IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 5 OF 2020

CHACHA CHIWA MARUNGU_____APPELLANT

VERSUS

THE REPUBLIC_____RESPONDENT

(Arising from the decision and orders of the district court of Serengeti at Mugumu, Ngaile RM, in economic case no 129 of 2018 dated 28.11.2019)

JUDGEMENT

Date of last order: 03.06.2020
Date of judgment: 10.07.2020

GALEBA, J.

Before the district court of Serengeti siting at Mugumu in economic case no. 129 of 2018, the appellant along with another person not a party to this appeal one **PAULO NYAMHANGA KIROCHE** were charged on three 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 one machete and one knife 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]** as amended by **Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 (the EOCA)** and unlawful possession of forty dried pieces of wildebeest and three tails of wildebeest which were government trophies contrary to section 86(1) and (2)(c)(iii) of the WCA as

amended by Written Laws (Miscellaneous Amendments) Act no 2 of 2016 read together with paragraph 14 of the first schedule to the EOCA. According to the prosecution, the offences were committed on 24.11.2018 at Gitamwaka area in Ikorongo/Grumeti game reserve in the administrative district of Serengeti in Mara region. At the trial the appellant and **PAULO NYAMHANGA KIROCHE** were convicted of all offences. On the 1st and 2nd counts they were sentenced to serve one year in jail in respect of each count and on the 3rd count they were sentenced to 20 years imprisonment. The sentences are currently running concurrently.

The appellant was dissatisfied by both conviction and sentence hence this appeal. In challenging the decision of the trial district court, the appellant raised four grounds of appeal which I will reproduce in ***verbatim***;

> ***"1. That the trial magistrate erred in law and in fact for convicting the appellant through admitted the wrong evidence from PWI, PWII, PWIII and PWIV the evidence does not satisfy the conviction of the appellant in the case.***
>
> ***2. That, the trial magistrate had erred in law and the fact (sic) in convicting and sentence the appellant by receiving the wrong Exhibits from prosecution side like Panga, bush knives wine (sic) that was taken in their area and presented before the court as an Exhibits without clear prove (sic).***
>
> ***3. That, the trial magistrate had erred in law and fact in convicting the appellant without give (sic) a chance to defend, there was no key witnesses of appellant were called to defend his care (sic) but the court gives the prosecution side for their witnesses to defend.***
>
> ***4. That, the magistrate erred in law in convicting and sentence the appellant without to consider (sic) the procedure during arresting there must be an Independent apart (sic) from park ranger and game reserve in order to preserve the principle of Natural justice."***

This appeal was heard via a virtual court video link system with the appellant and Mr. Frank Nchanila, learned state attorney for the respondent both submitting from remote sites due to corona virus outbreak at the time.

When the case came up for hearing the appellant prayed that the court adopts his grounds as his submissions in support of the appeal and then permit the learned state attorney to submit on them if he was objecting to the grounds. The respondent was permitted to make his submissions orally in objecting to the appeal.

In reacting to the 1st and 2nd grounds of appeal Mr. Nchanilla stated that the complaint in those grounds was misconceived. He submitted that at pages 17, 18 and 19 of the typed proceedings, **PW1** and **PW2** testified how they arrested the appellant in Ikorongo Grumeti Game Reserve with illegal weapons and the government trophies. He added that the appellants failed to produce at that time any permits to enter into the protected area or be in possession of weapons. Coupled with the evidence of weapons which were tendered as **EXHIBIT PE1,** Mr. Nchanila submitted that such evidence was enough proof for the offences in respect of the 1st and 2nd counts. Mr. Nchanila submitted finally that, as the appellant did not cross-examine on the exhibit, the appellant admitted the truthfulness of the evidence. In this respect he cited **CRIMINAL APPEAL NO 428 OF 2016; MARTIN MISARA VERSUS THE REPUBLIC CA, (UNREPORTED)** where it was held that where a party does not cross examine on an

important matter, then such party cannot question or deny the authenticity of the other party's evidence on that point.

As for the 3rd count, Mr. Nchanila submitted that although **EXHIBIT PE2** which was the trophy valuation certificate ought to be expunged as it was not read in court as required by law, but even after expunging it, the evidence of **PW3, WILBROAD VINCENT** at pages 21 and 22 of the typed proceedings is sufficient to base a conviction upon it without the certificate. He cited to me **CRIMINAL APPEAL NO 129 OF 2017; ISSA HASSAN UKI VERSUS THE REPUBLIC CA, (UNREPORTED),** at page 15 where having expunged the trophy valuation certificate, the Court of Appeal held that the evidence of **ANTHONI NDOROZI PENIA, PW4** was sufficient to prove possession of the trophy because the evidence of that witness equaled that contained in the expunged trophy valuation certificate. In other words, his submission was that this court be pleased to expunge the certificate but, it should still hold that the 3rd count of unlawful possession of the government trophies was proved. Mr. Nchanila moved the court to dismiss the 1st ground of appeal.

I have gone through the evidence tendered by **PW1 EDWARD HAMIS SIRIGWA** and **PW2 ROGATIRI GAMBACHERA MISITE.** They testified that on 24.11.2018 at around 12.00 hours while on patrol at Gitamwaka area within Grumet Ikorongo Game Reserve, they spotted two people, the appellant and **PAULO NYAMHANGA KIROCHE** and arrested them. Upon arresting the duo, the witnesses found them

with one machete, one knife and also they had 40 pieces of dried wildebeest meat and 3 dried tails of wildebeest. **PW1** and **PW2** testified that the two accused persons failed to show any permit from the director of wildlife permitting them to enter the game reserve and possess those items. They testified that both exhibits and arrested persons were presented to Mugumu Police Station and case file no MUG/IR/4062/2018 was opened. The evidence of **F6870 DC NELSON, PW4** was that on 25.11.2018 he was assigned case file no MUG/IR/4062/2018 which was in relation to illegal possession of government trophies for investigation. He stated that the trophies were 40 dried pieces of wild meat and 3 tails of wildebeests. He then called **WILBROAD VINCENT, PW3**, a wildlife warden with expertise in identification of various animal flesh and the latter identified the trophies to be wildebeest meat and the tails to be of the same animal. He identified the tails by looking at their colour which was ***"slightly grey to darker brown"*** and the 40 pieces of meat were of wildebeest because the meat ***"had the same colour and had also white oil/fat".*** Whereas **PW3** tendered a trophy valuation certificate **EXHIBIT PE2** (which I will expunge), **PW4,** tendered an Inventory of Claimed Property **(EXHIBIT PE3)** which he prepared on 27.11.2018. When both exhibits were tendered the appellant did not object to any of them, nor did he ask any question.

In respect of the 1st and 2nd grounds, in the main I agree with Mr. Nchanila that it is only lawful to expunge **EXHIBIT PE2**, which order I hereby make. As submitted by Mr. Nchanila, the contents of that

document is the same as what **PW3** testified, that is why the evidence on the possession of the trophies cannot be shaken. The problem on the trophies is the way **PW3** identified the 40 pieces of meat. He said that the meat ***"had the same colour and had also white oil/fat".*** This kind of identification is not acceptable. The identifying officer must detail facts which show that the meat he saw was the meat of no other animal except the animal he mentions. It is not enough to just say the meat had white oil or fat. A description of the trophy for it to be acceptable as lawful it must give the distinctive characteristics of the meat of a particular animal as against the characteristics of other meat of other animal species. That is to say in this case, there was needed a description of the meat from **PW3** which would show that the meat described was of no other animal except the wildebeest. He needed for instance to state that no other animal has meat of the colour he described and also no other animal has meat with white oil or fats. In this case the witness fell short of the distinction. So it is not known, from which animal was the meat procured. The description of the tails is acceptable but that of the meat that the pieces of meat were of wildebeest is refused. Therefore, the evidence of the trophies that remains is that of the tails, but which was sufficient for purposes of conviction.

In appropriate circumstances, the Inventory that was tendered by **PW4** is supposed to be prepared and an order for destruction of the perishable exhibit must be made in the presence of the accused

person(s). **PW4** stated that the order was made in the presence of the appellant and the latter did not ask any question or object to tendering the inventory. In the circumstances, the 1st and 2nd grounds of appeal are both dismissed for lack of merit in that the evidence of **PW1, PW2, PW3** and **PW3** was in my opinion credible evidence to prove the guilt of the appellant.

The complaint in the 3rd ground was that the appellant was not afforded a full opportunity to call his key witnesses and even he was not given a chance to defend himself, while the prosecution was given sufficient opportunity to prosecute their case. Mr. Nchanila objected to this assertion, and this court is in agreement with him. This court is in agreement with the defense on this ground because; ***first,*** throughout the prosecution, the appellant was given a chance to cross examine prosecution witnesses but he opted not to cross examine any of them. This is very clear at pages 19, 20, 22 and 30 of the typed proceedings. **Secondly,** when the prosecution closed its case on 27.11.2019; this is what the court stated at page 31 of the typed proceedings;

> ***"COURT; The accused person well addressed in terms of s. 231 of the Criminal Procedure Act and asked to reply thereto;***
>
> ***SGD; I. E. NGAILE***
> ***27.11.2019***
>
> ***1st accused reply; I will give evidence on oath.***
>
> ***SGD; I. E. NGAILE***
> ***27.11.2019***
>
> ***2nd accused reply; I will give evidence on oath and call one witness namely Singita Mangasa of Maburi Village.***

SGD; I. E. NGAILE
27.11.2019.

ORDER;

1. *Defence hearing on 31/10/2019*
2. *Defence witness be summoned*
3. *AFRIC*

SGD; I. E. NGAILE
27.11.2019"

Although I note that the appellant replied only in respect of giving oath and not to call any witnesses, but looking at the answer given by the 2nd accused person, who opted to call a witness, the inference is that both were responding to the same question and the appellant opted not to mention or call any witness. ***Thirdly*** at page 33, of the typed proceedings the appellant is recorded as having responded;

"1st accused; I'm ready for my defence."

Which means he was informed that he can give his evidence which he gave at page 34 of the typed proceedings and ***fourthly,*** on 13.11.2019 after he had given his defense evidence, at page 36 he stated;

"1st accused; I pray to close my defence."

That means had he wanted to call other witnesses, instead of closing his case, he could have called any additional witnesses. In this ground I agree with Mr. Nchanila that no injustice was occasioned on the part of the appellant as it was held in **CRIMINAL APPEAL NO 366 OF 2018; FLANO ALPHONCE MASALU @ SINGU AND 4 OTHERS VERSUS THE REPUBLIC CA, (UNREPORTED),** In **FLANO ALPHONCE MASALU** at page 13 as follows;

> ***"However, in our earlier decision in Jumanne Shabani Mrondo Versus Republic, Criminal Appeal no 282 of 2010 (unreported) where we confronted an identical irregularity; we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice."***

See also **RICHARD MEBOLOKINI VERSUS REPUBLIC [2000] TLR 90.** In this case the appellant was afforded every right to defend the charge and no miscarriage of justice is demonstrable on record. Accordingly, the 3rd ground of appeal is dismissed.

Finally, the complaint in the 4th ground of appeal was that the appellant was arrested without the arresting authorities calling an independent witness as required by law. In reply to that ground Mr. Nchanila submitted that the appellant was arrested in the game protected area and therefore it was not possible to have any person around other than workers in the game reserve. He submitted that there is not legal requirement of having an independent witness before arresting someone in the game reserve. The complaint in that ground is misconceived; ***first,*** there is no law that required any independent witness to be present at the time of arresting a suspect of pouching in the game reserve, national park or any protected area for conservation purposes and ***secondly,*** an independent witness is necessary where investigatory authorities want to conduct a search without a search warrant in a dwelling house in terms of section 106(1) (b) of the WCA ***proviso*** but not in circumstances as testified by the prosecution witnesses. That section which relates to the powers of search and arrests provides as follows;

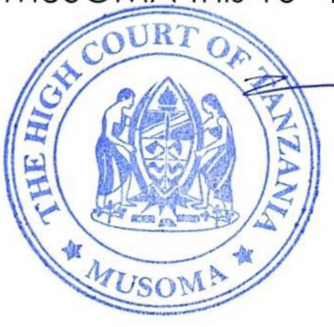
"106(1) Without prejudice to any other law, where any authorized officer has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act, he may;

(a) n/a
(b) enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in occupation or use of such person, open and search any baggage or other thing in his possession; Provided that no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness; and"

In the circumstances, there was no law that was breached by **PW1** and **PW2** when they arrested the appellant in the game reserve without there being any independent witness. In the circumstances the 4th ground of appeal has no merit and it is dismissed.

Finally, as all the grounds have been dismissed, this appeal is hereby dismissed for want of merit.

DATED at MUSOMA this 10th July 2020



Z. N. Galeba
JUDGE
10.07.2020

Court; This judgment has been delivered today the 10th July 2020 in the absence of parties. Parties may collect their copies from the judgment collection desk at the reception.

Z. N. Galeba
JUDGE
10.07.2020