

TANZANIA / JUDGMENT

HASSAN RAJABU RAMADHANI tanzlii

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DODOMA DC. CRIMINAL
APPEAL NO. 17448 OF 2024 (Arising from Economic Case No. 2137 of 2024 in the District Court of
Kondoa) HASSAN RAJABU RAMADHANI..... 1st APPELLANT RAMADHANI
RAJABU RAMADHANI..... 2nd APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

13h September & l#h October, 2024 MUSOKWA, J, The appellants herein were charged and convicted by the District Court of Kondoa (trial court) for unlawful possession of government trophy, contrary to section 86(1) (2) (c) (iii) of the Wildlife Conservation Act, Cap. 283, R.E. 2022 (WCA), read together with paragraph 14 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap. 200, R.E. 2022 (EOCCA). In brief, it was alleged by the prosecution that on 5th January, 2024 at Tungufu Village within Kondoa District in Dodoma Region, the appellants i were found in unlawful possession of government trophy, namely 'greater kudu' meat valued at TZS 5,500,000/- without a permit from the Director of Wildlife. The prosecution lined up six witnesses at the trial court and upon conducting a full trial, the appellants were found guilty of the charged offence. They were sentenced to serve twenty (20) years imprisonment. The appellants were aggrieved by the conviction and sentence, and preferred the present appeal based on nine grounds of appeal as follows: -

1. That, your honourable Judge, the trial Magistrate misdirected himself in law and facts to hold that prosecution side proved their case beyond all reasonable against the appellants.
2. That, your honourable Judge, the trial court erred in law and in fact in relying on the seizure certificate which resulted from a search that was conducted in violation of the law.
3. That, your honourable Judge, the learned trial Magistrate erred in law and fact by convicting the appellants without considering that the evidence of PW1 and PW2 had no legal authority to conduct a search which was not emergence as it was not an emergency search because PW1 the police officer who searched had received the relevant information about the people who deal with antipoaching being at the appellant's house at the early time but the search was conducted during nighttime.

4. That, due to the trial Magistrate Court grossly erred in law and fact by convicting the appellants on relying upon the evidence of search and seizure which were irregular because the appellants were not issued with a receipt acknowledging the seizure. 2
5. That, your honourable Judge the trial court erred in law and in fact as the magistrate ought not to have relied on a seizure certificate that did not indicate that the search was made at the appellants' house.
6. That, your honourable Judge, the trial court erred in law and fact by convicting the appellants upon uncorroborated extra-judicial statements which were irregularly procured and wrongly admitted.
7. That, your honourable Judge, the trial court erred in law and in fact when acted on the evidence of Justice of the peace who recorded the statements of the appellants without following the steps enumerated therein are adhere due to that justice of ought to observe, inter alia the following (i) time and date of the arrest of the appellant, (ii) the place where the appellants arrested (iii) the place where the appellants slept before they were brought to the Justice of peace (iv) whether any person by threat or promise or violation has persuaded the appellants to give statements, (v) whether the appellants wishes to make the statement on their free will and (vi) if the appellant makes a statement, the same may be used as evidence against them.
8. That, your honourable justice of appeal the trial court erred in law and in fact when convicted the appellants based on the caution statement which was unprocedurally recorded.
9. That, your honourable Judge, the trial court erred in law and in fact when convicted the appellants without considering that the evidence of the prosecution case did not establish the chain of custody of the alleged Exhibits from its arrest until it was brought before the court as an Exhibit. When this appeal was called on for hearing, the appellants appeared in person without legal representation. The respondent was represented by Ms. 3 Patricia Mkina, senior state attorney. The appellants being laymen, waived their right to begin, save for their right to join. The said prayer was granted and the respondent's counsel was the first to submit. Ms. Mkina prayed and was allowed by this court to address the 1st and 9th grounds of appeal jointly; the 2nd, 3rd, 4th and 5th grounds of appeal jointly; the 6th and 7th grounds of appeal jointly, and the remaining grounds were argued separately. On the 1st and 9th grounds of appeal, the learned state attorney strongly argued that the respondent proved the charged offence beyond reasonable doubt. The prosecution, in proving their case paraded 6 witnesses and tendered 9 Exhibits. According to the records, PW1 was notified by an informant that in the village of Tungufu in Kondoa District, in a certain house, the occupants therein are conducting poaching activities. Upon receiving this notification, PW1, PW3 together with other police officers went to the scene of the crime. They made prior communication with PW2, the street chairman and thereafter, PW2 escorted the police to the residence of the 1st appellant. The 1st appellant was placed under arrest, and was

informed that a search 4 would be undertaken in his house, as he was a suspect of conducting poaching activities. The learned state attorney stated that, the testimony of PW1 was corroborated with the testimonies of PW2 and PW3. That, upon entering the room of the 1st appellant, they found the meat of an animal known as 'greater kudu'. Further, in a storeroom near the house of the 1st appellant, the police officers found similar meat in a container. The same meat (a head of greater kudu) was found near the wall, and also some more meat in a bucket. PW1 completed a seizure certificate which was signed by the appellants and PW2, who were both present at the scene of the crime, including the street chairman. Ms. Mkina submitted further that, PW1 tendered the seizure certificate during the trial as an Exhibit and the appellants did not object thereto. This is recorded at page 16 of typed trial proceedings. The learned state attorney added that, PW1, PW2 and PW3 all testified that the appellants were then transferred to the Kondoa Police Station. However, PW1 took the Exhibit (the meat) and the appellants, before the magistrate whereby the magistrate 5 issued an inventory order that the meat be disposed by the wildlife authorities. Submitting further, Ms. Mkina asserted that, PW4, the trophy valuer also testified that he arrived at Kondoa Police Post, where he met PW1 who handed him the Exhibit for identification and valuation. PW4 valued the said Exhibit to the tune of TZS 5,500,000/- and a trophy valuation certificate was tendered by PW4 in court and admitted as Exhibit P4. The learned state attorney reiterated that, the evidence that was adduced at the trial, established the offence beyond reasonable doubt. Further that, the chain of custody was observed in accordance with the law. On the 2nd, 3rd, 4th and 5th grounds of appeal, Ms. Mkina submitted that, the seizure certificate was signed by the OCS- Officer in Charge of station. Therefore, the search and seizure processes were properly conducted. Ms. Mkina added that, the appellants herein agreed to sign the seizure certificate, which was also signed by PW2 and the street chairman. The respondent's counsel admitted that no receipt was issued to acknowledge the seizure, as per the requirements of the law. However, the appellants had no objection thereto, and signed the said certificate of seizure. It was the submission of 6 the learned state attorney that failure to issue the receipt, did not prejudice the rights of the appellants because the seizure certificate clearly indicated the place where the search was conducted; therefore, at the house of the 1st appellant. As regards to the 6th and 7th grounds of appeal, the learned state attorney admitted that the extra judicial statements were recorded by Pendo Sospeter, a Village Executive Officer (VEO); which was contrary to the Guidelines issued by the Chief Justice (Guidelines) which provides that only magistrates should record such statements. As the result, the learned state attorney prayed that the extra judicial statement be expunged from the records. On the 8th ground of appeal, Ms. Mkina submitted that the cautioned statement was recorded within time and all rights of the appellants were considered in accordance with the law. That, at page 26 of the typed proceedings, the appellants did not object to the cautioned statement being admitted in court. The learned state attorney prayed this appeal be dismissed in its entirety for want of merits. 7 In rejoinder, the 1st appellant stated that, they are not satisfied in the manner in which the search was conducted. The police did not have a search warrant and also nothing was found during the search. The 1st appellant submitted further that, while they were

charged with unlawful possession of government trophy; the evidence adduced at the trial did not establish that the Exhibit was in fact a government trophy. The 1st appellant further challenged the testimony of PW4 the valuer; for reason that he did not tender in court any evidence as proof of his credentials. The 2nd appellant's rejoinder essentially reiterated the submissions of the 1st appellant; and further prayed that the court should determine this matter accordingly for the interest of justice. Having carefully considered the submissions by the learned state attorney and the appellants, I will start by addressing the 1st and 9th grounds of appeal. These grounds of appeal are on whether or not the prosecution case was proven in accordance with the required legal standard in a criminal matter. It is a trite law that the prosecution is duty bound to prove its case beyond reasonable doubt. Section 3(2) (a) of the Evidence Act, Cap.6 R.E 2022 8 (Evidence Act) provides that the standard of proof in criminal cases is beyond reasonable doubt. For clarity, the provision of section 3(2) (a) of the Evidence Act reads as follows: -

- (2) / fact is said to be proved when-
- (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists, [emphasis added] The term 'beyond reasonable doubt' is not defined by statutes but case laws have defined it. The case of *Chausiku Nchama Magoiga vs Republic*, Criminal Appeal No. 297 of 2020 (unreported), referred to the case of *Magendo Paul and Another vs Republic*, [1993] T.L.R 2019, whereby it was observed that: - "For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused persons to leave a remote possibility in his favour which can easily be dismissed." Based on the authorities above, the prosecution in the instant case, was required to prove that the appellants were found in unlawful possession of government trophy. At the trial, the prosecution paraded 6 witnesses to prove their case. I refer to the testimony of PW1, the police investigator who testified as to the arrest of the appellants, as recorded at pages 15 and 16 of the trial court proceedings as follows: - "On the same day 5/01/2024 we received information from informer that at Tungufu Usandawe street there was one house whereby people therein were dealing with poaching...we called the street chairman who came and took us to the scene of crime. As we knocked the 1st accused opened the door we put him under arrest, we entered into that house. At the seating room we found the 1st accused young brother Rajabu Ramadhani and the 1st accused's wife wake up. We searched that house and, on the 1st accused room we found a dried meet which we went outside and asked the accused to open his store where we found greater kudu head, also there was a neck meet, and ribs meet. There was 4 arrows and bow. Also, in that store we found one pot which had a piece of rib meet. Outside the accused house we found a bicycle which was suspected to have been used in carrying Government trophy." In addition, PW2 the street chairman, testified that he escorted the police officers to the house of the appellants. For ease of reference, PW2's testimony is recorded as follows: - "That on 5/01/2024 at night, I received a phone call from one police officer who required me to meet them at Tungufu Primary School. I went at that place, after introducing myself to them they requested me to take them to the 1st accused house. I complied, as we arrived at

that house I pointed it. I called first accused, he responded by opening his door. He was put under arrest. We entered into that house and a black basin with a dried meet. We went outside the accused house, where there was a small house like store, the accused opened it and found meet (great kudu). On the black basin, we found a dry kudu in the red bucket there was a neck kudu meet which was still having the skin, on the pot there was a rib and on the wall there was a kudu head." On the other hand, the testimony of PW3, the wildlife officer, is recorded as follows: - "On 4/1/2024 we had a joint patrol between wildlife officer and police officers. While on the patrol we were informed that the accused was dealing with government trophy at Tungufu street. We went at the scene of crime and involved PW2 who directed to the 1st accused house. That house was searched and we managed to get dry meet on the black basin at the seating room. In the kitchen, we found a fresh meet in the bucket, the ribs were found in a bucket and head of great kudu...In the course of search, we found one bow and four arrows, knife, wire and bicycle which had all signs that it was used to carry the said great kudu meat." Another Wildlife officer (PW4) testified that: - li " On 5/01/2024, I was instructed to report at Kondoa Police station in order to identify and value the government trophy. I went at the police station where I met inspector Leonard Kaswa, he told me to identify and value the Exhibit suspected to be government trophy, he gave me one black basin with a dried meet. Also, he gave me a red bucket which had a fresh meet, head part. Also, I was given a pot with fresh ribs meet and head with two long horn. I managed to identify that meet particularly the head was from a great kudu meat.. I managed to identify it by its skin and strips which are found on great kudu. After identification, I conducted a valuation of that animal and found out that as per regulations, the value of that animal was USD 2200 by 05/01/2024 TZS 2500/-. The value of the great kudu was TZS. 5,500,000/-. I signed the trophy valuation certificate then I handed over the said Exhibit to Insp. Leonard Kaswa." The VEO (PW5) testified on recording the extra judicial statements of the appellants, and prayed to tender the said Exhibits, which were admitted as Exhibits P5 and P6. Further, PW6, a police officer testified that he interrogated the 1st and 2nd appellants; and tendered their cautioned statements as Exhibits P7 and P8 respectively. In their defence, the appellants admitted that they were found with great kudu meat. However, they pleaded ignorance, claiming that they were not aware that the said animal was government trophy. 12 As per the records, I am of the view that the evidence adduced contains grave irregularities and inconsistencies. Firstly, while the testimonies of PW1, PW2, PW4, PW5 and PW6 state that the appellants were found with unlawful possession of government trophy on 05/1/2024; PW3 on the other hand, testifies the said date to be on 04/01/2024. Further, the 2nd, 3rd, 4th and 5th grounds of appeal are premised on existing irregularities in the search and seizure procedures. It is trite law that a search must be conducted in accordance with the law. In this matter, it is evident that no evidence was adduced to prove that the search was done according to the requirement of the prevailing laws. Apart from the irregularities observed on the manner in which the search was conducted, the appellants further allege that no receipt was issued after the seizure. The law is clear under the provision of section 38 (3) of the Criminal Procedure Act, Cap.20, R.E. 2022 (CPA), which provides that: -

- (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the 13 signature of witnesses to the search, if any." [emphasis added] The provision cited above requires the issuing of a receipt upon seizure of an Exhibit. The respondent's counsel while admitting that no receipt was issued as per the requirements of the law, asserted that the said anomaly was not prejudicial to the rights of the appellants. However, this court is of the firm view that the failure to issue the receipt pursuant to the seizure was a grave error on the part of the arresting officers. The 6th ground of appeal challenges the procedure in recording the extra judicial statements for being contrary to the law. The recording of extra judicial statements is governed by the Guidelines issued under section 62(2) of the Magistrates Courts Act, Cap. 11 R.E 2019 (MCA). In the case of Jackson Protaz vs Republic, Criminal Appeal No. 385 of 2020 (unreported), the Court of Appeal of Tanzania (CAT) at page 11 of the judgment referred to the case of Japhet Thadei Msigwa vs Republic, Criminal Appeal No. 367 of 2008 (unreported) which observed that: - "54 when justices of the peace are recording confessions of persons in custody of the police, they must follow the Chief Justices Instructions to the letter. The section is couched in mandatory terms." 14 The Guidelines provide that the recording of extra-judicial statements must be undertaken by magistrates; or by persons authorized to perform the task. In the instant case, the trial court records indicate that extra judicial statements were recorded by the VEO. A perusal of Exhibit P5 and Exhibit P6 of the trial court records further reveals that the forms were entitled "KUANDIKA MAUNGAMO YA MAELEZO YA MTUHUMIWA AU MSHTAKIWA ALIYELETWA KWA ULINZI WA POLISI." The forms did not indicate the authority which mandated the VEO to record the extra judicial statements as a justice of the peace. Considering that the VEO was not authorized by any Primary Court or District Court, I am of the settled view that the Guidelines were not complied with. Thus, the extra judicial statements were recorded contrary to the law. On this point, the learned state attorney readily conceded to the aforementioned irregularity and prayed that said extra judicial statements be expunged from the records. Consequently, the extra-judicial statements are hereby expunged from the records. Another irregularity that has been observed in the instant case; is in relation to the procedure for destroying the Exhibit which was perishable. The testimony of PW6 reveals that the Exhibit, the 'greater kudu' meat was 15 destroyed following an order of the destruction thereof; issued by Hon. Amina Mhando. For ease of reference, the testimony of PW6 is as follows: - "...I and A/Insp. Leornard Kaswa we took the Exhibit great kudu meat together with the accused person we appeared before Hon. Amina Mhando seeking for inventory order. The prayer was granted and the inventory directed the said meat be returned to the wildlife officer so as to be disposed of. Also, the accused signed inventory..." Unfortunately, the said Hon. Amina Mhando was not called before the trial court to testify regarding this fact. Similarly, it was not enough for the appellants to appear before Hon. Amina Mhando. Instead, the appellants ought to have been given the opportunity to be heard by Hon. Amina Mhando in the course of the proceedings for disposal. In the case of Mohamed Juma @ Mpakama vs. Republic,

Criminal Appeal No. 385 of 2017 (unreported), it was stated that: - "While the Police Investigator, Detective Corporal Saimon (PW4), was full entitled to seek the disposal order from the Primary Court Magistrate, the resulting inventory form (Exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the Primary Court Magistrate " [emphasis added] 16 Further, in the said case of Mohamed Juma@ Mpakama (supra) at pages 22 and 23 the CAT stated that: - "Concerning the way the police are required to handle perishable Exhibit when still at the stage of criminal investigation, paragraph 25 of PGO No. 229(INVESTIGATION-EXHIBITS) applies and states;

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 immediate disposal, such Exhibits should be photographed before disposal The above paragraph 25 envisages any nears Magistrate, who may issue an order to dispose of perishable Exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused person (if he is in custody or out on police bail) 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 disposal order (Exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4) was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (Exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO." [emphasis added] 17 According to the position of the law above, the trial court records are silent on the right of the appellants to be given the opportunity to be heard during the proceedings for disposal. Thus, I am of the view that, the appellants were not heard when the 'greater kudu' meat was destroyed by the order of the court. Accordingly, and based on the case of Mohamed Juma@ Mpakama (supra) the Exhibit, 'greater kudu' meat cannot be proved against the appellants because they were not given the opportunity to be heard. In addition to the aforementioned irregularity in the procedure for the destruction of the respective Exhibit, the records do not contain any photographs of the said Exhibit. The law requires photographs of the Exhibit to be taken before the destruction thereof. Failure to take the photographs and failure to hear the appellants as required by the law was detrimental to the prosecution case. It follows therefore, that after disregarding the extra-judicial statements together with the Inventory Form (Exhibit, 'greater kudu' meat) which purportedly identified the animal, there remains no evidence of what animal was actually in unlawful possession by the appellants as indicated by the charge sheet. 18 In light of the aforementioned irregularities on the face of the records; including want of fair trial in the process of acquiring the inventory order, it is evident that the prosecution case was marred with incurable defects. In the premises, this appeal is hereby allowed. The conviction of the appellants; and the corresponding sentences are hereby quashed and set aside. Consequently, I order the immediate release of the appellants from prison forthwith unless

otherwise lawfully held. It is so ordered. DATED at DODODMA this 18th day of October, 2024. I.D. MUSOKWA JUDGE Judgment delivered in the presence of the appellant; and in the presence of Ms. Margareth Tiegray, state attorney, for the respondent. > I.D. MUSOKWA JUDGE 19

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