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

AT MUSOMA

CRIMINAL APPEAL NO. 82 OF 2020
(Arising from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 54 of 2018)

MICHAEL S/O MACHABA @ MOHEGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th July and 9th September, 2020

KISANYA, J.:

The appellant, Michael S/O MACHABA @ MOHEGA was arraigned before the District Court of Serengeti at Mugumu for offences of unlawful Entry into the National Park, contrary to section 15 (1) and (2) of the Wildlife Conservation Act, 2009 [Cap 282, R.E. 2002] and 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 by the prosecution and adduced by Edward Hamis (PW1) and Kulwa Richard (PW2) that, on 7th July, 2018, the appellant was found at Sanganga area within Ikorongo Game Reserve and

that, he had no permit previous sought and granted to him by the Director of Wildlife. Upon being searched, the appellant was found in unlawful possession of forty (40) pieces of dried meat of wildebeest. The said meat was identified as government trophy and valued by Wilboard Vicent (PW3) on 09/07/2018. According to the trophy valuation certificate (Exhibit PE1), the government trophies found in unlawful possession of the appellant had value of Tshs. 1,417,000. Since the same could not last for so long, it was disposed of by order of the Court as per evidence of F.5834 DC James (PW4). The Inventory Form of Claimed Property was tendered and admitted as Exhibit PE2.

In his defence, the appellant denied to have committed the offence. He deposed that he was arrested in his farm at Robanda Village when he was quenching the crops against damaging animals. The appellant went on to adduce that, he was taken to Kongoni Camp, Mugumu Police Station and arraigned before the Court for the above named offences.

After a full trial, the appellant was convicted of both offences as charged. He was then sentenced to custodial sentence of three years and twenty years for the first and second counts respectively.

He is aggrieved by the judgment, conviction and sentence and hence the present appeal. The grounds advanced in the petition of appeal are that: **One**, the evidence of PW1 and PW2 was not corroborated by an independent witness; **Two**, government trophy was not valued

by an expert from the Government Chemist and that the same was identified by colour only: **Three**, the case commenced without the consent of Director of Public Prosecutions (DPP); **Four**, the trial court failed to consider the defence case; and **Five**, the prosecution failed to prove its case beyond all reasonable doubts.

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 Court invited the appellant to submit in support of the appeal. However, he had nothing to say. He just asked the Court to consider the grounds of appeal as stated in the petition of appeal and discharge him.

In reply, Mr. Byamungu submitted that, the first count was proved beyond reasonable doubts. He substantiated that, the said offence was proved by PW1 and PW2 who found the appellant in the Game reserve. He was of the firm view that, their evidence did not need corroboration because it was a direct evidence. The learned State Attorney argued further that, the law does not bar people from the same office to give evidence and that, what matters is their credibility.

Concerning the second ground of appeal, Mr. Byamungu argued that PW3 was a competent person to value and identify the trophy under section 114 of the Wildlife Conservation Act (supra). As to the third ground of appeal, the learned State Attorney argued that, the

consent of the DPP was issued and duly filed on 17/08/2018.

Replying to the third ground, the learned State Attorney stated that the appellant's defence was considered by the trial court. He was of the view that, the defence did not raise doubt to the prosecution evidence which was watertight. Referring to the case of **Atanaa Ngomai vs R, Criminal Appeal** No. 57 of 2018 CAT at DSM, Mr. Byamungu went on to submit that, the appellant's defence was an afterthought because he failed to cross examine PW1 and PW2 who adduced evidence which incriminated him. However, Mr. Byamungu argued that, this being a first appeal, the Court may examine the defence case and come with its findings and conclusion.

As to the last ground on whether the prosecution case was proved beyond reasonable doubt, the learned State Attorney argued that the first count was proved by evidence of PW1 and PW2. He was of the view that the second ground was not proved as the government trophy was not tendered in evidence. This was after noting that, the prosecution tendered an inventory to prove that the trophy found in possession was disposed of but no evidence to show that the appellant was present at the time of disposing of the said government trophies. That said, Mr. Byamungu asked the Court to dismiss the appeal on the first count and allow the appeal on the second count.

The appellant rejoined by stating that the Government trophies subject to this appeal was no tendered in court and that he did not

commit any offence.

Having considered the evidence on record, the petition of appeal and submissions by the learned State Attorney, I am of the opinion that, this appeal can be disposed of by considering two issues. These are, whether the consent of the DPP was duly filed; and whether the prosecution case was proved beyond all reasonable doubts. In the course of addressing the second issues, I will dwell on other grounds stated in the petition of appeal.

The first issue on whether the consent of the DPP was duly filed is premised on the fact that the appellant was arraigned for an economic offence of unlawful found in possession of government trophy. Pursuant to section 26(1) of the EOCCA, a trial on economic offence cannot commence without prior consent of the DPP or State Attorney In-Charge. It is settled that, a trial which commence without consent of the DPP is a nullity.

I have carefully examined the record at hand. It is on record that, the consent of the State Attorney In-Charge together dated 23rd June, 2019 and amended charge sheet were filed in the trial court on 24th June, 2019. The substituted charge was read over to the appellant and preliminary hearing conducted on 24th June, 2019. Also the hearing commenced on 8th July, 2019. With that findings, the first issue is answered in affirmative. The trial commenced with prior consent of the DPP.

I now move to the second issue on whether the prosecution case

proved its case beyond all reasonable doubts. I have shown herein that the appellant was charged with two counts. I will start by considering whether the second count on unlawful possession of government trophy was proved. Both the appellant and the learned State Attorney were of the view that this offence was not proved. In order to prove this offence, the prosecution is among others, required to prove that the accused person was found in unlawful possession Government trophies.

It is not disputed that the government trophy to wit, 40 pieces of wildebeest alleged to have been found in unlawful possession of the appellant was not tendered in evidence. PW4 tendered the Inventory Form which was admitted as Exhibit PE2. He testified that, the said meat of wildebeest was disposed of by the order of the court as shown in the said Inventory Form. As rightly argued by the learned State Attorney, PW4 did not testify that the appellant was present at the time of disposing of the government trophy. The Court of Appeal has insisted on the requirement of presence of the accused person at the time of disposing of exhibits which cannot be kept due to speedy decay. See the case of **Mohamed Juma @ Mpakama vs R**, Criminal Appeal No. 385 of 2017, CAT (unreported) where it was held that:

> *"While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was*

not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent.

Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."

Applying the above position in the present case, it is clear that, the offence of unlawful possession of government trophy was not proved on the required standard. Exhibit PE2 cannot be relied upon to prove the government trophies found in possession of the appellant because nothing suggesting that the appellant was present at the time of disposing the said trophies.

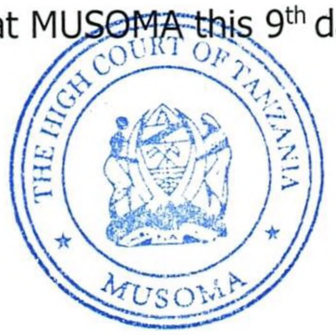
Returning to the first count on unlawfully entry into the Game Reserve, evidence to prove this offence was deposed by PW1 and PW2. Both witnesses are Game Scout of Ikorongo/Grument Game Reserve. Their evidence was to the effect that the appellant was found patrol at Sanganga area within Ikorogo Game Reserve and that he had no permit prior issued to him by the Director of Wildlife. Their evidence was not challenged by the accused person during cross examination. Further, evidence of PW1 and PW2 was direct. It needed no corroboration as argued by the appellant. Although both witnesses comes from the same office they were not barred from

giving evidence on the same matter. What matters is their credibility under section 127 of the Law of Evidence Act. Cap. 6. R.E.2002. The trial court found both witnesses to be credible witnesses. It is trite law that, credibility of witnesses is within the sphere of the trial court. The same cannot be challenged at appellate level. Hence, basing on evidence of PW1 and PW2, I am in agreement with Mr. Byamungu that, the first count was proved beyond reasonable doubts.

The appellant argued that his evidence was not considered by the trial court. His evidence was to the effect that he was arrested at his farm located at Robanda village and taken in the Game Reserve. The trial considered the said evidence as reflected at page 7 and 8 of the typed judement. After considering the appellant defence, the trial court was satisfied that the said defence did not raise any doubt to the prosecution case. Therefore, this ground has not merit.

For the foresaid reasons, the appeal is partly allowed. The conviction in respect of the second count of unlawful possession of Government Trophy is hereby quashed and its sentence set aside. On the other hand, the appeal against conviction and sentence on the first count of unlawful entry into the Game Reserve is dismissed. Thus, the appellant shall continue to serve three (3) imprisonment for the first count imposed by the trial court. Order accordingly.

Dated at MUSOMA this 9th day of September, 2020.



E. S. Kisanya
JUDGE

COURT: Judgement delivered this 9th day of September, 2020 in the presence of the appellant and Mr. Yesse Temba, learned State Attorney for the Republic/ respondent. B/C, M. Kimweri –RMA present.

E. S. Kisanya
JUDGE
09/09/2020

COURT: Right of further appeal is explained to the parties.

E. S. Kisanya
JUDGE
09/09/2020