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

CONSOLIDATED CRIMINAL APPEALS NO. 86, 87 AND 88 OF 2020
(Arising from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 154 of 2018)

1. **EMMANUEL S/O MICHAEL @ WAMBURA ..... 1ST APPELLANT**
2. **MAKORI S/O MASAHO @ MAKORI ..... 2ND APPELLANT**
3. **PAUL S/O ANTONY @ MWITA ..... 3RD APPELLANT**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th October and 21st December, 2020

KISANYA, J.:

This is a consolidated appeal. It merges Criminal Appeals No. 86, 87 and 88 of 2020 filed before this Court by Emmanuel S/O Michael @ Wambura, Makori S/O Masaho @ Makori and Paul S/O Antony @ Mwita respectively. All appeals originated from the judgment and sentence imposed by the District Court of Serengeti at Mugumu (the trial court) in Economic Case No. 154 of 2018. The appellants were arraigned before the said court for two counts under the National Parks Act (Cap. 282, R.E. 2002) and one count of economic offence.

The first count was unlawful entry into the National Parks contrary to sections 21(1)(a)(2) and 29(1) of the National Parks Act [Cap. 282 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003. The prosecution stated that on 20/12/2018 at Mto wa Rangi area in Serengeti National Park within Serengeti District, the appellants were

found in the National Park without permission of the Director of Wildlife previously sought and granted.

The second count was unlawful possession of weapons in the National Park under section 24(1)(b) and (2) of the National Parks Act [Cap. 282, R.E., 2002]. The particulars of offence thereto were to the effect that, on 20/12/2018 at the said Mto wa Rangi area within Serengeti National Park, the appellants were found in possession of weapons to wit; two knives and two animal trapping wires without permit and failed to satisfy to the authorized officer that the said weapon was intended to be used for the purpose other than hunting, killing, wounding or capturing of wild animals. The last count was unlawful possession of government trophies contrary to section 86(1) and (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments Act No. 4 of 2016) read together with paragraph 14 of the first schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [cap. 200 RE 2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. It was alleged by the prosecution that on 20/12/2018 at the said area of Mto wa Rangi within Serengeti National Park, the appellants were found in possession of government trophies to wit: ten pieces of dried meat of wildebeest valued at Tshs. 1,430,000 /=.

The appellants pleaded not guilty to all counts of offence. The prosecution was then called upon to prove its case. In so doing, four witnesses were paraded. These were Mtoni Wilbert (PW1) and Ezekiel Petro (PW2), park rangers who found the appellants in the national parks and in possession of the above mentioned weapons and government trophies; Wilbroad Vicent (PW3), a wildlife warden who identified and valued the government trophies found in possession of the appellants; and F.3785 D/CPL Proches (PW4), a police officer who investigated this matter including obtaining an order for

disposal of government trophies. The witnesses' testimony was supplemented with a real and documentary evidence to wit: Certificate of Seizure (Exhibit PE1); two knives and two animal trapping wires (Exhibit PE2); Trophy Valuation Certificate (Exhibit PE3); and Inventory Form of Claimed Property (Exhibit PE4). Each appellant gave his defence on oath. They called no witness to support their evidence.

The trial court was satisfied that the prosecution had proved its case beyond all reasonable doubts. It went on to find all appellants guilty and convicted them of the above named offences. In the result, the appellants were sentenced to serve one year imprisonment for the first and second counts and 20 years imprisonment the third count.

Dissatisfied, each appellant filed his own appeal. As stated earlier, their appeals were consolidated into one appeal. The grounds advanced in each petition of appeal were as follows:-

1. The appellant were denied the right to be heard on the reasons that they were not given an opportunity to call their key witnesses.
2. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant basing on wrong exhibits tendered before it.
3. That the prosecution failed to prove its case beyond all reasonable doubts.
4. An independent witness was not present at the time of arresting the appellant.
5. The consent and certificate of the Director of Public Prosecution (DPP) were not issued as required by the law.

When this matter was called on for hearing, each appellant appeared in person while Ms. Monica Hokororo, learned State Attorney appeared to represent the Republic/respondent. I will consider the parties submissions in the course of addressing each ground of appeal.

Starting with ground one, the appellants complain that they were denied the right to be heard and call their key witnesses. The right to be heard is enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. It requires the court or a person deciding a matter affecting another person to ensure that the person to be affected with its decision is accorded with the right to be heard. In criminal trials, the right to be heard include the right to call witnesses. The accused person is also entitled to right to know the charge against him, right to be present during the trial, right to bail, presumption of innocence, right to cross-examine the witnesses called by the prosecution to mention but a few. As far as the right to call witness is concerned, the provision of section 231 of the Criminal Procedure Act, Cap. 20, R.E. 2019 (the CPA) requires the trial court to inform the accused of that right and record his answer on how he wishes to exercise the said right.

In the instant appeal, the appellants were duly informed of the charges against them as required by section 228 of the CPA; they were present during the hearing of the prosecution case; and accorded the right to cross examine the prosecution witnesses including, object admission of exhibits sought to be tendered by the prosecution. Further, the appellants were duly addressed in terms of section 231 of the CPA. They informed the trial court that they would call witnesses. However, upon adducing their evidence, each appellant addressed the court as follows:

> *"I could not trace my witness due to corona virus pandemic; I therefore pray to close the close."*

It is therefore apparent that the defence case was closed at the instance of the appellants themselves. Since they opted not to call their witnesses, they are estopped from complaining that the trial court denied them the right to

call witnesses. In view of the evidence on record, the appellant were not denied the right to be heard. For that reason, ground one is unfounded.

I prefer to tackle ground five which is premised on illegality of the proceedings before the trial court. The appellants argue the trial commenced without prior consent and certificate conferring jurisdiction on the Serengeti District Court to try the economic offence and non-economic offence. In reply, Ms. Hokororo submitted that the required consent and certificate were duly filed and admitted before the commencement of the trial. Since the appellants were charged with economic and non-economic offences, the trial was required to commence upon filing of the consent of the DPP and certificate conferring jurisdiction on a subordinate court to try economic and non-economic offences under 26 and 12(4) of the EOCCA respectively. Any trial commencing without obtaining the consent and the said certificate is a nullity.

In the present case, the consent and certificate signed by the State Attorney In-Charge together with new charge sheet were duly filed and admitted in the trial court on 24.01.2020. The new charge was read over and explained to the appellant on the same date. Thereafter, the preliminary hearing was conducted on 18.02.2018 and the hearing commenced on 23.03.2020. In the circumstances, I am in agreement with the learned State Attorney who was of the firm view that, this ground is devoid of merit. The required consent and certificate from the DPP were filed before the commencement of the trial.

Reverting to ground four, the appellants state that their arrest was illegal due to absence of an independent witness. They stated further that they were arrested by the park rangers, game reserves officers and warden thereby contravening the law. Ms. Hokororo replied that it was not possible

for the arresting officers to have an independent witnesses because the appellants were arrested in the National Park. I have dispassionately considered this ground and the submissions by the learned state attorney. It is not a legal requirement that an independent witness must be present at the time of arresting or searching a person found in National Park and in unlawful possession of government trophies. In terms of section 106 of the Wildlife Conservation Act, the park rangers or wildlife officers are mandated to arrest and detain a person suspected of committing an offence under that Act, search him and seize any anything related to the offence. An independent witness is required if the search is to be conducted in a dwelling house. It is deduced from the evidence of PW1 and PW2 that the appellants were found in the National Park. In that regard, the requirement of an independent witness does not arise. Thus, ground four is unmerited and dismissed forthwith.

Lastly, I am of the view that ground two and three can be considered jointly by addressing the issue whether the prosecution case was proved beyond all reasonable doubts. In so doing, I will consider each count, evidence adduced by the prosecution and the defence and the submission by the parties.

In relation to first count, the appellants state that they were not found at Mto wa Rangi area in Serengeti National Park. In their defence before the trial court, the appellants stated on oath that they were arrested at Migwari area, Nyamatoke Village by the forest officers. The third appellant contended further that, PW1 and PW2 contradicted each other on the place where the appellants were arrested. In their submission before this Court, the appellants reiterated that they were not arrested in the National Park. It was submitted by the first appellant that PW2 and contradicted each in proving the first count. He pointed out that while the charge shows that they were arrested at Mto wa Rangi area, PW1 stated that the appellants were found at

the gorge (korongo) of Mto wa rangi and PW2 testified that it was at the mountain of Mto wa Rangi. Responding, Ms. Hokororo submitted that PW1 and PW2 proved that the appellants were arrested in the National Park.

In view of the above, I have examined the evidence adduced by PW1 and PW2 who testified to have arrested the appellants. Both witnesses told the court that on 20/12/2018 at around 1400 or 14.15 hours, they were on patrol at Mto wa Rangi area. PW2 deposed that at the material time, they saw "three people entering into a stone "pango"' and arrested them. On the other hand, PW1 testified that they saw "persons going inside the ditch" surrounded the area and managed to apprehend the accused. Thus, there was no contradiction on the area where the appellants were arrested.

However, upon examining further their evidence, PW1 stated that he was with Ezekiel Kulwa (PW2), Mligo Bbau Chama, Pilly Machera, Mgendi Magori and Jumapili Daniel. On his part, PW2 stated that he was with Mligo Chama, Mtoni Wilbert (PW1) and Mugendi Magori. Thus, Jumapili Daniel and Pilly Machera mentioned by PW1 were not named by PW2. It is my considered opinion that the said contradiction raises doubt on evidence adduced by PW1 and PW2 as to whether they together on the material date. This is so when it is taken into account that the appellants alluded that they were arrested by the forest officers. Furthermore, when asked by the 2nd appellant as to evidence to prove this offence, PW1 replied that he had none. In that regard, I find that the first count was not duly proved.

Proof of the second count is also based on evidence of PW1 and PW2 who deposed that the appellants were found in possession of two knives and two animal trapping wires. To start with, the identified contradiction between PW1 and PW2 raises doubt on credibility and reliability of their evidence. Even if the Court was to consider their evidence, in terms of section 24(1)(b) and (2) of the National Parks Act, the prosecution was required to prove

among others, that the appellant failed to satisfy to the authorized officer that the said weapons were intended to be used for the purpose other than hunting. Neither PW1 nor PW2 gave evidence to prove this element of offence. From the foregoing, I am of the humble view that the second count was not proved as well.

As regards the last offence on unlawful possession of government trophies, the appellants submitted that the trophies found in their possession was not tendered in evidence and that, the prosecution tendered wrong exhibits. On her part, Ms. Hokororo argued that, this count was proved by evidence of PW1, PW2, PW3 and PW4 together with exhibits tendered thereto, especially Exhibit PE3 and PE4. She submitted that the governnment trophies were disposed in accordance with the law as adduced by PW4 and supported by Exhibit PE4. The learned State Attorney went on to cite the case of **Mohamed Juma @ Mpakama vs Republic**, Criminal Appeal no. 385 of 2017, CAT (unreported) to support her argument.

On my part, since the said ten pieces of wildebeest subject to this offence was presented to the police by PW1 and PW2 whose evidence on is contradictory, their evidence cannot be used to prove this offence. Even if the said evidence is considered by the Court, the issue is whether the said 10 pieces of dried meat were government to trophies to with, wildebeest. An answer to this question is found in PW3's evidence who identified and valued the said dried pieces of meat as wildebeest. His evidence was that:

> *"I was shown 10 dried pieces of meat to which identified to be of wildebeest. I identified it by colour of slightly grey to darker brown, it fibres were compacted."*

In my view, PW3 being an expert in wildlife was required to give a detailed description as to how the said dried pieces of meat were of wildebeest and not any other animal. It is not clear as to whether every dried meat which is

slightly grey to darker in colour and with compacted fibres is of wildebeest only. How is dried meat of wildebeest different from other animal including domestic animal? Such evidence was not given by PW3. In my opinion, the evidence on identification of the government trophy in the instant case was not sufficient to prove the third count. Unlawful possession of government trophies is a serious offence. It attracts the minimum sentence of 20 years imprisonment. In that regard, it is pertinent for the prosecution to lead the witness to adduce sufficient evidence on identification of the government trophy found in possession of the accused. This duty was not exercised in the case at hand.

For the reasons I have endeavoured to highlight, this Court finds that the prosecution failed to prove its case beyond all reasonable doubts. Thus, grounds two and three are meritorious.

In the final analysis, the appeal is allowed, conviction entered by the District Court of Serengeti at Mugumu is quashed and sentence imposed hereby set aside. The appellants, Emmanuel S/O Michale @ Wambura, Makori S/O Masaho @ Makori and Paul S/O Antony @ Mwita are to be released forthwith from prison unless they otherwise lawfully held.

Dated at MUSOMA this 21st day of December, 2020.

E. S. Kisanya
JUDGE

COURT: Judgment delivered via virtual court this 21st December, 2020 in appearance of the appellants and Mr. Nimrod Byamungu, learned State Attorney. B/C Mr. Maiga-SRMA present.

E. S. Kisanya
JUDGE
21/12/2020