

TANZANIA / JUDGMENT

FRANK KISINGA ANOTHER

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UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SUB
REGISTRY OF MBEYA AT MBEYA CRIMINAL APPEAL NO. 80 OF 2023 (Originating from District
Court of Mbalari at Rujewa. Economic case no. 08 of 2018) FRANK MARICHELO @
KISINGA.....1ST APPELLANT ELIUD KISINGA
.....2ND APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 14/8/2023 Date of Judgment: 24/10/2023 Nongwa, J.: The appellants in this appeal at Mbalari District court were charged with two counts, the 1st count was unlawful possession of government trophy contrary to section 86 (1) and (2) © (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended, read together with paragraph 14 of the 1st schedule to and sections 60(2) and 57 (1) both of the Economic and Organized crimes Control Act, [Cap 200 R.E 2019]. It was alleged that on the 1st day of August, 2018 at Nyamakuyu village within Mbarali District in Mbeya Region the accused persons jointly and together were found in possession of government Trophy to wit; one skin of lion worth of Eleven million Two hundred and six thousand seven hundred ninety Tanzanian Shillings (Tshs. 11,206, 790/=) only being the property of the united republic of Tanzania without permit. The 2nd count was unlawful possession of forest produce contrary to section 88 of the Forest Act, [Cap 323 R.E 202]. It was alleged that on 1st day of August, 2018 at Nyamakuyu village within Mbarali District in Mbeya Region without lawful authority the accused persons, were jointly and together found possessing three (3) pieces of timber to wit; Pterocarpus angolensis worth of Twenty-Five Thousand seven hundred sixty-four forty-four cents Tanzanian shillings (Tshs. 25,764.44/=) only. It was the prosecution evidence from PW1 that on 1/8/2018 they received a phone call from informer that at Makuyu village in Madibira there was a person's possessing Government trophy unlawfully, they went there and surround that house, village chairman knocked the door and owner opened, they searched the house and found lion skin and three timbers were found. The owner told them that he took timber from forest and he introduced himself as Frank Kisinga, he said those things are owned by his relative who was in the next room known as Eliud Kisinga, they went and arrested the 2nd appellant and search on his room but nothing was found, they interrogated him, he admitted to own those trophies, then 2nd appellant managed to escape. The appellants on their side denied allegations of being found with that government trophies. At the end of the case the trial court

found that it was proved by the statement of Mbwadila who was a witness on search which was tendered and read in court by pw7 that the, 2nd appellant managed to escape in hand of rangers. Furthermore neither 1st nor 2nd appellant impeach the overcome of that fact. then the trial court convicted and sentenced the appellants each to serve 20 years imprisonment for the 1st count and 20 years imprisonment for the 2nd count, the sentences to run concurrently. Aggrieved with that decision the appellants filed the appeal at hand which contains six grounds of appeal.

1. That, the trial court erred in law when convicted and sentenced the appellants without taking into account that the prosecution failed to prove its chargers as per law.
2. That, the trial court erred in law when convicted and sentenced the appellants without regarding that none of the persons who were accompanied with PW1 called to proof the same.
3. That the trial court erred in law when convicted and sentenced the appellants without taking into account the failure to call chairman and ten cell leader the one who claimed by pw1 that being OCS Gabriel Zunda they conducted the said search at the appellant domicile the charge was not proved as per law with its exhibit PE1.
4. That the trial court erred in law when convicted and sentenced the appellants relying on exhibit PE5 by violation section 34B (2) (a) (d)
- (e) of TEA Cap 6 R.E 2019 now 2022 and exhibit PE2 was admitted without inquiry as per law.
5. That, the trial courts erred in law when convicted and sentence the appellants without taking into account in how every appellant involved in the said offences and the whole situation of search.
6. That, the trial court erred in law when convicted and sentenced the appellants without evaluating deeply the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 and defense side which led him to bad conclusion in delivering his judgment and failed to order the appellant to pay fine or failure to do so may serve sentence. During hearing the appellants appeared in personal while the respondent was represented by Mr. Emannuel Bashombe S.A. The appellants prayed to adopt grounds of appeal to form part of their submission. Respondent counsel argued 2,3 and 4th grounds together. Concerning the independence witness not being called to testify he submitted that the ground has no basis, that the prosecution proved that, the witness is not reachable and his statement was tendered as per section 34 B of TEA and admitted as exhibit PE5. He referred the case of Abas kondo Gede vs R, Criminal Appeal No.472 of 2017 CAT at Dar es salaam at page 32. Regarding to the complaint that the other witnesses who witnesses search were not called, he submitted that it is baseless. He referred section 143 of TEA that what is important is not number of witnesses but the weight of their evidence, he said that PW1, PW2, exhibit 5 and certificate of seizure were enough to prove that search was conducted and appellant were found with those trophies. On ground 6 he submitted that the evidence was properly analyzed and the trial magistrate found that the case was proved beyond the reasonable doubt but if this court will find that the defense was

not considered the remedy for this court is to go through their defense case. Submitting to the 1st and 5th grounds he said that the case was proved as required by law, the prosecution proved that the 1st appellant was inspected at his home and found with lion skin and natural timber, this was proved by PW1 and PW2 who went to crime scene and Exhibit PE5 the statement of independence witness and after search the 1st appellant signed the certificate of seizure exhibit PE1 He stated that the act of appellant signing certificate of seizure it proves his presence during search and that the item listed were found in his possession. He cited the case of Nabibakhsh pirbakhsh bibadre Mahamadhanif Nazirahmad Dorzade vs Republic, Criminal Appeal No. 663 of 2020, CAT at Dar Es Salaam. As to the 2nd appellant he argued that the item was not found on his room but they were found on his house which he was living with his brother the 1st appellant. PW1 and PW2 they said that the 1st appellant on arrest he admitted to owns those properties together with his brother and directed police officer to his room and the 2nd appellant escaped the arrest, the act of running away indicate that 2nd appellant was aware that the trophies were in his house and was in his control. He referred the case of Ashiraka Namahala vs Republi, Criminal Appeal No. 582 of 2019, CAT at Mtwara were the court stated that it is not necessary that one has to be caught with an item on his hands to say that he was in possession. It was the respondent submission that they managed to prove the case beyond the reasonable doubt and prayed the appeal to be dismissed. The appellant on rejoinder submitted that the ground has merit and prayed to be set free I have gone through trial court records, grounds of appeal and submission made by parties. I find that this appeal can be disposed under one issue of whether this case at the trial court was proved as per required standard It is a settled position of law that in criminal cases the burden of proof lies on the prosecution side and the standard of proof in criminal cases that is required by law is proof beyond reasonable doubt. The court of Appeal in Tanzania in the case of Mohamed Haruna @ Mtupeni & Another v Republic, Criminal Appeal No. 25 of 2007 (unreported) held that; "of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence" On the issue of whether this case was proved beyond the reasonable doubt against the appellants, I wish to determine on the chain of custody on exhibit PE2 which was tendered by PW1 weather it was proper. It is a trite law that, chain of custody is established where there is a proper documentation of the chronology of events in handling of exhibit from seizure, control, transfer until tendering exhibit in court at the trial. The principle of proper chain of custody of the exhibit was propounded in the famous case of Paulo Maduka & Another v. R. Criminal Appeal No. 110 of 2007 (unreported) in the following words; "By "a chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime -rather than, for instance, having been planted fraudulently to make someone appear guilty.... the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to

another must be documented and that it be provable that nobody else could have accessed it." The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused. Initially, the principle strictly required that chain of custody be, in all cases established by documentation, However, in Joseph Leonard Manyota v. R, Criminal Appeal No. 485 of 2015 (unreported), the scope of the principle was narrowed down so that it could not apply strictly to the exhibits that which cannot be easily tempered with. Subsequently, there were various decisions in support of the view that, in fit cases, proper chain of custody can be established by oral account. This was stated in case of Marceline Koivogui v. R, Criminal Appeal No. 469 of 2017 and Ernest Jackson @ Mwandikaupesi and Another v. R, Criminal Appeal No. 408 of 2019 (both unreported) In this case I find that the chain of custody was established by oral account. Going through evidence adduced on the trial PW1 testified that they arrested the appellants with lion skin and three timbers then they send accused to Madibira police station and handle exhibits and accused to CPL Magoro. CPL Matayo also said that he was handled exhibit one skin of lion and three timbers by Sargent Magoro and stored in exhibit room. On 20/08/2018 the valuer came to conduct valuation of timber and on 6/9/2018 another valuer come to conduct valuation of lion skin and on 16/11/2021 he handled those exhibits to D/CPL Ali to bring them to court. Going through evidence on record I find that D/CPL Ali has not testified in court concerning the fact that he was handled that exhibits by CPL Mathayo to send it to the court as said by CPL Mathayo and also the facts was silent on the person handled such exhibit from D/CPL Ali in court. I find that at page 42 of the typed proceeding PW1 tendered exhibits PE2 but the record does not show how that exhibit arrived to him. Also, PW1 testified that he handled exhibit and Accused persons to CPL Magoro and PW2 stated that he was handled exhibits from CPL Magoro but that CPL Magoro was not called to testify during hearing in order to clear those facts for purpose proper chronological events in handling of exhibits. In that circumstance I find that the chain of custody of exhibit PE2 was broken so the case not proved. Hence both conviction and sentences of the appellants are set aside. I consequently, order the release of the appellant from the prison forthwith unless they are detained for other unlawful cause. V.M NONGWA JUDGE 24/10/2023 DATED and DELIVERED at MBEYA this 24th October 2023, in presence of Respondent and the Appellants. Right of appeal explained. V.M NONGWA JUDGE

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