

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 164 OF 2019

MATIKO GIRAGO MARWA_____ **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 96 of 2018 dated 26.08.2019)*

JUDGEMENT

Date of last Order; 28.04.2020

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 96 of 2018 in which the appellant was charged on three counts of unlawful entry into the National Park contrary to sections **21(1)(a) and (2) and 29(1) of the National Parks Act [Cap 282 RE 2002]** as amended by the **Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA)**, unlawful possession of weapons in the National Park contrary to **section 24(1)(b) and (2) of the NPA** and unlawful possession of Government Trophies contrary to **section 86(1) and (2)(c)(iii) of the Wildlife Conservation Act no. 5 of 2009** as amended by the **Written Laws (Miscellaneous Amendments) Act No. 2 of 2016** (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 the **Written Laws (Miscellaneous Amendments) Act No. 3 of 2016** (the EOCA). The

appellant was charged along with another man called **PAULO GISIORI MUNYORO** (the second accused).

The facts leading to the arrest and prosecution of the appellant was that on **13.09.2018**, without permission of the Director of Wildlife the appellant was found at ITARO area which is within the Serengeti National Park. He was also found in possession of one knife, one machete and four animal trapping wires. The appellant failed to satisfy the authorized officer that the weapons were for purposes other than hunting, killing or capturing of wild animals. The appellant too was found in unlawful possession of four fresh pieces of meat of a wildebeest, a Government Trophy valued at Tshs 1,430,000/=.

When the charge was read to him, the appellant denied committing any of the offences charged. The case proceeded and on 26.08.2019 the appellant was found guilty and convicted on all the 3 counts. On the 1st and 2nd counts the appellant was sentenced to imprisonment for 1 year on each count and 20 years in respect of the 3rd count.

The appellant was aggrieved by both the conviction and sentence so he filed the present appeal raising a total of 4 grounds of appeal to challenge the judgment of the district court. The grounds may be paraphrased as follows;

- 1. The trial court erred in law by trying an economic case without consent and certificate conferring jurisdiction to the subordinate court.***

2. *The trial court erred in law and in fact by convicting and sentencing the appellant without the prosecution calling independent witness who witnessed the arrest.*
3. *The trial court erred in law and in fact by convicting and sentencing the appellant for relying on wrong evidence of PW1, PW2, PW3 and PW4.*
4. *The trial court erred in law and in fact by convicting and sentencing the appellant without the prosecution calling independent witness who witnessed the arrest as required by law.*

This appeal was called for hearing at the time when the whole world was at the middle of the tight grip of corona virus also called covid 19 having originated from Wuhan, a province in the Peoples' Republic of China in December 2019. The Ministry responsible for health had issued numerous public health guidelines including maintenance of social distance between individuals. In response to that call, the Judiciary of Tanzania made internal directives that prisoners with appeals be asked to confirm whether their appeals could be heard in their absence, including the appellant. Vide a letter of reference no **112/MAR/I/XXIV/57** dated **17.04.2020** from Musoma prison, the appellant permitted the court to proceed with hearing of the appeal in his absence by adopting his grounds as his submissions.

Mr. Frank Nchanila appeared for the Republic and submitted on all the 4 grounds raised. On ground one he submitted that that ground is misconceived because on 18.01.2019 the prosecution tendered the consent and certificate instruments before hearing started. I have reviewed the proceedings and I have noted

indeed the consent and the certificate to confer jurisdiction on the subordinate court were both tendered and they are on record. In the circumstances, this ground is dismissed.

Mr. Nchanila argued grounds 2 and 4 together because both are challenging the fact that the prosecution did not call any independent witness who witnessed his arrest. I will come back to these grounds if it will become necessary.

On ground 3 Mr. Nchanila submitted that the evidence of PW1, PW2, PW3 and PW4 that was tendered was sufficient and it did establish the guilt of the appellant. According to Mr. Nchanila it looks like the evidence was sufficient, but looking at several aspects of the trial one wonders whether the case was proved beyond reasonable doubt.

First, when the weapons were tendered, the two appellants said that they do not know the weapons. When that happens a court must hold an inquiry and make a ruling but in this case, the court just admitted the weapons as **EXHIBIT PE1** to support the case against the appellant and the second accused. That was not right and therefore the weapons constituents of **EXHIBIT PE1** are expunged from the record as the same were not procedurally accepted in evidence. That said, the appellant is acquitted of the second count of unlawful possession of weapons in the national park.

Second, although Mr. Nchanila submitted that at the time of the disposal of the trophies were being secured the appellant was involved, but there is no evidence that there are any comments that were taken from the appellant as it was held in **CRIMINAL APPEAL NO 385 OF 2017 MOHAMED JUMA MPAKAMA VERSUS REPUBLIC, (CA UNREPORTED)** followed by **CRIMINAL APPEAL NO 324 OF 2017, SAIDI LYANGUBI VERSUS THE REPUBLIC (CA DAR ES SALAAM UNREPORTED)**, a decision delivered on 12.03.2020. This omission leads to having the inventory (**EXHIBIT PE3**) liable to being expunged from the record, which order this Court hereby makes. In the absence of the inventory which stands in place of the physical trophy, the third count is brought to its knees, it cannot stand any more, and the appellant is acquitted of the third count based on unlawful possession of government trophies.

Thirdly, although the trial court made a finding of fact that the defense did not raise any doubt to shake the prosecution, but with due respect that is not the case. The evidence of the appellant is contained at page 30 of the typed proceedings and it is as follows;

"I remember on 13.09.2018 in the afternoon at about 13:00 hours I was from Bisarara village coming to Mugumu town to see my sister one Ghati Marwa, when I reached at Kibeyo village, the motor vehicle came, I asked for lift, the vehicle had Park Rangers, they gave me lift, when we reached at NMB Bank, I asked them to dump (sic) me, they did not do so instead they took me to police Mugumu and then I was brought before the court together with the 2nd accused person."

The above evidence is diametrically opposed to that of the prosecution, however, when the appellant was done with

testifying, there was no cross examination by the public prosecutor, which in effect meant that the prosecution found no problem with the evidence tendered, because if it had any issues, the witness would be cross examined. Where a party does not cross examine on a crucial matter, that party is barred from disputing the authenticity of the fact not cross examined see **CRIMINAL APPEAL NO 67 OF 2010 NYERERE NYEGUE VERSUS REPUBLIC, CA UNREPORTED** where the Court of Appeal held that;

"as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

The above evidence of the appellant created a very strong doubt to the root of the prosecution case with ability to shake the whole case against him.

Forth, on 24.06.2019 the court made a ruling that the appellant and the 2nd accused person had a case to answer. After then the matter was adjourned several times and on 22.07.2019 when the case was called for hearing, the prosecution prayed to withdraw the charge under section **91(1) of the Criminal Procedure Act [Cap 20 RE 2002]**. It is not clear why the court discharged the 2nd accused and retain the appellant. For avoidance of doubt; the record of that day will speak for itself;

"DATE; 22/07/2019

CORUM (sic) I. E. Ngaile RM

PP; MR. CHUWA & MAYENGA

ACCUSED; PRESENT

B/C; D. MCHAU-RMA

PP:- The matter is for defence hearing, we pray to withdraw the charge under section 91(1) of the Criminal Procedure Act Cap 20 [RE 2002]"

SIGNED; I. E. NGAILE RM

22/07/2019

ORDER:-

- 1. Charge against the 2nd accused person marked as withdrawn under section 91(1) of the Criminal Procedure Act [Cap 20 RE 2002] the accused person is discharged accordingly.***
- 2. The discharge is not a bar to further proceedings based on such facts.***
- 3. Defence hearing for the 1st accused person on 29/07/2019.***
- 4. 1st AFRIC***

SIGNED; I. E. NGAILE RM

22/07/2019"

In this case, it is not clear, why the court decided to terminate proceedings against the 2nd accused and proceed with the appellant while he had been informed that the prosecution was dropping the charge.

In view of the above discussion, the conviction of the appellant was unlawful and the sentence meted upon him was illegal. This Court takes the position that the prosecution did not manage to prove the case beyond reasonable doubt against the appellant. The appellant, MATIKO GIRAGO MARWA is hereby acquitted of the offences charged in economic case no 96 of 2018 with further

orders that he be released immediately from prison and set to liberty unless he is held there for any other lawful cause.

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