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

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 112 AND 113 OF 2020
(Arising from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 47 of 2019)

MARWA S/O MWITA @CHOKERA ..... 1ST APPELLANT
MARWA S/O MGANGA @MAGOIGA ..... 2ND APPELLANT

VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

21st October and 21st December, 2020

KISANYA, J.:

At District Court of Serengeti at Mugumu, the appellants, Marwa Mwita Chokera and Marwa Mganga Magoiga were jointly and together charged with four counts of offence namely, Unlawful Entry into the National Park, contrary to section 21 (1) (a), 2 and 29(1) the National Parks Act[Cap 282, R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act, No. 11 of 2003; Unlawful Possession of Weapons in the National Park, contrary to section 24(1)(b) and (2) of the National Parks Act[Cap 282, R.E. 2002]; and two counts of Unlawful Possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) 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, R.E 2002] (the EOCCA).

Both appellants were found guilty and convicted of all counts levelled against them. They were then sentenced as follows: imprisonment for two years for the first count; imprisonment for three years for second count; fine of Tshs 41, 800,000/= or imprisonment for twenty years for the third count; and fine of Tshs. 14, 300, 000 or imprisonment of twenty years for the fourth count. It was ordered that the sentence would run concurrently.

The brief facts which lead to arraignment, conviction and sentence imposed on the appellant went that: On 27/05/2019 Stamiurs Mutalemwa (PW1), Charles Mayunga (PW2) and other park rangers were on patrol at Mto Ntami area in Serengeti National Park. At around 1100 hours, they traced and caught the appellant in the bush at Mto Ntemi area. Upon searching them, the appellants were found in possession of two knives, one panga and one animal trapping wire. Other items found possession of the appellants were one fresh skin of buffalo, two forelimb of bufallo and two fresh hind limbs of wildebeest. Since the appellants had no permits to enter into the National Park and possess the said two knives, one panga and one animal trapping wires, one fresh skin of buffalo and two fresh hind limbs of wildebeest, they were arrested and the items found in their possession seized. A certificate of seizure signed by the appellants, PW2 and two park rangers was admitted in evidence as Exhibit PE1 prove the items found in possession of the appellants. The two knives, one panga and one animal trapping wire were tendered by PW1 and admitted as Exhibit PE2 collectively.

At the same time, the appellants were taken to Mugumu Police Station where an investigation file number MUG/IR/1614/2019 was opened. A Wildlife Warden one, Wilbroad Vicent (PW3) was called on to identify and

value the government trophies (one fresh skin of buffalo, two fore limbs of buffalo and two fresh hind limbs of wildebeest). He told the trial court that buffalo and wildebeest had value of Tshs. 5,610,000. The valuation certificate showing how PW3 identified and valued the trophies was admitted in evidence as Exhibit PE3. Since the said government trophies were subject to a speed decay, they were disposed of after procuring an order of the court. Evidence to such effect was adduced by F6443 DC Pius (PW4) who investigated the case. He also tendered the Inventory Form of Claimed Property (Exhibit PE4).

In their defence, the appellants deposed that they were arrested at Mto Bochungu. The first appellant contended that he went at Mto Bochungu to fetch water for his heads of cattle while the second appellant stated that he went at Mto Bochungu to take shower. Both appellants alluded that they were taken to Police Station and arraigned before the trial for the aforesaid offences.

Upon examining evidence adduced by both parties, the trial court was satisfied that the prosecution had proved its case on the required standards. It went to convict and sentence the appellants as earlier on stated.

Protesting their innocence, each appellant filed his own petition of appeal. Marwa Mwita @ Chokera's (first appellant) appeal was registered as Criminal Appeal No. 112 of 2020 while Marwa Mganga @ Mgoiga's (second appellant) appeal was registered as Criminal No. 113 of 2020. By order of this Court, both appeal were consolidated into one appeal. The grounds in each petition of appeal were as follows:-

1. The trial was conducted without certificate from the Director of Public Prosecutions (DPP).
2. That the trial magistrate was bias and relied on evidence of one side thereby contravening the principle of natural justice.
3. That the prosecution failed to prove the case beyond all reasonable doubts due to inconsistencies in its case.
4. That the appellants defence was not considered.

Before me, the appellants appeared in person to prosecute their appeal. On the other hand, the respondent was represented by Ms. Monica Hokororo, learned State Attorney.

Submitting in support of the appeal, the first appellant contended that he was not found with any exhibit and that the same was not tendered in the Court. He went on to contend that he was not present at the time of disposing the government trophies alleged to have been found in their possession. The first appellant submitted further that his defence was not considered. On his part, the second appellant urged the Court to adopt the petition of appeal and submissions made by the first appellant. Both appellant asked the Court to set them free.

Ms. Hokororo resisted the appeal. In relation to the first ground of appeal, she submitted the consent and certificate of the DPP were filed in the trial court before the commencement of the trial. Thus, the learned State Attorney urged the Court to disregard this ground.

Replying to the second and third grounds of appeal, Ms. Hokororo argued that the trial court considered evidence adduced by both parties. She went to submit that the prosecution evidence was watertight, the appellant

given the right to cross examine the prosecution witnesses, right to give their evidence and right to call witnesses. However, the learned counsel submitted that this being a first appeal, the Court can examine evidence adduced before the trial court and comes to its own findings.

As regards the third ground, Ms. Hokororo submitted that the prosecution witnesses did not contradict each other. She stated that PW1 and PW2 evidence was to the effect that the appellants were arrested in the National Park; PW3 identified and valued the government; while PW4 prepared the inventory in accordance with the law. The learned counsel contended that the appellants were present at the time of disposing of the government trophies on the reason that, they signed the inventory form (Exhibit PE4).

In view thereof, the learned State Attorney urged the Court to dismiss the appeal for want of merit. She also moved the Court to review the sentence imposed in respect of the third and fourth counts. She was of the view that the fine imposed by the trial court is not provided for by the law.

The appellants had nothing substantial to rejoin other than requesting the Court to discharge them.

Having considered the evidence on record and the submissions by both parties, the issue is whether this appeal is meritorious or not. In so doing, I will consider the grounds advanced by the appellants.

The appellants' complaint in the first ground is that the trial was conducted without prior consent of the DPP. In terms of the charge, the appellant were arraigned for economic (the third and fourth counts) and non-economic (the first and second counts) offences. In such a case, the

trial court had no jurisdiction to try the matter unless a certificate conferring jurisdiction on it to try the said economic and non-economic offences had been issued by the DPP under section 12(4) of the EOCCA. As that was not enough, the prosecution was also required to file the consent issued by the DPP under section 26 (1) of the EOCCA for the appellants to be tried with the economic offence. It is settled law that a trial which commences without the said certificate or consent or both is a nullity.

I have gone through the record at hand, the consent and certificate issued by the Senior State Attorney In-Charge on behalf of the DPP were filed in the trial court on 20.11.2019. Thereafter, the hearing commenced on 18.12.2019. For that reason, the first ground is meritless.

I find it pertinent to consider the third ground that the prosecution case was not proved on the required standard. In addressing this ground, I will examine whether each count was proved and consider the defence case thereby addressing the second and fourth grounds.

The evidence to prove the first and second counts was adduced by PW1 and PW2. These are park rangers who adduced how the appellants were found in the bush at Mto Ntami area within Serengeti National Park. They adduced further that the appellants were found in possession of two knives, one panga and one animal trapping wire. According to PW1 and PW2, neither the first nor the second appellant had the required permits to enter into the National Park and possess the said weapon which were admitted as Exhibit PE2 collectively. The appellants did not challenge adduced by PW1 and PW2 during cross examination. For instance, PW2 was not cross examined at all while Exhibit PE2 was also admitted without

being objected by the appellants. The law is settled that failure to cross examine a witness on important facts is tantamount to admission. In that regard, the appellant defence that they were found and arrested at Mto Bochungu where they were fetching water for heads of cattle (for the first appellant) or taking shower (for the second appellant) is an afterthought. The said defence was considered by the trial court which formed the opinion that it did not raise any doubt to the prosecution case. I have no reasons to fault the findings of the trial court and disregard evidence of PW1 and PW2. Their evidence was supplemented by Exhibit PE2 to prove the first and second counts. It was a direct evidence was direct. They did not contradict each other as stated by the appellants. Therefore, I am of the view that the offences of Unlawful Entry into the National Park contrary to section 21 (1) (a), 2 and 29(1) the National Parks Act [Cap 282,R.E.2002] as amended by the Written Laws (Miscellaneous Amendment) Act, No. 11 of 2003 and Unlawful Possession of Weapons in the National Park, contrary to section 24(1)(b) and (2) of the National Parks Act[Cap 282, R.E. 2002] were duly proved by the prosecution.

As far as the third and fourth counts are concerned, it is not disputed that the government trophies subject to these counts were not tendered in evidence. That first appellant contended that they were not present at the time of disposing of the said trophies. As noted herein, Ms. Hokororo argument is that, the trophies were disposed of in accordance with the law. I understand that the government trophies alleged to have been found in possession of the appellants were subject to a speed decay. There are two procedures for disposal of trophy, animal or exhibit which is subject of speed decay.

The first procedure is provided for under section 101 of the Wildlife Conservation Act, 2009 as by the Written Laws (Miscellaneous Amendments) Act, 2017. That provision empowers the trial court on its own motion or on application, to order disposal of any animal or trophy which is subject to speedy decay and intended to be used evidence. An order issued thereto is a sufficient proof of the trophy or animal during trial.

The second procedure is provided for under paragraph 25 of the Police General Orders (PGOs) which prescribes the manner of handling perishable exhibit when the investigation is still underway. The said provisions read:-

> *"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."*

Reading from the evidence adduced by PW4 and Exhibit PE4, I find that the trophies alleged to have been found in possession of the appellants were not disposed under section 101 of the Wildlife Conservation Act. This is because no order issued by the court on its own motion or application which was tendered in evidence. It follows that the trophies were disposed of under paragraph 25 of the PGO. However, it is a legal requirement, that the accused person is entitled to be present at the time of disposing of the animal or trophy and given the right to be heard before the order is issued by the court or magistrate. The PGO imposes further requirement of taking of photographs of the trophy at the time of disposing perishable exhibits.

In **Mohamed Juma @ Mpakama vs R** (supra), the Court of Appeal emphasized on the need of according the accused with the right to be heard at the time of disposing perishable exhibits when it held that:-

> *"While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent.*
>
> *Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."*

In the present case PW4 tendered Exhibit PE4 to prove that the government trophies found in possession of the appellants were disposed of by the order of the court. He did not adduce evidence to show that the appellant were present before the magistrate who signed the Inventory Form (Exhibit PE4) and given the right to be heard. The fact that the appellants' signatures appear on the Inventory Form (Exhibit PE4) is not a conclusive evidence that they were present before the magistrate court and accorded the right to be heard. Furthermore, the photographs taken at the time of disposing of the said trophies were tendered in evidence. In that regard, the third and fourth count was not proved due to the reasons

that, the government trophies subject to the said counts were not tendered in evidence or disposed of according to the law.

All said, I dismiss the appeal in respect of the first and second counts of offence. On the other hand, the appeal is allowed in respect of the third and fourth counts. Consequently, the conviction on the third and fourth count is hereby quashed and the sentence imposed thereto set aside. Thus, the appellants shall continue to serve the custodial sentence of one (1) year for the first count and three (3) years for the second counts as imposed by the trial court. For avoidance of doubt, the said sentences shall continue to run concurrently. Order accordingly.

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

E. S. Kisanya
JUDGE

COURT: Judgment delivered through virtual court this 21st December, 2020 in the attendance of the appellants and Mr. Nimrod Byamungu, learned State Attorney.

E. S. Kisanya
JUDGE
21/12/2020