3) of the Wildlife Conservation Act, Cap 283 R.E. 2022. **Ten,** the 1st appellate court erred in law and facts by upholding conviction based on the inventory which was obtained contrary to the law. **Eleven,**

the 1st appellate court erred in law and fact by failing to observe that section 210 (3) of the CPA was contravened.

Whilst in the Supplementary Memorandum of Appeal lodged on 31st January, 2024, the appellants had two complaints namely: **one**, the consent authorizing their prosecution was made by the Regional Prosecution Officer contrary to section 26 (1) of the EOCCA. **Two,** the consent and certificate conferring jurisdiction had no signature of the presiding magistrate as per section 128 (5) of the CPA.

During the hearing of the appeal, the appellants were present in Court unrepresented and, therefore fended for themselves. Ms. Upendo Shemkole and Ms. Lilian Kowero, both learned Senior State Attorneys appeared representing the respondent Republic. Upon inquiry, the appellants preferred the learned Senior State Attorney to address the Court first on their grounds of appeal and they will rejoin if need be.

Invited to address the Court, Ms. Shemkole, outrightly conceded that the appeal has merit because the first ground of appeal consisted undisputable point of law that the provision of section 26 (1) of the EOCCA was contravened. She contended that according to section 26 (1), the

Director of Public Prosecution (the DPP) was the one to issue consent and no one else as the authority is not delegable. In the instant appeal, the Regional Prosecution Officer of Manyara region was the one who issued the consent under section 26 (1) instead of section 26 (2) of the EOCCA which conferred him with such powers. By so doing the trial court conducted the trial proceedings without requisite jurisdiction. She thus urged us to invoke powers bestowed to us under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) and nullify the proceedings and judgment of the trial and that of the Resident Magistrate of Arusha with – Extended Jurisdiction (first appellate court) given that it emanates from the nullity proceedings. To support her submission, she cited the case of **Sandu John v. The Director of Public Prosecutions,** (Criminal Appeal No. 237 of 2019) [2023] TZCA 17719 (4 October 2023, TANZLII).

She, further submitted that after the nullification the Court could have exercised one of the two available options, that of acquitting the appellants or ordering a retrial. She, however, refrained from praying for the Court to order a retrial, contending that there was a procedural irregularity that tainted significant evidence holding the prosecution case together. This occurred during the disposal of the meat. She submitted

that according to the Police General Order (PGO) No. 229, specifically paragraph 25, Police have been directed on how to handle delicate exhibits. It is a requirement under the provision that an inventory be prepared and the same be presented before the court accompanied by the suspects so that they can be heard and witness the disposal of the intended exhibit, in this case, that did not happen. What transpired was that PW7 prepared the inventory and took it to court. The record is silent if the suspects were present before the court and heard. There was therefore no compliance with the requirements as prescribed under paragraph 25 of the PGO No. 229. Enhancing her position, she relied on the case of **Mohamed Juma @ Mpakama v. R**, (Criminal Appeal No. 385 of 2017) [2019] TZCA 518 (26 February, 2019, TANZLII).

In light of her submission and the authority cited, Ms. Shemkole discouraged retrial considering that evidence proving the prosecution case beyond reasonable doubt as required in law is lacking, as exhibit P5 and evidence of PW7 that there was giraffe meat disposed of in the presence of the appellants would be missing. A retrial would therefore not be in the interest of justice. Against that backdrop she hence supported the appeal and consequently the acquittal of the appellants.

Before she sat down, we probed her on who was the magistrate who ordered the disposal of the meat. The record is silent but likely was the one who conducted the hearing, was her response.

Reverting to the appellants, they both had nothing much to say, besides urging us to allow the appeal and release them from prison.

We have considered the concession by Ms. Shemkole to the first ground of appeal, that the proper consent was lacking since the Regional Prosecution Officer who in terms of section 26 (1) of the EOCCA issued the consent had no such powers under the envisaged provision. This is not the first time we have come across such a snag. In the cases of **Adam Seleman Njalamoto v. R** (Criminal Appeal No. 196 of 2016) [2018] TZCA 373 (1st March, 2018, TANZLII) and **Peter Kongori Maliwa & 4 Others v. R** (Criminal Appeal No. 252 of 2020) [2023] TZCA 17350 (14 June 2023, TANZLII), the latter which was referred to in the case of **Sandu John** (supra), the Court observed that the jurisdiction to try economic crimes under section 3 (1) of the Act, is solely vested with the Corruption and Economic Crimes Division of the High Court. However, for that to occur

there must be consent from the DPP under section 26 (1) of the EOCCA which provides as follows:

> "*Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*"

Reading from the provision, it is undeniable the powers are entirely vested in the DPP, meaning they are not to be delegated, owing to the fact they are not delegable. However, in certain instances, an economic crime may be prosecuted in a subordinate court where in addition to obtaining the consent of the DPP to prosecute; a certificate of transfer to try the offence in a subordinate court is issued under section 12 (3) of the EOCCA.

In the present appeal as alluded to by the learned Senior State Attorney, the consent was issued by the Regional Prosecution Office, under section 26 (1) of the EOCCA, which was specifically to be exercised by the DPP. The irregularity rendered the consent issued invalid for the reason that instead of using section 26 (2) of the EOCCA the Regional Prosecution Officer used section 26 (1) exclusively meant for the DPP. The trial was thus conducted without the requisite jurisdiction. We are without a flicker

of doubt and at one with Ms. Shemkole that, the consent issued and signed by the Regional Prosecution Officer was invalid. Consequently, we find even the certificate issued in terms of section 12 (3) of the EOCCA, in that regard lacks validity as it was issued based on invalid consent. The proceedings, before the trial court and the first appellate court, are therefore a nullity.

The only burning question we are left to answer is whether there is sufficient evidence to compel us to order a retrial.

Again, as intimated by Ms. Shemkole, the position we align ourselves with, is that an order for retrial would occasion miscarriage of justice. **One,** according to PGO No. 299, particularly paragraph 2 (a), once the exhibit has been surrendered to the Police for either investigation or safekeeping, perishable or not, a Police Officer entrusted with the obligation is fully responsible for handling it protectively. In the present appeal, PW7 was such an officer. The giraffe meat as per his evidence on page 59 of the record of appeal was in the exhibit room. As his duty, he prepared an inventory form No. 21 of 2018 (exhibit P5) and took the meat to court and the magistrate made a disposal order. Even though there was a disposal

order, it was not in line with what had been prescribed in paragraph 25 of the PGO No. 229. The paragraph provides thus:-

> *"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 giraffe meat was by any standard perishable and deserved quick disposal. But before the disposal order is made the provision imposes two conditions. **One,** it has made the presence of the suspects a mandatory requirement, be it they are in custody or out on Police bail. The rationale behind this is not farfetched. The presence of the suspects is required to allow them to be heard by the Magistrate before a disposal order is made and subsequently witness the disposal of the said exhibit. This mandatory requirement as illustrated in the case of **Mohamed Juma @ Mpakama** (supra) was not adhered to. As a result, the appellants' right to be heard was infringed resulting in the evidence that there was giraffe meat alleged found with the appellants ceasing to exist.

Two, the provision has also dictated that where possible photographs be taken before the disposal order. In the present appeal as pointed out above neither the suspects were present before the Magistrate nor were any photographs taken as instructed in paragraph 25 of the PGO. The aftermath is the weight of PW7's evidence and exhibit P5, becomes redundant and cannot be relied on to enhance the prosecution case, especially the evidence of PW1, PW2, PW3 and PW4. This is because, without proof that there was giraffe meat alleged unlawfully found in possession of the appellants, their evidence becomes flimsy and could not augment the prosecution case which has to be proved beyond reasonable doubt. PW1, PW2, PW3 and PW4 evidence could only make sense had the order to dispose of the meat as per exhibit P5 which was handled by PW7 been properly processed. Failure to present the appellants had watered down the whole prosecution case. This one ground of appeal on a point of law, in our view, sufficiently disposes of the appeal. The exercise of addressing the remaining grounds would be meaningless.

In light of what we have explained above, we find the appeal meritorious and allow it and in terms of section 4 (1) of AJA, we hereby nullify and quash all the proceedings, convictions and set aside the

sentences by the trial court. We also nullify the proceedings and judgment of the first appellate court. And proceed to order the release of the appellants from prison unless lawfully held for lawful causes.

DATED at **ARUSHA** this 13th day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P.S. FIKIRINI
JUSTICE OF APPEAL

A.A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2024 in the presence of the Appellants in person and Mr. Stanslaus Halawe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL