

TANZANIA / JUDGMENT

Daniel Charles Otieno

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB REGISTRY AT MUSOMA ECONOMIC APPEAL
NO. 000023988 OF 2024 REFERENCE NUMBER 202408222000023988 (Arising from Economic Case
No. 40906 of 2023 of the District Court of Serengeti at Serengeti) DANIEL CHARLES
OTIENO.....1st APPELLANT NYARAWA SAROTA
MGUSUHI..... 2nd APPELLANT MAKORI SIRARI
MAKORI..... 3rd APPELLANT VERSUS
THEREPUBLIC..... RESPONDENT

JUDGMENT

05th & 17th February, 2025 M, L, KOMBA, J.: Daniel Charles @ Otieno, Nyarawa Sarota @ Mgsuhi and Makori Sirari © Makori (the appellants) were arraigned before the District Court of Serengeti ©Serengeti for two offences, first; Unlawful possession of weapons contrary to Section 103 of Wildlife Conservation Act and Second; Unlawful possession of Government trophies contrary to section 86(1) and (2)(c)(iii) of the Wildlife Conservation Act (Cap 283 R.E 2022) read together with paragraph 14 of the first schedule to, and section 57(1) Page 1 of 14 and 60(2) both of Economic and Organized Crime Control Act (Cap 200 R.E 2022). It was alleged that; On 14/12/2023 the appellants were arrested at the Ikona Wildlife Management Area at the area known as MHma wa Mwarabu by the conservation rangers being in possession of carcass of warthog and weapons to wit; one machete, one sword, one spear and one knife, and they failed to satisfy to the authorized officer such weapons were not intended to be used for purpose of killing, hunting, wounding or capturing wild animals; the trial court after hearing both sides found them guilty as charged and sentenced them to serve 1 year imprisonment for the first count and 20 years for the second count and after considering the 1 year the appellants spent in custody the appellants were sentenced to serve 19 years. Being dissatisfied with conviction and sentence the appellants knock the door of this court praying for the court to quash both conviction and sentence and to set them free. They praying so with five grounds of appeals, and for easy understanding are summarized as follows; first, they were not involved at the time of disposing of government trophy and no photograph, taken, second; the case was not proved beyond reasonable Page 2 of 14 doubt, third; the trial wrongly admitted the evidence of PW1 and PW2, fourth; government trophy was not tendered and fifth, they did not sign the certificate of seizure as per testimony of PW1 and PW2. On their testimonies Dickson Masongo Kiraryo (PW1) and Aziz Biseko Makongo (PW2) testified that on that day while in patrol with other officers, David Magai Musiba, Gina Mwatugu Gilala and

Haroun Hamad, found three persons walking inside the Game Reserve, they went and arrested them as they were in possession of a carcass of warthog and weapons to wit; panga, spear, knife, and sime, which according to PW1 and PW2 testimonies the appellants admitted using them weapons for killing and skinning animals and without permit. On 15/12/2023 the government trophy was valued by Wilbrod Vicent (PW3) and the market value of the warthog was USD 800, which was equal to TZS 2,125,000/- on that day. On the same date, PW4 (J.4473 D/C Erick) police from Mugumu Police station received a file for further investigation and on his investigation, he found the appellants were alleged to enter into the National Park unlawfully and being in possession of government trophy and without having a permit. He further went with the appellants to Mugumu Primary Court to obtain the disposal order of the trophy before Page 3 of 14 the Magistrate, thereafter handed the trophy to PW1 for disposal, he then called PW5, Amani Joseph Massoro and gave him the GPS from the case file for drawing the geographical map of the arresting area. PW5 after receiving the GPS codes from PW4 with reference number 36M 0676534 UTM 9768950, he entered the number into the computer system known as Arch GIS for geographical map drawing, which shown that they were recorded within the boundaries of Ikona Wildlife Management Area. He then printed the map and handed it over to PW4. The appellants defended themselves and generally stated on 14/12/2023 at 08:00 hours they went to cut trees for burning the mud bricks at a reserved area (marisho) in the village. While cutting trees, police officers came and arrested them for cutting trees and they were taken to Mugumu police station. During hearing of appeal in this court, the appellants fended for themselves and the respondent was represented by Ms. Happiness Machage, State Attorney. The appellants had no much to say, they rather adopted their petition of appeal and in their rejoinder prayed to be set free. On the side of the respondent, Ms. Machage on her submission she started with the second ground, on the case being not proved beyond reasonable Page 4 of 14 doubt. She submitted that the prosecution side through their five witnesses and exhibits they managed to prove their case beyond reasonable doubt. PW1 and PW2 testified that, they arrested the appellants at MHma wa Mwarabu area and found them with weapons; machete, spear, knife, and sime, and they failed to explain that they did not intend to commit an offence with such weapons. Also were found with Nyama ya Ngiri (carcass of warthog) and certificate of seizure was prepared and admitted as exhibit PE1, she contended that when the appellants signed the certificate of seizure it proves that they were arrested with weapons and Government trophy. She then referred this court in the case of Papaa Oles kaladai Dendem and Another vs Republic, Criminal Appeal No. 47 of 2020. She continues to submit that, the GPS codes which were taken at the scene were given to PW5 who prepared the map and find appellants were within Hifadhi ya Jamii ya Ikona (Wildlife Management Area) and the map was admitted as exhibit PE5. The trophy which they were found with was valued and identified as warthog while providing distinguishing features of that animal and that valuation report admitted as exhibit PE3. On 15/12/2023 disposition order was procured before the Magistrate; the appellants were present and admitted being found with Government trophy Page 5 of 14 and signed the same. The inventory was admitted as exhibit PE4, she cited the case of Zarina Akbarary sharif and Another vs Noshil Filosesha,

[1963] EA 239, on admission done by accused person. And they prayed for dismissal of that ground as it has no merit. On the first ground, State Attorney submitted that, it is not requirement of law for an accused person to be present during disposition, PGO No. 29 directs accused to be present when prosecution seek for an order. On the third ground, she submitted that PW1 and PW2 testified as game rangers and there is no reason to doubt their testimonies as it is believed that every witness is credible, cited the case of Goodluck Kyando vs Republic, [2003] TLR 363. On the fourth ground, it is respondent submission that inventory was tendered which has the order of the Magistrate and since the Government trophy was perishable and it was tendered in replace of the Government trophy. She supported her submission with Buluka Leken Ole Ndindai vs Republic, Criminal Appeal No. 459 of 2020, where at page 15 and 16 the Court explained five ingredients to be considered when order is sought. On their part, they see all ingredients were considered. On the fifth ground, Ms. Machage submitted that, the certificate of seizure admitted during trial without Page 6 of 14 objection from the 3rd appellant while 2nd and 1st appellant objected but their objections were overruled because they just said they do not recognize the exhibit. In the end, Ms. Machage prayed the appeal to be found with less merit and this court to uphold the decision of the trial court. After hearing submission of the parties and perusing the record of appeal, I will discuss the grounds of appeal by combining first ground and fourth grounds of appeal, and I will end with second, third and fifth grounds jointly, as they are about proving the case beyond reasonable. The appellants on the first ground complaining that they were not involved at the time of disposing the trophy and no photograph taken, and on fourth ground complaining that no trophy that was tendered at the trial court. In cases of this nature, the exhibit may be disposed of by the order of the court since it is perishable and cannot be preserved until the trial, that is as per Paragraph 25 of Police General Order (PGO) No. 229 which reads; 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 Page 7 of 14 immediate disposal. Where possible, such exhibits should be photographed before disposal. It is also well explained and directed by the Court of Appeal in the case of Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017, TZCA; where the Court stated that; '...paragraph 25 envisages any nearest magistrate [who issues] an order to dispose of perishable exhibit...inaddition emphasizes the mandatory right of anaccused person to be present before the magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposalorder (exhibit PE. 3)..., in addition, no photographs of the perishable Government trophies were taken as directed by the PGO.... Exhibit PE. 3 cannot be relied onto prove that the appellant was found in unlawful possession of the Government trophies mentioned inthe charge sheet' In the present case the appellants were taken before the Primary Court of Serengeti District @ Mugumu before the Magistrate, however, the way the court prepare proceedings, it suggests that the appellants were taken before magistrate but the exhibit was not taken together with them for the Page 8 of 14 court to

order its disposition as per above directions. The court words were; 'Washtakiwa wote kwa pamoja wanaulizwa kama walikutwa na nyara ya serikali Hiyo rodheshwa katika form ya kutekeza nyara za serikali na kiia mmoja kwa maneno yake amesema.' Sgd Hakim u Mkazi 15/12/2023 Without taking time on whether taking of photograph is fatal and going to the merit of the case or not, that paragraph itself is enough to see the procedure under Paragraph 25 of PGO No. 229 and the celebrated case of Mohamed Juma @ Mpakama vs Republic (supra), was not adhered. The law requires exhibits to be taken before the Magistrate and the order should be prayed by the officer taking the exhibits together with accused before the Magistrate, failure of exhibit P4 to be self-explanatory on that, I find that exhibit cannot ground conviction on the second count of unlawfully possession of government trophy, and those grounds are meritorious. In reading the Charge, I find the appellants on first count were charged in possession of weapons with intent to commit an offence in Wildlife Page 9 of 14 Conservation Area contrary to section 103 of Cap 283, and further, Exhibit P5 shows appellants were found within Wildlife Management Area. After perusing into the Act, I found section 31 which provides; 31.-(1) The Wildlife Management Areas may be established for purposes of effecting community-based wildlife conservation in areas-

- (a) outside of core protected areas;
 - (b) which are used by local community members; and
 - (c) within the village land
- (2) Benefit sharing in the Wildlife Management Areas shall comply with guidelines issued by the Government and shall adhere to mechanisms of equitable distribution of costs and benefits targeted at promoting wildlife conservation, enhancing economic development and poverty reduction.
- (3) The Wildlife Management Areas shall be established and managed in accordance with regulations made by the Minister and published in the Gazette. Therefore, for the area to be the Wildlife Management Area needs to be established by Minister through Government Gazette and that area may be Page 10 of 14 part of the village. Reading record of this appeal and I find none of the witnesses establish there is Government Notice by a Minister which established Ikona Wildlife Area as Wildlife Management Area and therefore that area is a protected area. That is to say, if the appellants were found within M/ima wa Mwarabu area, there is no evidence on record that proves Ikona is Wildlife Management Area and the appellants were found against the law as they were charged. This is contrary to 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2019. Further looking on the record, I found contradiction on the place where the appellants were found during arrest, PW1 stated that they found the appellants at, the game reserve while in patrol, PW2 states that while in patrol found the appellants at Ikona Wildlife Management Area, PW4, the investigation officer stated, after reading the case file he found the appellants were accused for entering into the National Park and PW5, the author of the map stated after entering the GPS codes into computer

system known as Arch GIS, it show that the GPS codes were recorded within the boundaries of Ikona Wildlife Management Area. It is testimony of PW1 that they arrested the appellants and seized their weapons and the carcass of warthog, filled seizure certificate and Page 11 of 14 appellants signed, from the testimony of the PW1, PW2, PW4 and PW5 it is not clear where did the appellants found and arrested whether in Wildlife Management Area, Games Reserve or National Park. There is no doubt these are three different areas and their protection and establishments are different. The Charge in which appellants were convicted to, show in the particulars therein that; appellants were found at Ikona Wildlife Management Area. There is no doubt that being found in possession of government trophy regardless of the place within Tanzania is an offence, however, the prosecution evidence must tally with the Charge. It is trite that variance between the Charge and evidence is incurably defective unless the prosecution amends the charge, See the case of; Hussein Ramadhan vs The Republic, Criminal Appeal No. 195 of 2016, CAT; Michael Gabriel vs Republic, Criminal Appeal No. 240 of 2017, CAT. On top of that the testimonies of prosecution witnesses were also in inconsistency. The testimonies of PW1, PW2 PW4 and PW5 defeat logic and remain unknown where did the appellants found and arrested, taking into consideration of their defense, it was very important for the prosecution to establish and prove the area of arrest and seizure of weapons and the alleged carcass. Page 12 of 14 It was respondent submission that, the prosecution case was proved beyond reasonable doubt according to the testimony of PW1 and PW2 who found the appellants at the scene and there is no reason to fault their evidences as they were credible witnesses as per the case of Goodluck Kyando vs Republic (supra), looking into the record there are faults on the evidences of PW1 and PW2 as these witnesses mentioned the different areas of arrest as shown in previous paragraph while they were together in the patrol. Appellants complaint on the appearance of their signatures on the seizure certificate, the respondent submission that signing the seizure certificate amount to acceptance of the seizing government trophy and weapons. It is the position of this court that, since the prosecution evidence was to the extent that, the certificate was filled and signed at the scene of crime, failure to establish area of the arrest as analysed earlier, I find that the argument of the appellants on their signature has merit and raise reasonable doubt. Reading record of this appeal in its totality, I find the case of prosecution with doubts which, as customs in our jurisprudence, Doubts left by prosecution should benefit accused persons. Page 13 of 14 See Syridion Michael vs Republic (Criminal Appeal No. 262 of 2022)

[2024] TZCA 365 (15 May 2024). In the end, I find prosecution case was not proved in the standard required by the law, consequently, I allow the appeal, quash the conviction and set aside the sentence imposed to the appellants. I further order immediate release of the appellants unless they are lawful held. DATED at MUSOMA this 17th day of February, 2025. IT M. L. KOMBA JUDGE Page 14 of 14

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