IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 26 & 27 OF 2020

(Originating from Criminal Case No 142 of 2018 of the District Court of Serengeti at Mugumu)

1st MOME S/O RYOBA @ MOME .....APPELLANT

2nd SINDA MASERO @ SINDA ....APPELLANT

Versus

THE REPUBLIC .... RESPONDENT

JUDGMENT

29th June & 17th July, 2020

Kahyoza, J.

The appellants namely **Mome Ryoba @ Mome** and **Sinda Masero @ Sinda** 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 trophy. The appellants pleaded not guilty to 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.

Aggrieved by both the conviction and sentence, the appellants have appeared to this Court. The appellants contended that-

1. There was no evidence to prove possession of alleged items in the national park;
2. They were not arrested in the national park;
3. They were convicted unheard in breach of the natural justice;
4. They prosecution breached directive number 31 of PGO in tendering exhibits.

Background

The trial court found the appellants guilty and convicted them 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 (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 exhibits to prove the appellants guilt. The prosecution lined up two witnesses, Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**) who deposed that on the 7/12/2018 at about 08.00hrs were on routine patrol with three other parker rangers namely Magambo Malato,

Paulo Achien'g and Rafael Ally at Korongo la Machochwe within Serengeti National Park. They saw the appellants hiding they arrested them and found them in possession of two fore limbs of wildebeest. They deposed that the appellants had no permit to enter into the national park and possess government trophy. They further that deposed the appellants possessed weapons namely a panga and a knife. They took the appellants to police station and labeled the panga and the knife as IR 4217.

The prosecution summoned Wilbrod Vicent (**Pw2**) to identify and valuate the trophy. He identified the two fore limbs that they were of the wildebeest. Identified them by colour of the skin which was slightly grey to darker brown. Wilbrod Vicent (**Pw2**) deposed that the value of the trophy was USD 650 or Tzs. 1,430,000/=, which is the value of one wildebeest. Wilbrod Vicent (**Pw2**) prepared a trophy value certificate which he prayed to be admitted as exhibit. The court admitted it as Ex.PE.2 and invited Wilbrod Vicent (**Pw2**) to read its contents to the appellants.

The last prosecution witness, No. F6443 Dc Pius (**Pw4**) deposed that he interrogated the appellants and received and marked the exhibits. No. F6443 Dc Pius (**Pw4**) invited Wilbrod Vicent (**Pw2**) to identify and evaluate the trophy. He prepared an inventory form and presented the trophy and the appellants to the magistrate who ordered the trophy be disposed.

The defence case was that the appellants were arrested by the parker rangers on their way to the auction to sell knives and swords.

The first appellant went to the second appellant with a number of knives to sell to the auction. They left the second appellant's home to the auction with sixteen knives and six swords. The parker rangers stopped their vehicle, arrested them, and took them to Mugumu police station. Sinda deposed that he did not cross-examine Thadeus Michael @Genda (**Pw1**) because he was not the one who arrested them. He added that he did not cross-examine Wilbrod Vicent (**Pw2**) as he was called to the police station to identify the trophy.

The appellants' grounds of appeal, which are replica raised four issues for determination as follows-

1. Were the exhibits planted?
2. Did the trial court afford the appellants a right to be heard?
3. Did the trial court err to find the appellants guilty as charged?
4. Did the conviction of the appellants without tendering a certificate of seizure cause any injustice?

The appellants fended for themselves and the respondent was represented by Mr. Temba, the state attorney. The appellants beseeched the Court do 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.

Were the exhibits planted?

I will answer the above issue together with the issue whether it was proper to convict the appellants without a certificate of seizure. The

appellants contended that the prosecution failed to tender a certificate of seizure to prove that they possessed the exhibits.

It is self-evident that the prosecution did not tender the certificate of seizure. The law requires whenever a person who conducts a search to issue an official receipt to evidence such seizure. It so provided under section 22(2) and (3) of the Economic and Organized Crimes Act, **[Cap. 200 R.E. 2019] (**the **EOCA).** The section 22(2) and (3) provides as follows-

(2) ***Whenever any search is made or any such written authority is issued****, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it is issued and the results of any search made under it, to a district magistrate within whose area of jurisdiction the search is to be made or was made.*

(3) Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall-

(a) forth with or as soon as it is practicable evaluate or cause the property to be evaluated so as to ascertain its value;

(b) issue an official receipt evidencing such seizure and on which the value of the property as ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search.

The issue is whether in the circumstances of this case in there was a search in the meaning of section 22 the **EOCA**. Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**) deposed that they found the appellants in the National Park in possession of the government trophy and weapons. There was no search. Search is *an*

examination of a person's premises (residence, business or vehicle) by law enforcement officers looking for evidence of the commission of a crime. (*See https://dictionary.law.com/Default.aspx?selected=1894*).

Black's Law Dictionary 4th Ed. Defines the term search as follows-.

> *"An examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009, 1011. A prying into hidden places for that which is concealed and* ***it is not a search to observe that which is open to view****."*

It is my conviction from the above definition that, in this case, there was no search. The prosecution's witness observed an open view, which did not belong to the appellants. Thus, the provisions of section 22 of Cap. 200 did not bind the prosecution witnesses to prepare a search certificate of seizure and tender it in court.

The learned state attorney conceded that the prosecution did not tender a certificate of seizure. He contended that failure to tender a certificate of seizure was not fatal. He referred this Court to the decision of the Court of Appeal in **Kadina S. Kimaro V R** Criminal Appeal No 301/2017 (unreported CAT) and the case of **Issa Hassan Uki v R, Cr Appeal No 123/2017** (unreported CAT). He contended that in the latter case the Court of Appeal expunged the exhibit and relied on the prosecution witnesses' evidence to uphold the conviction

I agree with the state Attorney's position that the Court of Appeal held that a court may convict in the absence of the certificate of seizure if there is enough evidence to cover the contents of that certificate. See the case of **Issa Hassan Uki v R, (**supra).

In addition to the above, by their nature, the items found in possession of the appellants, which are two fore limbs of wildebeest, are not something easily available or common items which could change hands or be substituted in the course. Thus, the omission to tender the certificate of seizure was not fatal. Thus, the omission did not cause any injustice to the appellants. For the above reasons, I dismiss the first and forth grounds of appeal.

Did the court afford 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 them. That is to say it breached the one of the principles of right natural justice. They did not furnish circumstances of the alleged breach.

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.

I scrutinized the trial court's record, which depicts that the appellants were called upon to cross-examine the prosecution witnesses. The record shows that **Sinda Masero**, the second appellant, did on the 15th April, 2019 utilize his right and cross-examined Thadeus Michael @Genda (**Pw1**). However, the second appellate resolved not to

cross-examine the remaining witnesses. He stated in his defence that *"I did not cross-examine Pw2 because he told the court that he went to the police to identify government trophy and not us"*. The first appellate opted not to cross-examine any witness. It is 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 CPA and asked to reply thereto'*
>
> *Sgd by I.E.Ngaile –RM*
>
> ***First Accused**: I will give evidence and call two witnesses*
>
> 1. *Bahiti Samwel of Machoche village.*
> 2. *Amos Lucas of Machoche*
>
> ***Second accused**: I will give evidence on oath."*

The appellants closed their defence after they testified. The first accused who is now the second appellant closed his defence without calling his witnesses or informing the court to issue summons to his witnesses. The first appellate had no witness to call. He closed his defence after he testified. I see no bases of their complaint.

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 appellants' 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 appellants in terms of section 231 of the **CPA**, did not occasion miscarriage of justice.

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

Did the trial court err to find the appellants guilty as **charged?**

Lastly, I now determine whether there was sufficient evidence for the trial court to ground its conviction. This Court is the first appellant. 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 neccessary. (See, **Peters v. Sunday Post** [1958] EA 424 and

Alex Kapinga v. R., Criminal Appeal No. 252 of 2005 (unreported). Despite that duty, the appellants casted doubt on the prosecution's case by contending that the court erred to convict and sentence them with the offence of unlawful possession of the government trophy and weapons in the National Park. They contended that they were not arrested in the National Park but on the way to the auction at Machochwe village.

The Respondent's state attorney contended that the evidence Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**) gave evidence that the appellants entered into the national park and found them in possession of government trophy and weapons in the national park. He submitted that there was not ground to discredit his witnesses.

I dissected the evidence on record. The evidence shows that Thadeus Michael @Genda (**Pw1) deposed that the appellants had two fore limbs of the wildebeest.** On the other hand, Waziri Sekiboko @Athuman (**Pw3**) gave evidence that the **appellants had in their possession two fore limbs of zebra**. Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**) are the witnesses who arrested the appellants. It is to my dismay that the two principal witnesses gave contradicting evidence.

There is yet another testimony given by No. F6443 Dc Pius (**Pw4**) and Wilbrod Vicent (**Pw2**). No. F6443 Dc Pius (**Pw4**) deposed that he invited Wilbrod Vicent (**Pw2**) to identify and valuate the trophy. No. F6443 Dc Pius (**Pw4**) deposed that the appellants were taken to the

police station with exhibits, to wit **two fore limbs of wildebeest** and weapons. He invited Wilbrod Vicent (**Pw2**) who identified the **meat to be of the wildebeest**. F6443 Dc Pius (**Pw4**) tendered an inventory form as exhibit PE. 3. The inventory was signed by the magistrate who authorized the trophy to be disposed. Both F6443 Dc Pius (**Pw4**) and Wilbrod Vicent (**Pw2**) deposed that the appellants were taken to police with the two **fore limbs of the wildebeest**. The inventory also showed the meat was **two fore limbs of the wildebeest.**

The prosecution's evidence was not free of contradictions. The contradiction happened between the evidence of the principal witnesses. It is the principle of the law that minor contractions or discrepancies in the evidence which do not go the root of the matter should be ignored. The Court of Appeal propounded the principle in the number of cases the following being some of them. In **Chrisant John v R** Criminal Appeal No.313 of 2015 (CAT unreported), It stated-

> *" Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case.*

In another case of **Elia Nshambwa Shapwata and another v**

R Criminal Appeal No. 92 2007(CAT unreported), the Court of Appeal stated that-

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements.* ***The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter.****" (emphasis supplied).*

It is my duty to determine whether contradiction between the two principal witnesses (Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**)) was minor or went to the root of the matter. As shown above Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko @Athuman (**Pw3**) are the ones who arrested the appellant. Thadeus Michael @Genda (**Pw1) deposed that the appellants had two fore limbs of the wildebeest.** On the other hand, Waziri Sekiboko @Athuman (**Pw3**) gave evidence that the **appellants had in their possession two fore limbs of zebra**. This was not a minor contradiction or inconsistence. It goes to the root of the matter. The root of the matter at hand is possession of government trophy. The persons who arrested the appellants are at variance as to the trophy the appellants unlawfully possessed. The discrepancy pointed out above not only goes to the root of the matter but also destroys the credibility of the principal prosecution witnesses.

Given the patent contradiction or inconsistency, found in the evidence of Thadeus Michael @Genda (**Pw1**) and Waziri Sekiboko

@Athuman (**Pw3**), I can hold without demur that this was one of those few cases in which apparently contrived evidence was used to secure a conviction of the appellants. I quash the appellants' conviction and set aside the sentence. The appellants are to be released forthwith from prison unless otherwise lawfully held.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

27/2020

Court: Judgment delivered in the presence of the appellants and Mr. Temba S/A via the video link. B/C Charles.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza

JUDGE

22/7/2020

court: Appellant permanent address.

1. MOME RYOBA MOME
   C/O NYANSURURA - NYAKIBANJE BANJI
   HAMLET – CHAIRMAN.
2. SINDA MASERO SINDA
   C/O VEO – MAACHOCHWE – MACHOCHWE WABU
   HAMLET. MR. MARTIM NYAKONA KIMAHANA.