IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 173 OF 2022

SHIJA NGASA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma)

(Manyanda, J.)

dated the 28th day of March, 2022
in
(DC) Criminal Appeal No. 36 of 2021

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JUDGMENT OF THE COURT

30th April & 23rd May, 2024

KWARIKO, J.A.:

The appellant, Shija Ngasa was aggrieved by the decision of the High Court of Tanzania at Kigoma (henceforth "the High Court") which dismissed his appeal he had preferred against the decision of the District Court of Kigoma at Kigoma (the trial court). Before the trial court, the appellant faced two counts of unlawful possession of Government trophy contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009; now CAP 283 R.E. 2022 (the WCA) read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [CAP 200 R.E. 2019; now R. E. 2022]

(the EOCCA). It was alleged by the prosecution that on 1st May, 2019 at Lugando area within Uvinza District in Kigoma Region, the appellant was found in possession of one piece of leopard skin valued at USD 3500.00 equivalent to TZS. 8,102,500.00 and one horn of common duiker valued at USD 250 equivalent to TZS. 578,750.00, the property of the United Republic of Tanzania without any permit from Director of Wildlife.

Having denied the charge, the appellant was fully tried. At the end, he was convicted and sentenced to serve twenty years imprisonment in respect of each count, which terms were ordered to run concurrently. Dissatisfied, the appellant unsuccessfully appealed to the High Court. Undaunted by that failure, he has come before the Court on a second appeal.

In order to prove the charge, the prosecution paraded a total of four witnesses whose evidence can briefly be stated as follows: On 1st May, 2019, Inspector Kaitila Maiga Kubebeka (PW1) while at a funeral in Lugando Malagarasi area received information from an informer that the appellant was in possession of Government trophies. Thereafter, PW1 informed a hamlet chairman one Sefu Josephat Masabile (PW2) that he wanted to search at the appellant's house. It coincidentally happened that, PW2 and the appellant were also attendees at the said funeral. PW1,

PW2, together with Kulwa Samwel, Simon and Corporal Isaya took the appellant to his house. At the appellant's house a search was conducted, whereby a white bag was found containing traditional medicines, one leopard skin, one horn of common duiker and one lion skin. A certificate of seizure was prepared and duly signed by the appellant and witnesses. The certificate of seizure was admitted in evidence as exhibit P1 while the leopard skin, lion skin and horn of common duiker were admitted in evidence as exhibit P2 collectively.

Meanwhile, at noon the same day, No. G 4455 DC Abdallah (PW4) went to Malagarasi Nguruka Police Station and received exhibit P2 and also drew sketch map of the scene of crime (exhibit P4). On her part, Imelda Mbaruku (PW3), a game officer with Uvinza District on 13th September, 2019 received exhibit P2 from PW3 for identification purpose. She identified the trophies to be one skin of leopard and one horn of common duiker. She also valuated the trophies. However, she failed to identify the other skin since it was spoiled. The valuation report and PW3's response letter to the OC-CID were admitted in evidence as exhibit P3 collectively.

On the other hand, the appellant who was the only witness in defence, denied the charge. He accounted that on 7th March, 2018 he

was arrested by the police for allegations of murder of his relative before the charge was withdrawn. Later, in October, 2019 he was charged with the present offences. He complained that the prosecution did not prove that he signed the certificate of seizure.

At the close of the case from both sides, the trial court found that the prosecution case was proved beyond reasonable doubt and the appellant was accordingly convicted and sentenced as indicated earlier.

Before this Court, the appellant filed four grounds of appeal which we have paraphrased as follows: **One**, that PW3 was incompetent to evaluate the trophies in line with sections 86 (2) (a) (b) and 114 (3) (4) of the WCA; **two**, that the case was fabricated against the appellant having first been accused of murder; **three,** the appellant was detained in the police custody for a long time without being arraigned in court; and **four**, the prosecution case was not proved beyond reasonable doubt against the appellant.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent/Republic had the services of Mr. Shabani Juma Masanja, learned Senior State Attorney who was assisted by Mses. Edna Jackson Makala and Naomi Joseph Mollel, both learned State Attorneys. When invited to address the Court on his grounds of

appeal, the appellant having adopted them, chose for the learned counsel for the respondent to reply first, while reserving his right of rejoinder where necessary.

In reply, Ms. Makala who argued the appeal on behalf of the Republic, informed us that she was opposing the appeal. In respect of the appellant's complaint in the first ground that PW4 being a game officer was not qualified to identify the trophies, Ms. Makala argued that PW4 was qualified to identify the trophies as per sections 86 (4) and 114 (3) of the WCA. To fortify her contention, she also cited our earlier decision of **Shabani Ally Athuman v. Republic**, Criminal Appeal No. 151 of 2021 (unreported).

On our part, having perused the cited provisions of the law and the cited case, we agree with the learned State Attorney that the function of the game officer is not different from those of a wildlife officer which is to protect the wildlife and enforce the WCA. In the cited case of **Shabani Ally Athuman** (supra), the Court referred to our earlier decision in the case of **Jamali Msombe & Another v. Republic**, (Criminal Appeal No. 28 of 2020) [2022] TZCA 165 (30 March, 2022; TANZLII) and stated thus:

> *"In the present appeal, the designation of the person who assessed, valued, weighed and issued*

the trophy valuation certificate was a principal game officer. It is common ground that the main task of any game officer is to protect wildlife and ensure proper implementation of the WCA. We are therefore, satisfied that PW6 was a competent person to assess, value, weigh and issue the trophy valuation certificate."

Likewise, in the instant appeal, PW4 who introduced herself as a game officer, was a competent person to assess, value, weigh and issue the trophy valuation certificate. Therefore, the appellant's complaint in the first ground has no merit, and it is rejected.

In respect of the second ground where the appellant complained that the case is a frame-up, the learned counsel argued that this complaint has no merit since the appellant did not bring-up this matter from the beginning.

Having considered this complaint, we agree with the learned counsel that, the appellant has not brought evidence to prove that this case is a mere fabrication against him. The fact that he was earlier on accused of the murder, cannot be proof that the present case is a fabrication provided the prosecution had reason to believe that the appellant was involved in the said allegations. This ground thus fails.

In the third ground, the complaint is that, the appellant was unlawfully kept in police custody for a long time without being arraigned in court. Responding, Ms. Makala argued that the appellant was locked-up in the police custody for about five months from 1st May, 2019 to 23rd October, 2019 although section 29 of the EOCCA requires arraignment to be within 48 hours from the time of arrest. She was quick to defend this delay that it depends on the circumstances of each case citing the case of **Paulo Machandi v. Republic**, Criminal Appeal No. 244 of 2019 (unreported).

On our part, we are of the view that the first consideration by the prosecution should have been the observation of the law. Section 29 (1) of the EOCCA which is relevant in this respect provides thus:

> *"After a person is arrested, or upon the completion of investigations and the arrest of any person or persons, in respect of the commission of an economic offence, the person arrested shall as soon as practicable, and in any case within not more than forty-eight hours after his arrest, be taken before the District Court and the Resident Magistrate Court within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act."*

According to this provision, once a person is arrested in respect of an economic offence, should as soon as practicable be arraigned in court and in any case, it should be within not more than forty-eight hours after his arrest. This means, after the appellant's arrest on 1st May, 2019, he was supposed to be taken to court immediately but not more than forty-eight hours after his arrest. However, that was not the case because the appellant was arraigned in court on 23rd October, 2019 which was more than five months later. This was clear violation of the cited law. In the absence of any explanation concerning the delay, we draw an inference adverse to the prosecution which creates doubt on their case. We are guided on this observation by our earlier decision in the case of **Laurent s/o Rajab v. Republic,** Criminal Appeal No. 270 of 2012 (unreported). In that case, following his arrest, the appellant was kept in police custody for three months before he was arraigned in court. In that scenario, the Court observed as follows:

> *"The record shows that the incident occurred on 1-11-2009, but the appellant remained in custody until 16-2-2010 when he was sent to court to answer his charge for the first time. We think, three months is a very long time to remain without being charged. Such a delay in charging the appellant not within reasonable time is a serious*

and fatal omission on the part of the prosecution's case leading to watering-down the credence of their case. For that reason, we agree with Mr. Hashim Ngole that such delay in charging the accused (appellant) creates doubt to the credence of prosecution's case."

On the strength of the foregoing, we are certain that, the cited case of **Paulo Machandi** (supra) is distinguishable. This is because, although in that case the appellant was charged nine months after the incident, there was no record to show if he was kept in police custody for the whole period or was out on police bail. The Court stated thus:

"In the current case, both parties are at one that the appellant was taken to court after lapse of almost nine (9) months. The law we have referred which governs detention of arrested persons envisaged the situation where a person may be released on bail with or without sureties, and where he or she is retained in custody with a condition that he is brought before the court as soon as practicable. There is nothing on the record of appeal indicating as to where the appellant was, from the time of his arrest up to when he was arraigned before the trial court. In the circumstances, we do not think it will be appropriate to speculate what transpired."

The Court also observed that, how soon the accused should be brought to court after arrest, depends on the circumstances of each particular case. Hence, in the circumstances of the present case, we would have expected the prosecution to explain why the appellant was kept in police custody for five months without being arraigned in court. With this analysis, we find this ground with merit.

The last ground is a general one, as to whether the prosecution case was proved beyond reasonable doubt against the appellant. The respondent has maintained that the prosecution had discharged its duty of proving the case as required in law. Considering what has been discussed above, we agree with the appellant that this case was not proved as required by the law. Apart from what we have shown in the preceding ground, we have found that; **firstly,** the alleged Government trophies were not conclusively identified by PW3. This is because, while she said the alleged leopard skin had yellow, black and white dots, she did not explain any distinguishing features from the skin of any other like animals. Coupled with the fact that PW3 was unable to identify the second skin which was suspected to be of lion, one cannot overrule the possibility of inconclusive identification of the alleged leopard skin. PW3 did not

equally distinguish the said horn of common duiker from the horn of any other animal of like species.

Secondly, the chain of custody which means the movement of the seized items from one person to another until they were tendered in court as exhibits was not proved. The prosecution evidence shows that after the said trophies were found in possession of the appellant, PW1 took them to Nguruka Police Station but he did not mention the name of the exhibits keeper to whom he handed them over. Meanwhile, PW4 who said to have received the exhibits on 1st May, 2019, did not mention who had handed them to him. He did not either identify himself to be the exhibits keeper at the said police station. Moreover, the exhibits register was not tendered in evidence despite a promise by PW1 to do so. We thus find that the movement of the seized items from one person to another was not accurately documented. When the Court was faced with a like situation in the case of **Issa Mustapha Gora & Another v. Republic,** Criminal Appeal No. 330 of 2019 (unreported), it was stated thus:

> *"Like the learned State Attorney, we agree with the appellant that no register evidencing documentation on the handling of the government trophy (paper trail) was tendered in court in line with Court's findings in* ***Paulo Maduka and 4 Others vs. Republic,*** *Criminal Appeal No. 110 of 2007,* ***Chacha Jeremia Murimi vs. Republic,***

Criminal Appeal No. 551 of 2015 and ***Abuhi Omari and 3 Others vs. Republic,*** *Criminal Appeal No. 28 of 2010 (all unreported)."*

Conclusively, we are of the considered view that, the prosecution case was not proved beyond reasonable doubt against the appellant. We thus allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. Further, we order the appellant's immediate release from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 22nd day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of May, 2024 in the presence of the Appellant in person connected via Video facility from the High Court of Tanzania at Kigoma and Ms. Edna Makala, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL