IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS No. 90 AND 94 OF 2020

MAGEMBE VAELA @ MADATA..... 1st APPELLANT

JUMANNE GALIYELA @GHATI .....2nd APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Originating from Eco. Case No 136/2020 of the District Court of Serengeti at Mugumu)

JUDGMENT

9th & 19th November, 2020

Kahyoza, J.

The district court of Serengeti convicted **Magembe Vaela @ Madata** and **Jumanne Galiyela @Ghati** with three offences; **one**, unlawfully entry into the Game Reserve; **two**, unlawful possession of the weapons in the Game Reserve; and **three**, unlawful possession of Government Trophies. Further, it sentenced them to serve an imprisonment term of one year, two years and twenty years for offence of unlawfully entry into the Game Reserve, unlawful possession of the weapons in the Game Reserve and, unlawful possession of Government Trophies respectively. **Magembe Vaela @ Madata** and **Jumanne Galiyela @Ghati** were aggrieved by conviction and sentence.

Magembe Vaela @ Madata and **Jumanne Galiyela @Ghati** (the appellants) appealed to this Court contending that the trial court did not give them an opportunity to call witnesses, the evidence of Pw1,

Pw2 and Pw3 was fabricated, the exhibits relied upon by the trial court to convict them were irrelevant (wrong exhibits) and finally that the trial court convicted them without an independent witness.

This is the first appellate Court. The Court has a task to re-hear and re-evaluate the evidence together with a duty to consider the appellants' grounds of appeal. (**Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported). The appellants' appeal raises the following issues:-

1. Were the appellants denied an opportunity to call witnesses?
2. Was the evidence of Pw1, Pw2 and Pw3 fabricated?
3. the exhibits relied upon by the trial court to convict them were irrelevant (wrong exhibits?
4. Was it proper for the trial court to convict the appellant without an independent witness?

A brief back ground is that; On the 10th October, 2019, the game scouts **Pw1** Hamis lilanga, **Pw4** Kulwa Richard, Moremi Jackson, Juma Setta and Marobe Brighton while on their routine patrol at Ikorongo/Grumeti Game Reserves within Grumeti Game reserve saw two people carrying luggage walking along Grumeti river. They surrounded and arrest them. They searched and found them in possession of one knife, machete, and the government trophies to wit; one head of zebra, one neck of zebra, two fore limbs and two ribs of zebra. All pieces of meat were fresh. Those people identified themselves as Jumanne Galilaya and Magembe Madata the residents of Matoke

village. The appellants with no permit to enter into or possess weapons in the game reserve.

Magembe Vaela @ Madata and **Jumanne Galiyela @ Ghati** (the appellants) were arraigned for unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009, unlawful possession of weapons in the Game Reserve c/s 17 (1) and (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] and unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) 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] (the **EOCCA**).

The appellants denied the charges, whereupon the prosecution summoned four witnesses and tendered exhibits to support its claim.

Pw1 Hamis Lilanga deposed that after they arrested the appellants they prepared a seizure certificate and the appellants signed it. **Pw1** Hamis Lilanga tendered a seizure certificate as exhibit PE."1". Further, **Pw1** Hamis Lilanga identified and tendered the machete and a knife collectively as exhibit PE."2". **Pw4** Kulwa Richard identified exhibit PE."1"(the seizure certificate) and exhibit PE."2" (machete and a knife).

The appellants whilst at police station, the police investigator, **Pw3** G. 4076 DC Said, summoned **Pw2 Wilbroad Vicent,** a wildlife warden to identify and value the government trophies. **Pw2 Wilbroad Vicent** on the 11/10/2019 identified the government trophies that all

trophies were fresh meat of zebra. He identified the trophy due to the colour of the skin. He deposed that the skin had black and white strips colour. He valued the government trophy at **Tzs. 2,640,000**/= being the value of one zebra. **Pw2 Wilbroad Vicent** prepared a trophy valuation certificate and tendered it as exhibit PE."3". As the record bears testimony, the court read the contents of the exhibit PE."3" to the appellants.

Pw3 G. 4076 DC Said prepared an inventory form and sought the court's order to destroy the trophies as they were perishable. **Pw3** G. 4076 DC Said tendered the inventory form as exhibit PE."4".

The appellants denied to have committed the offence in their defence. Magembe Vaela @ Madata deposed on the 11/10/2019 he went to Bunda with with Jumanne Galiyela. They came back and decided to go to fishing expedition at Rubane river. They game scout arrested them while on their way to Rubane river. Jumanne Galiyela had nothing to add to the defence Magembe Vaela @ Madata gave.

Were the appellants denied an opportunity to call witnesses?

The appellants complained that the trial magistrate did not give them a chance to call their witness. It determined the case basing on the prosecution's evidence only.

Mr. Temba, the State Attorney, who represented the respondent refuted submission. He stated that the court gave the appellants an opportunity to call witnesses and they opted not to call witnesses. He submitted the trial court addressed appellants in terms of section of 231

of the **Criminal Procedure Act**, [Cap 20 R.E. 2019] (the **CPA**). He concluded that the appellants closed their defence after the made their defence. They did not indicate that they wanted to call witnesses.

I scrutinized the trial court's record, which depicts that the trial court addressed appellants in terms of section 231 of the **CPA**. The record reads-

> ***"COURT**: The accused persons well address in terms of section 231 of the CPA and asked to reply thereto'*
>
> *Sgd by I.E.Ngaile –RM*
>
> *01/04/2020*
>
> ***First Accused**: I will give evidence on oath*
>
> ***Second accused**: I will give evidence on oath."*
>
> *Sgd by I.E.Ngaile –RM*
>
> *01/04/2020*

The appellants closed their defence after they testified. I see no bases of their complaint.

I am alive the position of the law expounded by the Court of Appeal in **Abdallah Kondo v R** Criminal Appeal No. 322/2015 (CAT Unreported) that to comply with section 231 of the **CPA**, a trial court must **to record what it informs the accused and his answer to it.** It held-

> *"Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.*

*"**Court**: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence.*

***Accused response**: ... '[record what the accused says)."*

It is obvious that the trial court did not comply with the directive. However, given the appellants' response quoted above, I am of the considered view that the trial court did comply with the requirements of section 231 of the **CPA** as expounded by the Court of Appeal. That notwithstanding, I find that the trial court's failure to record what it informed the appellants in terms of section 231 of the **CPA**, did not occasion miscarriage of justice. The court properly addressed the appellants regarding their rights under section 231 of the **CPA**.

It is trite law that failure to comply with the mandatory provisions o f s. 231 (1) of the CPA vitiates subsequent proceedings. See **Maneno Mussa v. Republic** www.tanzlii.org [2018] TZCA 242 where the Court of Appeal *observed that-*

"non-compliance with s. 231 ***(1) of the CPA which safeguards the rights an accused person to a fair trial, is a fatal omission."***

The trial court in the case at hand, did comply with section 231 of the CPA, given the answer from the appellants. I find that the court did not deny appellants a right to call witnesses but they opted not to call them. I dismiss the first ground of appeal.

Was the evidence of Pw1, Pw2 and Pw3 fabricated?

The appellants second ground of appeal was that the trial court was wrong to rely on the cooked evidence of **Pw1, Pw2 and Pw3** to convict them.

The respondent's state attorney averred that the **Pw1, Pw2** and **Pw3** were credible witnesses. They were key witness. He added that the appellants did not cross-examine them.

I examined the record and found that in deed Pw1 was one of the key witness. **Pw1** Hamis Lilanga and **Pw4** Kulwa Richard deposed that they arrested appellants in the game reserve. **Pw2 Wilbroad Vicent** identified and valued the government trophy. I am unable to find any ground to discredit their evidence. It is settled law that witnesses must be trusted unless, there is a cogent reason to question their credibility. See **Goodluck Kyando v. R.**, [2006] TLR 363 and in **Edison Simon Mwombeki v. R.**, Cr. Appeal. No. 94/2016 CAT unreported) the Court of Appeal stated that-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

I am unable to find any cogent and good reason to disbelieve the prosecution witnesses. Wilbrod Vicent (**Pw2**) identified and valued the trophy. I find no reason to fault Wilbrod Vicent (**Pw2**)'s trophy valuation and identification. There is evidence that the trophy was fresh with its skin, for that reason easy to identify. The trophy valuation certificate was admitted as exh. PE.3 and its contents read to the appellants.

In addition to the above, the appellant did not cross-examine the prosecution witnesses. Failure to cross-examine a witness on material facts implied that the person is accepting that piece of evidence. See **Daniel Ruhere v. Republic** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R** Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013, a few to mention.

Were the exhibits relied upon by the trial court to convict the appellants irrelevant (wrong exhibits)?

The appellants complained that the trial court erred to rely on the irrelevant (wrong exhibits) to convict them.

The State Attorney submitted that all exhibits were relevant. He submitted that the first exhibit was a certificate of seizure (Exh. P.E. 1) and the panga and a knife were admitted collectively as exhibit P.E 2. The appellants were found in possession the weapons in the game reserve. Thus, the exhibits were relevant. A third exhibit was a trophy examination report. A fourth exhibit was an inventory form tendered in lieu of the trophy.

I wish to state at the outset that I see no merit on the third ground of appeal. I concur with the state attorney that the exhibits tendered were relevant and not "wrong" exhibits as submitted by the appellants. **Pw1** Hamis lilanga and **Pw4** Kulwa Richard deposed that they found the appellant in the game reserve in possession of the weapons and the trophy. They bound in law to tender the weapons they found in the possession of the appellants and the trophy. However, since the trophy was perishable it was destroyed and the law allows that.

I examined the record and found that the procedure of tendering the exhibits were complied with. They were tended without objection and the contends of documentary exhibits were read to the appellants. I only found one discrepancy. The appellants did sign the inventory but it is not clear whether they were taken before the magistrate who ordered the trophy to be destroyed. Not only that but also the magistrate did not give them a chance to air their comments before he ordered the trophy to be destroyed.

I noticed that the prosecution tendered the inventory form as exhibit PE."4", which was prepared either under the Police General Orders (PGO) i.e. paragraph 25 of the PGO No. 229 or section 101 (1) of the **Wildlife Conservation Act**, Cap 283 as amended by the **Written Laws Miscellaneous Act**, No.2 of 2017. Each of the above-named laws provides the procedure to be overserved when preparing the inventory**.** Unfortunately, **Pw3** G. 4076 DC Said did not comply with neither of specified procedures.

The procedure of disposing of exhibits subject to speedy decay under the Police General Orders (PGO) was considered by the Court of Appeal in the case of **Mohamend Juma @ Mpakama v. R** Criminal Appeal No. 385/2017 (CAT Unreported). The Court made a reference to Paragraph 25 of the PGO which states that-

> *25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.*

The Court of Appeal held that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits. It stated-

> *"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail)* ***to be present before the magistrate and be heard****." (Emphasis added)*

Pw3 G. 4076 DC Said did not indicate whether the appellants were present at the time the magistrate issued an order to disposal the perishable government trophies. **Pw3** G. 4076 DC Said only indicated that the appellants signed the inventory form. It is possible that the appellants signed the inventory form before **Pw3** G. 4076 DC Said submitted it to the magistrate.

As pointed above an inventory form may be prepared by observing the procedures provided by section 101 (1) of the **Wildlife Conservation Act** (supra). It provides that-

> *101.-(1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-*
>
> *(a) Prior to commencement of the proceedings, order that-*
>
> *(i) any animal of trophy which is subject to speedy decay; or*
>
> *(ii) any weapon, vehicle vessel or other article which is subject of destruction or depreciation,*
>
> *and is intended to be used as evidence, be disposed of by the Director; or*

(b) at any stage of the of proceedings, order that-

(i) any animal of trophy which is subject to speedy decay; or

(ii) any weapon, vehicle vessel or other article

which is subject of destruction or depreciation,

which has been tendered or put in evidence before it, be disposed of by the Director.

(2) The order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial.

(3)....(4)..... not applicable.

The procedure under section 101 (1) of the **Wildlife Conservation Act** requires the prosecutor to apply to the court for the disposal order. It is obvious that **Pw3** G. 4076 DC Said did not invoke that the procedure.

It is clear in the instant case, that **Pw3** G. 4076 DC Said did not prepared the inventory form neither under section 101 (1) of the **Wildlife Conservation Act** (supra) nor under the Police General Orders (PGO) i.e. paragraph 25 of the PGO No. 229. It was improper to admit and rely on such exhibit. I expunge exhibit P.E."4" from the court record.

After expunging the exhibit PE."4" from the record the issue is whether there is evidence to prove that the appellants were found in possession of the government trophy. The answer is simple, that is there is none. The prosecution failed to prove that the appellants were

in possession of the government trophy. It did not tender the trophy or the inventory form.

In the end result, I find that the prosecution did not prove the third count that is unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **EOCCA**.

Was it proper for the trial court to convict the appellant without an independent witness?

The appellants complained that the trial court erred to convict them without and independent witness as all witnesses were park rangers and game warden.

The respondent's state attorney submitted that the fourth ground of appeal was baseless. He averred that given the nature of the offences, it was not possible to find an independent witness as the appellants committed the offences in the game reserve.

He added that the law does not make it compulsory to have an independent witness. He submitted further that **Pw4** Kulwa joined **Pw1** Hamis Lilanga's evidence that the appellants were found in the game reserve and in possession of weapons and government trophy.

There is no doubt that the prosecution's principal witnesses are park rangers. Does that make their evidence not credible? A witness may be labeled an interested witness only when he derived some benefits from the result of litigation, or in seeing an accused person punished. But in the present case, none of the prosecution witnesses to

get any benefit, if the accused persons are punished. The appellants did not explain the benefits the park rangers derived from their conviction. The appellants had an opportunity to cross examine the prosecution witnesses, they opted not to take it.

In the absence of proof that personal gains, benefits, enmity or grudges pushed the prosecution witnesses to fabricate evidence against the appellant, I am of the view that they were independent witnesses. I find support in the decision of the Supreme Court of Indian in **Rameshwar v. State of Rajasthan** 952 AIR 54, 1952 SCR 377, where it was held that-

> *"A witness is normally to be considered independent unless he springs from sources which are likely to be tainted and that usually means* ***unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely****. Ordinarily a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth"(emphasis added)*

I am of the view that the prosecution witnesses were independent there is no need for an independent witness and their evidence is credible. I dismiss the fourth ground of appeal.

I pointed out that this is the first appellate court, thus, it is duty bound to re-evaluate the evidence. I reviewed the evidence on and considered an additional ground of appeal that the trial had no jurisdiction for want of consent and the certificate from the Director of Public Prosecutions (the DPP). The record is clear **the DPP** did issue a certificate conferring jurisdiction and consent to the Serengeti District Court on the 11/11/2019. This ground is baseless.

The evidence on record as whole is establishes beyond reasonable doubt that the appellants were found in the game reserve and in possession of the weapons. I have no reason to find otherwise.

In the upshot, I uphold the conviction of the appellants with offences in the; first count, of unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009; and in the second count, of unlawful possession of weapons in the Game Reserve c/s 17 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **EOCCA**.

I find that the trial court was wrong to convict the appellants with the offence in the third count of unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **EOCCA.** I set aside the conviction and sentence of the appellants for offence in the third count.

The appellants were sentenced to serve a custodial sentence of one (1) year for unlawfully entry into the Game Reserve c/s 15 (1) and

(2) of the **Wildlife Conservation Act**, No. 5 of 2009. I have no reason to interfere.

The trial court further, sentenced the appellants to serve two (2) years for the offence in the second count of unlawful possession of weapons in the Game Reserve c/s 17 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **EOCCA**. Section 60(2) of the **EOCCA** provides the sentence to a person convicted with an economic offence to be not less than 20 years. It states-

> (2*) Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*
>
> *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence.*

The law makes the offence of being found with weapons in the game reserve an economic offence. Section 17 of the **Wildlife Conservation Act**, (supra) provides a sentence less than the sentence provided under the **EOCCA.** It provides-

> *"17.-(1)A person shall not possess a firearm, bow, arrow or any other weapons in a game reserve without the written permission of the Director previously sought and obtained.*
> *(2) A person who contravenes subsection (l) commits an offence and on conviction* ***shall be liable to a fine not***

exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both. *" (emphasis is added)*

Given the provisions of section 60(2) of the **EOCCA, the trial court imposed a wrong sentence.** For that reason, I enhance the sentence from **two years imprisonment to twenty years imprisonment** for the offence in the second count of unlawful possession of weapons in the Game Reserve c/s 17 (1) and (2) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the **EOCCA.** The sentences in the first and second counts shall run concurrently as previously ordered.

The appeal partly succeeds as shown. I order.

J. R. Kahyoza, J.
19/11/2020

Court: Judgment delivered this 19th day of **November, 2020** in the presence of the appellants via video link and in the absence of the state attorney for Republic, duly notified. Right of appeal by lodging a notice of appeal within 30 days explained. Ms. Tenga B/C present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.
19/11/2020