IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 100 OF 2020

WIRANGA EMMANUEL @ WIRANGA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Originating from Eco. Case No 54/2019 of the District Court of Serengeti at Mugumu)

JUDGMENT

9th November & 7th December, 2020

Kahyoza, J.

The district court of Serengeti convicted **Wiramba Emmanuel** with two offences; **one**, unlawfully entry into the Game Reserve; and **two**, unlawful possession of Government Trophies. Having convicted **Wiramba Emmanuel,** the District Court sentenced him to serve an imprisonment term of six months and to pay a fine of Tzs. 3,300,000/= or to serve seven years custodial sentence for the offence of unlawfully entry into the Game Reserve and unlawful possession of Government Trophies respectively. The District Court's Conviction and sentence aggrieved **Wiramba Emmanuel**.

Wiramba Emmanuel (the appellant) appealed to this Court contending that the trial court did not give him an opportunity to call witnesses, the exhibits relied upon by the trial court to convict him were irrelevant (wrong exhibits), the trial court convicted the appellant

without consent and certificate from the DPP and finally that the trial court convicted him without an independent witness.

It is settled that apart from considering the ground of appeal, the first appellate Court has a task to re-evaluate the evidence an if necessary make its own conclusion. (**Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported). The appellant's appeal raises the following issues:-

1. Did the trial court deny the appellant an opportunity to call witnesses?
2. Did the trial court rely on irrelevant (wrong) exhibits to convict the appellant?
3. Did the trial court convict the appellant without consent and certificate from the DPP?
4. Was it proper for the trial court to convict the appellant without an independent witness?

A review of the evidence on record depicts that: On the 8th June, 2019, the game scouts **Pw1** Lugatili Gambachara, **Pw2** Sabasaba, Hamis Samson and Omary Said while on their routine patrol at Mto Maruru area into Ikorongo Grumeti Game Reserve saw a torch's light. They trailed and arrest the appellant. They searched and found the appellant in possession of four bicycles and two carcasses of African hare. The appellant had no permit to enter into or possess trophy. They prepared a certificate of seizure and took the appellant to police station.

Wiramba Emmanuel (the appellant) was arraigned for unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **Wildlife Conservation Act**, [Cap. 283] (the **WLCA**) and unlawful possession of Government Trophies contrary to section 86(1) and (2)(c)(iii) of the **WLCA** 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 appellant denied the charges, whereupon the prosecution summoned four witnesses and tendered exhibits to prove the appellant guilty beyond reasonable doubt.

Pw1 Lugatili Gambachara deposed that after they arrested the appellant, prepared a seizure certificate and the appellant signed it. **Pw1** Lugatili Gambachara identified and tendered a seizure certificate as exhibit PE."1". Further, **Pw1** Lugatili Gambachara identified and tendered four bicycles collectively as exhibit PE."2". **Pw2** Sabasaba identified exhibit PE."1" (the seizure certificate) and exhibit PE."2" (the four bicycles).

The appellant whilst at police station, the police investigator, **Pw4** G. 3785 DC Proches, summoned **Pw3 Wilbroad Vicent,** a wildlife warden to identify and value the government trophies. **Pw3 Wilbroad Vicent** on the 8/6/2019 identified the government trophies that the carcasses were of African hare. He identified the trophy due to the colour of the skin. He deposed that the skin was brown to yellow with black hair. He valued the government trophies at **Tzs. 330,000**/= being the value of two African hare. He deposed that the value of one

African hare was USD **150**. **Pw2 Wilbroad Vicent** prepared a trophy valuation certificate and tendered it as exhibit PE."3". As the record bears testimony, the witness read the contents of the exhibit PE."3" to the appellant.

Pw4 G. 3785 DC Proches prepared an inventory form, took the appellant to the magistrate to seek an order dispose the trophies as they were perishable. **Pw4** G. 3785 DC Proches tendered the inventory form as exhibit PE."4".

The appellant denied on oath to have committed the offence he stood charged. He deposed on the 8/6/2019 left home going to Robanda. He met game scout who arrested him and took him to police station. On being cross- examined he denied to have any quarrels with game scouts.

Did the trial court deny the appellant an opportunity to call witnesses?

The appellant complained that the trial magistrate did not give him an opportunity to call his key witness.

Mr. Temba, the State Attorney, who represented the respondent refuted submission. He stated that the court gave the appellant an opportunity to call witness and he opted not to call witnesses. He submitted the trial court addressed appellant in terms of section of 231 of the **Criminal Procedure Act**, [Cap 20 R.E. 2019] (the **CPA**). He concluded that the appellant closed his defence after he testified. He did not indicate that he had witnesses to call.

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**: Taking into consideration the prosecution evidence this court finds that the prima facie case has been established against the accused person and he is called upon to defence his case. Section 231 of the CPA Cap. 20 R.E 2002 complied with.*
>
> *Sgd by A. C. Mzalifu –RM*
>
> *30/03/2020*
>
> ***Accused**: I will defend under on oath, will not call any witnesses.*
>
> *Sgd by A. C. Mzalifu –RM*
>
> *30/03/2020*

The appellant informed the trial court he had no witnesses to call. As if that is not enough he closed his defence after he testified. I see no bases of his 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 appellant's response quoted above, I am of the determined view that the trial court's failure to record what it informed the appellant in terms of section 231 of the **CPA**, did not occasion miscarriage of justice. The court properly addressed the appellant regarding his 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 appellant. I find that the court did not deny appellant a right to call witnesses but he opted not to call them. He stated in white and black that he had no witness to call. I dismiss the first ground of appeal.

Did the trial court rely on irrelevant (wrong) exhibits to convict the appellant?

The appellant state in his ground of appeal that the trial court erred to rely on the irrelevant (wrong exhibits) to convict him.

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 second exhibit was four bicycles, which were collectively marked as exhibit P.E 2. The prosecution witness found the appellant in

possession two African hare, which could not be preserved until trial. **Pw3** Wilbroad identified and valued the trophy. **Pw3** Wilbroad tendered a third exhibit, a trophy valuation certificate. A fourth exhibit was an inventory form tendered in lieu of the two African hare.

I wish to state at the outset that I see no merit in 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 appellant. **Pw1** Lugatili Gambachara and **Pw2** Sabasaba deposed that they found the appellant in the game reserve in possession of the trophy. He had four bicycles. They had a duty in law to tender four bicycles and the trophy as exhibits. They tendered the four bicycles. However, since the trophy was perishable, the police sought and obtained an order and disposed the trophy. The law, paragraph 25 of the Police General Orders (the PGO) or section 101 (1) of the **Wildlife Conservation Act**, Cap 283 allows that.

I examined the record and found that the procedure of tendering the exhibits were complied with. They were tendered without objection and the contents of documentary exhibits were read to the appellant. I the appellant was present and he signed the inventory form before the magistrate ordered the trophy to be disposed.

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)*

Pw4 G. 3785 DC Proches deposed that the appellant was present at the time the magistrate issued an order to disposal the perishable government trophies. The appellant did not contradict that piece of evidence.

I find no reasons for the appellant's complaint that the trial court relied on wrong exhibits. I dismiss the second ground of appeal.

Did the trial court convict the appellant without consent and certificate from the DPP?

The appellant complained that the trial magistrate erred to convict and sentence him without consent and certificate from the DPP.

The state attorney submitted briefly that the ground of appeal was baseless as the DPP issued a certificate and consent as required by law.

It is settled that in the absence of a valid consent and certificate, the district court has no jurisdiction to try an economic case. This Court and the Court of Appeal have, many times, said that the issue of jurisdiction is fundamental and basic it goes to the very root of the authority of the court to adjudicate upon case. The Court of Appeal in **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 20 Others,** (CAT) Civil Appeal No. 8 of 1995 (unreported) held that:-

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature .. The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

The appellant was charged with an economic offence. I examined the record and found that the DPP tendered and a consent and certificate on the 11/12/2019. Trial commenced on the 13/02/2020. Thus, at the time the trial magistrate heard the evidence, had jurisdiction to try economic offence, as the DPP had already filed a certificate conferring jurisdiction and consent for the district court to try an economic offence.

Finally, I find the third ground of appeal baseless and dismiss it.

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

The appellant complained that the trial court erred to convict him without and independent witness as all witnesses were park rangers and police evidence.

The respondent's state attorney submitted that the fourth ground of appeal was baseless. He submitted that Pw1 and Pw2 were arresting officers, Pw3 was not a policeman or pack ranger. He added that Pw4 prepared an inventory.

There is no doubt that the prosecution's principal witnesses are park rangers or game scouts. 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 was to get any benefit, if the accused person is punished. The appellant did not explain the benefits the park rangers derived from their conviction. The appellant had an opportunity to cross examine the prosecution witnesses, he opted not to take it or asked less important questions.

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 am anchored in my reasoning by 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 examined the record and found that in deed Pw1 was one of the key witness. **Pw1** Lugatili Gambachara and **Pw2** Sabasaba deposed that they arrested appellant in the game reserve. **Pw3 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 (**Pw3**) identified and valued the trophy. I find no reason to fault Wilbrod Vicent (**Pw3**)'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 appellant.

I am of the view that the prosecution witnesses were independent and their evidence is credible. I find no ground to hold otherwise. I dismiss the fourth ground of appeal.

The evidence on record as whole is establishes beyond reasonable doubt that the appellant was found at Mto Maruru area into Ikorongo Grumeti Game Reserve and in possession of four bicycles and two carcasses of African hare. I have no reason to find otherwise.

In the upshot, I uphold the conviction of the appellant with offences in the; first count, of unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **WLCA**; and in the second count, of unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) of the **WLCA**. I do not uphold the conviction for economic offence. The law is clear possession of government trophy in the game reverse is not an economic offence.

Paragraph 14 of the First Schedule to the **EOCCA**, which creates economic offence under the **WLCA** does not include section 86. It stipulates-

> *14. A person commits an offence under this paragraph who commits an offence under section 17, 19, 24, 26, 28, 47, 53, 103, 105, Part X or Part XI of the Wildlife Conservation Act or section 16 of the National Parks Act.*

I find that the trial court was wrong to convict the appellant an economic offence. It however right to convict him with the offence under section 86(1) and (2)(c) (iii) of the **WLCA**.

The appellant was sentenced to serve a custodial sentence of six months for unlawfully entry into the Game Reserve c/s 15 (1) and (2) of the **WLCA**. I have no reason to interfere.

The trial court further, sentenced the appellant to pay a fine of Tzs 3, 300,000/= or serve seven for the offence of unlawful possession of the government trophy in the game reserve contrary to section 86(1) and (2)(c) (iii) of the **WLCA**. Sub section (2)(c) (iii) of the **WLCA** stipulates-

> *86.-(1) N/A*
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *(c) in any other case*
> *(i) Where the value of the trophy which is the subject matter of the charge does not exceed one hundred thousand shillings, to a fine of not less than the amount equal to twice the value of the trophy or to imprisonment for a term of not less than three years but not exceeding ten years;*
>
> *(ii) Where the value of the trophy which is the subject matter of the charge* ***does exceed one hundred thousand shillings but does not exceed one million shillings****, to a fine of not less than the amount* ***equal to thrice the value of the trophy or to imprisonment for a term of not less than ten years*** *but not exceeding twenty years;*
>
> *(iii)* ***where the value of the trophy*** *which is the subject matter of the charge exceeds* ***one million shillings****, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may, in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount.* ***(Emphasis added)***

The value of the trophy in the case at hand is Tzs. 330,000/=. The value does not exceed Tzs. one million. It was therefore wrong to sentence the appellant under paragraph (iii) of sub section (2) section 86 of the **WLCA**. The appellant was required to be sentenced under paragraph (ii) of sub section (2) section 86 of the **WLCA.** I quash the sentence imposed on the appellant in the second count for the offence of unlawful possession of the government trophy, the appellant shall pay a fine of Tzs. 990,000/= or to serve an imprisonment of term of ten years.

The sentence in both courts shall run consecutively from the date the appellant was convicted.

I order accordingly.

J. R. Kahyoza, J.
7/12/2020

Court: Judgment delivered this 7th day of **December, 2020** in the presence of the appellant and Ms. Agma Haule, the State Attorney. 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.
7/12/2020