IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 155 OF 2019

MAGANYI SENTEU MAGANYI_____APPELLANT

VERSUS

THE REPUBLIC_____RESPONDENT

(Arising from the Decision and Orders of the District Court of Serengeti at Mugumu, Hon. Ngaile RM in Economic Case No 2 of 2016 dated 27.08.2019)

JUDGEMENT

Date of last Order; 23.04.2020
Date of judgment; 15.05.2020

GALEBA, J.

This appeal arises from the decision and orders of the district court of Serengeti sitting at Mugumu in economic case number 2 of 2016 in which the appellant was charged along with **MAJENGO BAHEBE GOMBANILA** (the 2nd accused) who is not part of this appeal. The duo were charged on two counts based on unlawful possession of Government Trophies contrary to **section 86(1) and (2)(ii) of the Wildlife Conservation Act no. 5 of 2009 (the WCA)** read together with paragraph 14(d) of the first schedule and sections 57(1) and 60(2) of the **Economic and Organized Crime Control Act [Cap 200 RE 2002]** (the EOCA) and unlawful hunting contrary to **section 19(1) and (2)(a)** of the WCA.

The facts leading to prosecution of the appellant along with the 2nd accused was that on 25.05.2013, at Singisi Village in Serengeti district they were found in unlawful possession of two elephant

tusks weighing 57 kilograms valued at Tshs 18,000,000/=. The other offence for which the appellant was charged is that without permission of the Director of Wildlife on an unknown date between 01.05.2013 and 23.05.2013 at Grumeti area in the Serengeti National Park, the duo hunted and killed one elephant, the property of the Government of Tanzania, worthy Tshs 18,000,000/=. Those facts of the prosecution were denied by the accused persons, so the prosecution called 4 witnesses to prove the case. At the end of the trial, the appellant together with the 2nd accused person were convicted as charged and sentenced to 20 years imprisonment in respect of the first count and 10 years in respect of the second. The appellant was aggrieved by both the conviction and sentence so he filed this appeal raising a total of 5 grounds to challenge the judgment of the district court. The complaints of the appellant are paraphrased in the following points;

1. ***That the prosecution did not establish the chain of custody in respect of all exhibits which were tendered.***

2. ***That the case was not proved beyond reasonable doubt because of inconsistencies in evidence and also the inventory of the government trophies was not tendered.***

3. ***That after arresting the appellant, the latter was not arraigned in court in 48 hours as required by the law.***

4. ***That the trial court erred because it did not consider the defense of the appellant.***

5. ***There was no proof of unlawful hunting.***

Mr. Innocent Kisigiro learned advocate was counsel for the appellant. On the first ground, he submitted that it is not known who received the exhibits at the police and also it is not clear as to who brought the exhibits to court before the same were tendered. This anomaly included the trophies themselves. Counsel prayed that all exhibits be expunged as decided in **HIGH COURT CRIMINAL APPEAL NO 379 OF 2019; BITA MANUMBU VERSUS REPUBLIC** at pages 7 and 8. In reply to that complaint, Mr. Frank Nchanila learned state attorney submitted that the chain was established and that the complaint of the appellant had no basis. He submitted that for instances PW1 testified at page 21 of the proceedings that all exhibits were taken to the Police and at page 32 he said that the skull of the elephant was taken to Mugumu. He submitted that the exhibits were taken to the police by **PW1** and he is the one who tendered them. **PE7** the Trophy Valuation Certificate was prepared by **PW2** Wilbrod Vincent and he is the one who tendered it after identifying the document. Mr. Nchanila referred this court to **CRIMINAL APPEAL NO 301 OF 2017; KADIRIA KIMARO VERSUS REPUBLIC (UNREPORTED)** at page 11 where it was stated that there should be a relaxation in the chain of custody requirements where the exhibit in question is not one of the fast moving items.

In this case **EXHIBIT PE1** are two saws, one sword and one trapping wire. They were tendered and admitted on 19.09.2019 without any comment from the applicant. There was no objection in respect of any of the exhibits from both accused persons. Had there been any concern on the genuineness of these items an objection

would be raised by the appellant at the time of tendering them but he did not utter a word and the items were tendered as prayed.

Exhibit **PE2** were two elephant tusks and **PE3** remains of an elephant in the form of a skull and a jaw. They were tendered at page 18 of the proceedings and none of the accused persons had any issue with these exhibits. I must add here that these exhibits are by any means not items that are changing hands quickly.

Exhibit **PE4** are three records of search. When they were tendered, no one raised any issue. It is different if the appellant raised an issue at that time and the court silenced them or it overruled them. But as matters stand the documents were tendered without any objection.

Exhibit **PE5** was a gun make rifle 458 with 13 rounds of ammunition. This exhibit was objected to but the magistrate did not bother to make any ruling on the objection. That was not right. When the accused persons raised an objection, the court was supposed to inquire and get more details and then permit the prosecution to reply and finally make a brief order on whether he agreed with the accused persons or not. This exhibit is hereby expunged from the record because the same was unlawfully admitted by the trial court.

Exhibit **PE6** is the record of search of the gun; the same was also tendered without any objection from the appellant. **PE7** was the last exhibit in the trial court. It was the trophy valuation certificate, like most exhibits, the same was tendered without any objection. It was not shown that the document was in any way tempered with or that the document was not genuine.

In respect of this ground, there are several points I want to summarize here; they are, ***first,*** all exhibits complained of except Exhibit **PE5** which was a fire arm make rifle 458 and 13 rounds of ammunition, were tendered without objection, which means, if we are to rule today that the court was wrong to accept then, we would be seeking to raise an issue not raised in the court below. ***Secondly*** Mr. Kisigiro did not point out any exhibit amongst the 7 which he suspected to have been tempered with between its recovery and the time of tendering it in Court. So like his client during the trial, on appeal he had no ability to challenge any aspect of any exhibit. ***Thirdly***, items like jaws and skulls of elephants naturally are not fast moving items to the extent that even if the chain was to be broken then it follows automatically that their tendering or admission is unlawful see **CRIMINAL APPEAL NO 485 OF 2015; JOSEPH LEONALD MANYOTA VERSUS REPUBLIC CA (UNREPORTED).** There is some relaxation when to comes to slow moving items. Because of the above three points, although exhibit **PE5** has been expunged from the record, the first ground of appeal is dismissed.

The second ground was a complaint that the case was not proved beyond reasonable doubt because of inconsistencies in evidence and that the inventory of the government trophies was not tendered. In support of this ground Mr. Kisigiro submitted that ***first,*** it is not clear when the appellant was arrested ***secondly,*** it is not known when the exhibits were recovered from the appellant between 2013, 2015 and 2016, ***thirdly,*** PW2 stated that he was called to the police on 28.05.2015 but he carried out a trophy valuation on 28.05.2013, ***fourthly*** the respondent did not tender the caution statement and ***fifthly*** on 14.11.2016, the appellant was not given an opportunity to cross examine **PW2** although that complaint was not raised in any ground of appeal. In reply to this ground Mr. Nchanila submitted that all the arrests and the recoveries of all exhibits were in 2013 and even the trophy valuation certificate was drawn on 28.05.2013. He submitted that visiting the scene in November 2013 is proper because that came after the arrest. On the issue of cross examination, the record shows that the appellant was given the opportunity to cross examine but he did not utilize it. On tendering the caution statement he stated that, a party to the case cannot be compelled by his adversary which document to tender and which ones not to tender. Mr. Nchanila's point was that the appellant had no right to choose for him which exhibit to tender.

In this case, I will start with a caution. There is a difference between some dates as recorded in the typed proceedings and those recorded in free hand. So some arguments of Mr. Kisigiro

seems right when one reads only the typed proceeding but on closer look at the original record (because the typed is a copy) one does not note any inconsistencies on record. For instance both dates on page 15 in the evidence of **PW1** are in 2013 which is the year of the arrest. Although it shows that the water was drawn from the well by 24.05.2015 in both the handwritten and typed proceedings but it also shows at page 17 that after draining the water from the well they took the tusks to the police and they were marked MUG/IR/1431/2013, so it would be impossible to drain the well in 2013 and recover the tusks in 2015 and take them to the police on 2013. It is just logic. The issue of dates is not a serious matter in my opinion it is more of typing errors that it is a matter of justice. On the issue of evidence to be tendered, I agree with Mr. Nchanila that a party has a right to tender so much evidence without any interference from the other party. As the issue of not being given a right to cross examine was not raised as a ground of appeal the same cannot be raised by way of submissions and be ruled upon. Based on the above discussion, the second ground, like the first, is dismissed for want of merit.

The complaint in ground 3 was that after the arrest the appellant was taken to court beyond the 48 hours which time is prescribed by the law. Mr. Kisigiro cited section 29(1) of the **EOCA** as the law which was breached. He cited **CRIMINAL APPEAL NO 194 OF 2004; MARTIN MAKUNGU VERSUS REPUBLIC CA (UNREPORTED)** to ground his argument that if that happens then the appellant has to be acquitted. In reply Mr. Nchanila submitted that 48 hours are

counted after either the arrest or after the time that the investigation is completed. So there was no breach. This ground will not take a lot of our time to resolve. Section 29(1) of the **EOCA** provides that;

> ***"29-(1) After a person is arrested, or upon the completion of the investigations and the arrest of any person or persons, in respect of commission of an economic offence, the person arrested shall as soon as practicable, and in any case within not more than forty-eight hours after his arrest, be taken before the district court and the resident magistrates court within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act."***

According to the above provision, a person like the appellant in this appeal must be presented to court in 48 hours after the arrest and investigation of another person (if any) with whom he should be charged alongside in the same case. That being the interpretation of the above section, ground 3 is also dismissed for want of merit.

The complaint of the appellant in the 4th ground was that his defense was not considered by the trial court. Mr. Kisigiro submitted that the trial magistrate just recorded it but he did not analyze it. He cited **HIGH COURT CRIMINAL APPEAL NO 139 OF 2017; MAKARANGA MATIKO AND ISSA RAMADHANI VERSUS REPUBLIC (HON. SIYANI J-MWANZA) (UNREPORTED)** in arguing that where a defense is not considered in a trial, a conviction is vitiated.

In reply to that ground Mr. Nchanila submitted that the solution is for this court, being the first appellate court, to step into the shoes of the trial court and analyze the evidence and make an independent decision. He moved the court to invoke the provisions of section 366 (1) of The Criminal Procedure Act [Cap 20 RE 2002].

I agree with Mr. Nchanila, because in the case of **JUMANNE SALUM PAZI VERSUS REPUBLIC [1981] TLR 246**, it was held by this Court (Kisanga J) (as he then was) that;

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

There are also more decided cases on the subject including **PANDYA VERSUS REPUBLIC [1957] EA 336** and **OKENO VERSUS REPUBLIC [1972] EA 32.** So from now on for a while I will examine the defense of the appellant as recorded by the trial court and analyze the same in the context of the offences charged. The appellant's evidence (DW1) was that his house was searched by the police but they did not get anything. He was then beaten, arrested and taken to the police on 21.05.2013 on allegations that they got elephant tusks inside the well at his home while there is no well. He also stated that **PW3** told the court that upon searching they got two saws and one gun. **DW2** was the mother of **DW1.** At page 40 of the typed proceedings she testified that her son was arrested on 21.05.2013 on allegations of unlawful possession of a firearm which they did not get. **DW3** and **DW4** were **MAJENGO**

BAHEBE and **NYANGI BAHEBE** who were the 2nd accused (in the trial court) and his sister respectively, whose evidence is not relevant to this appeal.

Although in his evidence the appellant testified that at his place there is no well, but according to the evidence of PW1 at page 17 of the typed proceedings, it is recorded that there is a well at the home of the appellant and the appellant and **MAJENGO BAHEBE** (a co-accused in the district court) are the ones who informed them that the tusks were in the well. **PW3** at page 31 of the typed proceedings states that while at **MAJENGO BAHEBE**'s house, the latter convinced the appellant to disclose the location of the gun and also of the elephant tusks. It is at that time that the appellant led them behind his house where the gun was hidden under the earth and from where the same was recovered. Thereafter the appellant led them to the well in which he said there were elephant tusks but the well was full of water so they had to hire a water pump from Fort Ikoma which drained the water from the well next day whereupon the tusks were revealed at the bottom of the well and were recovered therefrom. The evidence of **PW4 FRODEA MAKURU** who was a local leader, her evidence on recovery of the elephant tusks, was the same as that of **PW1** and **PW3**. It is the holding of this court that there is no way could strangers (**PW1**, **PW3** and **PW4**) could have known where the elephant tusks were hidden except from reliable information from those who participated in hiding the trophies. I have no doubt therefore that even if the trial court would have considered the

defense it would have come with the same decision. In the circumstances, the 4th ground of appeal is dismissed.

The 5th ground was that the second count on the charge which is in relation to illegal hunting was not proved. First Mr. Kisigiro submitted that he had overlooked the law on the excessiveness of the sentence, so he modified that ground so that he maintained only one complaint on the insufficiency of evidence but not the punishment. On insufficiency of the evidence to support the second count, he submitted that the evidence on record shows that both accused persons were arrested at their homes and that there is no evidence that they were arrested while hunting in the national park. He submitted that there was not even corroborating evidence before a conviction was entered. In reply to that submission, Mr. Frank Nchanila submitted that according to the evidence of **PW1, PW3** and **PW4**, it is the appellant who told and led the investigators to the site where the elephant was killed and its skull and jaw collected from.

There is merit in respect of the 5th ground. There is merit because, the only witness who testified on hunting is **PW1** and he reports what he was told by the appellant. He mentions the dates that the appellant told him that they hunted, but those dates are not at one with the ones in the count relating to hunting in the charge sheet. At page 17 of the typed proceedings, **PW1** states that the appellant and the other accused told them that they hunted the elephant, on 18.03.2016. On that same page the witness says that

the elephant was killed on 25.03.2016. Then he goes on to state that they went to the bush and found a recently killed elephant. PW3 at page 31 to 32 he states that the appellant told them that they hunted but the witness does not refer to any date. **PW4** does not refer to anything relating to hunting in her evidence. In other words according to the prosecution evidence the hunting was either on 18.03.2016 or on 25.03.2016, but the charge states that the hunting for which the case was brought happened between 01.05.2013 and 23.05.2013.

When there is a difference between the date of the alleged commission of the offence and the date in the evidence the charge is taken to have not been proved leading to the miscarriage of justice if the appellant is convicted on such evidence. In **CRIMINAL APPEAL NO 24 OF 2015ABEL MASIKITI VS REPUBLIC (UNREPORTED)** it was held;

> ***"in a number of cases in the past, this court held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."***

In the circumstances, the 5th ground of appeal is upheld and in the final analysis this appeal is partly dismissed and partly upheld in that;

1. The appeal against the conviction and sentence in respect of being found in unlawful possession of government trophy is hereby dismissed and the conviction and sentence of 20 years imprisonment passed by the district court is upheld.

2. The conviction and sentence of 10 years imposed upon the appellant in respect of the second count of unlawful hunting is set aside.

DATED at MUSOMA this 15th May 2020

Z. N. Galeba
JUDGE
15.05.2020

Court; This judgment has been delivered today on 15th 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.

Z. N. Galeba
JUDGE
15.05.2020