IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 304 OF 2020

NYAMHANGA MWISE MUHERE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Musoma)

(Kahyoza, J.)

dated the 29th day of June, 2020

in

DC Criminal Appeal No. 160 of 2019

JUDGMENT OF THE COURT

31st October & 9th November, 2023

KIHWELO, J.A.:

In the quest for justice, the appellant, Nyamhanga Mwise Muhere has knocked the doors of this Court seeking to challenge the decision of the High Court of Tanzania at Musoma (Kahyoza, J.) in Criminal Appeal No. 160 of 2019, in which the High Court upheld the decision of the District Court of

Tarime at Tarime which found the appellant guilty of three counts he stood charged and was consequently convicted and accordingly sentenced.

It is noteworthy that, in accordance with the charge laid at the appellant's door and evidence led by the prosecution in the District Court in Economic Case No. 71 of 2018, the appellant was formally arraigned for three counts, namely, unlawful entry into the national park, unlawful possession of weapons in the national park and unlawful possession of Government trophies. The three counts were, respectively, predicated on sections 21 (1) (a) and (2) and 29 (1) of the National Parks Act, Cap. 282 as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA), section 24 (1) (b) and (2) of the NPA and section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (WCA) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act, Cap. 200 as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars of the offence for the first count alleged that, on 11.10.2018 at Hingira area in Serengeti National Park within Tarime District

in Mara Region, the appellant entered into the Serengeti National Park without permission of the Director thereof previously sought and obtained.

Furthermore, the particulars of the offence for the second count alleged that, on the same date and place, the appellant was found in possession of weapons to wit; two trapping wires and one machete in the Serengeti National Park without permit and failed to satisfy an authorized officer that the same were intended to be used for purposes other than hunting, killing, wounding or capturing of wild animals.

Finally, the particulars of the offence for the third count alleged that on the same date and place, the appellant was found in unlawful possession of one head of Buffalo valued at TZS. 4,560,000.00 the property of the United Republic of Tanzania.

The appellant refuted the accusations whereupon, the prosecution featured five witnesses to prove the charge, namely, Joseph Mpangala (PW1), Jacob Bura Hema (PW2), Njonga Marco William (PW3) and No. H. 625 PC Omary (PW4). The prosecution also produced three exhibits, namely, two trapping wires and one machete (exhibit P1), Trophy Valuation Certificate (exhibit P2) and an Inventory Form (exhibit P3). On the other

hand, the appellant was the only defence witness who elected not to say anything in defence to the charge facing him except for the fact that he did not have a father or any relative to assist him.

Briefly, the prosecution case which was believed by the learned trial Magistrate was to the effect that on 11.10.2018 at Hingira area which is said to be within the boundaries of the Serengeti National Park, PW1 and PW2 along with other fellow park rangers, while on their routine patrol within the national park, they stumbled upon the appellant who was apparently carrying a luggage and weapons. They detained the appellant and upon search of the luggage he was carrying, they discovered one head of Buffalo and on interrogation the appellant admittedly told PW1, PW2 and other park rangers that he had no permit to enter the national park. Furthermore, the appellant admitted that he neither had permit to carry weapons in the national park nor to own Government trophy.

PW3, the District Game Officer, upon being summoned by the Officer in Charge of Gibaso Police Station, examined the alleged head of Buffalo and confirmed it to be a fresh meat of head of buffalo. He also conducted a valuation and prepared a trophy valuation certificate (exhibit P2). On the

other hand, PW4 is a police officer who was at the Gibaso Police Station on 11.10.2018 when the appellant who was under arrest was escorted by PW1, PW2 and other fellow park rangers.

When the respective cases from either side were closed, the learned trial Magistrate was impressed by the prosecution case, and in the end, he was satisfied that the appellant committed the offences and found him guilty as charged. In consequence, the trial court convicted and sentenced the appellant to serve a prison term of one year for the first count, two years for the second count and twenty years for the third count. The learned trial Magistrate ordered the sentences to run concurrently.

The appellant appealed to the High Court presided over by Kahyoza, J. who upon further evaluation of the evidence on record, he was satisfied that the trial court rightly found the appellant guilty for the offences charged and therefore, he dismissed the appeal and upheld the conviction and sentences.

The appellant's dissatisfaction with the decision of the High Court is expressed in a memorandum of appeal comprising five grounds of grievances which was lodged in Court on 07. 09. 2020. Nonetheless, for a

reason that will shortly become apparent, we think that it will be unnecessary for us to reproduce the five grounds of appeal.

When invited to address us, the appellant being a lay person not conversant with the law prayed to adopt his five (5) grounds of appeal and preferred for the learned State Attorney to respond, so that he would rejoin if need to do so would arise.

On his part, when eventually invited to respond on the appeal, Mr. Tawabu Yahaya Issa, learned State Attorney who argued the appeal on behalf of the respondent Republic assisted by Mr. Anesius Kainunura, learned Senior State Attorney, hastily, supported the appeal but on account of a different reason not being one of the five grounds of appeal raised by the appellant. He faulted the first appellate court for not finding that the learned trial Magistrate erred in convicting the appellant in all the three counts for which the appellant was charged and ultimately convicted. He contended that, the procedure for disposal of perishable government trophy was not complied with in preparing the Inventory Form, exhibit P3, as such, there was no proof that the appellant was found in possession of Government trophy, to wit the head of Buffalo.

For him, exhibit P3 cannot be relied to prove that the perishable Government trophy was found in the custody of the appellant. He took the view that the appellant was wrongly convicted and sentenced for the offence which was not proved by the prosecution, referring to page 25 of the record of appeal where PW3 admitted on cross examination by the appellant that it was not necessary to involve the accused during the disposal of the Government trophy. To facilitate the proposition of his argument, the learned State Attorney referred us to our earlier decision in **Mohamed Juma @ Mpakama v. Republic,** Criminal Appeal No. 385 of 2017 (unreported), in which faced with an analogous situation, we emphasized the mandatory right of an accused to be present before the Magistrate and be heard.

On our prompting on the fate of the first count, despite the fact that the appellant has already served the prison term of one year, the learned counsel was quick to admit and without mincing words, he contended that the appellant was wrongly charged and convicted on a non-existent offence because section 21 (1) (a) and (2) of the NPA does not create the offence of unlawful entry into the national park as cited. He took the view that, it

was irregular to charge the appellant using that provision and therefore, he implored us to quash the conviction and set aside the sentence of one year which was imposed on the appellant.

Upon our further prompting as regards the second count, the learned State Attorney argued that, the prosecution ably proved that the appellant was found in possession of weapons in the national park and referred to exhibit P1, two trap wires and a machete which were tendered by PW1 to prove the charge. However, the appellant has already served the prison term of two years which he was sentenced for the second count, the learned State Attorney submitted. In all, he urged the Court to allow the appeal, quash the conviction for the third count and set aside the sentence and the appellant be set free.

In rejoinder the appellant did not have anything useful to submit aside from maintaining his innocence and praying that the appeal be allowed and he be set free.

We have anxiously weighed the submission by the learned State Attorney in support of the appeal and we shall now proceed to determine

the appeal and in so doing, we propose to discuss the appeal in the pattern he preferred.

First and foremost, we should interpose here and observe that the issue of the appellant being charged and convicted on a non-existent offence because section 21 (1) (a) and (2) of the NPA does not create the offence of unlawful entry into the national park should not detain us much for the simple reason that this matter is now settled and clear. There is, in this regard, a considerable body of case law, if we may cite but a few. See, for instance the case of **Dogo Marwa @ Sigana and Another v. Republic,** Criminal Appeal No. 512 of 2019 and **Willy Kitinyi @ Marwa v. Republic,** Criminal Appeal No. 511 of 2019 (both unreported), In the former case we held that:

> *"Ironically, before the amendment of the NPA by Act No. 11 of 2003, section 21 clearly disclosed an offence of unlawful entry into the national parks."*

We held further that:

> *"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 park) and got confusion in section 21 (1) of the NPA. As far as we are concerned, the appellants were charged, tried, convicted and sentenced for a non-existent offence of unlawful entry into Serengeti National Park."

We think, with respect, that, the learned State Attorney was undeniably right to argue that, that was irregular. As we held in the case of **Willy Kitinyi @ Marwa** (supra), the defect denied the appellant a fair hearing because he could not prepare an informed defence against a non-existent offence.

On the second count, we fully agree with the submission by the learned State Attorney that the prosecution ably proved that the appellant was found in possession of weapons in the national park through exhibit P1, two trap wires and a machete which were tendered and admitted in evidence by PW1. As earlier on hinted, the appellant was sentenced to two years prison term on 4.07.2019 which he has since served.

We will next deliberate on the infraction in relation to the failure to comply with the procedure for disposal of the perishable Government trophy while preparing the Inventory Form exhibit P3. We hasten to state at this

point that, in seeking to answer the question on whether the prosecution in the instant appeal proved the case beyond reasonable doubt, that the appellant was found in possession of the Government trophy, we think, this should not detain us much as the answer is not far-fetched. The learned State Attorney was undeniably right to submit that failure to produce in court the alleged head of the Buffalo defeated the entire prosecution's case in respect of the third count. This is because exhibit P3 cannot be relied to prove that the appellant was found in possession of the perishable Government trophy owing to the fact that the procedure as stipulated under paragraph 25 of the Police General Orders (PGO) No. 229 was not complied with to the letter.

Quite clearly, the provision of paragraph 25 of PGO No. 229 requires in mandatory terms the involvement of the accused in the process of disposal of perishable exhibits which cannot be easily preserved until the case is fully heard. Luckily, this situation is not novel. In the case of **Mohamed Juma @ Mpakama** (supra) in which the Court was faced with an analogous situation, we had the following to say:

"The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (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)".

In light of the above position of the law, we think that, the learned State Attorney was correct that, while PW3 was fully entitled to seek and obtain a disposal order from the primary court magistrate, the Inventory Form (exhibit P3), which came out cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court magistrate at the time of making the order to dispose of the exhibit.

It bears reaffirming that, the burden is always on the prosecution to prove the case beyond reasonable doubt. The accused person has no duty of establishing his innocence. There is a litany of authorities on this and we need not cite one as it is crystal clear and settled.

When all is said and done, we find merit in the appeal, and as such we allow it, quash the conviction for the first and third counts, set aside the sentences imposed upon the appellant and order his immediate release from prison, unless held for other lawful cause.

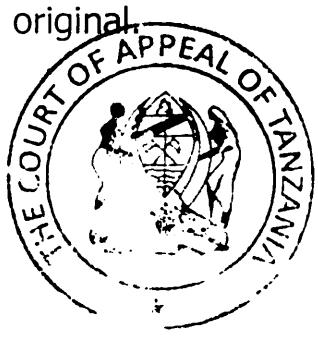
DATED at **MUSOMA** this 9th day of November, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 9th day of November, 2023 in the presence of the Appellant in person, and Mr. Tawabu Yahya Issa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL