IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 448 OF 2016

JOSEPH YOMBO @ MAHEMA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Mwanza)

(Makaramba, J.)

dated the 31st day of August, 2016

in

HC. Criminal Appeal No. 11 of 2016

.....

JUDGMENT OF THE COURT

4th November, 2019 & 25th February, 2020

MWARIJA, J.A.:

The appellant, Joseph Yombo @ Mahima and another person, Gochati Shaghala @ Geyonga (hereinafter the appellant's co-accused person) were charged in the District Court of Bunda with four counts. In the 1st count, they were charged with the offence of entering into a national park without a written permit contrary to section 21(1) and (2) of the National Parks Act [Cap. 282 R.E. 2002] (The National Parks Act). It

was alleged that on 10/6/2013, they were found at Grumeti river area in Serengeti National Park within Bunda District, Mara Region (the National Park) without any written permit from the Director of National Parks.

In the 2nd and 3rd counts, they were charged with the offences of being found in unlawful possession of weapons in a national park and unlawful hunting contrary to sections 24(1) (b) and (2) of the National Parks Act read together with paragraph 14(c) of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCC Act) and Section 23(1) of the National Parks Act read together with paragraph 14(a) of the First Schedule to the EOCC Act respectively. The prosecution alleged that on the same date and at the same place stated in the 1st count, the appellant and his co-accused were found with six arrows, two bows, one machete and two knives without permit and without sufficient explanation that those weapons were to be used for purposes other than hunting, killing, wounding or capturing animals. It was also alleged that they unlawfully hunted three wildbeests in the National Park.

In the 4th count, they were charged with the offence of unlawful possession of Government trophies contrary to section 86(1) and (2) (b) of

the Wildlife Conservation Act No. 5 of 2009 (which was in force at the material time)(the WCA) read together with paragraph 14 (d) of the First Schedule to the EOCC Act. The particulars of that charge were that, on the date and place stated in the 1st count, the appellant and his co-accused were found in possession of three carcasses of wildbeests value at Tzs. 3,120,000.00, the property of Tanzania Government without a valid permit from the Director of Wildlife.

All the four counts were denied by the charged persons and as a result, the prosecution called three witnesses to testify before the trial court. Two of the witnesses, Wama Masoyimarobe (PW1) and Deus Kisabo (PW2) were the persons who arrested the appellant and his co-accused. The said witnesses were, at the material time, employed by the National Park as Game Rangers. In his evidence, PW1 testified that on 10/6/2013 at about 13:00 hrs while on patrol along Grumeti river bank together with PW2, he spotted two persons at a bushy area. He advanced together with PW2 and managed to arrest the two persons who happened to be the appellant and his co-accused. He averred that the said persons had in their possession the above stated weapons and three carcasses of wildebeests. According to PW1, when asked whether they had any permit authorizing

them to enter into the National Park and carry out hunting activity, the appellant and his co-accused replied that they did not have any permit.

In his testimony, PW2 supported the evidence of PW1 on how they made the arrest of the appellant and his co-accused as well as the items which were found in their possession. The weapons were tendered by PW1 and the same were admitted in evidence as exhibit P1 collectively.

Another prosecution witness, Erwin Mwoywa (PW3) who was until the material time, a Wildlife Warden, testified that as a valuer, he prepared a report in respect of the three wildbeests carcasses. According to his evidence, each of the three killed wildbeests was valued at Tzs. 1,040,000.00 and as such, he said, their total value was Tzs. 3,120,000.00. He tendered in court the certificate of inventory and valuation report. The same were admitted in evidence as exhibits P.2 collectively.

In their defence, the appellant and his co-accused did not dispute the fact that they were arrested on 10/6/2013. Their main contest was that they were not arrested in the National Park. Each one of them testified that he was arrested at Rubana river banks, outside the National Park boundaries. It was their defence that they were followed and arrested at

the place outside the National Park while collecting the trees which they had previously felled.

Having considered the prosecution and the defence evidence, the trial court found that the prosecution had proved its case to the required standard. It found, first, that the prosecution witnesses were credible and secondly, that the defence evidence did not raise any reasonable doubt in the prosecution case. Consequently, the learned trial Principal District Magistrate found the appellant and his co-accused guilty of all counts and thus convicted them accordingly. They were as a result, sentenced to an imprisonment term of one (1) year each in the 1st and 2nd counts and three (3) years imprisonment each in the third count. On the 4th count, each one of them was sentenced to twenty (20) years imprisonment. The sentences were ordered to run concurrently.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was however, unsuccessful. The learned first appellate Judge upheld the findings of the trial court that the prosecution evidence had sufficiently proved the charges brought against the appellant. He observed as follows in his judgment at page 55 of the record of appeal:

"The testimonial evidence of PW1, PW2 and PW3 and the exhibits tendered at the trial and received in evidence without contest in my considered view was sufficient for the trial court to found a conviction against the appellant..."

The learned Judge was also of the view that the appellant's defence, that he was arrested outside the National Park at the banks of Rubana River, did not raise any reasonable doubt in the prosecution case. This was more so he reasoned, because of uncontested evidence of PW1 and PW2 that the appellant was arrested in the National Park by Game Rangers while in possession of some dangerous weapons.

The appellant was further aggrieved by the decision of the High Court hence this second appeal which is predicated on seven grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Mr. Castuce Ndamugoba, learned Senior State Attorney. As stated above, in this appeal, the appellant has raised seven grounds of his discontent with the decision of the High Court. In the 4th ground, he complained about

non-inclusion of a copy of the charge in the record of appeal. He contended that, in the absence of that copy, the Court would not be able to decide on the existence or otherwise of *mens rea* and *actus reus* as regards the charges which were preferred against him. A copy of the record was however, included in the record of appeal before the hearing of the appeal and as a result, that ground became redundant.

With regard to the other grounds of appeal, the same can be paraphrased as follows:

1. That the learned High Court Judge erred in law and fact in upholding the decision of the District Court while that court conducted the trial without the consent of the Director of Public Prosecutions and the certificate authorizing the trial of the case by a subordinate court as required by the law.

2. That the High Court erred in upholding the finding of the trial court that the charges were proved while the prosecution did not tender any certificate of seizure or receipt in respect of exhibits so as to establish on whose possession were the same found.

3. That the learned High Court Judge erred in failing to find that the prosecution's failure to produce a sketch map of the area where the appellant was arrested entitled the trial court to find that its evidence was insufficient to prove that the appellant was found in the National Park.

4. That the learned High Court Judge erred in failing to find that the valuation report was invalid for failure to describe the actual trophy alleged to have been found in the appellant's possession.

5. That the learned High Court Judge erred in law and fact by contradicting himself and failing to find that the appellant was wrongly convicted and sentenced in respect of the offence involving an animal not listed under Part 1 of the 1st Schedule to the WCA.

6. That the learned High Court Judge erred in upholding the decision of the trial court while the charges against the appellant were not proved beyond reasonable doubt.

When the appellant was called upon to make his submission in support of the appeal, he did not have any arguments to make. He

adopted his grounds of appeal and urged us to consider them and allow the appeal.

In response to the appellant's grounds of appeal as paraphrased hereinabove, the learned Senior State Attorney began by expressing his stance that he was supporting the appellant's conviction and the metted out sentences. With regard to the 1st ground of appeal, Mr. Ndamugoba argued that the trial court properly conducted the trial because the DPP had, on 9/1/2014, issued both the consent for trial of the appellant and his co-accused under section 26(1) of the EOCC Act together with the certificate authorizing the trial of the appellant and his co-accused by the District Court of Bunda. According to the learned Senior State Attorney, since the consent and the certificate were issued before hearing of the case had commenced on 14/4/2014, both the consent and the certificate were valid.

On the 2nd ground of appeal, Mr. Ndamugoba conceded that no certificate of seizure was issued at the time of taking the exhibits which were tendered in the trial Court (Exhibits P.1 and P.2). He argued however that given the circumstances under which the exhibits were seized, and the

persons who made the arrest, it was not practicable to obtain a certificate of seizure. He added that, in any case, the omission did not weaken the prosecution evidence.

Concerning the 3rd and 4th grounds, the learned Senior State Attorney submitted in response that there is sufficient evidence that the appellant was found in possession of the carcasses of three wildebeests. He argued further that there were no contradictions as regards that evidence. It was his contention also that, although in the 4th count, the prosecution cited *inter alia,* paragraph (2) (b) of section 86 of the WCA while wildbeest was not specified in the 1st Schedule to that Act but rather under the Third Schedule thereto, by virtue of the provisions of section 86(2) (c) (ii) of the said Act, the appellant was properly convicted and sentenced. The learned Senior State Attorney submitted that the error in citing section 86(1) and (2) (b) instead of section 86(1) and (2) (c) (ii) of the WCA is a curable irregularity.

With regard to the 5th and 6th grounds, the learned Senior State Attorney opposed the contents of those grounds arguing firstly, that at the trial the appellant did not challenge the validity of the inventory and the

valuation report and secondly, that the evidence of the three prosecution witnesses sufficiently proved the prosecution case beyond reasonable doubt. He thus prayed that the appeal be dismissed.

Having considered the grounds of appeal and the submission made by the learned Senior State Attorney in opposition thereof, we wish to begin with the 1st ground of appeal. The contention by the appellant was that the trial court lacked the requisite jurisdiction to try the charges which were preferred under the EOCC Act. Under Section 3 of that Act, economic offences are triable by the High Court sitting as an Economic Crimes Court. The Section provides as follows:

> *"3-*
>
> *(1) The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the High Court.*
>
> *(2) The High Court when hearing charges against any person for the purpose of this Act shall be an Economic Crimes court"*

Notwithstanding that provision, a case involving an economic offence can be heard by a subordinate court upon a certificate given by the DPP under section 12(3) of the EOCC Act. That provision states as follows:

> *"12- (1)....*
>
> *(2)....*
>
> *(3) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by the court subordinate to the High Court as he may specify in the certificate."*

It is also a condition under section 26 of the EOCC Act,that a trial of a person for an economic offence must not commence without the consent of the DPP. The provision states that:

> *"26 –*
>
> *(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions."*

The crucial matter for determination is whether in this case, the two conditions were met. From the original record, it is clear that on 9/1/2014, a certificate and a consent envisaged under sections 12(3) and 26(1) of the EOCC Act respectively, were issued by the State Attorney In-charge of Musoma Zone. The same were issued after institution of the proceedings in the trial court. Mr. Ndamugoba submitted that, so long as the certificate was issued and the consent made before commencement of the trial, both documents were valid. He stressed that, according to the applicable procedure, cases under the EOCC Act involving economic offences are being filed in subordinate courts for committal proceedings and at that stage, the consent of the DPP to prosecute the charged persons is not required. According to the learned Senior State Attorney, the consent is mandatorily required at the trial stage.

Having considered the submission made by the learned Senior State Attorney and the cited provisions of the EOCC Act, we agree with him that the trial court had the requisite jurisdiction to try the case.

To start with the requirement stipulated under section 12(3) of the EOCC Act, the trial of the appellant commenced on 14/2/2014 after the

DPP had issued a certificate authorizing such trial by the District Court of Bunda. In the circumstances therefore, the trial Court had jurisdiction to hear the case.

On the requirement of the consent of the DPP to the trial of the appellant for the Economic Offences, we also agree with Mr. Ndamugoba that under Section 26(1) of the EOCC Act, it is at the trial stage that such consent is required. We are aware of the decision of this Court in the case of **Hsu Chin Tai & Another v. The Republic,** Criminal Appeal No. 250 of 2012(unreported) but in our view that case is distinguishable. In that case, the Court had the occasion of interpreting a similar provision; that is section 94(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] which prohibits institution of criminal proceedings against a person who is not a citizen of the United Republic of Tanzania for an offence committed within the territorial waters without the consent of the DPP. That section provides as follows:

> *"94 – (1) Subject to the other provisions of this section, proceedings for the trial of any person who is not a citizen of the United Republic for an offence committed on the open sea within two hundred*

nautical miles of the coast of the United Republic measured from the low-water mark ***shall not be instituted*** *in any court except with the leave of the Director of Public Prosecutions and upon his certificate that it is expedient that such proceedings should be instituted."*

[Emphasis added].

Whereas the information in respect of the appellants in that case was instituted in the High Court on 4/8/2009, the leave of the DPP was filed on 24/9/2009. Considering the validity or otherwise of the DPP's consent, the Court held as follows:

"Since in this case we have found that the proceedings were instituted on 4/8/2009 and since there is no other evidence to suggest that the DPP's consent/leave was given prior to institution of the proceedings, except the ('the consent') dated 24/9/2009 which was 50 days later, it is obvious in our view that, the purported consent was given and filed in violation of the law. As this court said in ***PAULO MATHEO v. R*** *[1995] TLR 144, if the DPP's consent is given retrospectively, it cannot be said to have been given in accordance with the law."*

In that case, the leave or consent of the DPP was found to be invalid because it was filed after the institution of proceedings, that is; after the information had been filed while the provisions of section 94(1) of the CPA prohibits institution of proceeding without the consent of the DPP. In the case at hand however, what is prohibited by section 26(1) of the EOCC Act is commencement of a trial without the consent of the DPP. Since the trial commenced after the consent of the DPP had been filed in the trial Court, the proceedings were properly conducted. In the circumstances therefore, the first ground of appeal is devoid of merit.

In the 5th ground of appeal, the appellant challenged the sentence metted out in respect of the 4th count. In his judgment, the learned first appellate Judge was of the view that, even though wildebeest is not specified under Part 1 of the First Schedule to the WCA cited in the 4th count, the appellant was properly sentenced because the metted out sentence is provided for under section 86(2) (c) (iii) of that Act. We respectfully agree with the learned Judge. In the first place, we do not find any contradiction in the observation made as regards the propriety or otherwise of the sentence. Secondly, although it is true that wildebeest is not specified in the First Schedule to the WCA, that animal is listed under

the Third Schedule thereto and under section 86(2) (c) (iii) of WCA the punishment for the offence of being found in possession of that animal is twenty (20) years imprisonment. We therefore agree with the learned Senior State Attorney that the error in citing in the charge, sub-sections (1) and (2) (b) instead of sub - section (2) (c) (iii) of section 86 of the WCA is a curable irregularity. The error did not occasion any injustice to the appellant because he knew that he was being charged with the offence of being found in unlawful possession of three carcasses of wildbeets. This ground is thus similarly, devoid of merit.

Turning now to the other grounds of appeal, the same centre on the question of sufficiency or otherwise of the prosecution evidence. As pointed out above, both the trial Court and the High Court were satisfied that the witnesses, PW1, PW2 and PW3 were credible and that their evidence sufficiently proved the charges against the appellant.

It is trite principle that where there are concurrent findings of facts by two courts below, the appellate court cannot interfere with such findings, unless, there are sufficient grounds for doing so. For instance, in

the case of **Dickson s/o Joseph Luyana & Another v. The Republic,** Criminal Appeal No. 1 of 2005 (unreported), the Court stated as follows:

> *"As was held by this Court in the case of* ***Amratilal D. M t/a Zanzibar Silk Stores v. A. H. Jariwala t/a Zanzibar Hotel*** *[1980] TLR 31, where there are concurrent findings of fact by two courts below, the Court should as a wise rule of practice follow the long established rule repeatedly laid down by the Court of Appeal for East Africa. The rule is that an appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principles of law or practice."*

In the case at hand, after having considered the evidence and the tendered exhibits, we are satisfied that both the trial court and the first appellate court properly directed themselves on the same and thus arrived at a right conclusion, that the prosecution had proved its case beyond reasonable doubt. The complaints in the 2nd, 3rd and 4th grounds which were not raised in the High Court and the 6th ground in which the appellant

contends generally, that the charges against him were not proved beyond reasonable doubt, are therefore devoid of merit.

For the foregoing reasons, we find that this appeal has been brought without sufficient reasons. The same lacks merit and is thus hereby dismissed.

DATED at **DAR ES SALAAM** this 7th day of January, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2020 in the presence of appellant appeared in person and Ms. Lilian Merry learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. H. Mahimbali
DEPUTY REGISTRAR
HIGH COURT OF TANZANIA MWANZA