**IN THE HIGH COURT OF THE UNITED REPIBLIC OF TANZANIA**
**(MUSOMA DISTRICT REGISTRY)**

**AT MUSOMA**

**CONSOLIDATED CRIMINAL APPEAL NO. 153**
**AND 154 OF 2019**
*(Originating from Economic Case No. 76/2018 in the District Court of Serengeti at Mugumu)*

**ZAKARIA S/O SARI @MATIKO ..... 1ST APPELLANT**
**RYOBA MAKANGE @ RANGE ..... 2ND APPELLANT**

**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 19/02/2020*
*Date of Jugdement: 6/03/2020*

**KISANYA, J.:**

This consolidated appeal originates from Economic Case No.26 of 2018 instituted in the District Court of Serengeti at Mugumu. In the said case, the appellants herein, together with MWITA S/O MASINYO SABAYI (first accused) were charged with three offences. The first offence was Unlawful Entry into the Game Reserve, contrary to section 15 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009. It was alleged that, on 4th August, 2018 at Mto Grumet area into Ikorongo/Grumet Game Reserve within Serengeti District, the appellants entered into the Game Reserve without permission of the Director.

The second offence was Unlawful Possession of Weapons in the Game Reserve, contrary to section 17 (1) and (2) of the Wildlife Conservation

Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] (as amended). The prosecution alleged that, on 4th August, 2018 at Mto Grumet area into Ikorongo/Grumet Game Reserve within Serengeti District, the appellants were found in unlawful possession of weapons to wit, one knife and four animal trapping wires, without permit and failed to satisfy to the authorized officer that the said weapons were intended to be used for purposes other than hunting, wounding or capturing of wild animals.

The third offence was 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 the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] (as amended). It was alleged that, on 4th August, 2018 at day of October 2018, at Mto Grumet area into Ikorongo/Grumet Game Reserve within Serengeti District, the appellants were found in unlawful possession of sixteen dried meat of wildebeest valued at Tshs.4,290,000/=, the properties of the United Republic of Tanzania.

It is important to depict, albeit brief, what prompted this appeal. On 4th August, 2018 at 0200 hours PW1, PW2, Jumanne Lenard and Kulwa Gambay were on patrol at Mto Grument area within Ikorogongo Grumeti Game Reserve. They saw the first accused and the appellants in the bush. They caught and found them in possession of one knife, four trapping wires and sixteen pieces of dried meet of wildebeest. The appellants had not permits to enter into the game reserve and that of having government trophies. The said weapons were tendered by PW1 and admitted as Exhibit

PE1 collectively. On 6 August, 2018, PW3 identified the said 16 pieces of dried meat of wildebeest. They were equal to three killed wildebeest, each one valued at USD 650 thereby amounting to USD 1950, equivalent to Tshs 4, 142,000/=. He tendered the Trophy Value Certificate which was admitted as Exhibit PE2. Thereafter, the District Court of Serengeti at Mugumu issued an order to dispose of the Government Trophy. The Inventory of Claimed Property was tendered by PW4, who investigated this case. It was admitted as Exhibit PE3.

The First accused person was discharged under section 98(a) of the Criminal Procedure Act [Cap. 20, R.E. 2002], at the instance of the prosecution. This was after PW1, PW2 and PW3 had already testified.

The appellants denied the charges. The first appellant testified that, he was arrested on 4/8/2018 when he was walking on the road demarcating Ikorongo Game Reserve and the Village. He was taken in the camp by the Game Reserve Scout who arrested him. Thereafter, he was then taken taken to Mugumu Police Station on 6/8/2018. On his part, the second appellant testified that he was arrested at his house on 4/08/2018 by the police officers.

After examining the evidence given by the prosecution and the defence, the appellants were found guilty of the charged offence. They were convicted forthwith and sentenced to serve one year imprisonment for the 1st and 2nd Counts. As to the third count, the appellants were sentenced to imprisonment for twenty years.

Dissatisfied, the first appellant filed Criminal Appeal No. 153 of 2019 while the second appellant filed Criminal Appeal No. 154 of 2019. Both appeal

were consolidated as Criminal Appeal No. 153 and 154 of 2019. Their grounds of appeal can be summarized as follows:

1. The trial magistrate erred in law and fact in convicting and sentencing the appellant basing on hearsay evidence.
2. The trial court received wrong exhibits.
3. The appellants were denied right to call their key witnesses
4. That, the independent witnesses apart from the park rangers and the game scouts were not called to testify.
5. That, the case was not proved by the prosecution.
6. That, the trial court had no jurisdiction to try the case for want of consent and certificate issued by the Director of Public Prosecution.

At the hearing of this appeal, both appellant appeared in person, unrepresented. On the other hand, Mr. Nimrod Byamungu, learned State Attorney, appeared for the respondent.

In his submission in chief, the 1st appellant adopted his Petition of Appeal. He reiterated that he was arrested at his house and that he was denied the right to call witnesses. As to the 2nd appellant, he also adopted his petition of appeal. He argued further that, justice was done as the first accused person was discharged while the prosecution evidence was to the effect that all accused persons were found in the game reserve. The 2nd appellant submitted further that, documentary evidence was not read over after being admitted. Both appellants urged the Court to allow their appeal.

In reply, the learned State Attorney, supported the appeal in respect of the third count. He resisted the appeal on the first and second counts.

Starting with the ground on the discharge of the first accused, the learned State Attorney argued that the prosecution is entitled to withdraw the charges at any stage. He stated further that, discharge of the first accused does not exonerate the appellants from liability. However, the learned State Attorney conceded that there was double standard because the first accused was named and identified by PW1 and PW2 that he was together with the appellants in the game reserve.

Supporting the appeal on the third count, Mr. Byamungu argued that the said offence was not proved. This is because the Valuation Certificate (Exhibit PE2) was not read over to the appellants. Thus, the appellants were denied to know contents of Exhibit PE2. He therefore, submitted that, if Exhibit P E-2 is expunged, there is no evidence to prove the third count.

Thereafter, Mr. Byamungu did not support the appeal in respect of the first and second counts. On the first ground of appeal, the learned State Attorney submitted that evidence of PW1 and PW2 was direct evidence and not hearsay as argued by the appellant. He argued that both witnesses testified how the appellants were found in the game reserve with weapon.

On the second ground of appeal, the learned State Attorney argued that Exhibit PE1 tendered by PW1 was not wrong exhibit. He argued that PW1 was an arresting officer who identified the said exhibit before tendering it and that the same was related to the second offence.

On the third ground of appeal, the learned State Attorney was of the view that the appellants were given the right to call their witnesses. Arguing

against the fourth ground, Mr. Byamungu stated that the game reserve officer and park rangers are not barred from giving evidence. They are competent witnesses. On the fifth ground, the learned State Attorney submitted that the Court had jurisdiction to try the case because consent and certificate of the DPP were filed in the trial court.

After submitting on the grounds of appeal, the Mr. Byamungu addressed me on the sentence of one year imprisonment imposed on the first and second counts. He argued that both counts are economic offence and hence the proper sentence for each is 20 years imprisonment as provided under section 60(2) of the EOCCA. Therefore, the learned State Attroney urged me to enhance the sentence under section 366(1) of the Criminal Procedure Act.

Upon being probed, Mr. Byamungu conceded that section 60(2) of the EOCCA was not cited in the statement of offence. However, citing the case of **Festo Domician vs R, Criminal Appeal No. 447/2016, CAT at Mwanza** (unreported), the learned State Attorney argued that the said omission is curable under section 388 of the Criminal Procedure Act.

In their rejoinder, the appellants urged me set them free. The 2nd appellant reiterated that there is no justification on the discharge of the first accused.

After going through the evidence on record and submissions by both parties, I find that, this appeal centers on four issues namely, whether the trial court had jurisdiction to try the offence; whether the documents were admitted in accordance with established procedure; whether the prosecution proved its case beyond reasonable doubts; and whether the

sentence imposed on the first and second counts was proper.

Starting with the issue whether the trial court had jurisdiction, it was argued by the appellant that the consent and certificate of the DPP were not issued. I have gone through the record noted that the Consent of the DPP and Certificate conferring jurisdiction on Subordinate Court to try an economic and non-economic cases made under sections 26(1) and 12(4) of the EOOCA respectively, were filed on 11th September, 2018. Therefore, I agree with the learned State Attorney that this ground has no merit.

The next issues is whether documents were tendered in accordance with the law. It is now settled that after a document is admitted in evidence, it must be read over to the accused person. The spirit of this procedure is to enable the accused person to comprehend the evidence in the said document and be in a good position of cross-examining the witness or prepare his defence. In **Florence Athanas @ Baba Ali and Another vs Republic**, Criminal Appeal No. 438 of 2016, CAT at Mbeya (unreported), the Court of Appeal held as follows on the failure to read over the admitted documents:

> *"The failure occasioned a miscarriage of justice to the appellants since they were deprived to understand the substance of the admitted documents."*

The documentary evidence in case at hand are the Trophy Valuation Certificate (Exhibit PE2) and Inventory of Claimed Property (Exhibit PE3). Both documents were not read over to the appellants. Therefore, the appellants had no opportunity of understanding the substance of evidence in the said documents. This omission vitiated the proceedings because it goes to the root of justice. For that reasons, Exhibit PE2 and Exhibit PE3

cannot be relied upon.

I now move to the third issue on whether the prosecution proved its case beyond all reasonable doubts. This issue will be disposed of by addressing the grounds of appeal and the evidence in record.

Starting with the third count, I agree with the learned State Attorney that, in absence of Exhibit PE2 and Exhibit PE3, offence of Unlawful Possession of Government Trophies was not proved. This is because there is no evidence to prove the appellants were found in possession government trophies and that the same was disposed in accordance with the law.

As for the first and second counts, the prosecution evidence which implicate the appellants in the charged offence, is extracted from PW1 and PW2. These are park rangers who averred that, the appellants together and the first accused person were found at Mto Grumeti area into Ikorongo Game Reserve. They also testified how the all accused were caught red-handed with weapons to wit, one knife and four animal trapping wires, within Serengeti National Park. The said weapons were admitted as Exhibit P-1 collectively. The appellants failed to show the relevant permits as required by the law. Therefore, I find that evidence of PW1 and PW2 was direct not hearsay as stated by the appellants. Likewise, Exhibit PE1 implicated the appellants in the second count. Hence, the appellant's argument that the court admitted wrong exhibit lacks merit.

The appellants argue further that an independent witnesses apart from Park rangers was not called to testify. Pursuant to section 127(1) of the Evidence Act, every person is competent witness unless otherwise stated

by the law. The issue whether a witness is competent or not, is in the domain of the trial court. This position was stated in **Popart Emanuel vs R**, Criminal Appeal No 200 of 2010, CAT at Iringa (Unreported) when the Court of Appeal held that:

> *"As regard to reliance of evidence from one office, we know of no law which imposes restriction. .....The three police officers were competent to testify. The question whether they had said true or not was the domain of the trial Court."*

In this case, PW1 and PW2 were found to be competent witnesses. They are not barred from giving evidence only because they come from the same office. The appellants were required to challenge or cross examine and shake their credibility. Therefore, I agree with Mr. Byamungu that this ground has no merit.

On the issue whether the appellants were denied the right to call witnesses, the record shows that they were addressed in terms of section 231 of the Criminal Procedure Act and informed of their right to defend themselves and to call witnesses. The appellants replied that they were going give their evidence oath and call one each. When the case was called on for hearing on 19th September, 2019, the appellants informed the court that their witness were not on attendance and prayed to give their evidence. Upon giving their evidence, each appellant prayed to close his case. Therefore, after going through the proceedings, I am of convinced that the appellants were not denied the right to call witnesses.

The last ground is whether the prosecution proved its case beyond reasonable all doubts. In criminal cases, the prosecution is duty bound to prove its case beyond all reasonable doubts. Any doubt ends in favour of

the accused person. I have stated herein that, evidence to prove the first and second offence is deduced from PW1 and PW2. These witnesses testified to have found the appellants and one, Mwita Masinyo (first accused person) in the game reserve. The prosecution evidence shows that all accused persons were together.

However, as rightly argued the second appellant and conceded by the Respondent, charges against the first accused were withdrawn by the prosecution under section 98(a) of the Criminal Procedure Act. I agree with the learned State Attorney that the prosecution is mandated to withdraw the charges against any person at any stage of proceeding. However, it is my considered opinion that, such power should be exercised judiciously by considering the need to dispensing justice; the prevention of misuse of procedure for dispensing justice; and the public interest as provided for under Article 59B(4) of the Constitution of the United Republic of Tanzania, 1977.

In the case at hand, the first accused was discharged by the prosecution at the time when PW1 and PW2 have testified and gave evidence which implicated him and the appellants. While I acknowledge that the prosecution has power to withdraw the charge, I am of the considered opinion that, the discharge of the first accused at that stage and in the circumstance of this case raises doubt on the evidence of PW1 and PW2 against the appellants. Further, it led to double standard to the accused persons charged before the trial court. The said doubt ends in favor of the appellants.

That said and done, I hold that all offences were not proved beyond reasonable doubts. Therefore, the appeal is allowed. I accordingly quash the conviction and set aside the sentence imposed by the trial court. The appellants should be released from custody unless they are otherwise lawful held.

Order accordingly.

Dated at MUSOMA this 6th day of March, 2020.


E. S. Kisanya
JUDGE
6/3/2020