

TANZANIA / JUDGMENT

HAMISI MALIKI VS Repubilc

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB REGISTRY OF SHINYANGA) AT SHINYANGA CRIMINAL APPEAL NO. 30234 OF 2024 (Originating from Economic Case No. 13410 of 2024 Bariadi District Court) HAMISI MALIKI @ SONTOME.....APPELLANT VERSUS THE REPUBLIC.....RESPONDENT

JUDGMENT

5th & 22nd November, 2024 MASSAM, J.: The appellant herein above was charged before the District Court of Bariadi at Bariadi with two counts. One, Unlawful Possession of Weapons in the National Park Contrary to Section 17 (1) (b) and (2) of the National Parks Act [Cap 282 R:E of 2002]. Second, Unlawful Possession of the Government Trophies Contrary to Section 86 (1) and

- (2) (b) of the Wildlife Conservation Act [Cap 283 R:E 2022], read together with paragraph 14 of the First Schedule to; and Section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 R:E 2022]. The briefs facts of the case are that, on 28th day of April, 2024 at Kitamwaka area in Serengeti National Park within the District of Bariadi 1 and Simiyu Region, accused person was found in unlawfully possession of weapons to wit, one knife and failed to satisfy the arresting officer that the same was not intended to be used for the purposes other than hunting, killing, wounding or capturing of wild animals. Moreover, on the same date and place accused person was found in unlawful possession of Government trophy to wit; fresh side of ribs of warthog equivalent to one warthog unlawful killed valued at USD 450 Tshs 1,165,950/= the property of Tanzania Government without valid permit from the Director of Wildlife. Accused person after been read over his charges he pleaded not guilty to the charges. After the full trial, the appellant was found guilty with two offences, convicted and sentenced, to serve two years (2) imprisonment for first offence and twenty years (20) imprisonment for second offence. Aggrieved therein, the appellant rightly lodged his appeal in this court with 3 (three) grounds as follows; -
1. That, the trial magistrate court erred in law and in fact to accept the evidence which adduced by the public witness for the offence which I did not commit. 2

2. That, the prosecution side failed to establish the case beyond reasonable doubt while I was forced to sign the certificate of seizure to the offence which I did not commit.
3. That, the investigator of this case lied in court that he tendered a chain of custody in court as exhibit thus led trial magistrate to enter wrong decision and left a shadow of doubts. During the hearing of this appeal, the same was argued orally and the appellant appeared in person unrepresented, while the respondent was represented by Mr. Saguya learned State Attorney. In submitting his appeal, the appellant submitted that, he was not satisfied with decision meted by lower court, so he prayed this court to consider his grounds of appeal have merit. In response, the learned State Attorney for respondent strongly opposed the appeal and supported both conviction and sentence imposed by the trial court. With regard to the grounds of appeal submitted by the appellant. The respondent's counsel Mr. Saguya S/A prayed to this court to argue all grounds of appeal separately. 3 Mr. Saguya stated that as per the evidence adduced by prosecution side proved that appellant was the one who committed the offence. Starting with PW1 who was conservation ranger at Serengeti conservation area told the court that on 28/4/2024 at 10.00 am he was at patrol with his fellow, they arrested Hamisi Maliki with ribs of warthog together with knife. Mr. Saguya added that appellant was interrogated and said that the said knife was used to cut meat and he had no permit to own the said meat and he signed the certificate of seizure. PW1 and his fellow also they recorded the said map through GPS and the same was tendered to the court as exhibit. Moreover, Mr. Saguya said that a map, certificate of seizure and knife was tendered and admitted as exhibit P1, P2 and P3 respectively without any objection from appellant. The said witness said that he identified that ribs to be of warthog and his evidence was supported by the evidence PW3 in identification. Also the contents of the evidence testified by PW1 and PW2 was the same as all of them were in the scene as game rangers. Coming to the second ground of appeal, appellant complained that prosecution side failed to establish his case beyond reasonable doubt as he was forced to sign certificate of seizure. It was submission 4 of Mr. Saguya that the appellant statement has no proof and when the said exhibits were tendered appellant did not challenge it. On the last ground of appeal, the appellant complained of non-tendering of chain of custody by the investigator the act causes the trial magistrate to enter wrong decision and left the shadow of doubts. Mr. Saguya replied that the chain of custody was tendered to the court so his complain is against the court records. In his conclusion he stated that all four witnesses' evidence and exhibits tendered proved that the prosecution case was proved beyond reasonable. According to that appellant's grounds of appeal have no merit. In his rejoinder the appellant, prayed this court to leave him free to join his family who depend on him. Upon going through the entire records and carefully considered the submission from both sides, it is in view that the appellant is challenging the conviction and sentence meted against him on the reason that the prosecution did not prove its case against him beyond reasonable doubts. Therefore, the main issue to be determined by this court is to whether the prosecution proved the case against the appellant beyond reasonable doubt. 5 There is no objection that it is a common legal principle that in criminal law the burden of proof lies to the prosecution and the

standard is beyond reasonable doubts see Section 110 and 112 which read together with Section 3 (2) (a) of the Evidence Act [Cap 6 R:E 2019]. Also, the same principle was stated in the case of Woodmington Vs. DPP (1935) AC 462, the court held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused, See also the case of Christian Kale & Another Vs. The Republic (1992) T.L.R 302 CAT and John Makorobera & Another Vs. The Republic (2002) T.L.R 296, where it was firmly held that the accused person should only be convicted of an offence, he is charged with on the basis of the strength of the prosecution case not on the weakness of the defense case. The term beyond reasonable doubt is defined in case laws, see Magendo Paul & Another Vs. Republic (1993) TLR 219 where the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the 6 accused person as to leave a remote possibility in his favor which can easily be dismissed." Starting with the first ground of appeal that, where the appellant complained that the trial magistrate court erred in law and in fact to accept the evidence adduced by the public witness for the offence which he did not commit. Mr. Saguya in his reply he argued that prosecution side proved that appellant committed that offence. PW1 who was conservation ranger at Serengeti conservation area told the court that on 28/4/2024 at 10.00 am with his fellows arrested Hamisi Maliki in National Park with ribs of warthog together with a knife. Moreover, Mr. Saguya submitted that appellant was interrogated and admit that the said knife was used to cut meat and he had no permit to own the said meat. Also he said that appellant signed the certificate of seizure. Again he said that they managed to record the said map through GPS and the same was tendered to the court. Mr. Saguya added that, certificate of seizure, a map and knife were admitted as exhibit P1, P2 and P3 respectively and all of them were not objected by the appellant. PW1 identified that ribs to be of warthog the evidence 7 which was supported by the evidence PW3. The evidence of PW1 and PW2 was the same as all of them were in the scene as game rangers. It is trite law that where there is misdirection and non-direction on the evidence or misapprehension of substance, nature and quality of the evidence by the lower court, an appellate court is entitled to look at the evidence and make its own findings of the facts. See the case of Demaay Daat vs republic, Criminal Appeal No. 80 of 1994 CAT. I have gone through submission of both parties and court's records. I found that there is misapprehension of evidence on the trial court. PW4 WP 4579 D/SGT Upendo is reflected as investigator in judgment while in proceedings the same witness was named as PW3 WP 4579D/SGT Upendo. The same inference is drawn in the testimony of PW3 Kwembea Meki Senso a wildlife officer as reflected in the judgment while in proceedings the Wildlife officer was named as PW5. Bad enough there are no proceedings with regards to the testimony of PW4 in trial court proceedings. From the above evidence, it is difficult before this court to ascertain who was investigator between PW4 and PW3 and a wildlife officer between PW3 and PW5 as reflected in judgment and proceedings. 8 Now, under such circumstances, I hesitate to say that the prosecution side proved the case beyond reasonable doubt as it was held in the case of Mohamed Haruna @ Mtupeni & Another Vs. R, Criminal Appeal No. 25 of 2007 CAT (unreported) where it was 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." See also the case of Joseph John Makune vs Republic (1986) TLR 44, George Mwanvigili vs Republic, CAT Criminal Appeal No. 335 of 2016. From the above analysis. I find that the first ground of appeal has merit and it is allowed. Coming to the issue of certificate of seizure, appellant complained that he was forced to sign it. It was submission of Mr Saguya that the statement has no proof and when the said exhibits was tendered appellant did not challenge it. 9 I have gone the court records. I agree with Mr Saguya that there is no evidence to prove that the appellant was forced to sign the same and the certificate of seizure was admitted without objection from appellant and he failed to cross examine it and failure to cross examine for the fact given make the court to believe that he admits as it was held in the case of Nyerere Nyangue vs Republic, Criminal Appeal No 67 of 2010 at page 5-6 that "A party who fails to cross examine a witness on a certain matter deemed to have accepted that and will be estopped from asking the trial court to disbelieve what the witness said" From the above observation. I find that the second ground of appeal has no merit and it is dismissed. On the last ground of appeal that, the investigator of this case lied in court that he tendered a chain of custody in court as exhibit thus lead of trial magistrate to enter wrong decision and left a shadow of doubts. Mr Saguya argued that the chain of custody was tendered and his complain is against the court record and all four witnesses' evidence and exhibits proved the case beyond reasonable. I have gone through the records of the trial court in the eCMS, there is no proceedings with regards to the testimony of PW4. However, 10 WP 4579 D/SGT Upendo (investigator) was reflected in judgement as PW4 while in proceedings was named as PW3. The same inference is drawn in the testimony of PW3 Kwembea Meki Senso a wildlife officer in the judgment while in proceedings the Wildlife officer was named as PW5. In the premises it is difficult to ascertain who was investigator and a wildlife officer and who tendered what. Notably, the rationale of chain custody when comes to exhibits was explained in the case of Chacha Jeremiah Murimi and 3 Others versus Republic, Criminal Appeal No. 551 of 2015, where the court held that chain of custody when comes to exhibits is very important to prove origin and custody of the exhibits up to the time such exhibits are taken to court. The aim is to prove that such exhibit was not tampered anyhow. From the above analysis. This court agrees with the appellant that the investigator did not tender the chain of custody because, I failed to ascertain who was investigator between PW3 as reflected in proceedings and PW4 as in judgement. So according to the following reasons this court find the third ground of appeal has merit and it is hereby allowed. It is well settled principle that in some cases such irregularities may warrant the court to order trial denovo but in my considered view 11 the circumstance of this case at hand does not warrant this court to do so because the prosecution side will fill the gaps in their case. See the case of Fatehali Manji Vs. Republic [1966] EA 343 where the court of Appeal of East Africa restated the principle upon which the court should order retrial. It said; "In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling

the prosecution to fill the gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case came must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person....” Having said so, basing on Section 388 of the Criminal Procedure Act, Cap. 20 the irregularities are immense that does not favour this court to order retrial or trial de novo and the interest of justice does not require to do so. 12 In view of the aforesaid. I allow this appeal and quash the conviction and set aside the sentence. I further order the appellant be released from prison forthwith unless held for any other lawful cause. It is so ordered. DATED at SHINYANGA this 22nd day of November, 2024. R.B. Massam JUDGE 13

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