IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 99 OF 2020

(Originating from Criminal Economic Case No 106 of 2018 of Serengeti District Court at Mugumu)

AMOS NYAKIHA.....APPELLANT

Versus

REPUBLIC ..... RESPONDENTS

JUDGMENT

23rd November & 7th December, 2020

Kahyoza, J.

Amos s/o Nyakiha appeared with Daud Nyamkoro @ Mwita and Marwa Mahanga @ Mwita, before Serengenti District Court at Mugumu charged with three counts. The charges against **Amos s/o Nyakiha** and his co-accused persons, were; **one,** unlawful entry into the National Park; **two,** unlawful possession of the weapons in the National Park, and **three,** unlawful possession of the government trophies. The prosecution withdrew the charges against **Marwa Mahanga@ Mwita**. David Nyamkoro @ Mwita jumped bail and was sentenced in absentia. **Amosi s/o Nyakiha,** the appellant pleaded not guilty to the charges.

After a full trial, the district court found the appellant and David Nyamkoro guilty and convicted them as charged. The trial court imposed an imprisonment of term of two years for the first offence in the first

count, three years for the offence in the second count and twenty years for the offence in the third count in I default of paying a fine of Tzs 10,417,000/=. It ordered the sentences to run concurrently.

Aggrieved, **Amos Nyakiha** appealed to this Court raising four grounds of appeal from which I deduced the following issues-

1. **Was it proper for the trial court to convict and sentence the appellant without the prosecution tendering a certificate of seizure?**
2. **Was the trial court justified to convict the appellant without an independent witness?**
3. **Were the admitted exhibits irrelevant or "wrong" exhibits?**
4. **Did the trial court afford the appellant the right to be heard?**

The trial court convicted the appellant with three counts: **one,** unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the **National Park Act** (CAP. 282 P.E. 2002) as amended by the Act No 11 of 2003,: **two** unlawful possession of weapons in the National Park c/s 24 (l)(b) and (2) of the **National Park Act** (CAP. 282 P.E. 2002) (the **NPA**): and **three** unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (the **WLCA)** (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, P.E 2002] (the **EOCCA**) as amended by act No 3 of 2016.

The prosecution summoned four witnesses and tendered four exhibits to prove the appellant's guilt. The prosecution witnesses, **Clement s/o Kigaila(Pwl)** and **Omary s/o Mohamed(Pw2)**

deposed that on the 03/10/2018 at about 00.00hrs were on routine patrol with other parker rangers namely **Omary Mzee, Jesca Machache** and **Jema Jacob** at Korongo la Nyamburi within Serengeti National Park. They saw a light of fire in the bush. They surrounded the area and arrested the appellant and David Nyamkoro. They found the appellant and his co-accused person in possession of one Panga, two animal trapping wires; one limb and one rib of the Wildebeest. They also found them with no permit to enter the national park and possess government trophy.

They took the appellant to police station with the exhibits. The police opened file and labelled one Panga and two animal trapping wires. Clement s/o Kigaila **(Pw1)** tendered the certificate of seizure and one Panga and two trapping wires as exhibit PE.I. and PE.2 collectively.

F. 6443 DC Pius (Pw4), the investigator, summoned **Wilbrod Vicent (Pw3)** to identify and value the trophy. **Wilbrod Vicent (Pw3)** identified one limb and one rib as being fresh meat of the wildebeest. **Pw3** Wilbrod Vicent identified it due to the skin colour which is slightly grey to darker brown. Wilbrod Vicent **(Pw3)** deposed that the value of the trophy was USD 650 or Tzs. 1,417,000/=, which is the value of one wildebeest. Wilbrod Vicent **(Pw3)** prepared a trophy value certificate which he tendered as exhibit. The court admitted it as Exhibit .PE.3. **(Pw4)** interrogated the appellant and prepared an inventory form and presented the trophy to the magistrate who ordered the trophy to be disposed.

The appellant fended for himself before the trial court and before this Court whereas Mr. Peter Ilole, the state attorney represented the

respondent. The appellant, when called upon to expound his grounds of appeal, he stated that the trial court did not consider his defence and no any exhibits were tendered.

Mr Peter Ilole, the state attorney did not support the appeal. I will refer to his submission while answering the issues deduced from the grounds of appeal.

Was it proper to convict the appellant without certificate of seizure

The appellant complained that the trial court erred to convict him without a certificate of seizure from the DPP.

Mr Peter Ilole, the state attorney submitted that Pw1 tendered exhibits PE.1 which was a certificate of seizure without objection from the appellant.

I went through the records and found; **one,** that the appellant did not object to the tendering of the certificate of seizure which was an exhibits PE1 and; **two, that** the appellant did not cross-examine Pw1 who tendered the certificate of seizure and weapons found in possession of appellant and his co-accused person. The appellant's failure to cross-examine implied that he accepted the evidence. **Fabian Chumila V Republic**, Criminal Appeal 136 of 2014 on held that-

> *"The principle has always been that failure to cross-examine on an important point implies that one is admitting the truthfulness of the testimony on the point"*

I agree with State attorney, Pw1, who arrest the appellant and searched the appellant was a proper person to tender the certificate of seizure and weapons. The law does not require the DPP to tender a

certificate of seizure. Thus, I dismiss the first ground of appeal for want of merits.

Was the trial court justified to convict the appellant without an independent witness?

The appellant alleged in the second ground of appeal that the trial court erred to convict him without an independent witness.

Mr. Peter Ilole, stated the prosecution side summoned four witnesses, two park rangers who arrested the appellant, one witness who identified and valued the trophy and one police officer who was an investigator. He added that the appellant and his co-accused were arrested within the national park area which is a restricted area, it is difficult to find an independence witness within the national park.

I did not find a reason to doubt the credibility of the prosecution witnesses. I believed them. It is settled law 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.* See **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016.

Clement s/o Kigaila **(Pwl),** and Omary s/o Mohamed **(Pw2)** testified consistently that they saw two people in the Kolongo la Nyamburi arrested them whilst in possession of the government trophy and took them to police station.

The appellant contended that he was arrested in the process of giving assistance to one Nyamhanga s/o Chacha who went to his house to hide himself. The park rangers arrested the appellant on the evidence from his neighbours with whom he had bad blood. The neighbour suspected the appellant to have extramarital relationship with his wife.

I find the prosecution witnesses credible the trial court, hence trial court was justified to rely on their evidence to convict the appellant. The witness had no personal gain or interest to see the appellant convicted. The absence of an independent witness did not cause any injustice. I dismiss the second ground of appeal.

Were the admitted exhibits irrelevant or wrong exhibits?

The appellant contended that the trial court erred to rely on "wrong" exhibits to convict an innocent person.

The learned state attorney submitted that all exhibits tendered before the trial court were relevant and the appellant did not object before the witnesses tendered them.

I went through the record and found that on 06/12/2019 the prosecution tendered the certificate of seizure and weapons without any objection from the appellant. Also, **Pw3** Wilbroad Vicent tendered the trophy valuation certificate without any objection. Section 86(4) of **WLCA**, allows a trophy value certificate to be prepared and tendered as exhibit. Thus, the prosecution did legally tender the trophy valuation certificate, exhibit P.3. In addition, since the prosecution read the contents of the trophy valuation certificate, the same was properly tendered and acted upon. Section 86(4) of **WLCA**, stipulates-

> *(4) In any proceedings for an offence under this section, a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein.*

In the end, I find that the trophy valuation certificate, exhibit P.3 was relevant to prove that the appellant and his co-accused person were found in possession the government trophy.

There is yet the inventory form Exhibit P.4, the document tendered *in lieu* of the one limb and rib of the wildebeest which could not be kept to be tendered as exhibit its original state. The record shows that the appellant was present before the magistrate who authorized the trophy to be disposed. Pw4 deposed during cross-examination that the appellant and his-co accused were before the magistrate who ordered the disposal of the trophy.

Did the trial court afford the appellant the right to be heard?

The appellant complained that the trial court did not give him an opportunity to call his witnesses, thus, denying him the right to be heard.

Mr Peter Ilole, learned state attorney submitted that the appellant was addressed in term of section 231 of the **Criminal Procedure Act** [Cap 20 R.E 2019] (the **CPA**). The appellant informed the court that he had witnesses. The case was adjourned two times to give the appellant an opportunity. The appellant failed to call his witnessed. After two adjournments, the appellant defended himself and close his defence.

The appellant had a right to a fair trial. A fair trial in as far as criminal justice is concerned, include the right to know the charge preferred by the prosecution; the right to be present at the hearing of the case; the right to cross examine the witnesses called by the

prosecution; the right to defend the case; and the right to call witnesses and other rights which I have not mentioned herein.

It is trite law that, a decision which does not take into account the right to be heard is a nullity as stated by the court of appeal by the court of appeal cases of **EX D. 8656 CPL Senga s/o Idd Nyembo and 7 Others vs R,** Criminal Appeal No. 16 of 2018 (unreported), where the Court of Appeal quoted 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 of a party to be heard before an adverse action or decision is taken against such a party has 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."*

In addition, the Court of Appeal made an elaborate explanation of the accused person's right in the case of **Amos John V. R**, Criminal Appeal No. 129/2006 (CAT Unreported), which I wish to quote in extension, thus-

> *This section [section 231 of the **CPA**] **not only guarantees to an accused person a right to be heard on his own behalf I but also imposes a duty on the trial court to inform him fully of this right**. But what does this accused's right to give evidence on his own behalf entail? A clear-cut answer is not readily available from the above quoted provisions of the Act. This is usual in the drafting of statutes. For, as Denning, L.J. once aptly observed in SEAFORD COURT ESTATES LTD V. ASHER [1949] 2 KB481, at page 499. **" it must be***

remembered that it is not within human powers to foresee the manifold set of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity"

.....This is because, in our view, this provision enshrining the fundamental right to a hearing, must be given a liberal and purposive construction, if it is to be held to be in conformity with the provisions of Article 13 (6) (a) of the Constitution, which was indeed the intention of the Legislature. In including this section in the Act, the Legislature intended to impose a duty on a trial court to create or provide an environment for a fair hearing or a fair trial (both phrases are often used inter-changeably). ***So, an accused's right to give evidence on his own behalf, simply means that he must be given a fair trial****. This right would be illusory where an accused person ordered to conduct his defence without being* ***afforded reasonable opportunity to present his case fairly and fully to the court****. Such opportunities, include, being supplied with copies of court proceedings when requested..."*

The appellant faults the trial court for failing to give him the chance to call his witnesses. The record shows that the appellant was addressed in term of section 231 of the **CPA**. He replied that he will call two witnesses and the Court adjourned the defence hearing twice to afford the appellant an opportunity nto call his witnesses. The appellant was unable to summon his witnesses. He finally gave his defence and closed his case. In such a situation, the appellant cannot be heard to complain that he was refused an opportunity to call witnesses. Thus, I find his complaint in the fourth ground of appeal without merit and dismiss it.

In the upshot, I uphold the conviction of the appellant and his co-accused person.

I, now consider the sentence imposed. The trial court sentenced the appellant to serve one year in respect of the offence in the first court of unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the **NPA**, and in respect of the offence in the second count of unlawful possession of weapons in the National Park c/s 24 (l)(b) and (2) of the **NPA**. It also sentenced the appellant to pay a fine of TZS 10,417,000/ or serve 20 years imprisonment for the offence in the third count of unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the **WLCA** read together with paragraph 14 of the First Schedule to the **EOCCA**. I have no reason to interfere. The sentences imposed are within the dictates of the law.

Finally, I uphold the conviction and sentence imposed and dismiss the appeal in its entirety.

J. R. Kahyoza
JUDGE
7/12/2020

Court: Judgment delivered in the presence of the appellant and Ms. Agma Haule, the S/A via the video link. B/C Catherine.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza
JUDGE
7/12/2020