IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 65 OF 2020

(Originating from Criminal Case No 114 of 2018 of the District Court of Serengeti at Mugumu)

MWITA S/O MOHERE .....APPELLANT

Versus

THE REPUBLIC..... ..... RESPONDENT

JUDGMENT

27th July & 27th August, 2020

Kahyoza, J.

Mwita Mohere (the appellant) 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 appellant pleaded not guilty to the charges.

At the conclusion of a full trial, the district court found the appellant guilty and convicted him of the offences he stood charged. The trial court imposed an imprisonment term 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.

Aggrieved by both the conviction and sentence, **Mwita Mohere**

has appealed to this Court on the grounds that-

1. The trial court erred to convict the appellant without consent and certificate conferring jurisdiction to subordinate court from the DPP.
2. The trial court erred in law and fact to rely on exhibits P.E. 2 and P.E. 3 manufactured by the prosecution witnesses to secure his conviction and that Pw1 and Pw. 2 fabricated the case against him.
3. That the evidence of Pw1 and Pw2 was hearsay evid ence and that they were not independent witnesses as they had interest to serve.
4. The trial court erred to convict the appellant without considering his defence.
5. The trial court erred in law and fact to convict the appellant without the prosecution proving the case beyond all reasonable doubt.

The trial court convicted the appellant with three counts: **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 (the **WLCA**) (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 prosecution summoned four witnesses and tendered three exhibits to prove the appellant's guilt. The prosecution witnesses, Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) deposed that on the 9/10/2018 at about 22.00hrs were on routine patrol with two other parker rangers namely Nyamkeri Mruta and Emmanuel Bishalile at Korongo la Hingira within Serengeti National Park. They saw a light of fire in the bush. They surrounded the area and arrested the appellant. They found the appellant in possession of a fresh hind limb of wildebeest and bush knife. The appellant had no permit to enter into the national park and possess government trophy.

They took the appellant to police station with the exhibits. The police opened police file number MUG/IR/3489/2018 and labeled the bush knife. Julius Kisanga (**Pw2**) tendered the bush knife as exhibit PE.1.

WP No. 7277 Dc Anastazia (**Pw4**), the investigator summoned Wilbrod Vicent (**Pw3**) to identify and value the trophy. He identified the hind limb that it was of the wildebeest. Identified it due to its skin colour which is slightly grey to darker brown. Wilbrod Vicent (**Pw3**) deposed that the value of the trophy was USD 650 or Tzs. 1,417,000/=, which is the value of one wildebeest. Wilbrod Vicent (**Pw3**) prepared a trophy value certificate which he tendered as exhibit. The court admitted it as Ex.PE.2.

WP No. 7277 Dc Anastazia (**Pw4**) interrogated the appellant and

received and marked the exhibits. She prepared an inventory form and presented the trophy to the magistrate who ordered the trophy to be disposed of. It as subject of quick delay.

The appellant denied to have committed the offences he stood charged. He testified on oath that he was arrested at Mbalibali centre with other persons. Police released other people and charged him because he had no money to offer.

The appellant's grounds of appeal raised four issues for determination as follows-

1. Was the appellant convicted without consent and certificate from the DPP?
2. Were exhibits P.E. 2 and P.E. 3 manufactured by the prosecution witnesses to secure the appellant's conviction?
3. Did Pw1 and Pw. 2 fabricate the case against the appellant?
4. Was the evidence of Pw1 and Pw2 hearsay?
5. Were Pw1 and Pw. 2 independent witnesses free from any interest to serve?
6. Did the trial court accord the appellant a right to be heard and consider his defence?
7. Did the prosecution prove the case beyond all reasonable doubt?

The appellant fended for himself before the trial court and before this Court whereas Mr. Temba, the state attorney represented the respondent. The appellant, when called upon to expound his grounds of

appeal, pleaded the Court do adopt his 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.

Was the appellant convicted without consent and certificate from the DPP?

The appellant alleged that the magistrate erred in law and fact to convict and sentence him without a certificate conferring jurisdiction to subordinate court to try economic offence and consent from the D.P.P.

Mr. Temba countered the allegation. He submitted that the first ground of appeal was baseless as the D.P.P. did issues a certificate and consent. The prosecution filed a certificate and consent on the 3th January, 2019.

There is no disputed that economic offences are validly tried after obtaining a consent of the D.P.P as per section 26(1) of the Economic and Organized Crime Control Act [Cap. 200, R.E 2019] (the **EOCCA)**, which stipulates that-

> "26 (1) *Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions."*

On the part of subordinate courts, like the trial court, they can competently try economic offences provided they obtain a consent of

the D.P.P as per section 26(2) of the **EOCCA** and a certificate of transfer issued by the D.P.P or any State Attorney authorized by him to do so in terms of section 12(3) or (4) of the **EOCCA** which provides as follows:

> "12 (3) *The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest; by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the high Court as he may specify in the certificate."*

The above apart, section 12(4) of the same **EOCCA** provides for the issuance of a certificate of transfer of a case involving an economic offence in combination with a non-economic offence. It states -

> *"12(4) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public Interest; by a certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence/ be instituted in the Court."*

I examined the trial court record and discerned that the prosecution did on the 3rd January, 2019 submitted D.P.P's consent and certificate conferring jurisdiction to the trial court. The trial court recorded in the proceedings that *"**Court**: New charge sheet, consent and certificate duly filed in court"*. On further scrutiny, I discerned that

the D.P.P issued a certificate giving jurisdiction to the trial court to try economic offence under section 12 (4) of the **EOCCA.**

The appellant stood charged and convicted with both economic and non-economic offences. It is settled as I pointed out above that once an accused person is charged with both economic and non-economic offences the D.P.P has to issue a certificate conferring jurisdiction to subordinate court to try both offences under section 12 (4) of the **EOCCA** and not under section 12 (3) of the **EOCCA.** See **Kaunguza Machemba vs. The Republic,** Criminal Appeal No:1578 of 2013 (CAT unreported), held that the appropriate section under which the certificate ought to have been made was section 12(4) of the Act which caters for both economic and non-economic offences. Thus, I find the first ground of appeal meritless and dismiss it.

Were exhibits P.E. 2 and P.E. 3 manufacture by the prosecution witnesses to secure the appellant's conviction?

The appellant complained that the trial court erred in law and fact to rely on exhibits P.E. 2 and P.E. 3 manufactured by the prosecution witnesses to secure his conviction and that Pw1 and Pw. 2 fabricated the case against him.

The respondent's state attorney vehemently opposed the ground of appeal. He submitted that the prosecution tendered relevant exhibits. He averred that the prosecution tendered a certificate of seizure and an

inventory form.

It is on record that exhibits PE. 2 and PE.3 are trophy valuation certificate and inventory form respectively. I do not agree with the appellant that the documents were prepared in order to secure his conviction. The law mandates the prosecution witnesses to prepare them. I will commence with exhibit PE. 2, a trophy valuation certificate. Section 86(4) of the **WLCA** allows the wildlife officer to state the value of any trophy in a certificate. It stipulates-

> *(4) In any proceedings for an offence under this section,* ***a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence*** *and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein. (emphasis is added)*

As pointed above exhibit PE.3 is an inventory form. The law allows an inventory form to be prepared in a circumstance where an exhibit is perishable. There are two different laws allowing a police or an investigator to prepare an inventory form to dispose of a perishable exhibit and tender that form instead of the perishable exhibit. The evidence on record depicts that the appellant was found in possession of a fresh hind limb of wildebeest. It was a perishable exhibit. It could not be kept and tendered in court during trial in its original state. Thus, WP No. 7277 Dc Anastazia (**Pw4**) had mandate to prepare exhibit PE.3 is an inventory form.

The inventory form may prepared under paragraph 25 of the **Police General Orders** (PGO), which 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.*

Also, an inventory form can be prepared to dispose perishable, exhibits in the circumstances of this case, under section 101 (1) of the **WLCA**, Cap 283 as amended by the **Written Laws Miscellaneous Act**, No.2 of 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 am of the view that exhibit PE. 3, the inventory form was prepared under the Police General Orders. They appellant signed the inventory form. It was, therefore not manufactured to procure the appellant's conviction.

In the upshot, I find the appellant's second ground of appeal without merit. I dismiss it.

Did Pw1 and Pw2 fabricate the case against the appellant?

The appellant alleged that the trial court relied on the evidence of Pw1 and Pw2 which was fabricated and hearsay. He also argued in another ground of appeal that Pw1 and Pw2 were not independent witnesses as they had interest to serve. The appellant did not expound his grounds of appeal.

Mr. Temba strongly objected to all allegation touching the credibility of Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**. He submitted that Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2** are eyewitnesses. They gave direct evidence.

Indeed, Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) are

eyewitnesses. They deposed that on the 9/10/2018 at about 22.00hrs were on routine patrol with two other parker rangers namely Nyamkeri Mruta and Emmanuel Bishalile at Korongo la Hingira saw light of fire in the bush. They surrounded and arrested the appellant. They gave direct evidence.

I also find the evidence of Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) credible. The appellant sought to discredit the evidence of Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) on the ground that they were not independent witnesses. They had an interest to serve. He did not explain that interest. It trite law that every witness is entitled to credence unless there is a cogent reason to question his credibility. In **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.

There is no doubt that Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) were the prosecution's principal witnesses and both were park rangers. Does that make their evidence not credible? A witness may be labeled an 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 (Deus Gilbert (**Pw1**) or Julius

Kisanga (**Pw2**)) was to get any benefit, if the accused person is punished. The appellant did not explain the benefits the park rangers derived from his conviction.

In the absence of proof that personal gains, benefits, enmity or grudges pushed Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) to fabricate evidence against the appellant, I am of the view that they were independent witnesses. I find refuge 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 was no need of an independent witness and their evidence is credible. I dismiss part of the second ground of appeal and the third

ground of appeal.

Did the trial court accord the appellant a right to be heard and consider his defence?

The appellant contended in the fourth ground of appeal that the trial court convicted and sentenced him without hearing him. That is to say it breached the one of the principles of right natural justice. He did not elaborate the circumstances of the alleged breach.

The Republic through Mr. Temba contended that the appellant was afforded the right to be heard. The trial court gave him the right to cross-examine the prosecution witnesses and defend himself. He added that the appellant opted not to cross examine the witnesses and the trial court gave him an opportunity to defend himself on oath and to call witnesses. The appellant intimated that he will call witnesses. However, after he testified, the appellant prayed to close his defence case without calling his witness. He should therefore, not complain for not being given a chance to call witnesses, the state attorney concluded.

I scrutinized the trial court's record, which depicts that all prosecution witnesses gave evidence in the presence of the appellant. The Court invited the appellant to cross-examine them, however, he cross-examined only Wilbrod Vicent (**Pw3**). It is therefore, clear that the court gave the appellants an opportunity to cross-examine the prosecution witnesses which is part the package of the right to be heard.

I, further, examined the record found 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 Criminal Procedure Act and asked to reply thereto'*
>
> ***Sgd by I.E.Ngaile –RM***
>
> ***07/08/2019***
>
> ***First Accused**: I will give evidence on oath and call witnesses.*
>
> ***Sgd by I.E.Ngaile –RM***
>
> ***07/08/2019***
>
> ***LIST OF FIRST ACCUSED WITNESSES***
>
> *1. Moruga S/O Daniel @ Kimagaigwa of Mbalibali village.*
>
> ***Sgd by I.E.Ngaile –RM***
>
> ***07/08/2019"***

The appellant informed the court that he would defend himself and call witnesses. He testified closed prayed to close his defence. Thus, he relinquished his right to call his defence witnesses. He cannot be heard to complain that he was denied the right to call witnesses.

I am alive the position of the law expounded by the Court of Appeal in **Abdallah Kondo v R** Criminal Appeal No. 322/2015 (CAT Unreported) that to comply with section 231 of the **CPA**, a trial court must **to record what it informs the accused and his answer to it.** It held-

> *"Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial*

magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.

*"**Court**: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence.*

***Accused response**: ... '[record what the accused says).*"

It is obvious that the trial court did not comply with the directive. However, given the appellant's response quoted above, I am the considered view that the trial court did comply with the requirements of section 231 of the **CPA** as expounded by the Court of Appeal. Thus, the trial court's failure to write what it informed the appellant in terms of section 231 of the **CPA**, did not occasion miscarriage of justice.

In fine, I find that the court afforded the appellant the right to be heard.

The appellant further complained that the trial court convicted him without considering his defence.

A cursor look at the judgment of the trial court left me with no flicker doubt that the court considered the accused's defence. The trial court stated in his judgment **"From the testimony of DW1, there is no doubt raised by the accused testimony against the prosecution evidence."** The trial court did not find merit in the defence. It is trite law the court convicts or acquits an accused basing on the strength of the prosecution's case not on the weakness of the defence case. The accused's duty is to raise doubt that is to pierce the

prosecution's case and not prove himself innocent. The court considered the appellant's defence and ruled out that it did not raised doubt in the prosecution case.

I gave the appellant's defence another consideration, undeniably, I found it too weak to raise doubt, let alone a reasonable doubt in the prosecution's case. The prosecution's case was too watertight to be shaken by the appellant's contention that he was arrested at his village together with other people. And, that he was prosecuted because he had no money to offer.

Did the prosecution prove the case beyond all reasonable doubt?

Lastly, I now determine whether there was sufficient evidence for the trial court to ground its conviction. This Court is the first appellate court. The appellants, therefore, are entitled to this Court's own fresh re-evaluation of the entire evidence and arrive at its own conclusions of fact, if necessary. (See, **Peters v. Sunday Post** [1958] EA 424 and **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (unreported).

I dissected the evidence on record. The evidence shows that Deus Gilbert (**Pw1**) and Julius Kisanga (**Pw2**) **deposed that the appellant had one fresh hind limb of the wildebeest and a bush knife.** As discussed above, I find no any reason to discredit their testimony. I believe their testimony.

Mr. Temba, the respondent's state attorney, stated that the appellant's contention that there was no enough evidence to prove his

guilt was baseless. I acquiesce, the prosecution's evidence was watertight. The appellant did not cross-examine the prosecution's witness. The appellant may have found the prosecution's evidence too tight to create reasonable doubt by cross-examination and resolved to keep his own counsel. In **Mengi Paulo Samweli Luhanga and Another v.R.,** Criminal Appeal No 222 of 2006 (CAT unreported), the Court of Appeal defines what amounts to "watertight evidence," quoting what it had previously stated in in **Nhembo Ndalu**(supra) it said-

> *"In law, then, for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt. "*

I find the prosecution's evidence in the case at hand, admissible, credible, plausible, cogent, and convincing and leaving no room for a reasonable doubt. Thus, the last ground of appeal is baseless. I dismiss it.

There are few shortcomings in the prosecution's case which had no impact. **One**, the prosecution did not read the contents of exhibit PE.2 after it was cleared for admission. This is a fatal defect. Its consequences is to expunge the exhibit. See **Sunni Amman Awenda v Republic,** Criminal Appeal No. 393 of 2013. The Court of Appeal held in that case that **the omission to read the contents of the cautioned and extra judicial statement out was a fatal irregularity as it deprived the parties to hear what they were all about.** It was therefore improper for the trial court to rely on it. I expunged exhibit

PE.2 from the record.

There is yet another snag in the prosecution's case. Exhibit PE.3, the inventory form was not prepared in compliance with the procedure provided under the Police General Order (the PGO). The Court of Appeal directed in **Mohamend Juma @ Mpakama** Criminal Appeal No. 385/2017 (CAT Unreported) before disposal of exhibits under paragraph 25 of PGO No. 229 held 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 no evidence in the present case that the appellant was before the magistrate before he ordered the one hind limb of wildebeest to be disposed. The appellant endorsed his signature on the inventory form, which may suggest that he was present. Even, if, he was present it is not on record that he was given an opportunity to air his comment. Thus, the inventory form exhibit PE. 2 was not properly admitted. I expunge it from the record.

It is my finding that despite the fact that I have expunged exhibits PE. 2 (trophy valuation certificate) and PE.3 (inventory form), there is ample evidence to prove the value of the trophy and the fact the appellant was found in possession with the government trophy. I find support in the position of the Court of Appeal expressed in **Issa**

Hassan Uki V. R Cr. Appeal No. 129/2017 (CAT unreported). In that case, the court expunged the exhibit and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit.

It is firm determination that the prosecution did prove the appellant's guilt beyond all reasonable doubt. I dismiss the appellant's fifth ground of appeal.

Finally, I dismissed the appeal and uphold the conviction and sentence imposed by the trial court.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

27/8/2020

Court: Judgment delivered in the absence of the parties. B/C Charles present.

THE HIGH COURT OF TANZANIA MUSOMA

J. R. Kahyoza

JUDGE

27/8/2020