IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 34 OF 2020
(Originating from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 105 of 2018)

CHACHA MARWA @SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 13/05/2020
Date of Jugdement: 08/07/2020

KISANYA, J.:

The appellant, Chacha Marwa @ Samwel together with Ntera s/o Nchama @Marwa (hereinafter referred to as "the second accused") were arraigned before the District Court of Serengeti at Mugumu for three counts of offence. The first count was Unlawful Entry into the Game Reserve, contrary to section 15 (1) and (2) the Wildlife Conservation Act, 2009. It was stated that, on 1/10/2018 at Mto Rwamchanga area in Ikorongo Game Reserve within Serengeti District in Mara Region, the appellant and the second accused jointly and together, were found to have entered into the Game Reserve without the permission of the Director thereof previously sought and obtained.

The second count was Unlawful Possession of Weapons in the Game Reserve, contrary to section 17(1)(2) and 20(1)(b)(4) of the Wildlife Conservation Act, 2009 read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended. The prosecution claimed that, on 1/10/2018 at Mto Rwamchanga area in

Ikorongo Game Reserve within Serengeti District in Mara Region, the appellant and the second accused jointly and together, were found to have in possession of weapon to wit; one panga without the permit and failed to satisfy to the authorized officer that, the said weapon was intended to be used for the purposes other than hunting, killing, wounding or capturing of wild animals.

The third count was 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. It was alleged that, on 1/10/2018 at Mto Rwamchanga area into Ikorongo Game Reserve within Serengeti District in Mara Region, the appellant and the second accused person, were found in unlawful possession of one carcass of wildebeest valued at Tshs. 1, 417,000/= the property of the United Republic of Tanzania.

As the appellant pleaded not guilty to all counts, the prosecution paraded four witnesses and tendered three exhibits to prove its case beyond all reasonable doubts. The prosecution case was to the effect that: on 1/10/2018 at around 2130 hours, three game Game Scouts stationed at Ikororong/Grumeti Game Reserve were on patrol at Mto Rwamchanga area within Ikorongo/Grument Game Reserve. These were Antony Manga'ri @Mang'ari (PW1), Juma Athumani Mahega (PW2), David Chokora and James Songeko. They saw a fire light inside the bush. Upon surrounding the said bush, they managed to arrest the appellant and the second accused. Both were found in possession of one panga and one fresh carcass of wildebeest, without permit from the relevant authorities. Therefore, the appellant and second accused were taken to Mugumu Police Station where case number MUG/IR/3367/2018 was filed.

On 2/10/2018, Wilbroad Vicent (PW3) identified and valued the fresh carcass of wildebeest found in possession of the appellant and the second accused as a Government Trophy valued at Tshs. 1, 417,000. A Trophy Valuation Certificate was tendered and admitted as Exhibit PE2. Also, G763 DC Egagwa (PW4) prepared an inventory of Government Trophies which was presented before the magistrate for disposal order. The magistrate ordered the carcass of the wildlife to be disposed of. The Inventory form was tendered and admitted as Exhibit PE3.

The appellant defended himself on oath. He denied to have been found in possession of one panga and one knife. He deposed that he was found on the road while riding his bicycle on 1/10/2018 at about 1300hours and brought before the trial court on 3/10/2018.

After the full trial, the appellant was found guilty and convicted of all counts of offence. Consequently, he was sentenced to one (1) year imprisonment for the first and second counts and twenty years imprisonment for the third count.

Dissatisfied with conviction and sentence, the appellant has come to this Court by way of appeal. He has advanced five grounds of appeal which have been summarized into four grounds as follows:

1. That, the trial Magistrate erred in law and fact to convict the appellant without evidence of certificate of seizure to prove that he was found in possession of the alleged items in the Game Reserve.
2. That, the appellant was convicted and sentenced unheard.
3. That, the trial Magistrate misdirected himself to convict the appellant on offence of unlawful possession of government trophies and unlawful possession of weapons within game reserve while he was arrested along the road waling with his bicycle without anything.
4. That, there was possibility of tempering with exhibits tendered by the

prosecution as Police Form No. 45 was not tendered thereby violating Directive No. 31 of Police General Orders Number 229.

When this matter was called on for hearing, the appellant appeared in person, unrepresented. On the other hand, the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

The appellant prayed to adopt the grounds stated in his petition of appeal. He went on to argue that, he was not arrested in the Game Reserve. The appellant contended that, he was arrested in the village and taken in the game reserve by PW1 and PW2.

The appellant went on to submit that, he was not present when the valuation certificate was being conducted and that, the Government Trophy found in his possession was not tendered as exhibit. For the aforesaid reasons, he argued that the case was fabricated. It was contended further by the appellant that, he did cross examine the prosecution witnesses but his questions were not allowed by the trial court and that, his objection on admission of the exhibits was not considered. That said, the appellant urged the Court to allow the appeal and set him free.

Responding, Mr. Byamungu, indicated that he was not supporting the appeal on the ground that, the case against the appellant was proved beyond all reasonable doubts. The learned state attorney conceded that, there was an irregularity on admission of the Trophy Valuation Certificate (Exhibit PE2) and the Inventory Form (Exhibit PE3). He argued that, Exhibit PE2 was not read over to the accused person upon being admitted. As to Exhibit PE3, the learned counsel argued that, the appellant was not given the right to state whether he was objecting its admission. Therefore, Mr. Byamungu urged the Court to expunge Exhibits P-2 and P-3 from record. However, the learned

state attorney was of the firm view that, even if the said exhibits are expunged from the record, evidence of PW3 and PW4 was sufficient and covered what was stated in Exhibit PE2 and PE3 respectively. He cited the case of **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017, CAT at Mtwara (unreported) to support of his argument.

As to the first ground on non-tendering of the certificate of seizure, Mr. Byamungu argued that, the law does not require issuance of certificate of seizure when the person is found in the game reserve. The learned state attorney contended what is required is credibility of witness who testify on the arrest of the accused person and how the chain of custody of the exhibit was maintained. His argument was based on the decision of the Court of Appeal in **Kidiria Said Kimaro vs R**, Criminal Appeal No. 301 of 2017, CAT at Dar es Salaam (unreported). He went on to argue that, the prosecution's witnesses deposed to have arrested the appellant in the game reserve, labelled the items found in possession of the appellant before disposing them by order issued by the magistrate

On the second ground of appeal, the learned state attorney argued that the appellant was not denied the right to be heard because he was present during hearing of the prosecution's case and given the right to cross examine the witnesses.

Regarding the third ground of appeal that, the appellant was arrested in the village, Mr. Byamungu argued that, the appellant's evidence to that effect was an afterthought. This argument was based on the fact that, the appellant failed to cross examine PW1 and PW2 who testified to have found him in the game reserve. He referred to the decision of the Court of Appeal in **Issa Hassan Uki** (*supra*), where it was held that, a person who fails to cross-examine a witness on certain matter is deemed to have accepted that fact and estopped from

asking the Court to disbelieve what was stated by the said witness.

As to the fourth ground of appeal, the learned Stated Attorney argued that, although the chain of custody was not recorded, evidence of PW1, PW2, PW3 and PW4 shows that the chain of custody was maintained. The learned State Attorney submitted further that, government trophy cannot change hands easily and hence little chances of tempering with it as held in **Issa Hassan Uki** *(supra)*. Thus, he was of the firm view that, the ground that the chain of custody was not recorded has no merit due to the nature of exhibits found in possession of the appellant.

From the foregoing, Mr. Byamungu requested the Court to dismiss the appeal on the ground that, the case against the appellant was proved beyond all reasonable doubts.

The appellant rejoined by stating that, the government trophy found in his possession was not proved and tendered in the Court.

Having considered the evidence on record, petition of appeal and submission by both parties, the main issue is whether the present appeal has merit.

The first and fifth grounds of appeal relates to non- tendering of the certificate of seizure to prove that the appellant was found in possession of panga and government trophy. Pursuant to section 106(1) of the Wildlife Conservation Act, an authorized officer has mandate to enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage in his possession and seize the government trophy or weapon. An independent witness is required when the search is to be conducted in the dwelling house.

In the present case, evidence of PW1 and PW2 shows that the appellant was found in possession of one panga and government trophy in the game reserve. Further, there was no search warrant which had been issued to search the appellant and the second accused person. Therefore, certificate of seizure was not necessary in the circumstance of this case. However, it is on record that, PW1 and PW2 reported the matter to the nearest police. The fact that the appellant was found in in possession of one panga and government trophy in the game reserve was proved by PW1 and PW2. The trial Court found PW1 and PW2 to be credible witnesses. Therefore, the first ground of appeal has no merit.

The second ground of appeal is to the effect that, the appellant was convicted and sentenced unheard. Right to be heard is a constutional right enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania. Any person who is likely to be affected by the decision of any judicial body is entitled to be heard. In criminal trials, the accused is not only entitled to be present when the witnesses adduce evidence against him but also entitled to put questions to the witnesses. Further, he is entitled to give evidence and call witnesses of his own choice.

It is on record that, the appellant was present at the hearing of the case against him. He was accorded with the right to ask cross-examine every witnessed called by the prosecution. Further, the appellant was addressed in terms of section 231 of the CPA and he replied that he would give his evidence on oath and call no witness. The record shows further that, the appellant adduced his evidence on oath. Therefore, I find that the ground that he was convicted and sentenced unheard is devoid of merit.

The third ground is premised on the defence that, the appellant was arrested in the village and not in the game reserve. The arresting officers were PW1 and

PW2. In their evidence, they deposed that the appellant was found at Mto Rwamchanga area in Ikorogo Game Reserve while in possession of panga and carcass of wildebeest without permit from the relevant authority. The appellant did not cross examine PW1 and PW2 on the fact that he was arrested in the village and taken in the game reserve. In the case of **Issa Hassan Uki** (*supra*) the Court of Appeal held as follows on failure to cross examine the witness on certain fact:

> *"The appellant did not challenge the testimony of the witness. This connotes that he was comfortable with the contents of the testimony of the witness. Had he any query or doubt as to the veracity of PW1's testimony he would not have failed to cross-examine on the same. It is settled in this jurisdiction that failure to cross examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony.*

The Court of Appeal went on to cite its decision in **Cyprian A. Kibogoyo vs Republic**, Criminal Appeal No. 88 of 1992 and **Paul Yusuf Nchia vs National Executive Secretary, Chama cha Mapinduzi and Another,** Civil Appeal No. 85 of 2005 (both unreported) where it held that:

> *"As a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said."*

As shown herein, the appellant did not cross examine PW1 and PW2 whose testimony was to the effect that, he was found at in the bush at Mto Rwamchanga area within Ikorongo Game Reserve. Therefore, it is taken that he admitted what was testified by PW1 and PW2. He is then estopped from asking this Court to disbelieve them at this stage of appeal. Thus, the third ground of appeal is devoid of merit as well. The prosecution proved the first count through evidence of PW1 and PW2.

The next issue for consideration is the fourth ground that, the prosecution did not tender exhibits to prove chain of custody of exhibit found in his possession. As rightly argued by Mr. Byamungu, the prosecution's witnesses gave evidence to show how the items found in possession of the appellant were maintained and kept. It is also true that, there is no document tendered to show how the items found in possession of the accused was seized, kept and changed hands. However, it is not necessary to prove chain of custody in circumstances where an item cannot change hand easily and therefore not easy to temper with. This position was stated in **Ali Hassan Uki** (*supra)* when the Court of Appeal held:

> *"In case relating to custody of chain of custody, it is important to distinguish items which change hands easily... The elephant tusks in the case hand were such that they could not change hand easily and therefore could not be easily tempered with. Neither was there a danger to have them tempered with. They were therefore appositely received in evidence."*

Guided by the above decision, I find that the carcass of wildebeest in the case at hand is not an item which could change hand easily due to its nature. Therefore, although documentary evidence on how the chain of custody was not tendered, evidence to such effect was given by the prosecution's witnesses. That said, I hold that the fourth ground has no merit.

The last issue is whether the prosecution proved its case. I have shown herein that, PW1 and PW2 proved that the appellant was found in the game reserve and that, their evidence was not challenged by the appellant.

As to the second and second counts, the prosecution' case was to the effect the applicant was found in possession of panga and government trophy to wit, one carcass of wildebeest. The prosecution tendered three exhibits to prove these offences. These are panga (Exhibit PE1), Trophy Valuation Certificate

(Exhibit PE2) and Disposal Form (Exhibit PE2). However, there were irregularities in tendering and admission of the prosecution's exhibits.

Exhibit PE1 (panga) was tendered by the public prosecutor and not PW1. It is my considered opinion that this was irregular. An exhibit has to be tendered by the witness and not the prosecutor. However, this irregularity did occasion failure of justice as the appellant was given the right to object its admission and to cross examine the witness who gave evidence on the same. Further, even if Exhibit PE1 is expunged from the record, there is evidence of PW1 and PW2 to the effect that the appellant was found with panga in the game reserve and that he had no permit to have to panga in the game reserve. This evidence was not contradicted or challenged by the appellant during cross examination.

However, that evidence was not sufficient to prove the second count. This is because neither PW1 nor PW2 proved that, the appellant failed to satisfy them that, the said panga was intended to be used for the purposes other than hunting, killing, wounding or capturing of wild animals as alleged in the particulars of offence and required under section 20(1)(b) of the WCA cited in the statement of offence. That was an important element to be proved by the prosecution. Since the same was not proved, I find that the second count was not proved beyond all reasonable doubts.

I now move to Exhibit PE2 (trophy valuation certificate), this was tendered by PW3. However, the proceedings do not show that, it was read out in court after being admitted. It is settled law that once a document is cleared for admission and admitted in evidence, it must be read out in court. (See **Sunni Awenda vs Republic**, Criminal Appeal No. 393 of 2013, CAT (unreported) which was cited with approval in **Ali Hassan Uki** (*supra*)). Therefore, Exhibit PE2 is hereby expunged from the record because the omission to read it out occasioned failure of justice to the appellant who had no opportunity to know

the contents thereto.

However, I agree with Mr. Byamungu that, even if Exhibit PE2 is expunged, there is evidence of PW3 who deposed to have been summoned to Mugumu Police Station where he identified and valued one carcass of wildebeest as Government Trophy whose value was Tshs 1, 417,000. Thus, the essence of PW3's evidence was to prove identification and valuation of the trophy alleged to have been found in possession of the appellant. Value of trophy is important ingredient of the offence of unlawful possession of Government trophy under section 86 of the WCA. It has an effect in imposing a sentence against the accused person. Pursuant to section 86(4) of the WCA, the value of trophy has to be stated or carried out by the Director of Wildlife or wildlife officer from the rank of wildlife officer. The said section reads:

> *"In any proceedings for an offence under this section, certificate signed by the Director or wildlife officer from the rank of wildlife officer stating the value of trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified thereon."*

As stated herein, identification and valuation of Government Trophy in the case at hand was conducted by PW3. He introduced himself as Warden Officer and not wildlife officer. I understand that under section 3 of the WCA wildlife warden is included in the definition of the term "wildlife officer" which reads as follows:

> *"Wildlife officer" means a wildlife officer, wildlife warden and wildlife ranger engaged for purposes of enforcing this Act."*

However, not every wildlife officer named under section 3 of the WCA is authorized to make valuation of Government Trophy for purposes of section 86 of the WCA. In my opinion, the wildlife warden and wildlife ranger are

excluded when it comes to valuation of Government Trophy for purposes of section 86 of the WCA. The Parliament intended the said valuation to conducted by the Director of Wildlife or wildlife officer from the rank not wildlife officer and not otherwise.

Therefore, I am of the considered views that, evidence on the valuation of trophy conducted by PW3 cannot not be admitted because he had no such authority under section 86(4) of the WCA. For that reasons, the value of trophy alleged to have been found in possession of the appellant was not proved on the required standard for the third count to stand.

The last exhibit tendered by the prosecution is the Inventory Form (Exhibit PE3). The proceedings do not show that the appellant was asked as to whether he was objecting admission of the Inventory Form. It is trite law that before any exhibit is admitted in evidence the adverse party must be heard on whether he/she has any objection. Therefore, Exhibit PE3 was not cleared accordingly and the said irregularity occasioned failure of justice. For that reason, Exhibit PE3 is expunged from the record.

Again, Exhibit PE3 had the effect of showing that one carcass of wildebeest found in possession of the appellant was disposed of by an order issued by the magistrate. Evidence to such effect was adduced by PW4 as follows:

> *"I remember on 02/10/2018 at about morning hours me and DC Christopher were assisgned file Ref. No. MUG/IR/3367/2019, the offence of unlawful possession of government trophies. We read the same it had two accused person one Chacha Marwa and Ntera Cahar, the exhibits were one carcass of wildebeest, one weapon being panga. We took the statements of the accused person. My fellow DC Christopher called one Wilbroad Vicent to identify and value the government trophy. I prepared an inventory and presented before the magistrate for a disposal order...It was ordered in the order that the carcass of*

the wildlife be disposed as the same cannot be stored for a long time...."

The above evidence implies that, the government trophy alleged to have been found in possession of appellant was not tendered in evidence. The provisions of section 101 of the Wildlife Conservation Act, 2009 as amended empowers the trial Court, on its own motion or upon application made by the prosecution, prior to the commencement of the proceedings, to order that any animal or trophy which is subject to speedy decay and intended to be used evidence, be disposed of at by the Director. Such order is a sufficient prove of the matter in dispute before the court during trial.

The essence of an order sought under section 101 of the WCA is to have an evidence on the animal or trophy which will be used against the accused person. Therefore, the accused person is entitled to be present at the hearing and determination of the application for disposal of the animal or Government Trophy.

In his evidence, PW4 did not prove that the appellant was present at the disposal of carcass of wildebeest. That is why the appellant argues that, the Government trophy found in his possession was not tendered in evidence. If he was not present, the proceedings on disposal of the animal or government trophy were vitiated and cannot be cannot be admitted in evidence. Therefore, I find that the third count on offence of unlawful possession of government trophy was not proved because the alleged trophy was not tendered in evidence or disposed of in accordance with the law and due to the fact that it was not valued by the Director or wildlife officer as required by the law.

In view of the above, I dismiss the appeal in respect of the first count; and allow the appeal, quash and set aside conviction and sentence in respect of the second and third counts. For avoidance of doubt, I order the appellant to serve

one year imprisonment in jail as imposed by the trial Court, in respect of the first count and that, the said sentence commenced from the date of sentence (31/12/2019). Order accordingly. .

DATED at MUSOMA this 8th day of July, 2020.

E. S. Kisanya
JUDGE
8/7/2020