

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 31 OF 2020

KHAMIS MUSSA WEINANI_____ **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 103 of 2018 dated 28.11.2019)*

JUDGEMENT

Date of last order: 24.04.2020

Date of judgment: 22.05.2020

GALEBA, J.

Before the district court of Serengeti sitting in economic case no. 103 of 2018, the appellant was charged on three counts of unlawful entry into the game reserve contrary to section **15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 (the WCA)**, unlawful possession of one machete and one knife in the game reserve contrary to section 17(1) and (2) of the WCA read together with paragraph 14 of the first schedule of the **Economic and Organized Crime Control Act, [Cap 200 RE 2002]** as amended by **written laws (Miscellaneous Amendments) Act No. 3 of 2016 (the EOCA)** and unlawful possession of two ribs of wildebeest which are government trophies contrary to section 86(1) and (2)(c)(iii) of the WCA as amended by Written Laws (Miscellaneous Amendments) Act no 2 of 2016 read together with paragraph 14 of the first schedule to the

Economic Organized Crime Control Act (cap 200 R.E. 2002) as amended by Act No. 3 of 2016. According to the prosecution the offences were committed on 29.09.2018 at Chumvi are in Ikorongo/Grumeti game reserve in the administrative district of Serengeti in Mara region. At the trial the appellant was found guilty and on the first and second counts he was sentenced to serve 12 months in jail in respect of each count and on the third count he was sentenced to 20 years imprisonment. The sentences are currently running concurrently.

The appellant was dissatisfied hence this appeal. In challenging the decision of the Serengeti district court, in his petition of appeal the appellant raised four grounds of appeal complaining and I will reproduce them in summary form;

- 1. That the trial magistrate erred in law and in fact for relying on cooked evince of the prosecution which did not show that he committed the offences.***
- 2. The appellant was not given a chance to call his witnesses while the prosecution was permitted to call all its witnesses.***
- 3. The court erred in law and in fact by admitting wrong exhibits that the appellant does not know.***
- 4. The court erred in law and in fact for not getting independent witness and relied upon only park rangers.***

This appeal was heard in the absence of appellant due to corona virus outbreak. The appellant had approved that the appeal could be heard in his absence in a letter with a reference

No.112/MAR/1/XX1V/57 dated 17.04.2020 from Musoma prison to court. Then the court would consider his grounds and take the submissions of the respondent. The respondent was permitted to make his submissions orally in objecting to the appeal.

During reply Mr. Nchanilla stated that the 1st ground of appeal was misconceived. He submitted that what he noted was the valuation report was not tendered but even without it the oral evidence of PW3 is sufficient. He cited the content of **CRIMINAL APPEAL NO 129 OF 2017; ISSA HASSAN UKI VERSUS THE REPUBLIC CA UNREPORTED at page 18**. As for the inventory, Mr. Nchanila submitted that although the same was not shown to the accused person at the time the same was tendered, but there is oral evidence to establish the offence.

As regards the Trophy Valuation Certificate, at page 19 of the typed proceedings the following is what happened on 24.06.2019;

"PP; We pray to tender Trophy Valuation Certificate as Exhibit.

SIGNED: I. E. NGAILE- RM

24/6/2019

Accused Person;- I do not know anything about the said Trophy Valuation Certificate.

SIGNED: I. E. NGAILE- RM

24/6/2019

PW3 xxd by Accused person;-

- My duties are not to interrogate the accused persons.

Section 210(3) of the Criminal Procedure Act, Cap 20 [RE 2002] complied with."

Although from the above the Trophy Valuation Certificate was not tendered but there is on record of the trial court a Trophy Valuation Certificate marked as **EXHIBIT PE2**. It is not clear how it got there; for avoidance of doubt, if it is there as an exhibit in the trial court I hasten to expunge it because; **first** the appellant objected to it and no ruling or order was made in respect of the objection and **secondly** the same was not admitted as per the proceedings. The important point to note in the evidence of **PW3** is that of identifying the animal whose parts he examined and it has nothing to do with where, how, when and who killed the animal.

That was the Trophy Valuation Certificate. The inventory was worse. The following is what happened on 11.11.2019;

"Court; PW4 has been able to identify the Inventory Form and the accused person.

SIGNED: I. E. NGAILE- RM

11/11/2019

PW4;- I pray to tender an inventory form as an Exhibit.

SIGNED: I. E. NGAILE- RM

11/11/2019

Accused Person;- The Inventory Form Ref. No. MUG/IR/3340/2018 dated 30/09/2018 admitted and marked as Exhibit PE3.

SIGNED: I. E. NGAILE- RM

11/11/2019

COURT; The contents of PE3 read in open court by PW4.

SIGNED: I. E. NGAILE- RM

11/11/2019."

Surely that would not be a lawful acceptance of exhibits in courts. It is not the duty of the accused to admit exhibits against his interests. The court did not admit the document instead the accused to have

done it, if at all that happened. This Inventory cannot be saved. The same is hereby expunged.

Because the inventory has been removed from the record and it is the inventory which states that the trophies were there and were destroyed then the evidence on trophies and their destruction becomes invalid too. That is one aspect of why the appellant must be acquitted of the third count. The other reason the appellant for the 3rd count was charged for having contravened section 86(1) and (2)(c)(iii) of the WCA as amended by Written Laws (Miscellaneous Amendments) Act no 2 of 2016 read together with paragraph 14 of the first schedule to the **Economic Organized Crime Control Act (cap 200 R.E. 2002) as amended by Act No. 3 of 2016**. But section 86 (2)(c)(iii) of the WCA provides as follows;

"86 (2) A person who contravenes any provisions of this section commits an offence and shall be liable on conviction-

(c) in any other case

(iii) where the value of the trophy which is the subject matter of the charge exceeds one hundred thousand shillings but does not exceed one million shillings to a fine of not less than the amount equal to thrice the value of the trophy or to imprisonment for a term of not less than ten years but not exceeding twenty years or both."

According to the third count in the charge sheet, the value of the trophy was Tshs 1,417,000/=, which means, the appellant was even charged under wrong law that law relates to trophies whose value falls between Tshs 100,000/= and Tshs 1,000,000/=. A scrutiny at page 9 of the judgment the trial court convicted the appellant under the

provisions of section 86(1) and (2)(c)(ii) of the WCA which section of law he was not charged under. All these issues point at one aspect, miscarriage of justice.

That said, the first ground of appeal succeeds to the above extent.

The complaint in the second ground was that the appellant was not given a chance to call witnesses, but that ground is misconceived because at page 34 of the proceedings the appellant stated that he will call no witness and that he will testify alone. That suggests that the appellant was afforded the necessary opportunity but declined to utilize it. This ground therefore is hereby dismissed for want of merit.

The complaint in the 3rd ground is the court admitted exhibits that the appellant did not know. The case in point is **EXHIBIT PE1**, which were one machete and one knife. In order to determine the legality or otherwise of the manner of tendering the exhibit, let the record speak for itself; from the bottom of page 16 to the top of page 17 of the typed proceedings; **PW1 KULWA MAGANGA**, a game scout from Ikorongo/Grumeti Game Reserve says;

"....We took the accused person to Police Mugumu and opened case No. MUG/IR/3340/2018. I remember the weapons because we labeled them (PW1 identified the weapons in question.)"

PP; We pray to tender one panga and one knife as an Exhibit.

SIGNED: I. E. NGAILE- RM
24/6/2019

Accused person; I know nothing about the exhibit

SIGNED: I. E. NGAILE- RM
24/6/2019

COURT; One (01) Panga and one (01) Knife admitted as Prosecution Exhibit PE1 Collectively.

**SIGNED: I. E. NGAILE- RM
24/6/2019**

This part of the proceedings raise two pertinent questions. **First**, how did **PW1** identify the machete and the knife that they relate to the appellant. He stated that they (PW1 and other people who arrested him) labeled them. How were they labeled because then a different set of weapons would not be mixed up with the ones necessary for present case. This is so because, there could be more machetes and knives in the exhibit store at Mugumu Police. **Secondly**, when shown the exhibit, the appellant stated "**I know nothing about the exhibit**". With no further ado, the court admitted the exhibit and quickly gave it a name. The remark made by the appellant was an objection it was not admission or it was not a no objection comment. The court was supposed, to pause and record the reasons for the objection, permit the prosecution to respond and then make a ruling on it before it could admit the document. That said the document was accepted erroneously.

In this ground, **PW1** did not tell the court how remembered that the weapons were the ones which were found with the appellant nine months before the trial and secondly the appellant objected to the documents but he was not given opportunity to explain himself. The two errors rendered admission of **EXHIBIT PE1** irregular and the same is expunged. I agree with Mr. Nchanila that there could be

circumstances where expunging the exhibit might not affect the content of the evince, but that is only when the witness, has ability to describe the details of the document, in this case, we stated above that **PW1** did not tell us how he knew that the machete and the knife are the ones they left at the police nine months before testifying in court so the holding in the **ISSA HASSAN UKI** case cannot be useful to the respondent's course of argument. It is different if the witness described how they labeled the weapons. In the circumstances, the third ground of appeal is upheld.

The 4th ground of appeal was to the effect that the trial court erred in law and in fact for not getting independent witness and relied upon only park rangers. This complaint is misconceived because as stated by Mr. Nchanila independent witnesses are a requirement of law when a search is being conducted in a dwelling house. See section 106(1) of the WCA, which provides to that effect. In this case, it was alleged and testified that the appellant was arrested at Chumvi area in the game reserve. In the circumstances, that ground is dismissed.

Based on the above discussion;

- a) The sentence of 12 months in respect of the second count of unlawful possession of weapons in the game reserve is set aside and the appellant is acquitted of that offence.

- b) The sentence of 20 years imprisonment imposed upon the appellant in respect of the 3rd count of unlawful possession of government trophies is hereby nullified and the appellant is acquitted of that offence.
- c) The sentence of 12 months only in respect of unlawful entry in the game reserve is hereby confirmed, the appellant shall serve only 12 months imprisonment in respect of the 1st count running from 28.11.2019.

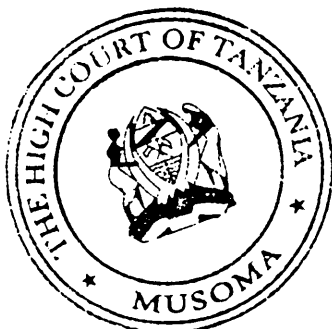


DATE OF THIS JUDGMENT: 22nd May 2020

Z. N. Galeba
JUDGE
22.05.2020

Court; This judgment has been delivered today the 22nd 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 warning 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.



Z. N. Galeba
JUDGE
22.05.2020