

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CRIMINAL APPEAL NO 56 OF 2021**

*(Arising from District Court of Serengeti at Mugumu on Economic Case No 100 of 2026)*

**MATESO S/O MASHURUBU @ KAHENA.....APPELLANT**

**Versus**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

*31<sup>st</sup> & 26<sup>th</sup> July, 2021*

**Kahyoza, J**

**Mateso Masharubu @Kahena** (the appellant) was aligned before the District Court of Serengeti charged with three counts; **one**, unlawful entry into the national park; **two**, unlawful possession of weapons to wit; one knife and three animal trapping wires; and **three**, unlawful possession of government trophies. After full trial, the district court of Serengeti, found the appellant guilty, convicted and sentenced him to serve a custodial sentence of one (01) year for each offence in the first and second counts and twenty-five years' imprisonment for the offence in the third count. It ordered the sentence to run concurrently.

Aggrieved, **Mateso Masharubu @ Kahena** appealed to this Court. He raised six grounds of appeal, climaxed to the following issues

- 1) Was there sufficient evidence to convict?
- 2) Were the government trophies identified properly?
- 3) Was the exhibit properly admitted?

- 4) Was there an independent witness?
- 5) Was the search and seizure properly conducted?
- 6) Did the prosecution prove the case beyond reasonable doubt?

The District Court of Serengeti at Mugumu relied on the evidence of three prosecution witnesses to find **Mateso Masharubu @ Kahena** guilty and convicted him with three counts to wit; **one**, unlawful entry into the National Park c/s 21(I)(a), (2) and 29(1) of the National Park Act, [CAP. 282 R. E 2002] (the NPA); **two**, unlawful possession of weapons in the National Park c/s 24(I)(b) and (2) of the NPA and **three**, unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (the **WLCA**) 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. 2019] (the **EOCCA**).

The prosecution witnesses, **Emmanuel Masanja** (Pw1), and Manfred **Mapunda** (Pw2) while on their routine patrol on the 13/10/2016 at about 17.00hrs with two other park rangers namely Tares Ndunguru and Stephen Nsumba at Ntami area within Serengeti National Park saw foot prints. They tracked the foot prints until they found a person hiding in the bush. They arrested that person. They found that person, the appellant, in possession of two pieces of dried meat of wildebeest. They also found that person in possession with weapons to wit; one knife, and three animal trapping wires.

Emmanuel Masanja (**Pw1**) tendered and the court admitted weapons as Exhibit P.E.2. The appellant did not object the pieces of

meat to admitted as exhibit as exhibit before commencing trial or object when Emmanuel Masanja (**Pw1**) tendered the weapons.

Wilbroad Vicent (**Pw3**) identified and valued the trophies. He identified two pieces of dried meat as wildebeestt due to the colour. He described the colour of the wildebeest meat as being slightly grey to dark brown. Wilbroad Vicent (**Pw3**) prepared and tendered a trophy valuation and identification certificate, as exhibit P.E3. The witness omitted to read the contents of exhibit P.E3 to the appellant.

The appellant denied to have committed the offences he stood charged with. He deposed that on the 13/10/2016 he went to Park Nyigoti to buy charcoal and he bought charcoal. While waiting for transport, car stopped, people in that arrested and took him to Mugumu Police. The appellant denied to be arrested by Pw1 and Pw2. He mentioned that it was one Bulemo who arrested him.

The trial court found the prosecution witnesses credible, convicted and sentenced the appellant as shown above. The appellant appeared in person unrepresented at the hearing and Mr. Temba represented the respondent

### **Was there sufficient evidence to convict?**

The prosecution evidence was not shaken. The appellant did not raise questions which would have weaken the credibility of **Emmanuel Masanja** (Pw1), and Manfred **Mapunda** (Pw2). As a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See the decision of the Court of Appeal in **Daniel Ruhere v. R** Criminal Appeal No. 501/2007, **Nyerere Nyaugue v. R** Criminal Appeal No. 67/2010 and

**George Maili Kemboge v. R** Criminal Appeal No. 327/2013. In **Cyprian Athanas Kibogoyo v R** Criminal Appeal No. 88/1992 the Court of Appeal stated-

*"we are aware that there is useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

I find the prosecution's evidence that the appellant was found in the national park unchallenged. I therefore, uphold the conviction of the appellant with the offence of unlawful entry into the national park in the first count. The sentence was lawful. I am alive of the fact that the appellant was denied an option to a fine sentence. Given the fact the court also sentenced him to serve twenty-five custodial sentence a fine sentence would have no value.

I now consider the evidence regarding the second count of unlawful possession of weapons in the national park. The prosecution tendered weapons to wit; one knife and three animal trapping wires. The court admitted the exhibits without objection from the appellant. He did not cross-examine the witnesses. He complained that the exhibits were not properly tendered. I see no ground for the appellant's complaint. There is no certificate of seizure. That alone cannot render the weapons inadmissible. There is ample evidence that the appellant was found in the national park and in possession of the weapons.

I considered the evidence against the offence in the third count. The appellant was convicted in the third count with the offence of unlawful possession of the government trophy. **Emmanuel Masanja**

(Pw1), and Manfred **Mapunda** (Pw2) deposed that they found the appellant in possession of dried meat. The described the meat as that of wildebeest. Wilbroad Vicent (**Pw3**)'s evidence corroborated the evidence of **Emmanuel Masanja** (Pw1), and Manfred **Mapunda** (Pw2) that the dried meat was of the wildebeest. Wilbroad Vicent (**Pw3**) held a diploma in Wildlife Management. He identified the meat due to its colour. He told the trial court that the meat was slightly grey to dark brown. The prosecution had a duty to prove that the meat the appellant was found in possession was that of wildebeest. I am unable to hold that Wilbroad Vicent (**Pw3**)'s identification was beyond reasonable doubt. I will resolve the doubts in favour of the appellant.

### **Were exhibits properly admitted?**

The records shows that two pieces of meat were tendered by the prosecutor as Exhibit P.E.1. They were tendered before the trial court had jurisdiction to trial the appellant. It was against the established procedure for the prosecutor to tender exhibit and to do so before the court had jurisdiction to try the appellant with economic offence. It is a well settled procedure in Criminal proceedings that, an exhibit has to be tendered in court by a witness, who thereafter, is cross examined by the accused or his representative. The Court of Appeal in **Kifaru Juma Kifaru Versus Republic**, Criminal Appeal No 126 of 2018 CAT (unreported).

Exhibit P.E.1 was wrongly tendered and admitted. I will expunge two pieces of meat, exhibit P.E.1 from the record.

In addition, Wilbroad Vicent (**Pw3**) tendered P.E.3 the trophy valuation certificate. Unfortunately, he did not read the contents to the appellant. It is now settled that failure to read out the contents of an

exhibit after it is cleared for admission is fatal and must be expunged from the record as demonstrated by the Court of Appeal in the case of **Mabula Mboje & Others v. Republic**, Criminal Appeal No 557 of 2016 CAT (unreported). I expunge exhibits P.E.3, the valuation certificate from the record.

After expunging two pieces of meat and the trophy valuation certificate I find no exhibits to prove 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 and sections 57(1) and section 60(2) the **EOCCA**. I quash the conviction and set aside the sentence in the third court.

The last question is whether I should order a retrial. It is settled that a retrial should not be ordered in order the prosecution to filling the gap in their case. In **Fatehali Manji v R** [1966] EA341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

*"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

In this case, the trial court ordered the exhibit, two pieces of dried meat to be destroyed. In the absence of the exhibit the prosecution cannot prove the offence in the third count.



Now, that I upheld the sentence in the first and second count which were ordered to run concurrently, the appellant must be set free after serving one year custodial sentence. The appellant was sentenced on the 27<sup>th</sup> February, 2017, he must be released after serving the one year imprisonment sentence, unless held there for any other lawful cause.

It is ordered accordingly.



**J. R. Kahyoza, J.**

**26/7/2021**

**Court:** Judgment delivered in the presence of the appellant and Mr. Temba S/A via video link. B/C Mr. Makunja present.



**J. R. Kahyoza, J.**

**26/7/2021**