IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO 170, 171, 182, 183 AND 184 OF 2019

1. **JOSEPH KIBABA NYAMBACHA**_____**1ST APPELLANT**
2. **TATU SIROCHA MACHOTA**_____**2ND APPELLANT**
3. **PETER KONGORI MARIWA**_____**3RD APPELLANT**
4. **CCM MAYONGA KHAMIS**_____**4TH APPELLANT**
5. **YOHANA NYAMBEHO WASHA MANG'UTA**_____**5TH APPELLANT**
6. **WANGI SAMWEL WANGI** _____**6TH APPELLANT**
7. **JUMATANO BONIFACE NYERERE**_____**7TH APPELLANT**

VERSUS

THE REPUBLIC_____**RESPONDENT**

(Arising from the Decision and Orders of the District Court of Serengeti at Mugumu, Ngaile RM, in Economic Case No 74 of 2018 dated 16.10.2019)

JUDGEMENT

Date of last Order; 03.04.2019
Date of judgment; 08.05.2019

GALEBA, J.

These five consolidate appeals arise from a common decision of the district court of Serengeti sitting at Mugumu in economic case number 74 of 2018. In that case the appellants, except the 1st and the 2nd, were charged on five counts of unlawful entry into the National Park as the first count and unlawful possession of weapons

in the National Park as the second count contrary to sections **21(1)(a), (2), 29(1)** and **24(1)(b) and (2) of the National Parks Act [Cap 282 RE 2002]** (the NPA) respectively. The third count was unlawful possession of Government Trophies contrary to **section 86(1), (2)(b) of the Wildlife Conservation Act No 5 of 2009** (the WCA) read together with paragraph 14 of the first schedule to the **Economic Organized Crime Control Act [Cap 200 RE 2002] (the EOCA)**. The fourth count was unlawful possession of Government trophies contrary to section **86(2)(c)(iii)** of the WCA read together with paragraph 14 of the first schedule to the EOCA and the fifth count was unlawful dealing in Government trophies contrary to **section 84(1)** the WCA read together with paragraph 14(b) of the first schedule to the EOCA and the sixth count which was in respect of the 1st and 2nd appellants was failure to report the possession of government trophies contrary to sections 87(1) and (2) of the WCA.

The facts giving rise to the case in the district court is that between 18.07.2018 and 26.07.2018 the 3rd to the 7th appellants were hunting wild game at Nyibeho area in the neighborhood of Warangi River in the Serengeti National Park. In the process, the appellants killed 39 wildebeest and 1 zebras as they were found with 276 and 14 pieces of wildebeest and zebra meat respectively. According to the prosecution, on 29.07.2018 the trophies from the national park were transported by bicycles to Robanda village by the 3rd to 7th appellants and from Robanda village to Darajani area between

Bwitegi and Park Nyigoti villages at the bank of River Gurunga the trophies were transported by the 1st and the 2nd appellants in a motor vehicle Make Toyota Land Cruiser Pick up with Registration No. T916 AEU (the Vehicle) owned by Ikona Wildlife Management Area Authority (Ikona WMA). At this river bank the trophies were offloaded from the vehicle and then transported by bicycle to the house of the 5th appellant **YOHANA NYAMBEHO WASHA MANG'UTA** which is about 90 meters from the point where the trophies were offloaded from the vehicle. How it came to be known is that an informer whose identity was not made public, informed **PW1 EDWIN NJIMBI,** a game officer that there were trophies being offloaded from the vehicle at Darajani area. **PW1** contacted **Inspector Abdallah, Jacob Matatala** and **Hussein Mede** who all headed towards Mugumu. On the way at Fort Ikoma Madukani they met the vehicle being driven by the 1st appellant who was in company of the 2nd appellant. The two appellants were arrested instantly. The vehicle and two mobile phones of these appellants were seized. Later they (**PW1, Inspector Abdallah, Jacob Matatala** and **Hussein Mede**) went to the 5th appellant's house arrested him and also arrested 3rd, 4th, 6th and 7th appellants after having been mentioned by the 5th appellant that they participated in the illegal hunting. All the appellants except the 1st and the 2nd recorded caution statements **(EXHIBITS PE8, PE9, PE10, PE13** and **PE14)** admitting to commit the charged crimes.

On 01.08.2018 which was the 1st day of hearing the Court moved to the ***locus in quo*** (Nyibohe area in the Serengeti national park) and recovered 38 animal trapping wires, 1 machete, 2 nylon used tent, 1 tin of maize, sorghum flour, 4 metal cooking pots, and 2 mosquito nets. These items were seized and were taken to the police.

The appellants were arraigned as stated above but they disputed the all allegations. Despite the denials of the appellants in participating in the criminal acts subject of the crimes charged, the district court resolved that the prosecution proved the case to the hilt and therefore, it found the 1st and 2nd appellants guilty in respect of the 5th and 6th counts and sentenced each of them to 3 years imprisonment or payment of Tshs 4,000,000/= as fine in relation to count no 5 and imposed upon them a fine of Tshs 500,000/= each for count no 6. Both of these appellants paid the fine hopefully to escape the rigors of jail life. The other appellants were found guilty on all counts for which they had been charged and were sentenced to various jail terms ordered to run concurrently with the highest being 20 years imprisonment.

Upon the above verdict, all the appellants were aggrieved and accordingly, the 1st and 2nd appellants filed criminal appeal no. 170 with 5 grounds of appeal and the 3rd and 4th filed criminal appeal no. 171 containing 6 grounds and the remaining appellants, the 5th,

6th and 7th, each filed a separate appeal. They filed respectively Criminal Appeals No. 182 with 6 grounds, 183 with 6 grounds which are identical to those in Criminal Appeal No 182 and 184 with a total of 7 separate grounds of appeal. All appeals are of 2019.

On 03.04.2020, when these appeals were called on for hearing it happened that Mr. Innocent Kisigiro learned advocate was representing the 1st to the 4th appellants with the 5th, 6th and 7th, each appearing in person. The republic had the services of Mr. Frank Nchanila, the learned state attorney. With concurrence of parties and also because all the appeals were originating from a common decision of the district court, this Court consolidated the five appeals into one Consolidated Appeals No. 170, 171, 182, 183 and 184 of 2019, which is the matter before me.

Before starting to argue the grounds of appeal brought by the 1st, 2nd, 3rd and 4th appellants (appeals no. 170 and 171), Mr. Kisigiro prayed to abandon grounds no. 4 in both appeals. He then proceeded to argue grounds no. 1 in both appeals which were a complaint that the chain of custody was not established in respect of the items that were retrieved from the national park which were the animal trapping wires and some cooking utensils. He stated that it was not known where the items were between being retrieved from the jungle till when they were tendered in court. He submitted

that **PW 10 WILBROAD VINCENT** did not disclose who gave him the trophies at the police. The learned advocate cited **CRIMINAL APPEAL NO 379 OF 2019 BITA MANUMBU NYAMBABE VERSUS REPUBLIC** at page 8 and **CRIMINAL APPEAL NO 240 OF 2017 JACKSON WEREMA NYAMYOMBWE VERSUS REPUBLIC** at pages 5 and 6 both unreported to support his point that an exhibit tendered in violation of the chain custody requirements ought to be expunged. Further submission of the advocate was that the trophies were not tendered in court and that offended section **101 of the WCA** and the holding in **CRIMINAL APPEAL NOT 422B OF 2013 EMMANUEL SAGUDA SULUKA VERSUS REPUBLIC (unreported).**

In reply to the issue of chain of custody Mr. Nchanila submitted that **PW5 INSPECTOR ABDALLAH** seized the trophies and prepared the certificate of seizure and took the trophies to Ikorongo Game Reserve and later to Mugumu Police Station on 29.07.2018. He stated that trophies were tendered by way of tendering **EXHIBIT PE 15** which was an **INVENTORY.** He submitted that tendering the inventory is equivalent to tendering the trophies themselves as per the provisions of section **101(1) of the WCA**. As for the weapons he stated that the 5th appellant led the court to visit the ***locus in quo*** from where weapons were recovered. **PW5** brought the weapons to Court and had them tendered as **EXHIBIT PE 6**. He submitted that the chain of custody was not broken.

The first grounds of appeal in criminal appeals 170 and 171 are identical, they are both complaining along the following lines;

> ***"1. The trial court erred in law and facts when it admitted exhibits without the prosecution side establishing the chain of custody of tendered exhibits."***

Although Mr. Kisigiro argued this ground, but on the way he went further to challenge the prosecution for not having tendered actual trophies which was not his clients' complaints in the above ground. Finally he prayed that this court be pleased to expunge the **EXHIBITS**, which then would not be possible with respect to the trophies which were not tendered. The prayer was contradicting the submission made. I will therefore ignore the submissions on all matters not raised in the above ground and deal with the issue of chain of custody in respect of **EXHIBITS** which were tendered and which are complained about. I have gone through the submissions of counsel and his complaint is on establishment of the chain of custody in relation to the weapons. The weapons **EXHIBIT PE6** (38 animal trapping wires, 1 machete, 1 knife and 8 cooking pots) were recovered from the National Park in the presence of **PW1 EDWIN NJIMBI** and **PW4 MOHAMED ATHUMAN.** The items were seized by **PW6 F3785 DC PROCHES** (page 66 of the proceedings) who took them to Mugumu Police Station where he works from. The **EXHIBITS** were tendered by **PW5 INSPECTOR ABDALLAH MBWANA IDDI** who

was a police officer from the Regional Police Office but who witnessed the whole police case in respect of the accused. The genuineness of these items was acknowledged by the 3rd, 5th and the 6th appellants immediately after coming from visiting the locus in quo on 30.07.2018 in their caution statements (**EXHIBIT PE 10, PE13** and **PE 14).** The items were not questioned by the appellants at the trial as being different from those they detailed in their confessions. In the circumstances the complaint of noncompliance with the chain of custody is refused and so the first ground of appeal has no merit.

Ground 2 in appeals 170 and 171 is that the trial court did not consider the defence evidence and Mr. Kisigiro Mr. Kisigiro submitted that that omission vitiated a conviction. In supporting his submission on that aspect Mr. Kisigiro, referred this court to the decision of this court in **CRIMINIAL APPEAL NO 139 OF 2017 BETWEEN MAKARANGA MATIKO AND ISSA RAMADHANI VERSUS THE REPUBLIC** (unreported).

In reply to that complaint Mr. Nchanila for the respondent submitted that at page 8 of the judgment the court considered the defence of the accused persons but the court may as well step into the shoes of the lower court and consider the evidence of the appellants and make good the anomaly. To back his submission he cited the provision of section 366(1)(a) of the **Criminal Procedure Act [Cap 20 RE 2002]** for the this court to step into the shoes of the trial court,

evaluate the evidence of the trial court and come up with an independent findings, if necessary. First I agree with Mr. Kisigiro that failure to consider the defence vitiates a conviction, and there are many authorities on this aspect including **CRIMINAL APPEAL NO 473 OF 2016 HALID HUSSEIN LWAMBANO VS REPUBLIC, (CA-IRINGA) (UNREPORTED), CRIMINAL APPEAL NO 243 OF 2007 MICHAEL ALAIS VS REPUBLIC (UNREPORTED)** and **CRIMINAL APPEAL NO 48 OF 2019.** For example in **HALID HUSSEIN LWAMBANO VS REPUBLIC** (supra) at page 15 of the typed decision of the Court of Appeal while stressing on that point, it stated;

> ***"To say the least, it is now trite law that failure to consider the defence of the person accused is fatal and vitiates a conviction. That concludes the appeal in the appellant's favour and, it is needless for us to belabor on the other grounds raised by the appellant."***

However that is the position where failure to consider defence is omitted twice, in the trial court and also in the first appellate court. The Court of Appeal in the above case of **LWAMBANO** implying that the High Court can consider the defence, if the district court does not, it observed as follows at page 10;

> ***"Finally, with respect to the last two grounds of appeal the learned state attorney conceded that apart from giving a summary of what the appellant stated in defence, the trial court did not, at all, critically consider the defence case. <u>When we asked whether or not the shortcoming was remedied by the first appellate court</u>, Ms. Nichombe just as well conceded that the first appellate court similarly did not critically consider the appellant's defence but, if at all, the first appellate court***

simply brushed aside the appellant's defence on account that the same was an afterthought. " (emphasis is my own).

Also in **JUMANNE SALUM PAZI VERSUS REPUBLIC [1981] TLR 246**, the trial court did not consider the defense at all like in this case. This Court (Kisanga J) (as he then was) held that;

> ***"(i) this court being the first appellate court must consider the evidence, evaluate it itself and draw its own conclusion..."***

There are many more cases on this point including **PANDYA VERSUS REPUBLIC [1957] EA 336, SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT CO LTD [1968] EA 123** and **OKENO VERSUS REPUBLIC [1972] EA 32.**

Therefore I agree with Mr. Nchanila that this court can step into the shoes of the trial court and re-evaluate the whole evidence including the defense testimonies of the appellants which I shall do in the course of this judgment. That said the solution for the complaint in the 2nd ground will become clear at the end of judgment.

In respect of ground 3, Mr. Kisigiro submitted that the case was not proved beyond reasonable doubt because of contradictions and inconsistencies on who was with the 4th appellant **CCM MAYONGA KHAMIS,** when he was being arrested. He stated that whereas **PW3** said at page 44 of the proceedings that he was arrested while with **PETER KONGORI,** preparing traditional spirit (called ***gongo)*** at his

house, **PW2** stated that they arrested him at his house with the 6th appellant **JUMATANO NYERERE**. Mr. Kisigiro went further to argue the points he did not raise in his grounds of appeal for instance, he submitted that the appellants were not given opportunity to cross examine **PW4 MARIAM ROKET** and therefore her evidence ought to be expunged from the record. He submitted also that many exhibits were not referred to although tendered and also that none of the appellants was arrested in the National Park for any of them to be convicted on the 1st count.

In reply Mr. Nchanila submitted that the contradiction cited does not go to the root of the matter and the same ought to be ignored. He submitted that the appellants were convicted based on their confessions. On the issue of not cross examining **PW4** he stated that evidence should not be expunged rather the case may be sent back to the trial court for retrial because the case was a public interest case. As for the exhibits which were not referred to by the trial court, Mr. Nchanila submitted that this court can consider the affidavit and come up with its own findings.

Ground 3 which is the subject of discussion presently is couched as follows;

> ***"3. The trial court erred in law and fact to convict and sentence the appellants while the Respondent did not prove its case beyond reasonable doubt as there were inconsistencies/contradictory evidence."***

In supporting this ground Mr. Kisigiro submitted on one inconsistence but then abandoned the ground and started to complain about other matters of cross examination and also non consideration of exhibits. It is the holding of this court that when a ground is raised, it is putting the other party to notice that what will be argued is that very ground and not other complaints not raised in the appeal. This court will therefore not consider the complaints of Mr. Kisigiro on cross examination or the complaint that the trial failed to make reference to some exhibits because those complaints are not part of his ground of appeal. If it was the desire of the appellants to add those matters as grounds of appeal, this Court would have readily granted the prayer. Section 362(2) provides that;

> ***"362(2) The petition shall contain particulars of the matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred."***

So the complaints must be contained in the petition of appeal. It follows that matters not contained in the petition cannot be argued or raised on appeal. That allows me to consider the merits or demerits of the complaint on the person with whom **CCM MAYONGA KHAMIS** was with at the time of his arrest. To decide on this matter, is not that complicated, it is to look at the charge and also at the complaint. The case before the trial court was a range of wildlife crimes from entering into the National Park illegally, to being

found there with unlawful weapons and also unlawful possession of trophies. The case is not on arrest or trying to prove whether the arrest was right or wrong. In the circumstances, whether **CCM KHAMIS** was arrested in the presence of **PETER KONGORI,** preparing ***gongo*** or in the presence of **JUMATANO NYERERE,** it does not really matter, legally we can hold that that inconsistence goes to the root of the matter. In the circumstances this ground is dismissed.

As for ground 5, Mr. Kisigiro submitted that the certificate of seizure in respect of **EXHIBIT PE1** and **PE2** the 1st and 2nd appellants' telephones was not completed in compliance with **section 22(3) of the Economic and Organized Crime Control Act [Cap 200 RE 2002].** He submitted that that was the case with **YOHANA NYAMBEHO WASHA MANG'UTA** from whose house the trophies are alleged to have been found.

In reply Mr. Nchanila submitted that **EXHIBIT PE4**, the seizure certificate of the trophies was tendered without objection so any complaints on appeal are afterthoughts and that as for seizing the telephones, the game officers have powers under section 106(1)(c) of the WCA.

I agree with Mr. Kisigiro that there are no receipts issued or at least tendered in court by the prosecution in respect of both the trophies and the illegal weapons but there are certificates signed by the

appellants. **EXHIBIT PE4** which is a record of seizure by the police relates to the government trophies and the same is signed by **MARIAM ROKET** an independent witness who was a Bwitengi village leader and during her evidence she even recognized it at the bottom of page 44 of the proceedings. The **EXHIBIT** is also signed by **WANGI SAMWEL** and **YOHANA NYAMBEHO** who are both appellants in this appeal. The document was tendered on 19.06.2019 (see handwritten proceedings) without any objection from any appellant. Similarly were for **PE5** which are certificates of seizure of the weapons which were recovered from the bush. They are 2 and they were tendered on 19.06.2019 by **PW5 INSPECTOR ABDALLAH MBWANA IDDI,** again without objection and without any questions cross examining the witness.

In this case, although the receipts are missing but, it is my considered opinion that all these documents are needed in order to show the credibility of the evidence that some items were recovered following the search. In this case, the relevant appellants signed the respective **EXHIBITS** and accepted them. When they were being tendered no objections were raised. The story was the same for **EXHIBIT P1** which was a seizure certificate for the vehicle and two telephones. To me submitting something to the contrary at this late hour in the day does not sound to be a genuine or lawful complaint. In any event, Mr. Kisigiro did not access me with any authority establishing that where there are valid certificates duly signed by the

accused person and tendered without any objection, absence of a receipt can vitiate a conviction. In the circumstances, this ground of appeal also fails as against the 3rd and 4th appellants. The legality of evidences tendered against the 1st and 2nd appellants will be discussed later on.

That was all as for the 1st, 2nd, 3rd and 4th appellants. The 5th, 6th and 7th appellants as they informed the court to adopt their grounds as they are and let the state attorney submit generally on them.

Criminal appeals no. 182 and 183 of 2019 filed by the 5th and 6th appellants **YOHANA NYAMBEHO WASHA MANG'UTI** and **WANGI SAMWEL WANGI** had identical grounds of appeal, and the 1st and 3rd grounds had a complaint that they were convicted and sentenced in respect of unlawful possession of weapons while the prosecution did not tender the certificate of seizure. In reply Mr. Nchanila submitted that the certificates of seizure were tendered in court therefore the conviction and the ensued sentence were both lawful.

Indeed **EXHIBIT P5** are two certificates of seizure for the weapons and other items that were found in the National Park. The said **EXHIBIT** was tendered without any objection from any appellant. This ground therefore has no merit in both appeals.

In grounds 2, 5 and 6 the complaint of the two appellants is that they were not heard and their defenses not considered. Mr. Nchanila submitted that they were heard as their evidence is on record.

As held earlier, although the appellants were heard but their defenses were not duly considered or analyzed. At this point I must state that I will give a deserving answer to these three grounds whether directly or indirectly at the time I will be analyzing the evidence. So at the moment, I leave those grounds at that.

The complaint in grounds 4 was that the government trophies were tendered by the state prosecutor. Mr. Nchanila stated that no **EXHIBIT** was tendered by the prosecutor. In respect of this ground this court is in agreement with Mr. Nchanila because not only that the trophies were not tendered by the prosecutor but the same were not tendered at all. Therefore this ground is dismissed for want of merit.

That was all with criminal appeals no. 182 and 183 of 2019.

The last appeal is criminal appeals no. 184 of 2019 in which the sole appellant is the 7th appellant **JUMATANO NYERERE.** In ground 1 his complaint was that there was no certificate of seizure linking him with any trophies because the same were recovered from the 5th

appellant's place and not at his house. In reply to that complaint Mr. Nchanila stated that **MR. NYERERE** was convicted based also on evidence of other witnesses. This ground can be resolved adequately after I will have analyzed the evidence of the defense.

The complaints in ground 2, 3, 6 and 7 are commonly attacking the district court for having convicted him of entering into the National Park while he was arrested at his home and that his evidence was not considered. My assessment of the defence evidence will show whether the prosecution proved this offence against this appellant or not.

The complaint of the 7th appellant in ground 4 was essentially that the documents tendered were prone to being tempered with. Mr. Nchanila submitted that his reply is the same as those in respect of the chain of custody when he was replying to criminal appeal No. 170 and 171. The issues of chain of custody have been decided upon and as per the decision made on that issue, this ground is dismissed.

As ground 5 in criminal appeal no. 184 of 2019 was abandoned then that marks the end of our discussion on the grounds of appeal and their consideration except those I have postponed until I will have discussed the defense evidence of each appellant. That will assist

me answer the question whether the case was proved beyond reasonable doubt given the defence.

From this point on the issue I will be considering is one grand overriding issue in criminal procedure, namely, whether the case was proved beyond reasonable doubt in respect of each appellant. In doing that, I will observe both the evidence of the prosecution and that of the appellants. I will also rule whether or not at the closure of the prosecution case whether the prosecution evidence did disclose a prima facie case necessary for the 1st and 2nd appellants to answer the claim. In respect of the other appellants I will look at their defenses and also the evidence of the prosecution especially the confessions of the 5 appellants.

The appellants are in 2 clusters. Cluster one is composed on 1st and the 2nd appellants, **JOSEPH KIBABA NYAMBACHA** and **TATU SIROCHA MACHOTA** respectively. The second cluster is composed of the 3rd to the 7th who are villagers from Park Nyigoti and Bwitegi villages in Serengeti.

As for the 1st cluster, the crucial evidence against them (1st and 2nd appellants) was tendered by **PW1 EDWIN NJIMBI** who stated that "***his informer***" called him around **23.00 hours** in the night on 29.07.2018 and told him that a vehicle owned by the WMA was offloading

government trophies at a bridge close to Burunga river. He then called two workmates and one police officer and they headed towards Mugumu direction where on the way they met the vehicle which they stopped and arrested the 2 appellants, seized the vehicle and their telephones and presented them to the police. The evidence which connects the vehicle and the event is that in the vehicle there were small pieces of meat which, it was alleged, that they were from the wild game and also the car had a strong smell of meat of wild animals (see page 10 of the typed proceedings). The other reason why they the 2 appellants were connected with the saga was because when **PW1** and his colleagues went to Burunga river in the same night (according to **PW1**) they found ***"signs/marks of the vehicle and we reveals (sic) there signs of the vehicle of WMA which uses different tires.."*** (see page 11 of the typed proceedings at the top of the page).

The above evidence, even before getting to the defence, has questions to be answered. ***First,*** why did the ***informer*** had to hide and fail to come to testify so that the court could know with certainty, the exact identification of the vehicle that he saw at the river bank offloading the government trophies? This was necessary because no witness saw the vehicle (**EXHIBIT P3)** offloading the trophies during that night except ***"the informer"***. In other words the evidence of offloading trophies as tendered by **PW1** is the whole of it

hearsay which no court properly directing itself should accord any weight. Evidence of identification of the vehicle would only be credible if it came from the person who saw the vehicle offloading the trophies and who would clarify some issues like was the vehicle flashing lights or lights were off and if the latter was the case, did he have any other source of light which assisted him to identify vehicle during that time of night and may other unanswered questions.

Second, who scientifically tested the small pieces of meat which were found in the vehicle in order for them to match those recovered from the home of the 5th Appellant? That way common characteristics in both the small pieces and those recovered from the 5th appellant would compare and a conclusion that they both originated from the same animal specie could be made with comfort and a high degree of certainly. In this case there was no trophy valuation certificate in respect of the pieces of meat that **PW1** found in the vehicle so that one could link them with those seized from **YOHANA NYAMBEHO's** home.

Third, which tires do **WMA** vehicles use, because then it would be easy for the court to know that no other vehicle except those of the WMA use such tires. This was important because, **PW1** stated that he knew the vehicle involved was **EXHIBIT P3** because that vehicle had different tires, but that statement remained hanging, it did not

crystalize or settle to a particular solid point and tell the court what was it that he was meaning in essence. At least I did not understand what **PW1** meant when he said that, the vehicle had different tires.

Fourth, does the WMA own only one vehicle in order to justify the act of seizing the only vehicle which was being driven by the 1st appellant and also to justify the arrest of those in the vehicle and ***fifthly*** how did **PW1** and his colleagues know that the smell in the vehicle was the smell of meat from wild game not from meat from some other animals like domestic animals or any other scent smelling as such but not from dried meat of wild game; the point is, was there any proof that the smell was of a mixture of Zebra and Wildebeest meat? This court did not get any clue on what would be the answer to any of the above questions.

The other issue, is that the prosecutions seized telephones of these appellants, but they did not testify on and information in the phones linking them with the trophies or any other appellants, who were arrested with the trophies especially **YOHANA NYAMBEHO**. At page 12 of the judgment the court stated that the 2 appellants admitted to **PW1, PW2** and **PW5** that they transported the trophies; with due respect, that is not true, those prosecution witnesses did not say so anywhere in their evidence.

The other point is that although the 1st appellant was mentioned by **YOHANA NYAMBEHO** but no witness mentioned the 2nd appellant in the confessions **(EXHIBITS PE8, PE9, PE10, PE13** and **PE14).** Legally a person accused of an offence cannot be convicted based solely on the confession of a co-accused. See the cases of **THADEI MLOMO AND OTHERS VERSU REPUBLIC [1995] TLR 187** and **CRIMINAL APPEAL NO 141 OF 1992; MT 38870 PTE RAJAB MOHAMED AND OTHERS VERSUS REPUBLIC CAT** (unreported) as well as section **33(2)** of the **Evidence Act [Cap 6 RE 2002]**. So in terms of the above decisions and the law, even if the other accused persons were to mention the 1st appellant, still that would not hold water. In this case at least the 1st appellant was mentioned by **YOHANA** but the 2nd was never mentioned by anybody.

In this case, it is the holding of this court that without even getting to the defence, the 1st and 2nd appellants were supposed to be acquitted before they could defend the case because no case was made out by the evidence of the prosecution necessary for them to answer any thing. In the circumstances, this court finds that not only that the conviction was unlawful but even charging the 1st and 2nd appellants were illegal.

The second cluster was that of all the other appellants from the 3rd to the 7th appellants. The evidence touching on these appellants are

those of **PW1 EDWING NJIMBI, PW2 UTENA RASHID, PW3 MARIAM ROKETI, PW5 ABDALLAH MBWANA IDDI** and other witnesses. The common story on the trophy from these witnesses was that, **PW1 and PW5** went to the house of the 5th Appellant **YOHANA NYAMBEHO** and found 5 large parcels containing dried meat of wild animals. They arrested him and went with him to look for **PW3 MARIAM ROKETI** who was the village leader. He then stated that his fellow owners of the trophies were **JUMATANO NYERERE, CCM KHAMIS, PETER MARIWA** and **SAMWELI WANGI** who were arrested the same night from their homes. Then they went back to the house of **YOHANA NYAMBEHO** searched the house and found that the parcels had 290 pieces of wild meat. **PW1** and **PW4, PW6 PC PROCHES** and other witnesses testified on the recovery of the weapons and other kitchen wares from the National Park. **PW6** stated that on 30.07.2018 **PETER MARIWA** led them to Nyabohe valley in the vicinity of Warangi river in Serengeti where they recovered all items and weapons that were tendered in the case. Even the trial court noted at page 12 of the proceedings that it was the 2nd accused who, in this appeal is the 3rd appellant **(PETER MARIWA)** who led all the people to go to the scene of crime. After the arrest, caution statements of all the 5 appellants were recorded and also after the visit on 30.07.2019 they all recorded additional information detailing on how they recovered the weapons from the National Park. In total the prosecution

tendered **16 EXHIBITS 5** of which were confessions **(EXHIBITS PE8, PE9, PE10, PE13** and **PE14).**

The law on confessions is contained at **Part III of the Evidence Act**. A caution statement or confession of a suspect can solely be relied upon to convict him of the charged offence. Section 27(1) provides as follows;

> ***"27-(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."***

In defence, **DW1 YOHANA NYAMBEHO** stated that the police officers went to his house found nothing and then they went to pick **DW3** and when they came back they found the luggage of meat in his compound. He denied to have identified other appellants to the police. Although this was his evidence in court, but that of **PW3 MARIAM ROKETI,** his local leader was that the meat parcels were found in his house and she signed the seizure certificate **EXHBIT PE4** which he also signed. **YOHANA NYAMBEHO** did not testify on anything or deny any issue relating to going to the national park to collect the weapons. **EXHIBIT P14** is his confession in which he details the whole story as told the prosecution witnesses and even better. The **EXHIBIT** has additional information on how they went to the national park and recovered the weapons, based on **EXHIBIT P14** and other evidence of the prosecution corroborating it, **YOHANA NYAMBEHO** committed all offences charged. In the circumstances,

grounds 1, 2, 3, 6 and 7 we promised to resolve when we analyse the evidence of the defence, relating to criminal case no 182 of 2019 are hereby dismissed.

WANGI SAMWEL WANGI is the one who had the same appeal as **YOHANA NYAMBEHO**. In his defence he was very brief he stated that on 29.07.2019 police officers came to his house, arrested him and took him to **YOHANA**'s house and they were told to load the trophies in the vehicle. He denied to have involved himself in the crime. Although that is what he said in court but his confession completely detail what the prosecution stated and even after they had come from the National Park to recover weapons he added additional information. His statement marry well with all others' confessions. He details how he left his home on 17.07.2018 and carrying various items to Robanda village where they spent the night with other accused persons and started off to the National Park the next day on 18.07.2019. Within the Serengeti **WANGI SAMWEL** fully details how they hunted up to 24.08.2019 and too much more incriminating information. Based on **WANGI SAMWEL's** own confession **(EXHIBIT PE13)** I have no doubt that he committed the offences. That is so because at admission stage he did not object for the document to be tendered, after being tendered he did not question its content's authenticity and finally he did not stated that the document was not procured from him voluntary. With this appellant, the prosecution proved the case to the required standard.

The next in line are **PETER KONGORI MARIWA** and **CCM MAYONGA KHAMIS,** the 3rd and 4th appellants. These filed jointly criminal appeal no. 171 and their appeal was argued by Mr. Kisigiro. One of the allegations was that their defence was not considered and it is opportune at this time to consider the same. Both witnesses have in the main similar evidence that they were found together preparing local spirit at the home of **CCM** and they were taken to the home of **YOHANA NYAMBEHO** where they found large parcels of meat which they were told to load in the vehicle. From them, that was not all; there were 2 caution statements recorded at the police on 29.07.2028 (**EXHIBITS PE9 and PE10**). In those documents these two appellants detail how the hunting expedition to the Serengeti national park was organized and carried out, they detail how they camped, hunted and captured wild game and how they came back outside the National Park with trophies on their bicycles to Robanda village and later transported by car from Robanda to where they were kept at the house of **YOHANA NYAMBEHO** pending sale to some **LUO** traders. Each **EXHIBIT** has quiet a great detail of the pouching exercise into which the two appellants participated. I have reviewed the evidence of both the prosecution including the above stated exhibits in addition to other pieces of evidence; it is the holding of this Court that the prosecution proved the case against **PETER KINGORI MARIWA** and **CCM MAYONGA KHAMIS**

beyond reasonable doubt and the district court was right to convict them as it did.

The last is **JUMATANO BONIFACE NYERERE.** He stated that at around 4.30 in the morning on 29.07.2018, the police went to his home and arrested him. He testified that they searched but they did not get anything so they went toward Park Nyigoti, they picked **MARIAM ROKETI,** her village chairperson and went to the home of **YOHANA NYAMBEHO** where they found parcels of dry meat which they loaded in the vehicle. This witness denied participation in any offence connected to the trophies. Although he denied knowledge of the trophies or any involvement in the crime, but his story in court is diametrically opposite to what he wrote in **EXHIBIT PE8** which is his caution statement. In that statement he narrates how they left Robanda village and entered the national park. He stated that together with **YOHANA NYAMBEHO** they killed 8 wildebeests and how they carried the dried meat from the park. He states that each of them carried 18 pieces of dried meet. He states all of them left the meat at the place of **PETER KINGORI** at Robanda village and went home as **YOHANA NYAMBEHO** would organize transport from there to BWITEGI village. He narrated that he went back later and found that the meat had been transported to the house of **YOHANA NYAMBEHO** from Robanda, and they were waiting for the **LUO** buyers to come and buy the trophies.

Considering this evidence of **EXHIBIT P8** together with that of **PW6 PC PROCHES** and the caution statement of **YOHANA NYAMBEHO**, there is no way the conviction of this appellant can be set aside. In the circumstances, the conviction and sentences that were imposed upon **JUMATANO NYERERE** by the district court are both lawful.

In the final analysis, this court finds that although the trial court erred to convict and punish the 1st and 2nd appellants who were the 6th and 7th accused persons in the district court, but the court was right in convicting the 1st, 2nd, 3rd, 4th and 5th accused persons who are the 3rd, 4th, 5th, 6th and the 7th appellants in this Court. In the circumstances;

A; Under the provisions of **section 366(1) of the Criminal Procedure Act [Cap 20 RE 2002]**, this court makes the following orders;

1. Criminal appeal No 171 of 2019 by **PETER KONGORI MARIWA** and **CCM MAYONGA KHAMIS** is hereby dismissed.

2. Criminal appeal No182 of 2019 which was filed by **YOHANA NYAMBEHO WASHA MANG'UTA** is hereby dismissed.

3. Criminal appeal No183 of 2019 by **WANGI SAMWEL WANGI** is hereby dismissed.

4. Criminal Appeal No184 of 2019 by **JUMATANO BONIFACE NYERERE** is hereby dismissed.

B; Under the provisions of **section 366(1)(a)(i) of the Criminal Procedure Act [Cap 20 RE 2002]**, this Court issues the following orders;

(a) The findings, conviction and judgement passed against **JOSEPH KIBABA NYAMBACHA** and **TATU SIROCHA MACHOTA** are hereby quashed and nullified and the said appellants are both acquitted of the charges levelled against them in criminal case No 74 of 2018.

(b) The sentences of payments of Tshs 4,000,000/= and Tshs 500,000/= imposed upon **JOSEPH KIBABA NYAMBACHA** are hereby reversed and nullified. The said **JOSEPH KIBABA NYAMBACHA** is entitled to refund of the said amounts.

(c) The sentences of payments of Tshs 4,000,000/= and Tshs 500,000/= imposed upon **TATU SIROCHA MACHOTA** are

hereby reversed and nullified. The said **TATU SIROCHA MACHOTA** is entitled to refund of the said amounts.

(d) The seizure, forfeiture and orders of disposition made in respect of the Motor Vehicle bearing Registration No T 916 AEU Toyota Land Cruiser Pick Up are hereby nullified. The owners of that vehicle at the time it was being seized and forfeited are entitled to it.

DATED at MUSOMA this 8th May 2020

Z. N. Galeba
JUDGE
08.05.2020

Court; This judgment has been delivered today on 8th May 2020 in the absence of parties but with leave not to enter appearance in chambers following the corona virus outbreak globally and the medical advice to maintain social distance between individuals.

Order; Sufficient copies of this judgment be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.

THE HIGH COURT OF TANZANIA
MUSOMA

Z. N. Galeba
JUDGE
08.05.2020