IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

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

CRIMINAL APPEAL NO. 304 OF 2019

MASUNGA LIMBU @ GHABU ..... 1ST APPELLANT

MADUHU LIMBU ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ebrahim, J.)

dated the 22nd day of July, 2019

in

Criminal Appeal No. 87 of 2018

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JUDGMENT OF THE COURT

8th November, 2022 & 28th June, 2023

MWARIJA, J.A.:

The appellants, Masunga Limbu @ Ghabu and Maduhu Limbu were charged in the District Court of Bariadi with four counts. In the first count, they were charged with the offence of unlawful entry into the national park contrary to sections 21 (1) (2) (a) and 29 of the National Parks Act, Cap. 282 of the Revised Laws as amended by Act No. 11 of 2003 (the NPA). It was alleged that on 8/11/2016 about 9:30 hrs, the appellants were found in Serengeti National Park (the

National Park) at Duma river area in Bariadi District within Simiyu Region having entered therein without any written permit from the Director of the National Parks (the Director).

They were charged further, in the second count, with the offence of unlawful possession of weapons in a national park contrary to s.24 (1) (b) and (2) of the NPA; that on the same date, time and place as stated in the first count, they were found in possession of weapons, that is; two machetes, two knives and five animal trapping wires without the permission of the Director.

In the third count, the appellants were charged with the offence of unlawful hunting in a national park contrary to s.16 (1) (2) (a) of the NPA read together with GN No. 235 of 1968 and paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) and (3) of the Economic and Organized Crime Control Act, Cap. 200 of the Revised Laws as amended by ss.13 and 16 of the Written Laws (Miscellaneous amendments) Act No. 3 of 2016 (the EOCCA). They were also charged in the fourth count, with the offence of unlawful possession of Government trophies contrary to s.86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of

the First Schedule to and sections 57 (1) and 60 (2) & (3) of the EOCCA.

It was alleged in the fourth and the third counts that, on the same date, time and place as stated in the first count, the appellants were found with two pieces of zebra tails, three pieces of zebra's forehead skins and twenty one pieces of zebra skins valued at USD 3,600.00, equivalent to TZS 7,864,200.00 indicating that they had unlawfully hunted three zebras worth the above stated value, the property of the Tanzania Government.

The appellants denied all counts. In order to prove its case, the prosecution called four witnesses to testify. Wilson Adam (PW1) and Ally Sufian (PW2) were at the material time Park Rangers employed by the National Park. They were the officers who arrested the appellants on the material date. In his evidence, PW1 told the trial court that, while patrolling at Duma river area with among others, PW2, at 9:30 a.m., he saw some persons carrying a luggage. Using their patrol car, they pursued those persons who had dropped the luggage and took to their heels. According to PW1, his team managed to arrest three persons and after being questioned, they

identified themselves as Masunga Limbu (the 1st appellant), Maduhu Limbu (the 2nd appellant) and Magreen Mbelele who is not a party to this appeal.

It was PW1's further evidence that, they took the said persons to the place where they had dropped the luggage and upon inspecting it, the following things were found in it: twenty four pieces of zebra skin, two zebra tails, two knives, two machetes and five animal trapping wires (the trophies and weapons). The witness added that, when they were asked whether they had any permit allowing them to enter into the National Park with weapons and carry out hunting, the appellants and the other person replied that they did not have any such permit. They were consequently taken to Bariadi Police Station and were later charged in the trial court. PW1 tendered the trophies and weapons which were admitted in evidence as exhibit P1 collectively.

The testimony of PW1 was supported by PW2. He added that, although they handed over three persons to the police, the third person, Magreen Mbelele, was not charged. When he was cross

examined, PW2 denied that he chased and arrested the said Magreen Mbelele at the village where the appellants resided.

The Government trophies which were alleged to have been found in possession of the appellants were valued by David Gilong Sule (PW3) who was at the material time the District Game Officer, Bariadi. It was his evidence that, the trophies were from three zebras having a total value of USD 3600.00, equivalent to TZS 7,864,200.00 calculated on the basis of USD 1200.00 as the value of one zebra. The witness tendered the trophy valuation report and the same was admitted in evidence as exhibit P2.

No. G 1976 D/C Kalson (PW4) was the investigator of the case. He testified that, after having been handed over the police case file, he conducted further investigation including to find out the value of the trophies. He requested PW3 to go to Bariadi Police Station to identify the trophies and prepare a valuation report. Having completed his investigation, PW4 transmitted the file to the office of the Director of Public Prosecutions who later on charged the appellants.

As pointed out above, the appellants denied all counts. In his defence evidence, the first appellant who testified as DW1, contended

that on the material date, he woke up early in the morning and went to purchase some domestic needs and packaged hard drinks (viroba) with a view of preparing a party for his wife who had delivered twins. At 9:00 a.m while on his way home with his consignment, he heard someone raising alarm calling him by his name. When he went to the place where the alarm was being raised, which was at Mbogo area, he saw one Manyilili Ngelele who was known to him. The said person was under the custody of Game officials who were beating him.

It was DW1's further evidence that, the Game officials questioned him on the items which he had carried and the reason for being drunk. He said that, despite explaining to them that he had a party at his home and the consignment which he had carried was for that purpose, they arrested and dragged him into their motor vehicle. He thus denied the allegation that he was found in the National Park, adding that, he had never entered therein in his entire life.

On his part, the second appellant (DW2) testified that, on the material date, at about 9:30 a.m. while working in his farm, he saw a motor vehicle on which were Game officials. They approached and told him that they were chasing a certain person and thus asked him

whether he had seen anyone having passed there. Upon his response that he did not see such person, he was ordered to get into the motor vehicle on allegation that he lied because it could not be true that he did not see the person who ran away from them. He said further that, after a short driving distance, he saw a person on the run. The Game officials arrested and started to beat him.

That person raised alarm calling the first appellant who responded to the call. He was asked by that person to send information to his home, that he had been arrested. The first appellant was however, also arrested. DW2 named that person as Magreen Mbelele and that following the beatings by the Game officials, he became seriously sick such that he had to be taken to hospital. Like DW1, DW2 also denied the allegation that he was arrested in the National Park. He further denied to have been found in possession any of the trophies or weapons which were tendered as exhibits.

In its decision, the trial court believed the evidence of PW1 and PW2, that the appellants were arrested within the National Park at Duma river area without any permit from the Director. It found also

that, the evidence had sufficiently proved that the appellants were found with weapons. The learned trial Senior Resident Magistrate was of the view that, since the appellants did not cross-examine PW1 and PW2 on that aspect of their evidence, then the allegation that they were found with weapons was proved. He was therefore, satisfied that the first and second counts were proved.

As regards the fourth count, he was also satisfied that the evidence of PW1 and PW2 had sufficiently proved that the appellants were found in unlawful possession of the Government trophies, the value of which was certified by PW3 as per exhibit P2. According to the learned trial Senior Resident Magistrate, the appellants' defence was an afterthought. As for the third count, that the appellants had conducted unlawful hunting, the trial court found that the count had not been proved because no person was called to testify on that aspect. It was the opinion of the learned trial Senior Resident Magistrate that, a mere fact that a person was found with a trophy is not a conclusive proof that he hunted the respective animal.

Based on those findings, the appellants were found guilty and convicted of the first, second and fourth counts only. Each one of

them was consequently sentenced to pay a fine of TZS 200,000.00 or one year imprisonment on the first count, a fine of TZS 100,000.00 or one year imprisonment on the second count and twenty years imprisonment on the fourth count.

Aggrieved by the decision of the trial court, the appellants unsuccessfully appealed to the High Court. The learned first appellate Judge upheld the trial court's finding that, the appellants were found to have entered into the National Park without permit where they committed the offences charged in the second and fourth counts. She found that the appellants' conviction was based on the evidence of PW1, PW2 and PW3 which she found to be credible. She reasoned as follows in her judgment at page 71 of the record of appeal:

> *"[In their] testimonies PW1, PW2 and PW3 were consistent and I could not see any contradictions as claimed by the appellants in their rejoinder. Moreover, not in shifting the burden, but it cannot be possible for the appellants who live near the park to have never set a foot in the park in their whole life. DW2 said the distance from their village to the park is from the court to old Maswa area which is the distance of approximately 8 kms. I*

therefore, find that appellants' defence did not shake [the] prosecution case."

Having so reasoned, the learned Judge dismissed the appeal.

The appellants were further aggrieved by the decision of the High Court hence this appeal which is predicated on three grounds. The same may be paraphrased as follows:

1. *That, the learned first appellate Judge erred in law in upholding the conviction of the appellants on the case which was not sufficiently proved.*
2. *That, the learned first appellate Judge erred in law in upholding the appellants' conviction while the prosecution evidence did not prove that they were arrested in the National Park.*
3. *That, the learned first appellate Judge erred in failing to find that the appellants' defence was not considered hence denied them the right of fair hearing.*

At the hearing of the appeal, the appellants appeared in person, unrepresented while the respondent was represented by Ms. Verediana Mlenza, learned Senior State Attorney. When the appellants were called on to argue their appeal, they opted to let the

learned Senior State Attorney reply first to the grounds of appeal and thereafter, make their rejoinder if the need to do so would arise.

At the outset, Ms. Mlenza conceded that the appellants were charged in the first count, with an inexistent offence because, after amendment of the NPA by Act No. 11 of 2003, the offence of illegal entry in a national park was removed. In the circumstances, there is no gainsaying that the appellants were wrongly convicted of and sentenced on that count. The conviction on that count is therefore, quashed and the sentence is set aside.

On the grounds of appeal, we wish to start with the second ground in which, in his response, the learned Senior State Attorney argued that, from the evidence of PW1 and PW2, the prosecution proved beyond reasonable doubt that the appellants were arrested within the National Park. She contended further that, although the prosecution did not tender any documentary evidence to substantiate the witnesses' evidence that the area at which the appellants were arrested is within the National Park, Duma river area where the appellants were found is within the National Park.

In their rejoinder, both appellants reiterated what they stated in their defence evidence that, they were arrested in the village in which they were residing. They opposed the evidence that they were arrested in the National Park with weapons and that they had in their possession the Government trophies as contended by the prosecution witnesses.

The matter which arises for our determination in this ground of appeal is whether the finding of the two courts below is supported by sufficient evidence. In our considered view, the answer is in the negative. Having gone through the evidence of PW1 and PW2 and after having considered the submissions of the learned Senior State Attorney and the appellants, we are of the settled mind that, the two courts below misapprehended the evidence. The appellant maintained their defence that they were arrested in their village, at Mbogo outside the National Park boundaries. The prosecution ought therefore, to have proved that the area at which the appellants were arrested is within the geographical boundaries of the National Park. Even if the evidence of PW1 and PW2 that the place at issue was Duma river area, no evidence was adduced to prove that Duma river is wholly located within the National Park.

In the case of **Senso Maswi @ Mwita and Another v. Republic**, Criminal Appeal No. 518 of 2019 [2021] TZCA 637: [03 November 2021] (unreported), the Court considered the situation similar to the one in the case at hand. Underscoring the need to prove geographical location when an accused person disputes the allegation of having been found in a national park, the Court stated as follows:

> *"...considering that the second appellant said he was on a road heading home from another village where he had gone to attend wedding, and he said, the Park rangers appear to have taken issue with his mere use of the road,* ***there was need to prove that the road is within the game reserve.****"*
> *[Emphasis added]*

-See also the cases of **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017 [2022] TZCA 78: [25 February 2022] and **Dogo Marwa @ Sigana and Another**, Criminal Appeal No. 512 of 2019 [2021] TZCA 593: [21 October 2021] (both unreported).

Since in this case, the prosecution evidence did not prove that the appellants were found within the statutory boundaries of the

National Park, we find that, it was due to misapprehension of evidence that the High Court erred in upholding the appellants' conviction on the second count. We therefore, allow the appeal on that ground as well.

That said and done, we turn to consider the first ground of appeal with particular reference to the fourth count. Determination of this ground need not detain us much. **First**, as found above, the prosecution has failed to establish that the appellants were found within the statutory boundaries of the National Park, which is the place at which the appellant were allegedly found in possession of the Government trophies. **Secondly**, the evidence of PW1 and PW2 is uncertain as to who among the appellants and the third person who was not arrested, was found with the Government trophies. In his evidence found at page 21 of the record of appeal, PW1 stated that:

> *"While they were running, they threw away the luggages which they were carrying. We took them back to the place [where] they threw those luggages... we noted that the luggages which they were carrying [contained] 24 pieces of Zebra skin, two tails of Zebra ..."*

On his part, at page 24 of the record of appeal, PW2 testified that:

> *"They threw away the luggage ...which they were carrying. We took them back to the place where they threw the luggage. We saw it was two knives, two pangas and five trapping wires. We also found them with 2 tails of Zebra and 24 pieces of Zebra skin."*

It is not clear from the evidence of the two witnesses whether each of the three persons was carrying a luggage or whether it was one of them who carried it. This is because, if the Government trophies were contained in one luggage, then it could not have been carried by three persons at the same time. It is therefore, doubtful that the Government trophies were found in the joint possession of the appellants. We are increasingly of that view because of the appellants' defence that they were not arrested together as the evidence of the two prosecutions witnesses, who in referring to the dropping of the luggage and the arrest of the appellants, spoke in plural form. That doubt must operate in favour of the appellants. We thus find that the fourth count was equally not proved. On that

finding, the need for considering the third ground of appeal does not arise.

In the event, the appeal is allowed. The appellants' convictions on the second and fourth counts are also hereby quashed and the sentences imposed on them are set aside. They should be released from prison forthwith unless they are otherwise lawfully held.

DATED at **DAR ES SALAAM** this 23rd day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of June, 2023 in the presence of 1st and 2nd Appellants in person and Mr. Luis Boniface, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL