IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 28 & 29 OF 2020

(Originating from Criminal Case No 90 of 2018 of the District Court of Serengeti at Mugumu)

1st JUMA CHACHA @ MERENGO .....APPELLANT

2nd ICHEINE GHATI @ MUGENDI ....APPELLANT

Versus

THE REPUBLIC .... RESPONDENT

JUDGMENT

13th July & 18th August, 2020

Kahyoza, J.

The appellants namely **Juma Chacha @ Merengo** and **Icheine Ghati @ Mugendi** appeared before Seregenti District Court at Mugumu charged with three counts; **one**, unlawful entering in the National Park**, two,** unlawful possession of the weapons in the National Park, and **three**, unlawful possession the government trophies. The appellants denied the charges.

After full trial, the district court found the appellants guilty and convicted them of the offences they stood charged. The trial court imposed a custodial sentence of one year for each offence in the first and second count, and twenty years for the offence in the third count. It ordered the sentence to run concurrently.

Dissatisfied by both conviction and sentence, **Juma Chacha @ Merengo** and **Icheine Ghati @ Mugendi,** the appellants, appealed to this Court, contending that-

1. The prosecution evidence was fabricated and that it did not establish the appellants' participation in the commission of the offence;
2. The trial court denied them the right to be heard as it did not give them an opportunity to call witnesses;
3. The trial court convicted them basing on irrelevant exhibits; and
4. The trial court convicted them without evidence of an independent witness.

Background

The prosecution indicted the appellants of the offences of; **one,** unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act (CAP. 282 R,E 2002) as amended by the Act No 11 of 2003,: **two** unlawful possession of weapons in the National Park c/s 24 (1)(b) and (2) of the National Park Act (CAP. 282 R,E 2002): and **three** unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 2016. The trial court found the appellants guilty and convicted them as they stood charged.

The prosecution lined up four witnesses and tendered exhibits to

prove the appellants' guilt. The prosecution witnesses, Paulo Achieng' (**Pw1**) and salum Ahmad (**Pw2**) who deposed that on the 3/09/2018 at about 07.00hrs were on routine patrol with three other park rangers namely Deus Dende, Joseph Sauli and Clement Kigaile at Korongo la Hingira within Serengeti National Park. They saw two people, surrounded and arrested them. They identified the two people they arrested as the appellants. They deposed that they found the appellants in possession of a fresh head of Topi, one fresh rib, and one fresh neck, and weapons, which were one panga, one spear and four animal trapping wires. They took the appellants with exhibits to police station and labeled weapons. Paulo Achieng' (**Pw1**) tendered one panga, one spear and four animal trapping wires as exhibit PE. 1.

The prosecution summoned Wilbrod Vicent (**Pw3**) to identify and valued the trophy. He identified the fresh head, one fresh rib, and one fresh neck that they were of Topi. Wilbrod Vicent (**Pw3**) identified the trophy by colour of the skin which was chestiest (SIC) brown. Wilbrod Vicent (**Pw3**) deposed that the value of the trophy was USD 800 or Tzs. 1,744,000/=, which is the value of one Topi. Wilbrod Vicent (**Pw3**) prepared a trophy valuation certificate which he tendered as exhibit and the court admitted it as Ex.PE.2 and invited Wilbrod Vicent (**Pw3**) to read its contents to the appellants.

The last prosecution witness, No. G736 Dc Egwaga (**Pw4**) deposed that he interrogated the appellants and received and marked the exhibits. He described the exhibit as the fresh head of Topi, one fresh rib, and one fresh neck, weapons, which were one panga, one

spear and four animal trapping wires.

No. G736 Dc Egwaga (**Pw4**) added that on the 4/09/2019 his colleague summoned Wilbrod Vicent (**Pw3**) to identify and value the trophies. He prepared an inventory form and presented the trophies and the appellants to the magistrate who ordered disposal of trophies. The He tendered the inventory as Exh.PE. 3.

The appellants denied to commit the offence in their defence. The first appellant deposed that Paulo Achieng' (**Pw1**) and salum Ahmad (**Pw2**) who introduced to him as park rangers arrested him while making bricks near the national park border. They arrested him on the 3/9/2018.

The second appellant deposed that on the 3/9/2018 the park rangers arrested him whilst weeding his farm. The park rangers were chasing, messing up people and on reaching his farm they arrested him. He was with his friends who managed to escape.

The trial court found the prosecution case more plausible than the appellants' case as a result it convicted the appellants and sentenced them to custodial sentences. The appellants lodged separate appeals raising four grounds of appeal, which were replica. The grounds of appeal raised four issues for determination as follows-

1. Was the evidence fabricated?
2. Did the trial court deny the appellants a right to be heard?
3. Did the trial court convict the appellants basing on irrelevant exhibits?
4. Was the appellants' conviction justifiable without the evidence of

an independent witness?

The appellants fended for themselves and the respondent was represented by Mr. Temba, the state attorney. The appellants beseeched the Court to adopt their grounds of appeal.

Mr Temba, the state attorney did not support the appeals. I will refer to his submission while answering the issues raised by the grounds of appeal.

This is the first appeal. I will not only consider the appellants' ground of appeal but I will subject the whole evidence to scrutiny and conclude whether the prosecution proved the appellants' guilt beyond all reasonable doubt.

Was the evidence fabricated?

The appellants prayed this Court to adopt their grounds of appeal. They did not make length submission explaining their ground of appeal.

Mr Temba, the respondent's state attorney did not support the appeal. He submitted that there was ample evidence to prove that the appellants committed the offence. He submitted that the prosecution witnesses were credible, they explained how they found appellants in the national park in possession of the government trophy. He added that there was no ground to discredit them. To support his contention that the evidence of the prosecution witnesses was credible, he cited the case of **Goodluck Kyando v. R** [2006] TLR. 363

The record is evident of the fact that Paulo Achieng' (**Pw1**) and salum Ahmad (**Pw2**) deposed that they found the appellants in the national park in possession of one fresh head of Topi, one fresh rib, and

one fresh neck, and weapons, which were one panga, one spear and four animal trapping wires. The weapons, which were one panga, one spear and four animal trapping wires were tendered as Exh. PE.1. The fresh head, one fresh rib, and one fresh neck all of Topi were ordered to be destroyed and an inventory prepared. The inventory showed that the magistrate saw the fresh trophy in the presence of the appellants and ordered the police to dispose of the trophy as they were subject to speedy decay. The appellants signed the inventory.

No. G736 Dc Egwaga (**Pw4**) tendered the inventory form as exh.PE.3. The appellants did not object the inventory to be tendered. The trial court admitted the inventory and invited the witness to read its contents to the appellants.

Wilbrod Vicent (**Pw3**) identified and valued the trophy. I find no reason to fault Wilbrod Vicent (**Pw3**)'s valuation and identification. There is evidence that the trophy was fresh with its skin, for that reason easy to identify. The trophy valuation certificate was admitted as exh. PE.2 and its contents read to the appellants.

I find the exhibits relevant and not fabricated. Further, I find that the trial court did comply with the procedure for admitting the exhibits. I am unable to disbelieve the prosecution witnesses' evidence. as collectly submitted by Mr. Temba, the respondent's state attorney, it is trite law that witnesses must be trusted unless, there is a cogent reason to question their credibility. The **Goodluck Kyando v. R.,** [2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016 (the Court of Appeal stated that-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

I am unable to find any cogent and good reason to disbelieve the prosecution witnesses. The appellants complained that the trial court convicted them in the absence of an independent witness, that complaint suggests that the prosecution witnesses' evidence was not trustworthy, credible and is cogent. I will consider if there was a need for an independent witness. I dismiss the first ground of appeal.

Was the appellants' conviction justifiable without the evidence of an independent witness?

The appellants complained that the trial court erred to convict them without and independent witness as all witnesses were park rangers.

The respondent's state attorney conceded that all vital witnesses were park rangers. He submitted that given the nature of the offences, it was not possible to find an independent witness as the appellants committed the offences in the national park. He concluded that the absence of an independent witness did not prejudice the appellants.

There is no doubt that all prosecution principal witnesses are park rangers. Does that make their evidence not credible? A witness may be called as interested witness only when he derived some benefits from the result of litigation, or in seeing an accused person punished. But in the present case, neither of the witnesses PW-1 to PW-4 were to get any benefit, if the accused are punished. The appellants did not explain

the benefits the park rangers got following their conviction. The appellants had an opportunity to cross examine the prosecution witnesses, they opted not to take it. Even when they decided to cross examine the prosecution witnesses they extracted nothing therefrom, which could impair their credibility. In the absence of the proof that personal gains, benefits, enmity or grudges pushed the prosecution witnesses to fabricate evidence against the appellant, I am of the view that they were independent witnesses. I find support in the decision of the Supreme Court of Indian in **Rameshwar v. State of Rajasthan** 952 AIR 54, 1952 SCR 377, where it was held that-

> *"A witness is normally to be considered independent unless he springs from sources which are likely to be tainted and that usually means* ***unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely****. Ordinarily a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth"(emphasis added)*

I am of the view that the prosecution witnesses were independent there is no need for an independent witness and their evidence is credible. I dismiss the fourth ground of appeal.

Did the trial court deny the appellants a right to be heard?

The appellants contended in the ground of appeal that the trial court convicted and sentenced them without hearing giving them an opportunity to call witnesses. That is to say it breached the one of the principles of natural justice.

The Republic through Mr. Temba contended that the appellants were afforded the right to be heard. The trial court gave them the right to cross-examine the prosecution witnesses and defend themselves. He added that after the court entered conviction it invited the appellants to advance their mitigation for the sentence.

I scrutinized the trial court's record, which depicts that the court addressed the appellants in terms of section 231 of the **Criminal Procedure Act**, [CAP 20 R.E 2019] (the **CPA**). The record reads-

> ***"COURT**: The accused persons well address in terms of section 231 of the CPA and asked to reply thereto'*
>
> *Sgd by I.E.Ngaile –RM*
>
> ***First Accused**: I will give evidence on oath and call witnesses, and I have one witness.*
>
> 1. *Mrimi Chacha of Merenga village.*
> 2. *Ghati Mrimi of Merenga village*
>
> ***Second accused**: I will give evidence on oath and call witnesses."*

The trial court adjourned the defence hearing to another on the date probably to give time the appellants to marshal their defence. On the date fixed to commence the defence, the appellants told the court that

they had no witnesses in attendance and prayed the defence to proceed. The appellants testified and prayed to close their defence.

The record depicts that the appellants requested the court neither to fix another hearing date in order to call their witnesses nor to issue summons to their witnesses to appear and testify. I see no ground for the appellants' complaint at this late stage. A trial court was responsible to give an accused person an opportunity to a call witness or defend himself but not to drive him to defend himself or call witness.

In fine, I find that the court afforded the appellants the right to call their witnesses and dismiss the third ground of appeal of appeal.

Did the trial court convict the appellants basing on irrelevant exhibits?

The appellants submitted that the court admitted wrong exhibits. The prosecution tendered wrong exhibits, which were taken somewhere and presented to the court.

Mr. Temba state attorney submitted that all exhibits were tendered properly and were relevant. He prayed the third ground of appeal to be dismissed.

The appellants stood charged with three counts; **one**, unlawful entering into the National Park**, two,** unlawful possession of the weapons in the National Park, and **three**, unlawful possession the government trophies. The prosecution tendered the weapons as Exh. PE. The weapons tendered were one panga, one spear and four animal

trapping wires. Wilbrod Vicent (**Pw3**) tendered a trophy valuation certificate, which the court admitted and marked exh.PE.2. The trophy valuation certificate depicted the value of the identified trophy.

The prosecution also tendered the inventory form as exh.PE.3. The inventory showed the magistrate ordered the police to dispose fresh meat, which Wilbrod Vicent (**Pw3**) identified that it was Topi meat, one of the government's trophies, as it was subject to speedy decay.

The law provides two different procedures of disposing off exhibits which are subject to speedy decay in cases of this nature. **One** is the procedure of disposing of exhibits subject to speedy decay under the Police General Orders (PGO). The procedure under the PGO is provided under paragraph 25 of PGO No. 229 which was discussed by the Court of Appeal in the case of **Mohamend Juma @ Mpakama v. R** Criminal Appeal No. 385/2017 (CAT Unreported). Paragraph 25 of the PGO states that-

> *25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.*

There is a procedure to be adopted before perishable exhibits are ordered to be destroyed under the PGO as the Court of Appeal directed in **Mohamend Juma @ Mpakama v. R**. It stated that the accused person must be present and the court should hear him. It stated **"This**

paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail) to be present before the magistrate and be heard."

Two, there is also a procedure of disposing of perishable exhibits as provided by section 101 (1) of the **Wildlife Conservation Act**, Cap 283 as amended by the **Written Laws Miscellaneous Act**, ... 2017. It provides that-

> *101.-(1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-*
>
> *(a) Prior to commencement of the proceedings, order that-*
>
> *(i) any animal of trophy which is subject to speedy decay; or*
>
> *(ii) any weapon, vehicle vessel or other article which is subject of destruction or depreciation,*
>
> *and is intended to be used as evidence, be disposed of by the Director; or*
>
> *(b) at any stage of the of proceedings, order that-*
>
> *(i) any animal of trophy which is subject to speedy decay; or*
>
> *(ii) any weapon, vehicle vessel or other article which is subject of destruction or depreciation,*
>
> *which has been tendered or put in evidence before it , be disposed of by the Director.*
>
> *(2) The order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial.*
>
> *(3)....(4)..... not applicable.*

I guess, the inventory form was prepared under the Police General Orders. They appellants signed the inventory. It is obvious that the court did not hear the appellants as there is no such a record. It is not clear whether the appellants did appear before the magistrate although the inventory bears their signature. They could have signed before or after the magistrate order the exhibit to be disposed of. I will resolve the doubt in the appellants' favour. That is a principle of criminal law that in case of doubt the court must resolve the doubt in favour of the accused person. I will expunge the inventory form exhibit PE. 3, which not properly prepared.

Despite expunging the inventory form from the record, I find that there was other evidence to establish the appellants' guilt. The remaining exhibits were very relevant and connected to the offences the appellants stood charged. The court admitted the exhibits without objection from the appellants, the contents of the trophy valuation certificate were read over to appellants. Thus, the court complied with the procedure for admitting the exhibits.

The appellants did not cross examine Paulo Achieng' (Pw1). It was Paulo Achieng' (Pw1) who tendered the weapons as exhibit PE.1. They did not contradict his testimony. The first appellant alone cross examined Salum Ahmad (Pw2). Salum Ahmad (Pw2) deposed that after they arrested the appellants they took them to their camp before they presented them to police station. The appellants also did not cross examine Wilbrod Vicent (Pw3) who tendered the trophy examination

report. As a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See the decision of the Court of Appeal in **Daniel Ruhere v. R** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R** Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013. In **Cyprian Athanas Kibogoyo v R** Criminal Appeal No. 88/1992 the Court of Appeal stated-

> *"we are aware that there is useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

I have no shadow of doubt that the prosecution tendered relevant exhibits and failure of the appellants to cross examine the witnesses connotes that they accepted that they were found in possession of the exhibits. For the above reason, I dismiss the third ground of appeal.

In the upshot, I uphold the conviction of the appellants. I, now consider the sentence imposed. The trial court sentenced the appellants to one year in respect of the offence in the first court of unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [CAP. 282 R.E. 2002] and for the offence of unlawful possession of weapons in the National Park c/s 24 (1)(b) and (2) of the National Park Act [CAP. 282 R,E 2002]. I have no reason to interfere with that

sentence.

The appellants were sentenced to serve a custodial sentence of 20 years without an option of to pay fine for the offence of unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 2016. Section 60(2) of the Economic and Organized Crime Control Act. [Cap. 200 R.E. 2019] provides the sentence to economic offence to be not less than 20 years. It states-

> (2) *Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*
>
> *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence.*

Further, section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 provides a similar sentence. It states-

> *86 (2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *(C) in any other case*
> *(i)....*

(ii)……..
(iii) where the value of the trophy which is the subject matter of the charge exceeds one million shillings, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may, in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount.

I am of the firm view that the sentence imposed is a just sentence. I have no reason to interfere. I, therefore, uphold both the conviction and sentence and dismiss the appeal in its entirety. I order the sentences to run concurrently as previously ordered.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

18/8/2020

Court: Judgment delivered in the absence of the appellants and the respondent. Copies to be supplied immediately B/C Ms. Tenga.

J. R. Kahyoza

JUDGE

18/8/2020