IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 166 OF 2019

1. BAHAME SITTA
2. GILUISHA NIMBU ..... APPELANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Ebrahim, J.)

dated the 10th day of April, 2019

in

Criminal Appeal No. 88 of 2018

JUDGMENT OF THE COURT

1st & 11th November, 2022

KENTE, J.A.:

The appellants, Bahame Sita and Giluisha Nimbu were convicted by the District Court of Bariadi on a total of eight counts. In the first count, they were convicted of unlawful entry into the National Park, contrary to sections 21 (1) (2) (a) and 29 of the National Parks Act Chapter 282 of the Laws of Tanzania (the NPA). In the second count, the appellants were convicted of unlawful possession of weapons in the National Park contrary to section 24 (1) (b) and (2) of the same Act and in the third count, they were

convicted of unlawful hunting in the National Park contrary to section 23 (1) and (2) (b) also of the same Act. Regarding the fourth and fifth counts, the appellants were convicted in respect of each count, of unlawful hunting in a National Park contrary to section 23(1), (2) (d) of the NPA. With regard to the sixth, seventh and eighth counts, they were convicted of three economic offences of unlawful possession of Government trophies contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act (No. 5 of 2009) read together with paragraph 14 of the 1st Scheduled and section 57 (1) and 60 (2) and (3) of the Economic and Organized Crime Control Act, Chapter 200 of the Laws of Tanzania.

In support of the first count, the particulars alleged that, on 20th October, 2016 at about 12.00 noon, the appellants were found at a place called "Ibilingwa Hills" in Serengeti National Park within the District of Bariadi in Simiyu region, without a written permission from the Director of the National Parks. In support of the second count, it was alleged that, at the same time and place, the appellants were found in possession of three machetes, four knives and five wild animal trapping wires without the permit of the Director of National Parks. Regarding the third count, it was particularized that, still at

the same time and place, the appellants were found hunting five zebras valued at TZS.13,086,000.00 equivalent to USD 6000. The particulars of the fourth and fifth counts alleged respectively that, at the same time and place, the appellants were found hunting one eland valued at TZS.3,707,700.00 (USD 1,700) and one impala valued at TZS.850,590.00. (USD 390).

Whereas the particulars in the sixth count alleged that, at the same time and place, the appellants were found in possession of ten pieces of zebra-meat and one dry skin of zebra both with a total value of TZS.13,086,000.00. (USD 6,000), in the seventh count, it was alleged that the appellants were at the same time and place, found in unlawful possession of one dry skin of eland valued at TZS.3,707,700.00. (USD 1,700). Regarding the eighth and last count, the particulars alleged that, at the same time and place, the appellants were found while unlawfully possessing one dry skin of impala whose value was TZS.850,590.00. (USD 390). All the above mentioned trophies were said to be the properties of the Government of the United Republic of Tanzania.

Needless to say, the appellants pleaded not guilty to all counts. However, as stated earlier, they were tried and convicted of all counts and subsequently sentenced as follows:

i) For the first count – two years imprisonment.
ii) For the second count – To pay a fine of TZS.20,000.00 or upon default, one year imprisonment.
iii) For the third, fourth and fifth counts – Three years imprisonment; and
iv) For the sixth, seventh and eight counts – Twenty years imprisonment.

The above stated custodial sentences were ordered to run concurrently.

A brief historical background giving rise to this appeal as can be gleaned from the record, is to the following effect. On 20th October, 2016 Paul Mahendela PW2 and his fellow park ranger one Shafii Kafuluma PW4, were on routine patrol at Ibilingwa Hills which is said to be within the boundaries of the Serengeti National Park. They were accompanied by other four park rangers. In the course of the patrol, they saw some snare trap-wires which were set along game trails ostensibly to trap the unsuspecting wild animals. Upon following the said wires closely, they saw three persons in the bush. Suspecting them to be poachers, they pursued and arrested them.

They allegedly found them in possession of all the earlier mentioned items.

From there, the appellants were quickly bundled into the park rangers' car and whisked to the police station at Bariadi where they were detained. After some preliminary investigation of the crime which included the assessment of the value of the said trophies by the District Game Officer one David Giong Sulle (PW1), the appellants along with one Madoke John whose charges were however withdrawn mid-way in terms of section 91 (1) of the Criminal Procedure Act, Chapter 20 of the Laws, were arraigned and formally charged in court.

When put on their defence, the appellants denied to have been found neither in the National Park nor in possession of the Government trophies and the weapons mentioned in the charge. They narrated how they were arrested within their respective farming areas which they claimed to be part of their village land. They said that they were with some other peasants who however took to their heels when they saw the park rangers coming. Whereas the first appellant told the trial court during cross-examination that, he did not know the reason for his arrest, the second appellant is recorded

to have told the trial court that, his only wrongdoing according to the park rangers, was the carrying out of agricultural farming in the National Park the accusations which he equally denied.

After considering the evidence adduced before him, the learned trial Magistrate was satisfied that the prosecution had proved all the eight counts against the appellants beyond reasonable doubt. Accordingly, he found them guilty and convicted them as charged. Their first appeal to the High Court sitting at Shinyanga (Ebrahim, J.) was unsuccessful as the first appellate court confirmed both the conviction and sentences meted out on them by the trial District Court. The appellants have now appealed to this Court to challenge the decision of the High Court citing three grounds of complaint.

In an abridged form, the thrust of the said grounds was that, the learned Judge of the first appellate court was wrong to act on the trophies evaluation certificate (Exh. P1) which was improperly admitted in evidence and that the appellants' defence evidence was not considered by the two lower courts. The appellants also faulted the learned judge of the first appellate court for allegedly sustaining their conviction and sentences in the absence of sufficient evidence to prove the charge against them.

At the hearing of the appeal, the appellants appeared in person unrepresented. They had nothing to expound on their grounds of appeal apart from continuing with the protestation of their innocence. For the respondent Republic, Mr. Shaaban Mwigole teaming up with Ms. Verediana Mlenza, learned Senior State Attorneys partly resisted and partly supported the appeal as we shall herein-after demonstrate.

With regard to the sixth, seventh and eighth counts which charged the appellants with the economic offence of unlawful possession of Government trophies, Mr. Mwigole briefly submitted that, the trophy valuation certificate (Exh. P1) which formed the basis of the charges in the above-mentioned counts, was improperly received and acted upon by the trial magistrate as it was not read out to the appellants after being admitted in evidence. He added that, the omission to read it out rendered it evidentially valueless for which he prayed to be expunged from the record. Once it is expunged, the learned Senior Stated Attorney caved in and submitted, the charges in the sixth, seventh and eighth counts would remain unproven. According to Mr. Mwigole, this was more so taking into account that the evidence of David Gilong Sule (PW1) a Game

Officer who examined and assessed the value of the disputed trophies was so scanty as not to shed any light on, for instance, how he could have identified and differentiated zebra meat from any other wild animal meat or livestock meat.

In view of the fact that there was no inventory form which was admitted in evidence in support of the prosecution case as is the normal practice, the learned Senior State Attorney submitted further that, to cap it off, PW4 had just mentioned the said pieces of zebra meat without telling the trial court their whereabouts. Given the circumstances, Mr. Mwigole implored us to allow the appeal, quash the appellants' conviction in respect of the sixth, seventh and eighth counts and set aside the twenty years imprisonment sentences imposed on them.

When we asked Mr. Mwigole how could the charges in the third, fourth and fifth counts which referred to the same trophies still stand in view of his submissions and prayer in respect of the sixth, seventh and eighth counts, he was quick to concede that, since the allegations against the appellants were anchored on the same trophies, likewise the charges in the third, fourth and fifth counts would inevitably crumble away. In that regard, the learned Senior State Attorney

threw in the towel and urged for the appeal in respect of the said counts to be allowed as well.

Regarding the first and second counts which respectively charged the appellants with unlawful entry into the National Park and unlawful possession of weapons in the National Park, the learned Senior State Attorney submitted generally that, the two offences were proved to the required standard as to warrant the appellants' conviction. Relying on the testimony by the two park rangers (PW2 and PW4), Mr. Mwigole was firm that indeed, the appellants were found and subsequently arrested in the Serengeti National Park while in possession of the weapons mentioned in the charge. In the circumstances, the learned Senior State Attorney contended that, the appellants' complaint in respect of the charges in the first and second counts were without any basis.

As for the complaint in the third ground of appeal that the appellants' defence evidence was not considered by the trial court an omission which was subsequently glossed over by the first appellate court, Mr. Mwigole opposed that complaint. While claiming that this was a new ground which was not raised before the first appellate court, he referred to page 51 to 54 of the record of appeal, and

submitted correctly so in our view that, the appellants' defence versions which were substantially similar were briefly considered by the trial magistrate but, in his submission, they were duly rejected in view of the strong evidence adduced by the prosecution witnesses.

For our part, we wish to start with the conceded fact that, the charges in respect of the third, fourth, fifth, sixth, seventh and eighth counts were not proved as to warrant the appellants' conviction and sentence. As correctly submitted by Mr. Mwigole, the charges in the above-mentioned counts were solely anchored on the Government trophies whose whereabout was not disclosed and the inventory form of which was not tendered in court, if they had already been disposed of assuming that they were perishable items.

As for the trophy valuation report, it is indeed not in dispute that it was not read out to the appellants after it was admitted in evidence, (vide page 30 of the record of appeal). The law on this point is very clear that, whenever it is intended to introduce any document in evidence three steps ought to be followed. It should first be cleared for admission and be actually admitted in evidence, before it can be read out in court. (See **Robinson Mwanjisi and Three Others v. R** [2003] R.L.R 218. The reason why it is a mandatory

legal requirement to read out to the accused person the contents of the admitted documentary exhibit was underscored by this Court in the case of **John Mghandi @ Ndovo v. Republic**, Criminal Appeal No. 352 of 2018 (unreported) where we categorically stated that:

> *". . . whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him give a focused defence."*

What then are the effects of the failure or omission by the trial court to observe the above requirement of the law? There are case law in abundance all to the effect that, the omission is fatal as to occasion a miscarriage of justice to the accused person who, though was present throughout the trial, he was eventually convicted on the basis of the documentary evidence whose contents he was not made aware of. (See **Aniseth Ibrahim and Another v. Republic**, Criminal Appeal No. 277 of 2018 and **Evarist Nyamtemba v. Republic**, Criminal Appeal No. 196 of 2020 (both unreported). Put in the same situation as that obtaining in the above-cited cases and many others, we have no any other option than to agree with Mr.

Mwigole and proceed to expunge from the record the trophy valuation report which was not read out to the appellants following its admission in evidence.

Given the relationship which come close to mutualism between on one hand, the Government trophies which were a smoking gun in this case but were inexplicably not exhibited in court and on the other hand, the charges from the third to the eighth counts we entirely agree with Mr. Mwigole that indeed the said charges were not proved to the required standard. We thus allow the appeal, quash the appellants' conviction on those counts and set aside the custodial sentences which were imposed on them.

As for the first count which charged the appellants with unlawful entry into a National Park, we wish to state the following albeit very briefly. Faced with the question as to whether section 21 (1) (a) and (2) of the National Parks Act created the offence of unlawful entering into Serengeti National Park, in the case of **Dogo Marwa @ Sigana and Another v. Republic,** Criminal Appeal No. 512 of 2019 (unreported), after quoting in **extensor** and reviewing the said provisions of the law, (as amended by Act No. 11 of 2003) the Court held thus:

> *"It is now apparent that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national part) and got confusion in section 21 (1) of the National Parks Act.* ***As far as we are concerned, the appellants were charged, tried, convicted and sentenced for a non-existing offence of unlawful entry into Serengeti National Park."***
>
> *[Emphasis added]*

As a matter of principle, the position of the law which we took in Dogo Marwa (supra) was subsequently followed in our decisions in the cases of **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019 and **Maduhu Nhandi @ Limbu v. Republic** (both unreported). Like in the case now under scrutiny, in those three cases, the appellants were charged with the non-existent offence of unlawfully entering in the National Park purportedly under section 21 (1) (i) and 29 of the National Park Act.

For our part, without losing site of our previous decisions in the above-cited three cases, and the legality principle being *nullum crimen sine lege* (that, a person cannot or should not face criminal punishment except for an act that was criminalized by law before

he/she performed the act), we follow suit and reiterate the position that, as the law stands today, section 21 (1) (a) and (2) of the National Parks Act as amended by Act No. 11 of 2003, does not create the offence of unlawful entering into a National Park. We thus quash the appellants' conviction in respect of the first count and set aside the sentence of two years imprisonment imposed on them by the trial court and subsequently confirmed by the first appellate court.

Finally, is the second count which charged the appellants with unlawful possession of firearms in the National Park. The evidence led in support of this count was to the effect that, in the course of patrol at Ibilingwa Hills, PW2 and PW4 saw the appellants who they suspected to be poachers. Further that, when they pursued and arrested them, they found them in possession of three machetes, four bush-knives and five animal traping wires. Having found them in possession of the said weapons, they arrested and subsequently charged them.

In their respective defences, the appellants denied to have been found in possession of the said weapons claiming that they were arrested far away from the National Park area. They told the trial

court that since they were arrested in their farms, the only thing which each of them had during their apprehension was or a hoe.

Dealing with the question which he had framed earlier in his judgment as to whether the appellants had unlawfully entered into the Serengeti National Park an act which was an integral part of the offence charged in the second count, the learned trial magistrate referred fleetingly to the evidence of PW2 and PW4 and found in consequence thus:-

> *"It is clear from the testimonies of PW2 and PW4 that the accused persons were found inside the National Park at Ibilingwa area and they were questioned as to whether they had the requisite permit to enter into the National Park, they said they had none to produce. I am satisfied that the accused persons were found in unlawful entering into Serengeti National Park."*

On her part, the learned judge of the first appellate court did not specifically address this crucial point. She held generally that:

> *"I have dispassionately gone through the proceedings of the trial court. PW2 Paul Mahendela and PW4 Shafii Kafuluma both park rangers. They testified at length and consistently on how on the respective date of*

20.01.2016 around 12:00hrs in their routine patrol found the appellants and arrested them. They both evidenced before the court that the appellants had no permits."

Now, we need to make it clear that, in any case of the present nature, the question as to whether or not a given area or place is or is not within the statutory boundaries of a National Park, is not a question for casual and perfunctory testimony by the prosecution witnesses as it were in the instant case. Given the inter locking nature of some of the National Parks areas and the village lands in our country, together with a really nebulous idea among many people of what separates the two, and, taking into account the appellants' defence versions that they were arrested in their farms, it was incumbent upon the prosecution witnesses in the present case to lead evidence proving beyond doubt that, Ibilingwa Hill area where PW2 and PW4 allegedly arrested the appellants was within the Serengeti National Park area as specified in the First schedule to the National Parks Act. In the absence of such evidence, it was not open for the two courts below to hold as they did, that the appellants were arrested within the boundaries of Serengeti National Park while in possession of the alleged weapons.

All said and done, we find the appeal to have been filed with sufficient cause of complaint and we accordingly allow it. The appellant's convictions and sentences in respect of all counts are respectively quashed and set aside. We order for their immediate release form custody if they are not held for some other lawful cause.

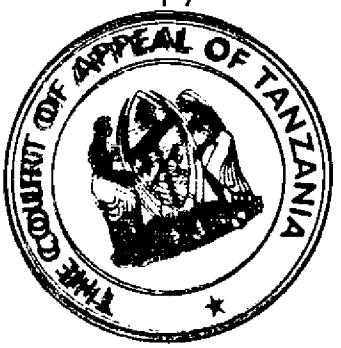
DATED at **SHINYANGA** this 11th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 11th day of November, 2022 in the presence for the Appellants in person and Ms. Gloria Ndondi, learned State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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