IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 53 OF 2020

MARWA CHACHA @ GEKONDO_____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 109 of 2018 dated 28.02.2020)

JUDGEMENT

Date of last order; 30.06.2020
Date of judgment; 14.08.2020

GALEBA, J.

The appellant in this appeal is challenging a decision and orders of the district court of Serengeti in economic case no 109 of 2018 in which he was charged on five (5) counts of unlawful entry into the National Park and unlawful possession of a machete, a knife and four (4) animal trapping wires in the National Park on the 1st and 2nd counts respectively. For the remaining three counts; the offences related to being unlawfully found in possession of ***firstly,*** two pieces of fresh meat of zebra and two (2) carcasses of zebras on the 3rd count, ***secondly*** two (2) carcasses of wildebeests on the 4th count and ***thirdly*** two limbs of a hartebeest on the 5th count which are all Government Trophies.

According to the charge sheet, on the 1st count the appellant breached 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) and in respect of the 2nd he offended **section 24(1)(b) and (2)** of the NPA. In respect of the 3rd count, it was alleged that the appellant committed the offence contrary to section **86(1) and (2)(b) of the Wildlife Conservation Act no. 5 of 2009** (the WCA) read together with paragraph 14 of the first schedule to 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) and in respect of the 4th and 5th counts the appellant is alleged to have offended section **86(1) and (2)(c)(iii)** of the WCA read together with paragraph 14 of the first schedule to the EOCA.

The facts leading to the arrest and prosecution of the appellant was that on 07.10.2018 around 13:00 hours, he was found at Borogonja area within Serengeti district in Mara regional, which is located in the Serengeti National Park with illegal weapons and Government Trophies as detailed above.

The appellant denied committing the offences; he was prosecuted and on 28.01.2020 he was found with a case to answer. He informed the court that he would give his evidence on oath but also he would call three witnesses namely **CHACHA MWITA BARANTE, MWITA CHACHA BARANTE** and **RHOBI CHACHA BARANTE.** Although that is the information that the court got from the respondent, but when defense hearing came, the appellant defended himself and on 24.02.2020 he decided closed his defence without calling any other witnesses. The court considered

the case and on 28.02.2020, it found him guilty and convicted him and sentenced him as follows; on the 1st and 2nd counts, the appellant was sentenced to one (1) year imprisonment on each count and on the 3rd, 4th and 5th counts the appellant was sentenced to twenty (20) years imprisonment on each count.

The appellant was aggrieved by both conviction and sentence and he filed the present appeal raising a total of four (4) grounds to challenge the judgment of the district court. The grounds are as follows;

> ***"1. That the trial court erred in law and in fact who convicted and sentenced the appellant with ouls (sic) considering appellant's defense however weak or strong it was.***
>
> ***2. That the trial court erred in law and in fact who convicted and sentenced the appellant without a proper certificate of seizure required by law.***
>
> ***3. That the trial court erred in law and in fact to convict while the respondents did not prove the case beyond reasonable doubt as there are inconsistencies.***
>
> ***4. That the trial magistrate was too bials for relying on side of the case against the principle of natural justice."***

When this appeal came up for hearing on 30.06.2020, the appellant prayed to adopt his grounds of appeal as his submissions. I therefore permitted Mr. Frank Nchanila the learned state attorney, who was appearing for the Republic to reply to the grounds in which case the appellant would rejoin if he elected to do so.

On the 1st ground of appeal in which the appellant was complaining that the trial court punished him without considering

his defense Mr. Nchanila submitted that this court has mandate under **section 366 of the Criminal Procedure Act [Cap 20 RE 2002] (the CPA)** to analyze and reevaluate the evidence and make its independent findings and orders. That proposition is the correct position of the law per the holding of the Court of Appeal in **CRIMINAL APPEAL NO 473 OF 2016 HALID HUSSEIN LWAMBANO VS REPUBLIC, (CA-IRINGA) (UNREPORTED).**

I agree that the trial court did not sufficiently analyze the evidence of the defense but to cure that anomaly I will right away analyze the evidence of the defense. The evidence of the defense as tendered by the appellant is that he was arrested at Merenga village while coming from **MR. CHACHA MWITA BARANTE's** place to participate in an entertainment group as there was a wedding. He was arrested while drunk waiting for public transport to go to his home. This witness never mentioned anything about the trophies or the weapons with which he was charged and also there are other aspects which can shed light. I will start from a little bit back.

When **PW1 LIBERATUS AMANDUS KIKO** tendered weapons which were marked **EXHIBIT PE1,** the appellant gave a no objection to the admission of the weapons. He did not even cross examine that witness on any aspect of his arrest or on the **EXHIBIT.** The story repeated itself when **PW2 THEODORI MALALA DUDICK** testified on participating in the appellant's arrest in the Serengeti National Park with the weapons and the carcasses of the animals, the appellant did not cross examine this witness when examined. It is now an established practice that where a party does not cross

examine on a particular matter of importance, he admits its truthfulness and genuinely; see **CRIMINAL APPEAL NO 428 OF 2016 BETWEEN MARTIN MISARA VERSUS THE REPUBLIC** (unreported) where at pages 7 to 8 the Court of Appeal held that;

> ***"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."***

Other decided cases on the same point include **CRIMINAL APPEAL NO 88 OF 1992; CYPRIAN KIBOGOYO VS REPUBLIC** and **CRIMINAL APPEAL NO 129 OF 2017; ISSA HASSAN UKI VERSUS THE REPUBLIC** both unreported. Briefly, because the appellant did not cross examine on his presence in the national park and being arrested therein with the weapons and the trophies, the appellant cannot be taken seriously to raise the same matters on appeal and seek to question their authenticity. Such are afterthoughts.

In addition, when **PW3 WILBROD VICENT** tendered the trophy valuation certificate, **EXHIBIT PE2**, the appellant did not object to its admission and even when he asked a question in cross examination, he was told that the certificate was prepared in his presence and he had no questions to contradict that answer see page 38 of the typed proceedings. **PW3 G4209 DC STEPHEN** tendered **EXHIBIT PE3** which was the Inventory of Claimed Property with a no objection from the appellant thereby clearing the admission. On asking a question he was informed that he signed the inventory form and he had no more questions. By having no

objection to all the **EXHIBITS** which were tendered, the appellant was consenting to the contents of the **EXHIBITS.**

The other aspect is that according to his evidence, the appellant was like raising the defence of ***alibi*** although not directly. In **SIJALI JUMA KOCHO VS REPUBLIC [1994] TLR 206** it was held that when one is to rely on an alibi, he must bring evidence of people who saw him at a place he alleged to have been at the time of the alleged offence. In this case the appellant indicated that he had **CHACHA MWITA BARANTE, MWITA CHACHA BARANTE** and **RHOBI CHACHA BARANTE** as his witnesses, and the reasonable expectation of the court would be that such witnesses would come to support the appellant's course of defence, that is, at the material time he was somewhere else and not in the national park with the trophies as alleged by the prosecution; but it was unfortunate that the appellant did not call any of the three witnesses. In these circumstances, this court is of the view that even if the trial court was to analyze the evidence as above, it would not have come up with a different finding. For those reasons the 1st ground of appeal is dismissed for want of merit.

The complaint in the 2nd ground of appeal was that the trial court erred in law and in fact as it convicted and sentenced the appellant without a proper certificate of seizure as required by law. In reply to that ground Mr. Nchanila submitted that he was in agreement that there was no certificate of seizure but he hastened to add that such certificate is not a mandatory requirement in wildlife cases. In addition he cited **CRIMINAL APPELA NO 19 OF 2017 JUMA MZEE VERSUS THE REPUBLIC**

(unreported) at page 13 where it was held that because the appellant was arrested with the solar panels the absence of a certificate of seizure cannot ***per se*** lead to an acquittal. In this case Mr. Nchanila submitted that the appellant had no objection to the exhibits establishing the offence without cross examining on the authenticity of the exhibits. He referred the court to the case of **ISSA HASSAN UKI (supra)** on that point.

In respect of this ground I agree with Mr. Nchanila that the evidence tendered was sufficient to establish commission of the offence beyond reasonable doubt even in the absence of the seizure certificate. In this case for instance, the court believes that the trophies and the weapons were found with the appellant in the national park because, when evidence was tendered against him, he did not make any deserving or serious reaction in refuting the claims at the trial. It is on appeal before me when the appellant is becoming fierce against the case as if we have witnesses here. When witnesses were there he was docile and submissive agreeing to everything, permitting every **EXHIBIT** to be entered against him but now he alleging is innocence playing holy. This court cannot agree with him. I agree with Mr. Nchanila that because the weapons and the trophies were proved to have been found in possession of the appellant within the Serengeti national park, in terms of the decision in the case of **JUMA MZEE (supra)**, an acquittal cannot be guaranteed only because a seizure certificate is missing. Therefore the complaint in the 2nd ground is not merited and the same is dismissed.

In respect of the 3rd ground of appeal, the appellant's complaint was that the trial court erred in law and in fact to convict him while the respondent did not prove the case beyond reasonable doubt as there are inconsistencies. On this ground Mr. Nchanila submitted that there were no inconsistences and added that the appellant all along was present in court and no inconsistences can be spotted anywhere. I have as much as I could to dig into the record of the trial court for the any material inconsistence going to the root of the prosecution case, but I did not find any. What would have been an inconsistence is that **PW3 WILBROD VICENT** did not mention that he examined the two carcasses of the zebras at page 37 of the typed proceedings, but I noted that that was typological error because when I went to the hand written proceedings of the same date, the error was sorted because there he stated to have identified the carcasses along with other trophies. This court otherwise took painstaking efforts to locate any material inconsistence, because not every inconsistence leads to an acquittal; only material inconsistences do, see **CRIMINAL APPEAL NO 92 OF 2007 DICKSON ELIA SAMBA SHAPWATA AND ANOTHER VERSUS REPUBLIC** at pages 7 to 8, but this court was not able to trace any such inconsistence. In the circumstances, the 3rd ground of appeal is dismissed.

The complaint in the 4th ground of appeal was that the trial magistrate was too biased for relying on one side of the case against the principle of natural justice. In reply to this ground, Mr. Nchanila submitted that the appellant was present in court

throughout the proceedings and therefore no principle of natural justice was breached.

In this case not only that the appellant was present throughout the proceedings, but also; ***first***, the appellant was afforded a right to cross examine every witness, although he opted not to cross examine some to them, ***secondly*** before any **EXHIBIT** was to be tendered the appellant was given an opportunity to object to the such admission although he had no objection with admission of any **EXHIBIT** and ***thirdly*** when the prosecution case was closed on 28.01.2020, he was asked on how he wanted to give his evidence and whether or not he would wish to call witnesses. He responded that he wished to give evidence on oath and he would call **CHACHA MWITA BARANTE, MWITA CHACHA BARANTE** and **RHOBI CHACHA BARANTE** as his witnesses although he ended up not calling any of them. In the circumstances, this court is in agreement with the respondent that the appellant was neither denied any right to be heard nor was the magistrate biased. For those reasons, the 4th ground of appeal is misconceived because the appellant was afforded all rights during the proceedings.

In the circumstances, this court upholds the decision of the district court of Serengeti in economic case no 109 of 2018 and dismisses this appeal for want of merit.

DATED at MUSOMA this 14th August 2020

THE HIGH COURT OF TANZANIA
MUSOMA

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.

Z. N. Galeba
JUDGE
14.08.2020