

TANZANIA / JUDGMENT

Masunga Washa Migato

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The Judiciary of Tanzania IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA CRIMINAL APPEAL CASE REFERENCE NO. 202412172000034982 MASUNGA WASHA MIGATO APPELLANT Versus REPUBLIC..... RESPONDENT (Originating from the Decision of the District Court of Bariadi at Bariadi) (Hon. M.M. Nyangusi - SRM) Dated the 30th October 2024 in Economic Case No.28148 of 2024

JUDGMENT

11th February & 21 st February 2025. F.H. MAHIMBALI, J The appellant in this case has been aggrieved by the decision of the District Court of Bariadi in which he was convicted of three offences in Economic Case No.2814 of 2024 filed against him. It was alleged in the charge sheet convicting him (first offence) that Contrary to Section 17(1)(b) and (2) of the National Parks Act, [Cap 282 R.E. 2002], on the 13th day of September, 2024 at Mlima Rasta in Serengeti National Park within Bariadi 1 District in Simiyu Region was found in unlawful possession of Weapons to wit, one bush knife, one knife and Six trapping wires without the permit and failed to satisfy the authorized officers that the same were intended to be used for purposes other than hunting, killing, wounding or capturing of wild animals. In the second and third offences, it was alleged that on the same date, place and time, the appellant was found in unlawful possession of Government trophy to wit, six pieces of dry meat of Zebra equivalent to One Zebra unlawfully killed valued at USD 1200 equivalent to Tanzania shillings Three Million Two Hundred Seventy-Six Thousand (Tzs.3,276,000/=) and two limbs of Wildbeest (fore and hind limbs) equivalent to One Wildbeest unlawfully killed valued at USD 650 equivalent to Tanzania shillings One Million Seven Hundred Seventy-Four Thousand Five Hundred (Tzs.1,774,500/=) only, which is 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 Sections 57(1) and 60(2), of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2022] both the properties of the United Republic of Tanzania. 2 The appellant pleaded not guilty to the charge of all three offences charged, whereby the prosecution brought a total of four witnesses and tendered six Exhibits in efforts to establish the charge. The appellant fended himself and had no exhibit to tender. In digest to the prosecution’s case in totality and as well as the defense testimony, the trial court found the

appellant guilty of all the three offences charged, convicted him and consequently sentenced him to serve one-year imprisonment for the first offence and 20 years' jail imprisonment for the second and third offences each. Thus, this appeal is against both, conviction and sentence:

1. That, the learned trial magistrate court erred in law and in fact to accept inventory form as exhibits instead of bringing the trophies in court as the charge read over. Thus left a shadow of doubts.
2. That, this trial court erred in law and in fact to pass sentence with Insufficient evidence adduced by the public witnesses.
3. That, the trial magistrate's court erred both in law and in fact when it not properly evaluate the evidence and ignored my defense. 3 Wherefore, on these three grounds of appeal, the appellant is seeking the indulgence of this honorable court to allow his appeal, quash the conviction, set aside the imposed sentences and in its place he be set at liberty. During the hearing of the appeal, the Respondent was represented by Mr. Kadata, learned state attorney while the appellant had no one to fend him, but himself. Submitting for the appeal, the appellant had no more to add save his prayer that this court should digest his grounds of appeal and on them, his appeal be allowed as he had nothing material to add. On his part, Mr. Kadata in resisting the appeal, had the following to submit. With the first ground of appeal, that there was no tendering of the physical exhibits but through inventory, that is not relevant, he refuted. Reading section 101(1) a of the Wildlife Conservation Act, R.E 2022, is clear that, a court of law is mandated to order disposal of a perishable exhibit before a case is heard. This order was properly issued by the court and that the appellant was dully involved in the whole process. The trial court's records establish that, the said inventory form was dully filled and signed by the appellant. The said inventory then formed the court's proceedings and was admitted as exhibit P.5 of the case. As the said exhibits were in 4 perishable nature, the trial court was justified to receive the inventory form in lieu of the physical exhibits which were then none existent as were already disposed of as ordered by the court, them being in perishable nature. Thus, this ground of appeal be not accorded any weight as it is meritless, submitted Mr. Kadata. On the second ground of appeal that the trial court erred in convicting him on insufficient evidence by the prosecution is not true as there was ample and sufficient evidence which established the charged offence beyond reasonable doubt. With the first offence, three ingredients ought to have been established: firstly, that the appellant was found within the national park, secondly whether the appellant was in possession of weapons therein, and thirdly that the appellant had no permit authorizing him possession of the said weapons therein. He clarified that the first ingredient was established beyond reasonable doubt that the appellant was found being within the National Park (PW1 and Exhibit P2 - GPS Map). This exhibit clearly established how the appellant was found within the coordinate points of Serengeti National Park. On the second ingredient, it was equally established beyond reasonable doubt that the appellant when arrested being within the National Park, was found being in possession of the weapons unlawfully as 5 he had no permit authorizing him so. Exhibit P1 which is certificate of seizure is explanatory on this,

which was admitted without any objection. Furthermore, the prosecution tendered in court the said knife, panga and six trapping wires (Exhibit P.3) which the same were not disputed their admission in court. On the last ingredient, the appellant failed to provide any permit authorizing him being in possession of the said weapons within the National Park. With this submission, it is his firm view that, the first offence was well established and it was beyond reasonable doubt. With the second and third counts/offences, he submitted that, the Prosecution had established the charged offences without leaving any flicker of doubt. He bolstered his stand on the basis that in these two offences as well, the prosecution was duty bound to establish three things: that the appellant was found in possession of the said trophies, that what was found with was really trophy and that the appellant had no license authorizing him to possess the same. Establishing ingredient no.1, he submitted that the Republic had tendered certificate of seizure which the appellant had not denied its admission in which, zebra and wildebeest meat, were seized from him. Secondly, it was clearly established how PW3 had identified the said meat as government trophies. The said witness, put it clear that, what the 6 appellant was found with, were nothing but government trophies by giving the distinct features. As if this was not enough, the trophy valuation report was admitted as exhibit P4 of the case. Apart from tendering the said valuation report, this witness too tendered the inventory form signifying that what was found/arrested with really was nothing but the disposed trophy. Therefore, it is undisputed that what was arrested with, was government trophy, he submitted. Lastly, the appellant, had not supplied any lawful permit authorizing him being in possession of the said trophies. Therefore, this ground of appeal is unmerited and the same be dismissed, he prayed. On the third ground of appeal, the concern that there was no evidence analysis by the trial court is not true as that was well done and that even the appellant's defense was equally well analyzed and considered but only that it ran short of substance. He invited this court to have a glance at pages 6- 9 of the typed judgment. Therefore, it is not true that the trial court neglected that duty. That notwithstanding, this court being the first appellate court, has all powers of stepping into the shoes of the trial court and do its own re-evaluation and rule out what is proper as per law, clarified Mr. Kadata. On this submission, Mr. Kadata, humbly prayed that this court to discard all the grounds of appeal and consequently dismiss the appellant's 7 appeal for want of merit. He persuaded this court be pleased to uphold both conviction and sentence meted out by the trial court as they were rightly founded. In his rejoinder submission, the appellant had nothing material to argue but just maintained on his grounds of appeal and adding that all this that has been submitted by the respondent is not true and is not reflected in the proceedings. When Mr. Kadata was probed by the court on whether the issue of interpreter's profile featured well in the proceedings of the trial court, he replied that, as per trial court's proceedings, the interpreter was identified as being Sayi Mabula and of Sukuma tribe. Whether he was conversant and competent to translate the two languages accurately and honestly, the proceedings are silent. However, he took it that, since the translator had taken oath; and since the appellant is recorded to have been comfortable with him, he was of the view that, he was a competent person to discharge the interpretation and he has no doubt that it was done perfectly and no prejudice on the part of the appellant. 8

Regarding the fact of court's interpreter, it is important for the trial magistrate to make sure that the interpreter's profile details are recorded for court's satisfaction. Such details include age, religion, academic background, source of his competency knowledge on interpretation. Only upon such satisfaction, the interpreter is made party of the case proceedings. In the current appeal, the scanning of the trial court's record has established that no proper details were taken from the said interpreter. Nevertheless, I agree with Mr. Kadata, that there has not been occasioned any injustice to the appellant despite the said facts being missing. So long as the appellant is recorded being comfortable, he served the good purpose. On the merit of the appeal, I have keenly followed the submissions of both sides for and against the appeal as far as the appeal is concerned. The main issue here for consideration is whether the prosecution had established their case beyond reasonable doubt as per law. This being a criminal charge, it is the trite law that the prosecution in the Common wealth jurisdictions (Tanzania inclusive) is placed with a heavier burden to prove their case than that of the accused. See Mohamed Saidi Matela V. Rep, (1995) T.L.R 3 and John Makolobela & 2Others V. Rep, (2002)T.L.R 296. See also Joseph John Makune vs. Republic [1986] TLR 9 44 at page 49 and Mohamed Haruna@ Mtupeni & Another v Republic, Criminal Appeal No. 25 of 2007. The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with, is always on the side of the prosecution and not on the accused person. This is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022] (The evidence Act). Secondly, is the principle that the proof of the said charge is beyond reasonable doubt (See section 3(2) (a) of the Tanzania Evidence Act, Cap 6. As per grounds of appeal in this current matter, which is entirely based on issues of facts, being the first appellate court, I have the privilege of stepping into the shoes of the trial court and re-evaluate the evidence. Before I do that, I first agree with Mr. Kadata on his submission as far as ground number one of appeal is concerned that though there was no tendering of the physical exhibits, but the same was perfectly done through inventory as per law. Reading section 101(1)a of the Wildlife Conservation Act, R.E 2022, empowers obtaining of disposal order of a perishable exhibit before a case is heard. Since the said order was properly issued by the court and that the appellant was dully involved in the whole process, the 10 appellant's grievance is not backed up by the law but his own personal feeling. The trial court's records establish that the said inventory form was dully filled and signed by the appellant. The said inventory then formed the court's proceedings and was properly admitted as exhibit P.5 of the case. As the said exhibits were in perishable nature, the trial court was justified to receive the inventory form in lieu of the physical exhibits which were then none existent as were already disposed of as ordered by the court, them being in perishable nature. As far as the submissions made by Mr. Kadata on the remaining grounds of appeal, I partly agree with him on the important ingredients to be established in the three charged offences. However, I differ with him on the degree/extent of establishment. Here is my response on the re- evaluation of the said evidence. To start with, digesting the evidence of PW1 and PW2 who are arresting officers, the relevant issue is whether they had actually arrested the appellant within the National Park of Serengeti with the alleged exhibits (P3, P4 and P5) as reflected in the said certificate

of seizure (Exhibit P1) which are then the offences contrary to Section 17(1)(b) and (2) of the 11 National Parks Act, [Cap 282 R.E. 2002] and 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 Sections 57(1) and 60(2), of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2022]. In my keen digest to the testimonies of PW1 and PW2, and how the appellant denied the charge saying that he was arrested just at his home premises near the said National Park, I had expected cognate, credible and irresistible testimony that the appellant was actually arrested within Serengeti National Park at an alleged area called Mlima Rasta and that Mlima Rasta is within the National Park. The evidence tendered by the prosecution establishing the proof of the said fact is the GPS Map print out describing the point of arrest as with coordinate points 36m0671098UTM9712625. I am aware with the genesis of this requirement of producing coordinate points as proof of the point of arrest being within the National Park are Court of Appeal's decisions rebutting the prosecution's assertion (See Dogo Marwa @ Sigana & Another vs Republic (Criminal Appeal No. 512 of 2019)

[2021] TZCA 593 (21 October 2021), where the Court of Appeal had this to say on proper description of the point of arrest in offences of such nature, that: 12 “We were somewhat surprised by the very casual and perfunctorily way; the national park rangers testified that they arrested the appellants at Milima Soroi areas, within the Serengeti National Park. We pointedly asked the learned Senior State Attorney whether the Milima Soroi area is within statutory boundaries of the Serengeti National Park. Mr. Mayenga submitted that section 5 (1) read together with the First Schedule to the NPA, describe the statutory boundaries of the Serengeti National Park: "5. -(1) The area specified in the First Schedule to this Act is declared a National Park to be called the Serengeti National Park:" After reading through the First Schedule, which provides the outlines of the boundaries of the Serengeti National Park, Mr. Mayenga conceded the Milima Soroi area where the park rangers supposedly arrested the appellants, does not appear under the First Schedule marking the boundaries of the national park. We need not reemphasize that the prosecution evidence on record, 13 did not prove beyond reasonable doubt that the park rangers arrested the appellants within the statutory boundaries of the Serengeti National Park”. Now, the issue for digest is whether by a mere tendering the GPS Map print out with coordinate points 36M0671098UTM9712625 established the fact the said particular point of Mlima Rasta was within the statutory boundaries of Serengeti National Park. It appears the prosecution had believed that the said fact was established beyond reasonable. Reading the said testimony in the trial court's readings expected, there is no description given regarding the admitted GPS Map print out. We are thus not aware what this coordinate points 36M0671098UTM9712625 means what and describes anything. Perhaps, the prosecution assumed that the trial court/ trial magistrate to go and search those coordinate points from unknown sources and interpret the statutory boundaries of Serengeti National Park and establish whether at that particular point, is really within the restricted geographical boundaries of Serengeti National Park. A mere production of the GPS Map was neither sufficient nor the proper interpretation of the conditions imposed in the case of Dogo

Marwa @ Sigana & Another vs Republic (supra). So, in my considered view, a mere production of that GPS 14 Map printout per se was not a conclusive proof that the alleged area was within the restricted statutory boundaries of Serengeti National Park. The production of that Map print out was just one step to the full proof of the alleged fact. By the way, it was not elaborated how the coordinate points were taken and by what device (its make, authenticity etc) and how the said coordinate points really reflect the said arrest point. Secondly, the print out map is an electronic evidence in the eyes of the Electronic Transactions Act, Cap 442 R.E 2022 which provides for the legal recognition of electronic transactions, the use of information and communication technologies in collection of evidence, admissibility of electronic evidence, etc. Under section 18 of the said Act, it clearly provides for the conditions of admissibility of electronic evidence. I quote: 18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.

- (2) In determining admissibility and evidential weight of a data message, the following shall be considered- 15
 - (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was 10 Electronic Transactions Act [CAP. 442 R.E. 2022] maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other factor that may be relevant in assessing the weight of evidence.
- (3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-
 - (a) there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system; 16
 - (b) it is established that the electronic record was recorded or stored by a part to the proceedings who is adverse in interest to the part seeking to introduce it; or
 - (c) it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a part to the proceedings and who did not record or store it under the control of the part seeking to introduce the record.
- (4) For purposes of determining whether an electronic record is admissible under this section, an evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record. In digest to the manner PW1 had testified, there has not

been any proof of reliability of the said information how it was generated, stored, produced, its integrity, authenticity and its weighty in evidence. Thus, the 17 production of the said purported evidence did not make any strict adherence and compliance to the mandatory section 18 of the Electronic Transactions Act, for it to have a legal value. It is thus unbelievable. As if this is not enough, the manner the said PW1 and PW2 had testified establishing the point of arrest of the appellant with the said weapons and trophies, raises more doubts. They assert that after they had arrested the appellant, they then found him with the alleged trapping wires and trophies. I have tried to ask myself, whether then the appellant was really found in possession of the alleged weapons and trophies as charged or was just given by the arresting officers. They further asserted that when they asked him about the use of the said wires, the appellant narrated the use of each of the said weapons (trapping wires – for trapping animals, knife – for skinning, panga – for cutting big bones). Firstly, as a matter of credible evidence, this assertion ought to have been supported with the still pictures exhibiting the said arrest of the appellant being in possession with the alleged trophies and weapons. This would have exhibited transparency in the administration of justice in such cases. I have further asked myself how the appellant had been able to carry two fresh limbs of Wildebeest animal, Knife, Panga, six trapping wires and the six pieces of Zebra by himself. The 18 exhibition by photographic print out or recording would have added value to their assertion. As it is, we remain mainly in illusory than reality. In addition, though I agree with the value of expert opinion, however, the same must be very clear and convincing for it to carry the weight of evidential value. In this case, PW3 had described on how he managed to identify the alleged trophies to be of zebra and wildebeest meat. He tried to clarify its uniqueness features distinguishable from other meat of animal, which makes its uniqueness. In William Maganga @ Charles Vs. Rep, Criminal Appeal No. 104 of 2020 and Evarist Nyamtemba vs. Rep, Criminal Appeal No. 196 of 2020 (unreported), where in a case involving identification and valuation of elephant tusks, it was observed that: "The testimony of PW5 lacked all this information. As rightly submitted by the learned State Attorney, PW5 gave a generalized statement that exhibit PI was elephant tusks with no further explanation as to the peculiar features of it that led him to conclude that exhibit PI was truly elephant tusks hence a government trophy." 19 A generalized statement is not acceptable, because anybody can make such a sweeping statement. In wildlife conservation related cases, identification of a particular specie of the animal affected or part of it in relation to an offence charged, is a matter of considerable significance. That aspect of the case, is provable by tendering a properly filled report of the scientific analysis done. The issue for consideration after all this discussion is whether the description by PW3 that the said alleged zebra dry meat being semi black, dark redish brown, muscles has parallel arrangement is by itself sufficient to be scientific features of zebra animal? Can those features not be borne by other domestic animals? According to law, an expert witness is expected to furnish the court with necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence (see Rep V. Kerstin Cameron [2003] T.L.R 85). With dry meat, I wonder if that description sufficed the irresistible

conclusion that it was nothing but zebra meat. In such a situation, I think with the development of science and technology, there ought to be said more by the said expert (PW3) 20 scientifically that by subjecting the said samples to scientific analysis, the conclusion was none but the said mammal group. I am not questioning the quality and competency of the PW3, but he being an expert, ought to have said more for him to convince the Court in the discharge of its noble duty. Otherwise there is a danger of convicting innocent persons on domestic carcass. It is high time now; DNA analysis is also implored to make such evidence credible and believable. In my considered view as to the present facts of the case, the explanations offered by PW3, being an expert in animal science and having explained the distinctive features of wildebeest animal from other animals – wild or domestic, I find it hardly convincing in the current era that such finding is nothing, but strictly a scientific explanation to be zebra and wildebeest meat only. Such a verbal explanation without an accompanying scientific explanation and at this era of developed science and technology, the description dry meat being: semi black – dark, reddish brown, muscles has parallel arrangement whose sufficiently enables the trial court to form its own independent judgment by application of these criteria to the facts proven in evidence that the said fresh meat (two limbs), is nothing but the government trophy known as wildebeest meat. It was expected such a 21 trophy remains to be subjected to scientific analysis for it to give a scientific result. Otherwise, it was not necessary for it to pass a legal process of scrutiny. Such an explanation by PW3 cannot stand the test in the current era of the developed science and technology. Instead, it is a degree of proof of the old stone age era and not the current era of 4th Industrial revolution. To accept this explanation as a scientific description differentiating it from other animal features is more general than a real science. It was important such a scientific explanation is supported by a scientific report. With me, such an explanation is not scientifically worth of value, and thus I accord no any weight. Therefore, in totality of my analysis above, the prosecution's case has failed on the value of the whole evidence from the arrest point connecting it with the appellant, to the production of the said evidence in court. Lastly, is on the trial magistrate herself. The courts' businesses nowadays are operated under the electronic case management vide two enabling laws (rules) which are Government Notice No. 148 of 2018 (The Electronic Filing Rules) and Government Notice No. 637 of 2021 (The Electronic Record Proceedings and Remote Proceeding Rules). The former staged the electronic filing processes we see in court 22 today, and the latter has enabled the electronic recording proceedings and the remote proceedings we see taking its high acceleration in our courts today. The twin rules, I may name them as brother and sister in the digital procession of our court business we see them today. Therefore, the digital case file must carry with it all the necessary materials relevant to the case. In the current appeal, scanning the subordinate court digital case file, I have missed all the important documents accompanying the case file contrary to what the proceedings narrate. It is the trial magistrate's mandatory task to make sure that all the necessary documents forming the digital case file are strictly accompanied. Such documents include the charge sheet (including amended charge), consent certificate and the certificate conferring jurisdiction to the subordinate court, letters, documentary exhibits all must be

filed with the e-cms. Not filing them with the e-cms, the digital file will be missing such important records. In the current case file, the only documents that are visible/attached with e-cms thus retrievable in the digital case file are only two (exhibit P2 – Map print out and trophy valuation report – exhibit P.4). The rest are missing record in the digital case file. Though the case proceeding establish admission of such documents, but are not traced in the digital case file or subsequent document window. 23 For the NPS – (Shinyanga and Simiyu regions), should make sure that the necessary documents warranting the legality of the case especially economic cases, such as consent and certificate conferring jurisdiction or amending charge are electronically filed in the course when that decision is made. Otherwise, as it has been in the current appeal, such necessary documents are missing with the digital case file. With all the above discussion and the analysis made, I find this appeal to have been brought with sufficient cause; and thus, it is accordingly allowed. The trial court's decision on both findings: conviction and sentence is hereby quashed and set aside. The appellant is thus consequently ordered to be released from prison unless lawfully held by other cause. Right of further appeal is hereby explained. DATED at SHINYANGA this 21st February, 2025. F.H. Mahimbali Judge 24

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