IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO 73, 74 AND 76 OF 2020

1. **NDURU JOHN @ NG'WAYA** _____ **1ST APPELANT**
2. **MACHEGE MUGABO @ KAMBARAGE** _____ **2ND APPELLANT**
3. **JUMA KITONGA @ NYING'ATI** _____ **3RD APPELLANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

(Arising from the decision and orders of the district court of Serengeti at Mugumu Hon. Semkiwa RM in economic case no 127 of 2019 dated 30.04.2020)

JUDGEMENT

Date of last order: 28.07.2020
Date of judgment: 14.08.2020

GALEBA, J.

These three consolidated appeals arise from the decision and orders of the district court of Serengeti in economic case number 127 of 2019 in which the appellants were jointly charged with **JUMANNE CHUCHU MACHAMBAGARA** who is not part of these proceedings on appeal. The appellants were charged on four counts of unlawful entry into the Game Reserve contrary to section **15(1) and (2) of the Wildlife Conservation Act no. 5 of 2009** (the WCA), unlawful possession of weapons in the game reserve contrary to **section 17(1) and (2) of the WCA** read together with paragraph 14 of the first schedule to the **Economic and Organized Crime Control Act [Cap 200 RE 2002] (EOCA)** as amended by the **Written Laws (Miscellaneous Amendments) Act no. 3 of 2016** and unlawful possession of Government Trophies contrary to **section**

86(1), (2)(b) and **(2) (c)(iii) of the WCA** as amended by the **Written Laws (Miscellaneous Amendments) Act No. 2 of 2016** read together with paragraph 14 of the first schedule of the **EOCA**.

The facts leading to the appellant's arrest, prosecution, conviction and subsequent imprisonment was that on 30.08.2018, without permission of the Director of Wildlife were found at River Rubana area, a location within Ikorongo Game Reserve with one knife and forty two animal trapping wires. The appellants failed to satisfy the authorized officer that the weapons were not intended to be used for hunting, killing, wounding or capturing wild animals. In addition to the above allegations, it was the prosecution's case that the appellants on the same day and location were found in unlawful possession of thirty four (34) pieces of fresh meat of zebra and one tooth of a warthog which were Government Trophies.

Although the appellants denied the charge, but on 30.04.2020 they were all found guilty, convicted on all counts and sentenced accordingly. On the 1st and 2nd counts the appellants were sentenced to 2 years on each count and 20 years imprisonment in respect of each of the 3rd on and 4th counts.

As the complaints in the appeals were identical in substance originating from the same decision of the trial court, on 28.07.2020 when they came up for hearing separately, **MR. FRANK NCHANILA** learned state attorney prayed that the appeals be consolidated so that they can be heard together which prayer was not objected to by the appellants. For convenience of each party and for purposes of economy of time and of all other resources to

be deployed in prosecuting and defending the appeals, this court consolidated the three appeals so that the same could be determined together. Together with that order of consolidation, there were a few supplementary orders that were made including orders that the controlling record shall be criminal appeal no 73 of 2020 and that the appellants shall be arranged as they are appearing in the caption to this appeal. Each appellant filed the following grounds.

> ***"1. That the hon. magistrate erred with the law and fact who (sic) convicted and sentenced the appellant for the 1st and 2nd counts as in the charge which were not proved beyond reasonable doubt that they unlawfully entry (sic) into the game reserve and were in unlawful possession of weapons in the game reserve.***
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> 2. ***That the trial court erred in law and fact when it admitted exhibits without the prosecution side establishing the chain of custody.***
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> 3. ***That the trial court erred in laws and fact convicted (sic) and sentenced the appellant for judgment is unreasonable as the principle of Natural justice applied whereby (sic) the right to be heard while knowing ignored (sic) in this decision.***
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> 4. ***That the hon. magistrate erred with the law for convicting appellant relying the evidence of prosecution which alleges that the appellants was found with government trophies because there was no certificate of seizure from the director to that effects."***

When the appeal was ready for hearing, the appellants prayed that this court be pleased to adopt their grounds as their submissions so that the learned state attorney could be permitted to reply on then so that the appellants may be allowed to rejoin if they would wish.

In respect of the 1st ground, Mr. Nchanilla submitted that the complaint was based on a misconception of evidence tendered by the prosecution. He submitted that **PW1** and **PW2** are recorded at pages 8 and 11 of the proceedings testifying that the appellant were all arrested at Robana River area (which is in the game

reserve) at 02:15 hours while with one knife and to support that oral evidence **PW1** tendered **EXHIBIT PE1** and **PE2** which were the certificate of seizure and a knife respectively. He submitted that both offences were proved by these witnesses because the **EXHIBITS** were tendered without objection and the witnesses did not cross examine the two witnesses. He cited **CRIMINAL APPEAL NO 88 OF 1992 BETWEEN CYPRIAN KIBOGOYO VERSUS THE REPUBLIC** to support his point that where a person fails to cross-examine he admits what has been testified. In reply to that point **MR. NDURU JOHN** speaking for himself and for the other two, stated that they did not see any **EXHIBIT**, what they saw were papers which were read but the trophies were destroyed in their absence.

In the 1st ground of appeal the appellants are disputing being found in the game reserve without an official permit and also being found there with offensive weapons, in this case, one knife and forty two (42) animal trappings wires. In this case the charge sheet is to the effect that the appellants were found in **IKORONGO GRUMET RESEREVE** and also the oral evidence of **PW1 RUGATIRI GAMABACHARA MESITE** and **PW2 UTENA RASHIDI** testified that the appellants were arrested at **IKORONGO GAME RESERVE.** The issue is according to **EXHIBIT PE1**, the **CERTIFICATE OF SEIZURE**, the game reserve into which the appellants were arrested is indicated as **GRUMETI GAME RESERVE**, it is not clear if there is such a game reserve in Tanzania. There was also no evidence to show that that game reserve is the same as **IKORONGO GAME RESERVE**. There is still another aspect for consideration. The maker of the certificate of seizure was **WILLIAM WARIAELI MBISE** who stamped the

document with a stamp reading **IKORONGO GRUMETI GAME RESERVE.** It was not made clear by the prosecution that **GRUMETI GAME RESERVE** and **IKORONGO GRUMETI GAME RESERVE** refer to **IKORONGO GAME RESERVE** in the charge sheet and the evidence of **PW1** and **PW2.** In this appeal no witness testified that any appellant was found in **IKORONGO GAME RESEVE** as charged. As stated, even **EXHIBIT PE1** did not refer to the place the appellants were found to be within **IKORONGO GAME RESERVE.** In the circumstances, it is only reasonable to give the benefit of doubt in favour of the accused persons by allowing the 1st ground of appeal.

The complaint in the 2nd ground of appeal was that the trial court was wrong for admitting exhibits without the prosecution side establishing the chain of custody. In disputing that ground Mr. Nchanila submitted that the chain of custody was well established. He submitted that **PW1** testified that the exhibits **(PE1** and **PE2)** were taken from where they were seized to Mugumu Police station where they were kept and from there they were brought to court and tendered. He submitted that there was no possibility of being tempered with. As for **EXHIBIT PE3** and **PE4** (the trophy valuation certificate and the Inventory respectively), Mr. Nchanila submitted that they were tendered by witnesses who made them and that there were no possibilities of being tempered with. He added that what matters was whether the documents were the same.

In this case, **EXHIBIT PE3** (the trophy valuation certificate) is the document which is meant to assist the court to identify the spices

of the trophy subject of the charge for purposes of imposing an appropriate punishment under **sections 86 (2) of the WCA** should a conviction precipitate from the case whereas **EXHIBIT PE4** (the Inventory of Claimed Property) acts as replacement of the destroyed government trophy or trophies. As submitted by Mr. Nchanila, **EXHIBIT PE3** was made by **PW3 WILBROD VICENT** on 31.08.2018 and is the one who tendered it. That certificate referred to trophies that were referred to in the police file no **MUG/IR/2928/2018** which was the case that was opened at Mugumu Police station in relation to the appellants. This number was mentioned by **PW2, PW3** and **PW4** as the number relevant to the appellant's case at the police. In this case because **EXHIBIT PE3** and **PE4** referred to the same file, the documents were kept in the same file at the police station from where they were taken when they were brought to court and I agree with Mr. Nchanila that in the circumstances I find no possibility of being doctored. In the circumstances the 2nd ground of appeal is dismissed for want of merit.

As for the 3rd ground, the appellants complained that the principles of natural justice were abused during their trial because their rights to be heard were not observed. In reply to that complaint, Mr. Nchanila submitted that their complaint on that aspect is misconceived because the appellants were accorded the full right of hearing. In support of that position he stated that at page 27 of the typed proceedings when they were found with a case to answer, they were asked how they would give evidence and whether they will have witnesses; and they responded that

they would give evidence on oath and they would not call witnesses. He added that although the appellants had indicated that they would call witnesses, but at page 34 of the typed proceedings, the appellants having testified, they all closed their cases. By that argument Mr. Nchanila was implying that had the appellants had other witnesses, they would not easily close their respective cases.

Before getting to determine this ground, let me highlight on several rights to which an accused person is entitled in the course of a typical criminal trial; ***first,*** an accused person has a right to know the charge that he is facing. In fulfilling this point the court is duty bound to ensure that a charge is read over to the accused person and he has a right to respond to the charge and he even has a right to remain silent, although the latter choice may not be to his advantage. ***Second,*** he has a right to be present on all days that his case is coming in court for any orders. ***Third,*** an accused person has a right to cross examine witnesses that come to testify against him. He has too, a right not to cross examine any witness, but he must be given that right. Here I mean proceedings must reflect that after a prosecution witness testified in chief, the accused was called upon to cross examine and indicate whether he cross examined the witness or he did not. ***Fourth,*** an accused person has right to comment on each exhibit that the prosecution wishes to tender in support of a case that he is facing. ***Fifth***, every accused person has a right to be asked on how he wishes to give his evidence; on oath or affirmation or even to give his evidence without any kind oath or affirmation. The court must get his answer

in this respect and document it and ***sixthly***, the accused is entitled to a right to be informed on whether or not he would wish to call any witnesses in defending the criminal charge leveled against him. This list of rights of an accused person is not an exhaustive list but it lists the major rights of the accused facing a criminal case. There are other miscellaneous rights like seeking to know whether the accused would wish to give evidence standing or sitting and others.

In this case the accused persons were all present on each day that the case was called, they were permitted to cross examine each witnesses from the prosecution, they were given the rights under **section 231 of the Criminal Procedure Act [Cap 20 RE 2019];** they were called asked whether they would call witnesses but they listed none. This court is therefore in agreement with Mr. Nchanila that indeed going through the record none of the rights listed above were breached including those that Mr. Nchanila submitted upon. In the circumstances, the 3rd ground of appeal is dismissed.

In respect of the 4th ground of appeal, the court had to seek clarification from the appellants because the ground was not clear as it was a complaint that the trial court tried an economic case without having in place a "certificate of seizure from the Director of Public Prosecutions." In clarifying the 1st appellant for the other two appellants and for himself stated that their intention was to refer to the certificate of the Director of Public Prosecutions which is issuable under section 12(3) or 12(4) of the EOCA. With that clarification Mr. Nchanila submitted that if that was the case,

the appellants were wrong. He submitted that according to the records of the trial court at page 1 of the typed proceedings, the certificate and the necessary consent, were filed before the case was to be heard.

On this aspect Mr. Nchanila was right. A perusal of the typed proceedings is as Mr. Nchanila has submitted and there is on record a certificate to confer jurisdiction to a subordinate court to hear an economic case. The certificate was issued by MR. **VALENCE MAYENGA** a State Attorney Incharge of Mara Region under section 12(4) of the EOCA. That means, the court tried the matter with necessary jurisdiction, which means the complaint in ground 4 is misconceived.

As the 1st ground of appeal was upheld, the appellants are acquitted of the 1st and 2nd counts of unlawful entry in the game reserve and possession of unlawful weapons therein. However conviction and the sentence of twenty (20) years imposed upon the appellants in respect of each of the 3rd and the 4th counts of unlawful possession on government trophies is upheld and their appeal in challenging conviction and sentence in respect thereof is dismissed.

DATED at MUSOMA this 14th August 2020

Z. N. Galeba
JUDGE
14.08.2020

Court; This judgment has been delivered today the 14th August 2020 in the absence of parties but with leave not to enter appearance following the public warning to maintain social distance between individuals. The appellants have a right of appeal to the Court of Appeal of Tanzania.

Z. N. Galeba
JUDGE
14.08.2020