IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 89 OF 2020

CHACHA S/O KISABO @ WANKYO_____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 12 of 2019 dated 30.04.2020)

JUDGEMENT

25th August & 25th September 2020

GALEBA, J.

In this appeal, **MR. CHACHA S/O KISABO @ WANKYO,** was charged for unlawful entry into a national park with two machetes and unlawful possession of two pieces of dried meat of a zebra, a government trophy. According to the charge, the offences were committed on 05.02.2019 at Korongo la Machochwe area in the Serengeti national park within Serengeti district in Mara region. That, according to the prosecution, violated wildlife conservation laws.

The appellant denied the charge but the district court convicted him on all counts and sentenced him to 1 (one) year imprisonment in respect of each of the 1st and 2nd counts and twenty (20) years imprisonment in respect of the 3rd count.

The appellant was aggrieved by the above orders and filed this appeal predicating it on four (4) grounds of appeal complaining

that, ***first*** the trial court erred legally when it admitted wrong evidence from unwilling witnesses who were PW1, PW2 and PW3, ***secondly*** that the trial court denied the appellant an opportunity to call his key witnesses, ***thirdly*** that the appellant was wrongly convicted and sentenced without consent and a certificate vesting jurisdiction unto and ***lastly*** the prosecution failed to prove the case beyond reasonable doubt.

When this appeal came up for hearing on 25.08.2020 **MR. NIMROD BYAMUNGU** learned state attorney was appearing for the respondent and the appellant fended for himself. The latter adopted his grounds as his submissions in support of the appeal and agreed that Mr. Byamungu starts, so that the appellant could be permitted to rejoin if he found need to.

Mr. Byamungu generally objected to the appeal starting with grounds 1 and 4 which he argued together. He submitted that the case was proved beyond reasonable doubt by PW1, PW2 and PW3, who were competent under **section 127(1) of the Tanzania Evidence Act [Cap 6 RE 2019**]. He cited the case of **Goodluck Kyando versus the Republic [2006] TLR 363,** impressing on me the fact that witnesses must be believed unless there are reasons not to. He however was bold and honest to admit irregularities that during tendering of **EXHIBIT PE1** (the certificate of seizure), **EXHIBIT PE2** (the two machetes) and **EXHIBIT PE3** (the trophy valuation certificate), the exhibits were not cleared with the appellant. He submitted that because of that irregularity affecting those exhibits the same must be expunged from the record. Mr. Byamungu however was quick to add that although he prayed to expunge

the exhibits but the evidence that remained was strong enough to sustain a conviction, he cited the case of **Anania Clavery Betela versus the Republic** Criminal Appeal No 355 of 2017 CAT, insisting that where physical exhibits have been expunged, oral evidence may still be sufficient to support a conviction. Before getting to the issue first, as submitted by Mr. Byamungu, this court hereby expunges from the record the following documents; **EXHIBIT PE1** (the certificate of seizure), **EXHIBIT PE2** (the two machetes), and **EXHIBIT PE3** (the trophy valuation certificate). The issue in resolving the 1st and the 4th grounds is whether without the expunged exhibits, a conviction of the appellant on all the 3 counts may still be deemed valid.

As for the **EXHIBIT PE1** (the certificate of seizure), I agree with Mr. Byamungu that even in the absence of **EXHIBIT PE1,** still the evidence **PW1 DEOGRATIOUS RICHARD** and **PW2 CLEMENT KIGAILA** is believable evidence even without the exhibit, because proof of entry in a protected area, the search warrant is not a mandatory document to be produced. That means a conviction in respect of the 1st count cannot be faulted.

Next was **EXHIBIT PE2,** the two machetes. The weapons had to be tendered but they were wrongly tendered. It is like the machetes were not brought to court. The point to consider is, suppose **PW1 DEOGRATIOUS RICHARD** and **PW2 CLEMENT KIGAILA** went to the district court and testified that they arrested the appellant with the machetes without tendering them, would have that court taken them seriously? I consider this question because, I do not want to

be influenced by the shadows of the expunged machetes; because the position is as if the weapons were not tendered at all. Legally, physical exhibits must be tendered see **Emmanuel Saguda Sulukuka and Sahili Wambura Versus the Republic** Criminal Appeal No. 422B of 2013 at pages 9 to 10. This court is satisfied therefore that if the machetes would not be tendered at the trial the prosecution would not have proved the 2nd count of unlawful possession of weapons in the national park. This court accordingly holds that the machetes having been expunged, there does not remain any evidence to show that the appellant can be held liable in respect of the 2nd count.

The other document which has been expunged at the instance of the respondent but also of law, is a trophy valuation certificate **EXHIBIT PE3.** Mr. Byamungu submitted that, the remaining oral evidence from **PW3, MR. WILBROD VICENT** was sufficient even without **EXHIBIT PE3**. I agree with Mr. Byamungu that it is not automatic that once an exhibit is expunged, then the charge collapses, because the remaining evidence may be sufficient to sustain a conviction. This is so because reading the evidence of PW3, one notes easily that his evidence shows the details of the trophies even before he prayed to tender the expunged certificate. So it was like the certificate was an addition to what the witness saw. I am therefore satisfied that even without **EXIBIT PE3**, the evidence of PW3 was sufficient to find the appellant guilty in respect of the 3rd court see **Anania Clavery Betela versus the Republic** at page 13.

To summarize the findings in respect of the 2nd and 4th grounds, this court is of the position that the 1st and 3rd counts were proved beyond reasonable doubt but the 2nd was not.

The complaint in the 2nd ground was that the appellant was denied an opportunity to call key witnesses. In reaction to this ground Mr. Byamungu submitted that the appellant was given an opportunity to call his witnesses at page 40 of the typed proceedings and he stated that he would call two witnesses but when time came to call them, he closed his case at page 43 of the typed proceedings. By way of rejoinder, the appellant submitted that it was the duty of the court to call his witnesses but it did not call them.

In this ground this court is in agreement with Mr. Byamungu because at page 40 of the typed proceedings when the appellant was addressed in terms of section 231 of the **Criminal Procedure Act [Cap 20 RE 2019] (the CPA),** he responded;

"I will give evidence on oath and call two witnesses."

This means that the appellant was given a right to call witnesses of his choice. At page 43, after the appellant gave his evidence, he did not call any witness. As hinted above, during the hearing of this appeal the appellant submitted that it was for the court to call his witnesses but it did not. Before concluding I must hold that it is not the duty of the court to call parties' witnesses, it is parties' duties to call their respective witnesses, although a court may be asked to issue a summons to a witness earmarked by a party.

Based on this discussion, the 2nd ground of appeal is dismissed for want of merit.

The last complaint is constituent of the 3rd ground. In this one the appellant's complaint was that the trial court tried the matter without jurisdiction because there was not in place either consent of the Director of Public Prosecutions or his certificate vesting jurisdiction in the trial court. In response to this complaint Mr. Byamungu submitted that at pages 22 and 23 of the typed proceedings the consent and the certificate were filed in court before hearing commenced. I have perused the record and I have noted that indeed that is the position; the consent and the certificate instruments were both filed in court on 07.01.2020. I have further confirmed presence of the two instruments in the trial case file, which means, the 3rd ground of appeal has no basis and the same is dismissed.

Based on the above discussion and findings, this court orders that;

1. The conviction of **MR. CHACHA S/O KISABO @ WANKYO** in respect of the 2nd count of unlawful possession of weapons in the nation park is quashed and its corresponding sentence of one (1) year imprisonment is set aside.
2. The sentence of one (1) year imprisonment imposed upon **MR. CHACHA S/O KISABO @ WANKYO** in respect of the 1st count of unlawful entry in the national park is upheld.
3. The sentence of twenty (20) years imprisonment imposed upon **MR. CHACHA S/O KISABO @ WANKYO** in respect of

the 3rd count of unlawful possession of government trophy is hereby confirmed.

4. This appeal is partly allowed and partly dismissed to the above extent.

DATED at MUSOMA this 25th September 2020

Z. N. Galeba
JUDGE
25.09.2020

Court; THIS JUDGMENT has been delivered before Z. N. Galeba **JUDGE**, today the 25th September 2020 in the absence of parties but with leave not to enter appearance following a directive to maintain social distance. Mr. Jovian Katundu, RMA is present.

The appellant has a right to appeal to the Court of Appeal of Tanzania.

Z. N. Galeba
JUDGE
25.09.2020