IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 55 OF 2020

NYAKARUNGU S/O ALPHONCE @ MAGIGE..... 1st APPELLANT

DICKSON S/O SIMION @MWITA .....2nd APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Originating from Criminal Case No 139/2018 of the District Court of Serengeti at Mugumu)

JUDGMENT

22nd July & 21st August, 2020

Kahyoza, J.

The district court of Serengeti convicted **Nyakarungu S/O Alphonce @ Magige** and **Dickson S/O Simion @Mwita (**the appellants**)** with three offences; **one**, unlawfully entry into the Game Reserve; **two**, unlawful possession of the weapons in the Game Reserve; and **three**, unlawful possession of Government Trophies. Further, it sentenced them to serve an imprisonment term of six months, one year and twenty years for offence of unlawfully entry into the Game Reserve, unlawful possession of the weapons in the Game Reserve and, unlawful possession of Government Trophies respectively.

Nyakarungu S/O Alphonce @ Magige and **Dickson S/O Simion @Mwita** appealed to this Court contending that the prosecution did not establish beyond all reasonable doubt that they were found in possession of weapons in the game reserve, exhibits were

admitted without establishing a chain of custody, they were convicted with the offence of unlawful possession of government trophies without tendering a certificate of seizure, the trial court did not consider their defence and finally that the trial court violated the principles of natural justice.

This is the first appellate Court. The Court has a task to re-hear and re-evaluate the evidence together with a duty to consider the appellants' grounds of appeal. (**Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported). The appellants' appeal spins around the following issues:-

1. Were the appellants found in possession of weapons in the game reserve?
2. Was it proper for the trial court to admit exhibits without the prosecution establishing the chain of custody?
3. Was it proper to convict the appellant with an offence of unlawful possession of government trophy, without tendering a certificate of seizure?
4. Was the defence considered?
5. Was the evidence properly evaluated and reasons provided f the decision?

A brief back ground is that; **Nyakarungu S/O Alphonce @ Magige, Dickson S/O Simion @Mwita** and another person who was discharged before the trial began, were arraigned for unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009, unlawful possession of weapons in

the Game Reserve c/s 17 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **Economic and Organized Crime Control Act**, [Cap.200 R.E. 2002] and unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **Economic and Organized Crime Control Act**, [Cap.200 R.E. 2002].

The appellants denied the charges, whereupon the prosecution summoned four witnesses and tendered exhibits to support its claim.

The prosecution account was that on the 8th December, 2018, the game scouts **Pw1** Adam Jimmy, **Pw2** Masumbuko Matandura and Hamis Edward while on their routine patrol at Mto Rubana in Ikorongo Game Reserve saw the appellants. They surrounded and arrest them. **Pw1** Adam Jimmy and **Pw2** Masumbuko Matandura found the appellants with a machete and the government trophies to wit; four fresh heads and eight fresh piece of Impala meat. **Pw1** Adam Jimmy and **Pw2** Masumbuko searched and found the appellants with no permit to enter into or possess weapons in the game reserve.

Pw1 Adam Jimmy and **Pw2** Masumbuko prepared a seizure certificate and the appellants signed it. **Pw1** Adam Jimmy and **Pw2** Masumbuko took the appellants with the exhibits to Mugumu police station. **Pw1** Adam Jimmy identified the seizure certificate and tendered

it as exhibit PE."A". Further, **Pw1** Adam Jimmy identified and tendered the machete as exhibit PE."B".

The appellants whilst at police station, the police investigator, **Pw4** G. 6069 DC Elias, summoned **Pw3 Wilbroad Vicent,** a wildlife warden to identify and value the government trophies. **Pw3 Wilbroad Vicent** on the 8/12/2018 identified the government trophies that all trophies were fresh meat of swala impala. He identified the trophy due to the colour of the skin. He valued the government trophy at **Tzs. 3,432,000/=. Pw3 Wilbroad Vicent** prepared a trophy valuation certificate and tendered it as exhibit PE."C". As the record bears testimony, the court read the contents of the exhibit PE."C" to the appellants.

After **Pw3 Wilbroad Vicent** identified and valued the government trophies, **Pw4** G. 6069 DC Elias prepared an inventory and sought the court's order to destroy them as they were perishable. **Pw4** G. 6069 DC Elias tendered the inventory form as exhibit PE."D".

The appellants denied to have committed the offence. They deposed that on the fateful day, Motukeri, their uncle invited them to search for his missing herds of cattle. On their way to their uncle, the appellants met game scouts who arrested them.

Were the appellants found in possession of weapons in the game reserve?

The prosecution tendered through **Pw1** Adam Jimmy the machete as exhibit PE."B". Both **Pw1** Adam Jimmy and **Pw2** Masumbuko deposed that they saw the appellants in the game reserve with the machete. **Pw1** Adam Jimmy tendered a seizure certificate as exhibit PE."A". Unfortunately **Pw1** Adam Jimmy did not read the contents of the seizure certificate, exhibit PE."A to the appellants. It is now settled that failure to read out an exhibit after admission is fatal and the same must be expunged from the record - see: **Mabula Mboje & Others v. Republic,** [2020] TZCA 1740 at www.tanzlii.org. I expunge the seizure certificate, exhibit PE."A from the record. Both **Pw1** Adam Jimmy and **Pw2** Masumbuko gave unchallenged evidence that the appellants were found in the game reserve in possession of the machete. The machete was tendered as exhibit PE."B". I was unable to find reasons not to trust the prosecution's case.

Having expunged the seizure certificate, exhibit PE."A from the record, the question is whether there remains evidence to establish that the appellants were found in possession of the weapon in the game reserve. I will hold that there is ample evidence.

It is settled that, even in the circumstance where a certificate of seizure is required but is not tendered, the court can still convict if, satisfied that there is evidence on the record to establish that the accused was in possession of the items, which ought to have been entered in the certificate of seizure. See **Issa Hassan Uki v. R** [2018]

TZCA 361 at www.tanzlii.org at pgs. 13 – 16. In that case, the court expunged the certificate of seizure and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit.

I dismiss the first ground of appeal for want of merit.

Was it proper for the trial court to admit exhibits without the prosecution establishing the chain of custody?

The appellants complained that the court admitted the exhibits without the prosecution establishing the chain of custody. They did not expound this ground of appeal.

Opposing the ground of appeal, state attorney stated that the nature of the exhibits in the case did not required the prosecution to account for the chain of custody. He contended that the government trophies were not such exhibits which would change hands quickly.

There is no dispute in this case that there is no chronological documentation or paper trial showing seizure, custody, control, and disposition of impala meat and the machete. That notwithstanding, the evidence of **Pw1** Adam Jimmy, **Pw2** Masumbuko, **Pw3 Wilbroad Vicent** and **Pw4** G. 6069 DC Elias sufficiently accounted for the handling of exhibits. Given the nature and the process involved from arrest, seizure handling of exhibits to police, identification, and valuation of trophies, which all accomplished in one day, I have no doubt that the

absence of the chronological documentation or paper trial did not prejudice the appellants.

It is settled that it is not every time that when the chain of custody is broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. (**Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (CAT unreported)). The exhibits referred in this case are a machete and fresh meat of impala. It is not very possible and likely to tamper with type of exhibits. They cannot also not move easily from one person to another. It is my conviction that the nature of the exhibits, do not require the chain of custody to be documented. I dismiss the second ground of appeal.

Was it proper to convict the appellants with an offence of unlawful possession of government trophy, without tendering a certificate of seizure?

The appellants contended that the trial court erred to convict them without the prosecution tendering a certificate of seizure. Mr. Temba the prosecution's witnesses submitted that the appellants' complaint was baseless as the prosecution tendered a certificate of seizure. He referred the Court to page 29 of the typed proceedings.

It is undisputed fact **Pw1** Adam Jimmy tendered a certificate of seizure. The appellants and another person signed the certificate of seizure, which the court admitted as exhibit PE."A". This ground of appeal like other grounds of appeal is baseless. However, it is worthy-

noting that I expunged the certificate of seizure from the record after I found that the court did not read its contents to the appellants.

It is settled, as I pointed out above that, even in the circumstance where a certificate of seizure is required but is not tendered, the court can still convict, if, satisfied that there is evidence on the record to establish that the accused was in possession of the items, which ought to have been entered in the certificate of seizure. In the circumstances of the instant case, I am unable to buy the appellants' contention that there was no evidence to lead to their conviction in the absence of the certificate of seizure.

I noticed that the prosecution tendered the inventory form (exhibit PE."D"), which was prepared in disobedience of the law. There are two types of procedures to prepare an inventory form. One of the procedures is under the Police General Orders (PGO) i.e. paragraph 25 of the PGO No. 229. The other procedure of disposing of perishable exhibits is provided by section 101 (1) of the **Wildlife Conservation Act**, Cap 283 as amended by the **Written Laws Miscellaneous Act**, No.2 of 2017. **Pw4** G. 6069 DC Elias prepared the inventory form without complying with any of the procedures identified above.

The procedure of disposing of exhibits subject to speedy decay under the Police General Orders (PGO) was considered by the Court of Appeal in the case of **Mohamend Juma @ Mpakama v. R** Criminal Appeal No. 385/2017 (CAT Unreported). The Court made a reference to Paragraph 25 of the 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.

The Court of Appeal held that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits. 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****." (Emphasis added)*

Pw4 G. 6069 DC Elias did not indicate whether the appellants were present at the time the magistrate issued an order to disposal the perishable government trophies. I expunge exhibit PE."D" from the court record.

Was the defence considered?

I now, consider whether the trial court considered the defence together with the issue whether the court properly evaluated the evidence and provided reasons for its decision. The appellants complained that the trial magistrate did not consider their defence.

The respondent's state attorney submitted that the appellants defence was considered. He submitted that the magistrate did frame issues and consider the defence while answering such issues.

I passionately examined the trial court's judgment to find out whether the trial magistrate considered the appellants' defence.

Unfortunately, I am unable to agree with the respondent's state attorney that the trial court considered the appellants' defence. I found the only reference to the appellants' defence is at page 7 of the judgment, where the trial court stated that **"....it shows that the accused persons committed the offences their defence did not raise any doubt on the part of the prosecution".**

The trial court did not attempt to show why it disbelieved the defence evidence. In other words, the court did not properly evaluate the evidence and provide reasons for its decision. It is a commor ground that an accused person is not convicted upon the weakness of his case but on the weight of the prosecution's case. Nonetheless, the trial court should have considered and pointed out reasons for not believing the appellants' account of events. In **Jeremiah Shemweta v. R** [1985] TLR 228, where court held-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

It is settled that failure to consider the defence evidence vitiates the trial. This was the position in **Leonard Mwanashoka Criminal Appeal No.** 226 **of** 2014 **(unreported),** cited in **YASINI S/O**

MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No.13 **of** 2012, where the Court of Appeal stated-

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too.***

I uphold the forth and the fifth grounds of appeal that the trial court did not properly consider and evaluate the defence.

I now, consider whether to order a retrial. In **Fatehali Manji v R** [1966] EA341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

Given the nature of the evidence on record and the fact that there are discrepancies in the conduct of the prosecution's case to order retrial would be to give the prosecution a chance to rectify the errors. I direct, for interest of justice to both sides, if the prosecution wishes may try the appellants afresh before another magistrate with the offence of unlawful possession of weapons in the Game Reserve.

The prosecution shall demonstrate its commitment to prosecute the appellants not later than 30 days from the date of this judgment, failure of which, the appellants shall be discharged from prison or lock up whatever the case may be.

It is ordered accordingly.

J. R. Kahyoza, J.
21/8/2020

Court: Judgment to be delivered the Deputy Registrar.

J. R. Kahyoza, J.
21/8/2020

Court: Judgment delivered this 21st day of August, 2020 in the absence of the parties. Ms. Tenga B/C present.

M. A. Moyo,
Deputy Registrar
21/8/2020