IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 192 & 193 OF 2019

ANDREA CHACHA@ MARWA ..... 1st APPELLANT

MGAYA BISALA @MWITA .....2nd APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Originating from Criminal Case No 78/2018 of the District Court of Serengeti at Mugumu)

JUDGMENT

23rd April & 6th June, 2020

Kahyoza, J.

Andrea Chacha@ Marwa, Mgaya Bisala @Mwita (the appellants**)** and **Joseph Magige @Peter** were arraigned for unlawfully entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [Cap.282 R.E. 2002], unlawful possession of weapons in the National Park c/s of the National Park Act, [Cap.282 R.E. 2002] and unlawful possession of Government Trophies contrary to section 86(1) and (2)(c) (iii) 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]. They denied the accusation, whereupon the prosecution summoned four witnesses and tendered three documentary exhibits to support its claim.

Before the trial commenced, the prosecution withdrew the charges against **Joseph Magige @Peter** who was the first accused person. The district court found **Andrea Chacha@ Marwa** and **Mgaya Bisala**

@Mwita, the appellants, guilty and convicted them of all offences in three counts, they stood charged.

Aggrieved, **Andrea Chacha@ Marwa** and **Mgaya Bisala @Mwita,** appealed to this Court against both conviction and sentence. They lodged separate appeals, which the Court consolidated at the hearing stage. The appellants' appeal revolves around the following issues:-

1. Was it proper for the trial court to convict the appellants in the absence of a certificate of seizure?
2. Was the guilt of the appellants proved beyond all reasonable doubt?
3. Was it proper for the trial court to admit exhibits P.E.1, P.E.2 and P.E.3 without an account as to the chain of custody?
4. Was it proper to convict the appellant with an offence of unlawful possession of government trophy, without tendering a certificate of seizure or calling an independent witness?
5. Was the evidence properly evaluated and reasons provided for the decision?

There are six ground of appeal for each appellant which are a replica of each other. They have given rise to a total of five issue which are to some extent repetitive. I will consider issues raised by the grounds of appeal, in addition, this being a first appeal, I will review the whole evidence or record and form my own conclusion if need be. In law, a first appeal takes the form of a re-hearing. The appellants, therefore, are entitled to this Court's own fresh re-evaluation of the entire evidence and arrive at its own conclusions of fact. (See, **Peters**

v. Sunday Post [1958] EA 424 and **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (unreported).

Briefly, the prosecution's evidence is that, the appellants and **Joseph Magige @Peter** on the unspecified date entered into the Serengeti National Park**.** On the **6**/8/2028 at 23.30 hrs, the Park Rangers Pw1 Thadeus Michael Gende, Pw2 Erwin Moywa, Waziri Athuman and Magambo Marato while on their routine patrol saw three people at Korongo la Machochwe within Serengeti National Park. They surrounded and arrest them. Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa testified that they found the three people with a knife, a panga, one fresh limb, one fresh tail and one fresh piece of skin all of wild animal called Topi. Pw1 Thadeus Michael Gende tendered weapons with no objection from the appellants, which the court admitted as Exh. P.E.1.

Third prosecution was witness, **Pw3 Wilbroad Vicent** deposed that on the 9/8/2018 identified and evaluated the government trophy at Mugumu police station. He identified the fresh pieces of meat as of an animal called Topi and that its value was 800 USD, **equivalent to Tzs. 1,760,000/=. Pw3 Wilbroad Vicent** prepared a trophy valuation certificate and tendered it as exhibit P.E.2. As the record bears testimony, the court did not read the contents of the exhibit P.E.2 to the appellants. Pw4 WP 5665 Sijali prepared an inventory Form and the magistrate ordered the disposal of the fresh meat in accordance with the law. She tendered the inventory Form as exhibit P. E. 3.

The appellants gave their own evidence on oath and did not call any other witness. They denied the charges. **Mgaya Bisala @Mwita,**

(Dw1) deposed that on the 6/8/2018 at 08.00 am **Andrea Chacha@ Marwa,** invited to his (**Andrea Chacha@ Marwa's**) home place. He went to **Andrea Chacha@ Marwa,** where **Andrea Chacha@ Marwa** notified him that his (**Andrea Chacha@ Marwa's**) cow fell into a pit. He denied the allegation that he was arrested whilst in the National Park. **Andrea Chacha@ Marwa Dw2's** denied to have committed the offence and an account similar to the evidence of **Mgaya Bisala @Mwita (**Dw1). I now consider the issues raised by the grounds of appeal.

Was it proper for the trial court to convict the appellants in the absence of a certificate of seizure?

It is self-evident from the record the prosecution did not tender the certificate of seizure. The appellants contended in their ground of appeal that the trial court erred to convict them in the absence of the certificate of seizure. They contended that prosecution was required prepare a seizure certificate as provided by section 22(2) and (3) of the Economic and Organized Crimes Act, **[Cap. 200 R.E. 2019].** The section 22(2) and (3) provides as follows-

(2) ***Whenever any search is made or any such written authority is issued****, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it is issued and the results of any search made under it, to a district magistrate within whose area of jurisdiction the search is to be made or was made.*

(3) Where anything is seized after a search conducted pursuant to this section, the police officer seizing it, shall-

(a) forth with or as soon as it is practicable evaluate or cause the property to be evaluated so as to ascertain its value;

(b) issue an official receipt evidencing such seizure and on which the value of the property as ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search.

The above cited law requires the searching officer to prepare a certificate of seizure and require the owner of the premises searched to sign it. In the present case, Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa found the appellants in the National Park in possession of the government trophy. There was no search. Search is *an examination of a person's premises (residence, business or vehicle) by law enforcement officers looking for evidence of the commission of a crime.* (*See* https://dictionary.law.com/Default.aspx?selected=1894).

Black's Law Dictionary 4th Ed. Defines the term search as follows-.

"An examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009, 1011. A prying into hidden places for that which is concealed and ***it is not a search to observe that which is open to view****."*

It is my conviction from the above definition that, in this case, there was no search. The prosecution's witness observed an open view, which did not belong to the appellants. Thus, the provisions of section 22 of Cap. 200 did not bind the prosecution witnesses to prepare a search certificate and tender it in court. Not only that but also, the nature of the items found in possession of the appellants, which are

pieces of Topi meat, are not something easily available or common items which could change hands or be substituted in the course. Omission to tender such certificate was not fatal. It did not cause any injustice to the appellants.

It is settled that, even in the circumstance where a certificate if seizure is required but is not tendered, the court can still convict if, satisfied that there is evidence on the record to establish that the accused was in possession of the items, which ought to have been entered in the certificate of seizure. See **Issa Hassan Uki v. R** Cr. Appeal No. 129/2017 (CAT unreported) at Page 13 – 16. In that case, the court expunged the certificate of seizure and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit.

I find therefore, that failure to prepare a certificate of seizure in the circumstances of this case was not fatal. The first issue, stemming from the first ground of appeal, is dismissed.

Was it proper for the trial court to admit exhibits P.E.1, P.E.2 and P.E.3 without an account of their chain of custody?

The appellants argued that the prosecution did not tender evidence to explain the movement and custody of exhibits from seizure to the time the exhibits were tendered to the court (the chain of custody). The exhibits in this case are a knife and a panga tendered as Exh. P.E.1, certificate of valuation of the trophy Exh. P.E. 2 and the inventory Form Exh. P.E.3. The phrase chain of custody in respect of evidence in a criminal trial, refers to documentation or proper trail of

exhibit from the time of seizure to show how they were collected, handled, and tendered in court. In the instant the case, the only exhibit, which the prosecution collected and tendered it in its form was exh. P.E.1, the weapons. Exh.P.E. 1 were a panga and a knife. Thus, the prosecution was required to provide the chain of custody of the knife and panga, Exh. P.E.1. The appellants referred this Court to the case of **Malumbo v. DPP**, [2011] E.A 280 to support their contention.

It is trite law that the chain of custody must be clearly shown so as to establish that the exhibits are not tampered with. See **Philimon Jumanne Agala v. R.**, Criminal Appeal No. 187 of 2015 (CAT unreported) and the case cited by the appellant of **Malumbo v. DPP** (supra). The exhibits referred in this case are a panga and knife. These types of exhibits cannot be tempered with. They cannot also not move easily from one person to another. It is my conviction that the nature of the exhibits, do require the chain of custody to be documented. Pw1 Thadeus Michael Gende contended that they labelled the exhibit and that is why he was able to identify them. I am of the view that the labelling in the circumstances of this case was sufficient. The Court of Appeal in **Josephs Leornard Manyota V R.,** Criminal Appeal No. 485/2015 the CAT differentiated the chain of custody in respect of goods which can change hands easily and those which cannot, it stated-

> "…. *It is not every time when the chain of custody is broken, then the relevant item cannot be produced and accepted by court as evidence regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the nature of being destroyed or polluted, and, or in any way tempered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have*

been broken. Of course, this will depend on the prevailing circumstances of every particular case."

The absence of the evidence of the chain of custody has no impact on the admission of the knife and panga, Exh.P.E.1. Thus, the trial court properly admitted the exhibits. I find the third grounds of appeal meritless and dismiss it.

Was it proper to convict the appellant with an offence of unlawful possession of government trophy, without tendering a certificate of seizure or calling an independent witness?

The appellants lamented that the prosecution did not tender a certificate of seizure or call an independent witness to prove their guilt. I ruled out above that given the circumstances of this case, failure to tender a certificate of seizure was not fatal. The appellants were not searched. The prosecution witnesses found the appellants in the prohibited place and in possession of government trophy. A certificate if seizure is mandatory when a person is searched and exhibits recovered in his premises or found in his possession. (*See section 22(2) and (3) of* ***Cap. 200 R.E. 2019)***

The appellants complained that the trial convicted them in the absence of an independent witness. They were thus, challenging the credibility of the prosecution witnesses. The prosecution summoned two Park rangers, a Warden, and a police woman. All witnesses are law enforcers. It is nowhere stated that courts should not convict if the prosecution evidence is only coming from law enforcers. It trite law that witnesses must be trusted unless, there is a reason to question their credibility. The **Goodluck Kyando v. R.,** [2006] TLR 363 and in

Edison Simon Mwombeki v. R., Cr. Appeal. No. 94/2016 (the Court of Appeal stated 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."*

The appellants opted the appeal to be heard in their absence due to COVIP-19 outbreak, for that reason they could not add meat to the ground of appeal. Being the first appellate court I decided to review the evidence on record to determine if there is any ground to discredit prosecution witnesses.

I am alive of the position of the law that credibility of the witness is the domain of the trial court. That notwithstanding, the first or second appellate court can determine credibility of the witness when assessing the coherence of that witness in relation to the evidence of other witnesses including that of an accused person. See **Shaban Daud v. R.,** Criminal Appeal No. 28 of 2001 (CAT unreported).

I passionately considered the evidence on record, at the outset, I wish to state that I find the prosecution's evidence as whole doubtful or illogical for what I will explain. The prosecution witnesses **Pw1 Thadeus Michael Gende** and **Pw2 Erwin Moywa** deposed that while on routine patrol with Waziri Athuman and Magambo Marato saw three people at Korongo la Machochwe within Serengeti National Park. They surrounded and arrest them. They found them with a knife, a panga, one fresh limb, one fresh tail and one fresh piece of skin all of a wild animal called Topi. The prosecution charged three suspects, to my surprise, before the trial commenced the prosecution withdrew charges

against one of the suspects, **Joseph Magige @Peter**, the first accused person.

The act of the prosecution's withdrawing charges against one of the suspects raises a make-or-break issue, creating reasonable doubt to the prosecution's evidence. If, I am to rely on the prosecution's evidence, it is axiomatic that Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa saw three people, who were the appellants (Mgaya Bisila and Andrea Chacha) and **Joseph Magige @Peter**. They arrested them and the prosecution arraigned the before the court. The prosecution dropped charges against **Joseph Magige @Peter,** believing, I hope, that he did not commit the offence. I get an impression that the prosecution was of the view that there was not credible evidence to prove **Joseph Magige @Peter's** guilt. Should that be prosecution's view and the same be true; then, what evidence do they have against the appellants?

The prosecution witnesses deposed that they found three persons, Mgaya Bisila and **Andrea Chacha@ Marwa** and **Joseph Magige @Peter** in the Seregenti National Park without permission to enter therein, while in possession of weapons and government trophy and weapons. By withdrawing charges against **Joseph Magige @Peter,** it meant the prosecution did not trust its own witnesses. The prosecution did not trust its witnesses' account, that they arrested three people in the park or that the people they found in the park are the ones charged.

I am unable to see logic in the prosecution's act of withdrawing the charges against **Joseph Magige @Peter** in the circumstances of this case. The circumstances leading to arrest of the appellants and

Joseph Magige @Peter, was that the witnesses caught them red-handed in the National park with trophy and weapons. It would have no consequences if the prosecution's evidence was that they saw three people and one managed to escape. It is the prosecution's account that its witnesses found three people unlawfully in the National Park, arrested and charged them. Then, if that account was true, why then withdraw charges against a third person. The prosecution applied a double standard principle to drop charges against **Joseph Magige @Peter.** That double standard, destroyed the credibility of the key witnesses of the prosecution namely, Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa. My analysis of that evidence is either Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa did not see the appellants and **Joseph Magige @Peter** in the national park or they found two people and not three. They fabricated evidence against the **Joseph Magige @Peter**. If, Pw1 Thadeus Michael Gende and Pw2 Erwin Moywa found two persons in the national park, why did they cause three persons to be charged when they knew it was false.

Given what I discussed above I find prosecution's key witnesses saying something which is not probable in the circumstance of the case or something which defeat logic. In **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal propounded the manner of assessing or determining credibility of witnesses. It stated -

> *"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways;* ***one, when assessing the***

coherence of the testimony of that witness. Two, *when the testimony of that witness is considered in relation with the evidence of other witnesses or including that of the accused person. In these occasions the* ***credibility of a*** *witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

It was the defence case, that the appellants were not found in the national park. The prosecution's act of dropping charges against the **Joseph Magige @Peter, whom it alleged was arrested in the national park together with the appellants,** weakens its evidence and gives credence to the defence witnesses. I am of the view that the prosecution's key witnesses gave improbable or implausible evidence which was weak to lead to the appellants' conviction. I uphold the appellants' ground of appeal questioning the credibility of the prosecution witnesses though for dissimilar reason.

Was the evidence properly evaluated and reasons provided for the decision?

Lastly, the appellants sought to challenge the trial court's judgment on the ground that it was unreasoned judgment. They referred to the case of **Mkulima Mbagala v. R.**, (CAT) Criminal Appeal No. 267 of 2006, where the Court of Appeal stated that-

"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed

opinion as to its quality before a formal conclusion is arrived at. See, for instance, ***D.R. PANDYA v R. (supra), SHANTILAL M. RUWALA v. R.*** *[1957] E.A. 570, and* ***IDDI SHABAN @ AMSI v. R.*** *(supra). It now behoves us to discharge this duty."*

It is self-evident from the record that the trial court gave a brief analysis of the evidence. It raised three issues and in two paragraphs considered the issues. Its analysis was barely enough. Thus, I find the six ground of appeal meritless.

Before I pen down I wish to point out that, the trial court did not cause the contents of the trophy evaluation report, **Exh.P.E.2**, to be read out to the accused persons. It is settled that after the court clears the exhibit for admission, it must invite the witness to read its contents to the accused person. In the event, the trial court omits to read the contents of the admitted exhibit to the accused person, the appellate cannot act on such exhibit. It expunges it from the record. See **Sunni Amman Awenda v R.,** Criminal Appeal No. 393 of 2013 (CAT unreported), where the Court of Appeal held that-

> ***"the omission to read the contents of the cautioned and extra judicial statement out was a fatal irregularity as it deprived the parties to hear what they were all about.*** *It was therefore improper for the trial court to rely on it. It is expunged from the record."* (***emphasis supplied***).

Given the above position of the law, the trial court was not entitled take into consideration the trophy evaluation report, **Exh.P.E.1.**

In the final analysis, I find that there was no reliable evidence for which to ground conviction as the prosecution's key witnesses were not

credible or were rendered not credible. I allow the appeal in its entirety, quash and set aside the conviction and sentence. Meanwhile I order the immediate release of appellants from prison unless they are otherwise lawfully held.

I order accordingly.

J. R. Kahyoza

JUDGE

15/6/2020

Court: Judgment delivered in the presence of the appellants and Mr.Temba, state attorney for the Republic through video link. Right of appeal explained. B/C Ms. Tenga present via video link.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.

15/6/2020

Appellants' Permanent Address

1. ANDRES CHACHA
   C/O MACHOCHO VILLAGE
   NYANGOSO HAMLET – SERENGETI MUGUMU

2. MUGAYA BISALA MWITA
   C/O MACHOCHO VILLAGE
   NYANGOSO HAMLET – HAMLET CHAIRMAN MR. JEREMIAH NYASU