

TANZANIA / JUDGMENT

ECONOMIC APPEAL NO

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© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA (CORAM: HON. AUGUSTINE RWIZILE) ECONOMIC APPEAL NO. 000009592 OF 2024
COSMAS KURW A COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF VERSUS REPUBLIC
RESPONDENT I DEFENDANT

JUDGMENT

Fly Notes

Facts

Ratio Decidendi 9th of August 2024 Hon. RWIZILE.: This appeal arises from the decision of the District court of Kibondo where Cosmas Kurwa was arraigned on three counts. First, it was unlawful entry into a game reserve contrary to section 15(1) and (2) of the Wildlife Conservation Act, [Cap 283 R.E 2022]. On the second count, he was charged of unlawful possession of government trophies contrary to Section 86(1)(2)(c)(b) of Wildlife Conservation Act, [Cap 283 R.E 2022], 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. 2022]. Lastly, it was the offence of unlawful possession of firearms contrary to section 20(1) and (2), 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. 2022]. When the charges were put to him, he admitted the first count. He was convicted and then sentenced to imprisonment of one year. The trial was conducted on the 2nd and 3rd counts which he denied. After full trial, he was found guilty in both counts, convicted and sentenced to a pay fine of TZS. 5,000,000.00, in default to serve 20 years imprisonment on the 2nd count and 5 years for the 3rd count. The sentences, accordingly, were to run concurrently. Aggrieved by both conviction and sentence, he has appealed to this court for the following three

reasons:

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1. That, the trial Magistrate erred in law and in fact in accepting that the prosecution side had proved its case beyond all reasonable doubts while in fact the whole prosecution evidence was framed up.
2. That, the trial court erred in law and in fact in failing to consider the appellant's defence.
3. That, the trial court erred in law and in fact to convict the appellant due to weakness of his defence. At the hearing, the appellant was unrepresented. The respondent was under the services of Rehema Mpozemenya, learned State Attorney. The reasons for the appeal, as advanced by the appellant are that witnesses were fake. That is why, he added, it took some eleven months to have the case heard. Secondly, he argued that the trial court did not Analyse his evidence properly. He said, he was convicted based on the prosecution case only. He asked this court therefore to allow this appeal. Like the appellant, the learned state attorney supported this appeal. The reasons for supporting it were clearly stated that the appellant was sentenced to one-year imprisonment upon admission of the first count. The other counts which he did not admitted were not proved beyond reasonable doubt. She argued, it was first stated at the preliminary hearing that they found three beads with the appellant but the same were not brought to court. According to her, Pw1 said, he identified the gun and no one else saw it. Elaborating further, the learned state attorney said, at the arrest, it was testified, there were two people, but the other witness did not identify the said gun. According to her, the evidence of Pw3 was a valuation of the trophies which he said was a buffalo meat. He did not show how he identified buffalo meat against other types of meat. On the chain of custody, she said, it was not properly stated as to how the buffalo meat got to Pw3 for valuation. It is not known as to how it got to him for valuation. The exhibit keeper as well, did not come to testify to prove the manner he received the same as an exhibit and how the same was kept. She was therefore of the view that this appeal is supportable. Having heard submissions of the parties and gone through the records. I have to say, the case must be proved beyond reasonable. This onus of proof has all the time, been to the prosecution. The appellant as it has been shown was not represented. His brief statement on the grounds of appeal has been that the case was not proved and that witnesses for the prosecution told lies to the trial court. This view was supported by the learned state attorney that the same was not proved. It is true as submitted by Rehema that the two witnesses for the prosecution alleged arrested the appellant. It was according to the evidence found in possession of the muzzleloader gun, illegally. The point is why was the gun allegedly found in possession of the appellant was only identified by one witness between the two who arrested him. This failure to clearly identify the same weapon, does not only weaken the prosecution case, but all puts to question the credibility of the two arresting witnesses. It should be noted with concern however that, all the said was done without independent witnesses given the nature of the case and obtaining circumstances. They were in Moyowosi game reserve, not expected to have independent witnesses. Pw3 is alleged to have identified buffalo meat and valued the same. In the eyes of the law, he is an expert in wildlife since he is an officer trained in that area. Unless his expertise is wanting, which may be the case, because Page.2 Hon. AUGUSTINE RWIZILE the court was not informed about his credentials, he ought to

identify to the court how unique is buffalo meat distinct from others wild animals. This court, in the case of Chacha Chiwa Marungu vs The Republic, (HC- Musoma). Criminal Appeal No 5 of 2020, my learned brother Galeba, J as he then was had this to say on page 6 of the judgement; - "This kind of identification is not acceptable. The identifying officer must detail facts which show that the meat he saw was the meat of no other animal except the animal he mentions. It is not enough to just say the meat had white oil or fat. A description of the trophy for it to be acceptable as lawful it must give the distinctive characteristics of the meat of a particular animal as against the characteristics of other meat of other animal species." Pw3, merely said, the meat is buffalo. He did not explain, how he came to know that it was buffalo meat and not beef, for instance. Further Pw 1 said they found nose, two ears and intestines of the said buffalo as per exhibit Pl. Pw3 in terms of exhibit P4 which is a certificate of valuation of trophies simply said, it was African cape buffalo seven pieces. While Pw5 in the inventory exhibit PS supported the point. It is doubtful, as to what was testified by Pw1 that the meat was nose, ears and intestines as it was seized is what was valued and destroyed later by the Pw3 and Pw4. It is not known as well how large the intestine was and if it was chopped into pieces to call a total of seven of the same. The other point is on the chain of custody. Chain of custody is a key thing in proving that what was seized in relation to the crime at the crime scene, is what was tendered in court. This is important because, the court, which was not at the crime scene, has to be sure that the evidence brought before it, indeed was found with the person brought before it. Messing up with the chain of custody of exhibits does not only jeopardize the prosecution case, but also may lead to acquitting the culprit or convicting the innocent. The evidence is not clear as to how, the articles were moved from one place to another. Witnesses had to show that when the exhibits were seized, there was unbroken chain until when they were tendered in court. All that is lacking. I doubt, the prosecution witnesses. I therefore agree with both, the appellant and the learned state attorney that the case was not proved beyond reasonable doubt. But if we are all wrong, it is otherwise found that the same was proved, still, the charge and the whole prosecution is not supportable. I am saying so because, the trial court received the charge sheets dated 31st January 2023, 1st June 2023 and 11th July 2023, but the one date June 1st has been written on it, by hand "amended" The rest are intact and have no court endorsement. The charge sheet dated 31st January has only two counts and the other two have three counts. It was not right for the trial court to dump charge sheets in the record. The charge sheet being a serious document that institutes the case must be handled with care. In case the same has been amended or altered, the record must not only show, but the charge sheet itself has to contain the endorsement by the trial court in terms of section 234 of the Criminal Procedure Act. But worse still, this was an economic offence. The trial court had no jurisdiction to try the offence unless it is vested with such powers by the Director of Public Prosecutions or someone acting on his behalf and in this case in terms of section 26(1) of the Economic and Organized Crimes control Act. The record shows, on June 1st 2023, the District Prosecutions officer one Shaban J Masanja consented to the prosecution of Justine Amon. The appellant is called Cosmas Kurwa and the record shows, it is the person named in the charge sheets as I have shown before, Page. 3 Hon. AUGUSTINE

RWIZILE and it is same person whose case is named in the certificate of transfer. I have perused the record times without number, and I am far convinced that despite having no evidence proving the charge still, the trial court had no jurisdiction to try the matter. There was no proper consent so say. There was no consent to try Cosmas Kurwa, but Justine Simon instead. In the end, this appeal has merit. It is allowed. The 2nd and 3rd counts were not proved. In all the trial was a nullity and whole proceeding is quashed, sentences meted set aside. The appellant be released from prison unless otherwise lawfully held. Dated at KIGOMA ZONE this 9th of August 2024. AUGUSTINE RWIZILE JUDGE OF THE HIGH COURT
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