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

**AT MUSOMA**

**CRIMINAL APPEAL NO. 52 OF 2020**
*(Appeal from the judgment of the District Court of Serengeti at Mugumu (I.E. Ngaile-RM) dated the 28th day of February, 2020 in Economic Case No. 143 of 2018)*

**MWANZI S/O KITATI @ MARWA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*12th August and 7th October, 2020*

**KISANYA, J.:**

In the District Court of Serengeti at Mugumu the appellant was charged with three counts namely, unlawful entry into the Game Reserve contrary to section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009, unlawful Possession of Weapons in the Game Reserve contrary to section 17(1)(2) of the Wildlife Conservation Act No. 5 of 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 by Act No. 3 of 2016 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016; and Unlawful Possession of

Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (amended by the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016) 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 appellant denied the charge. Subsequently, the prosecution marshaled four witnesses namely: Rugatiru Gambachara Mesite (PW1), Adam Jimmy Kitogolo (PW2), Wilbroad Vicent (PW3) and G. 736 DC Egawaga (PW4). The prosecution also tendered one panga and one knife; the trophy valuation certificate and the inventory of claimed property which were admitted Exhibits PE1, PE2 and PE3 respectively.

Pursuant to the evidence adduced in the trial court, the appellant was found and arrested at Mto Rubana area within Ikorongo/ Grumet Game Reserve on 9/12/2018. He was arrest by PW1, PW2 and Sospeter Magori, game scouts from Grument Game Reserve who were on patrol against the poachers. Upon searching his luggage, the appellant was found in possession of one fresh head, two fresh ribs, one foreleg of wildebeest together with one panga and one knife. The appellant failed

to produce the relevant permits to enter into the Game Reserve, possess weapons in the Game Reserve and possess government trophies. He was then taken to Mugumu Police Station.

The items meat found in possession of the appellant were identified by PW3 as one wildebeest and valued at Tshs. 1, 430,000. Since the said government trophy was subject to speed decay, an Inventory of Claimed Property was prepared. The government trophy was then disposed of by order of the court in the presence of the appellant.

The appellant fended himself. As earlier stated, he denied to have committed the offence. He testified that he got arrested when he was on his way to the farm located Nyabisagi Village within Serengeti to look after his farm which had been destroyed by some cattle.

At the end, the trial court convicted the appellant on the strength of the evidence adduced by the prosecution. He was then sentenced to custodial sentence of one (1), two (2) and twenty (20) years for the first, second and third counts.

Aggrieved, the appellant has preferred the present appeal on the five grounds of appeal as follows:

1. That the appellant was denied the right to be heard.
2. That independent witnesses were involved in arresting the appellant as required by the law.
3. The trail court admitted wrong exhibits by written statement or documents contrary the law.
4. That the prosecution case was not proved beyond reasonable doubts.
5. That the appellant was arrested at his house and taken to the campy where he was told to have committed the offence.

To prosecute the appeal, via a virtual link to Mugumu Prison where the appellant was serving the custodial sentence and the National Prosecution Service, the appellant appeared in person, legally unrepresented while the respondent Republic was duly represented by Mr. Nimrod Byamungu, learned State Attorney.

Having considered the parties' submission and the evidence on record, I am of the firm view that this appeal can be disposed of by addressing the first ground of appeal that, the appellant was denied the right to be heard.

I am quite aware that, right to be heard is a constitutional right embodied under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). As far as criminal justice is concerned, right to be heard include right to know the charge preferred by the prosecution; right to be present at the hearing of the case; right to cross examine the witnesses called by the prosecution; right to defend the case; and right to call witnesses. This is not an exhaustive list of the accused person's right. It is trite law that, a decision which does not take into account the right to be heard is a nullity. See the case of **EX D. 8656 CPL Senga s/o Idd Nyembo and 7 Others vs R**, Criminal Appeal No. 16 of 2018 (unreported). In that case, the Court of Appeal cited with approval its decision in **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) where it was held that: -

> *"The right o f a party to be heard before an adverse action or decision is taken against such a party has 13 been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a beach of the principles of natural justice."*

The appellant faults the trial court for failing to give him the chance to defend the case and call his witnesses. On his part, Mr. Byamungu contended that, the appellant was not denied of any right. He pointed out that the appellant was present throughout the trial, given right to cross examine the prosecution witnessed and addressed in terms of section 231 of the Criminal Procedure Act, Cap. 20, R.E. 2002 (the CPA). Upon being probed on whether the section 231(1) of the CPA was full complied with, Mr. Byamungu conceded that, it was partially complied with. He substantiated that, the record is not clear on what the appellant replied in respect of witnesses to support his defence. Mr. Byamungu moved the Court to quash the conviction and sentence and order the trial court to comply with the law. He supported his argument by citing the case of **Simaiton Patson @Tashi vs R**, Criminal Appeal No. 167 of 2016, CAT at DSM (unreported).

In the light of the above, the question for attention or consideration is the consequence of the omission by the trial court to fully comply with section 231 (1) of the CPA. The essence of section 231(1) of the CPA is to ensure that, the right to give evidence and right to call witness are well exercised by the accused. In that regard, the trial court is charged with the duty of informing the accused person of his right to defend

himself and call witnesses. Further, the court is required to record the appellant's answer in respect of both rights. This position was taken in the case of **Maduhu Sayi @ Nigho vs R**, Criminal Appeal No. 360 OF 2017, CAT at Shinyanga (unreported) when the Court of Appeal held:

> *.... the record does not show the manner in which the appellant elected to give his evidence and whether or not he intended to call witnesses. The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such rights after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel."*

Guided by the above cited cases of the Court of Appeal, it is clear that, the trial court is expected to record the following from the accused person: One, whether he will give evidence on oath or not, on his own behalf; and two, whether he intends to call witnesses or not. The omission by the trial court to record how the accused person is intended to exercise any of the two rights prejudices the accused person thereby vitiating the proceedings.

It is on record that, upon ruling that, the appellant had a case to answer, the trial court addressed the appellant in terms of section 231(1) of the CPA. Thereafter, the learned trial magistrate recorded the

following answer from the appellant:

*"Accused person: - I will defend under oath."*

The above answer, suggests that the appellant was only asked to state on whether he intended to give evidence on oath or not. Nothing was recorded on whether he intended to call witnesses or not. As rightly submitted by Mr. Byamungu, was partial compliance with section 231(1) of the CPA. In **Mabula Julius and Another vs R,** Criminal Appeal No. 562 OF 2016, CAT at Shinyanga (unreported) the Court of Appeal noted the record silent in the manner how the appellants would exercise his right to call witnesses. It went on to hold as follows:

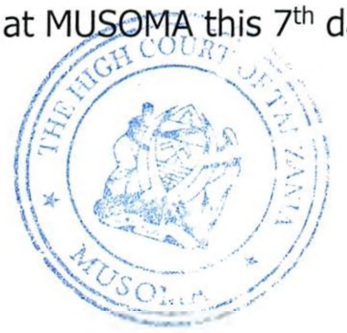
> *"Flowing from the above, failure by the trial court to record whether the appellants would call witnesses in terms of section 231 (1) (b) prejudiced the appellants. The infraction, on the authority of the decisions cited above, is fatal. It vitiated all subsequent proceedings."*

I associate myself to the above decision. In view of what I have endeavored to demonstrate, the appellant was not sufficiently accorded the right to defend himself. The said omission vitiated the proceedings but from the moment he was denied of this right to call witnesses. I therefore find merit in the first ground of appeal.

That said, I am inclined to as hereby invoke the revisional powers vested in this Court under section 373 of the CPA to nullify the proceedings after the closure of the prosecution's case and the judgment. Likewise, the sentence imposed against the appellant is set aside.

Having considered the charges levelled against the appellant, the evidence on record, and the period of 7 months which the appellant has served the sentence of twenty years, I am of the considered view that, it will be in the interest of justice to order retrial. In that regard, the original case file is remitted to the District Court for continuation of trial from the proceedings after the ruling that the appellant had a case to answer. For convenience and with a view of accelerating the matter, it is ordered that the case be heard by the learned trial magistrate who heard the prosecution case. In the event the appellant is convicted of the charged offence, the time he spent to serve the sentence at hand be taken into account.

DATED at MUSOMA this 7th day of October, 2020.




E. S. Kisanya
JUDGE

COURT: Judgement delivered this 7th day of October, 2020 in the presence of the appellant in person and Mr. Nimrod Byamungu, learned State Attorney for the Republic/ respondent. B/C, Mariam present.


E. S. Kisanya
JUDGE
7/10/2020