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

AT MUSOMA

CRIMINAL APPEAL NO. 45 OF 2020
(Originating from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 52 of 2018)

MOHAMED S/O KIMASE MBWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 06/05/2020
Date of Jugdement: 03/06/2020

KISANYA, J.:

At the District Court of Serengeti at Mugumu, the appellant, Mohamed S/O Kimase @ Mbwita together with Fredy Elija @Carol (the second accused) were charged for two counts namely, Unlawful Entry into the Game Reserve, contrary to section 15 (1) and (2) the Wildlife Conservation Act, 2009 and 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.

The appellant pleaded not guilty to both counts. In order to prove its case, the prosecution called four witnesses who tendered two exhibits. On his part, the appellant defended himself on oath. At the end, the appellant was found guilty of the charged offences. Thus, he was convicted as charged

and sentenced to serve imprisonment for a term of three years and twenty years for the first and second counts respectively.

Aggrieved, the appellant has filed the present appeal which is premised on the following grounds of appeal:

1. That the trial Magistrate relied on uncorroborated evidence of PW1 and PW2 who work in the same office.
2. That the trial Magistrate erred in law and facts when he admitted cooked evidence of PW3 and Exhibit PE1 which was not tendered by an expert from the Government Chemist on the ground that it is impossible to trophy by colour only.
3. That conviction and sentence are illegal as the Trial Magistrate tried the case without consent of the Director of Public Prosecutions.
4. That, the appellant's evidence was not considered by the trial Magistrate.
5. That, the prosecution case was not proved beyond all reasonable doubts.

A brief background of the case shows that, on 06/7/2018 at 12.00 hours, Game Scouts at Ikororongo/Grumet Game Reserve namely, Kulwa Richard Maganga (PW1), Edward Hamis Siriwa (PW2), Kangeshoi Kaminche and Dickson George were on patrol at Ikorongo/Grument Game Reserve. They followed a torchlight and managed to catch the appellant and the second accused in the Ikorongo/Grumet Game Reserve. Upon searching them, they were found in possession of twenty dried pieces of meat of wildebeest. Since the appellant and the second accused had no relevant permit to enter into the Game Reserve and to possess the said meat of wildebeest, they were taken to Mugumu Police Station on 7/7/2018. Two days later on, 09/07/2018 at 09.00 hours, a wildlife warden namely,

Wilbroad Vicent (PW3) went to the police station. He identified the twenty pieces of dried meat found in possession of the appellant and the second accused as wildebeest meat valued at Tshs 4, 142,000. He tendered a Trophy Valuation Certificate as Exhibit PE1. On the same day (9/7/2018), H3802 DC Yunus (PW4) prepared an inventory an inventory of Government Trophies which was tendered and admitted as Exhibit PE-2.

In his defence, the appellant testified that he was arrested on 06/7/2020 at 20.30 hours at the open area used for grazing when he and Elija Kija were tracing his goats. He claimed that, the game scouts took them at Sawakwa Camp within Grumeti Game Reserve before taking them to Mugumu Police Station on 7/7/2018 at about 1500 hours. The appellant denied being found in possession of 20 dried pieces of wildebeest meat.

The trial court was satisfied that the prosecution had proved its case beyond all reasonable doubts. He was convicted and sentenced as stated above thereby leading to the appeal at hand.

Hearing of this appeal was conducted through video conference in attendance of the appellant in person, unrepresented and Mr. Nimrod Byamungu, learned State Attorney for the respondent.

When the appellant was called upon to submitting in support of the appeal, he just requested the Court to consider his grounds of appeal and allow the appeal, quash the conviction and set aside the sentence.

In response, Mr. Byamungu, resisted the appeal. He conceded the fourth ground of appeal that, the appellant's evidence was not evaluated by the trial court. However, he was of the firm view that, this Court being the first

appellate court, can step into the shoes of the trial court and evaluate the evidence given by the appellant in his defence. Thus, Mr. Byamungu was of the view that, the omission to evaluate the evidence of the accused (appellant) is curable under section 388 of the Criminal Procedure Act, Cap. 20, R.E. 2019 (the CPA).

Thereafter, Mr. Byamungu submitted against the first ground of appeal. He argued that the law does not bar persons from the same office to give evidence and that what matters is their credibility and reliability. The learned counsel invited the Court to consider the case of **Popart Emanuel vs R.**, Criminal Appeal No. 200 of 2010, CAT ta Iringa (unreported). Counsel Byamungu argued further that, evidence of PW1 and PW2 was not weak and unreliable as they testified how the appellant was caught red-handed in the game reserve and in possession of the Government Trophies and that he did not cross examine them.

On the third ground, the learned State Attorney stated that, PW3 is a wildlife warden and thus competent to identify and value the Government Trophies pursuant to section 3 of the Wildlife Conservation Act, 2009 (as amended). Therefore, he was of the considered view that Exhibit PE1 was tendered in accordance with the law without being objected by the appellant and that there was no need of calling the Government Chemist to testify on the matter.

As to the third ground of appeal, counsel Byamungu submitted that the consent of the Director of Public Prosecution was issued and filed in the trial Court accordingly.

On the fifth ground of appeal, the learned State Attorney replied that the prosecution case was proved beyond all reasonable doubts. He argued that the prosecution evidence was direct evidence and that the same was not challenged by the appellant. The learned Stated Attorney went on to argue that Exhibits PE1 and PE2 were tendered in accordance with the law and without being objected by the appellant.

Upon being probed by the Court on whether the appellant closed his case, the learned State Attorney replied that the appellant's case was closed by the court. However, he stated that the appellant was not prejudiced because he had indicated that he would not call any witness. The learned State Attorney cited the case of **Tongeni Naata vs R.**, (1991) TLR 54 and **Fulano Alphos Masabu Sugu** and 4 others vs R, Criminal Appeal No. 366 of 2018, CAT at DSM (unreported) where it was held that the proceedings can be vitiated if the accused person was prejudiced.

For the aforesaid reasons, Mr. Byamungu urged me to dismiss the appeal on the ground that it was meritless. In alternative, he requested the Court to nullify and quash the proceedings, conviction and sentence and order retrial of this case due to the above irregularities.

In his rejoinder, the appellant stated that the second accused person was discharged while it was testified by the prosecution witnesses that he was together with him. He submitted further that there was no evidence to implicate him in the charged offences.

I have read the evidence on record, petition of appeal, submission by the learned State Attorney and the appellant. I will consider the grounds of appeal as raised by the appellant and submitted in reply both Mr.

Byamungu.

I prefer to start with the last issue raised by the appellant in his rejoinder submission that, the second accused was discharged while the prosecution evidence was to the effect that he was arrested together with the appellant. It is on record that the second accused, Fredy Elija @ Carol was not discharged. He was convicted in absentia after jumping bail. The trial court ordered that the sentence against him will commence from the date he will be arrested. Therefore, though this ground was not raised in the petition of appeal, I find that it has no merit.

The second issue was raised by the Court, *suo motu,* on whether the appellant closed his case. This issue was raised after noting that the defence case was closed by the Court. It is trite law that, the court is not required to close the prosecution or the defence case. It is the prosecution and the accused person who are duty bound to close their respective cases and not the Court. Therefore, the trial court erred to close the defence case on behalf of the appellant. The next question is whether this act prejudiced the appellant. It is on record that upon being found with the case to answer, the appellant was addressed in terms of section 231 of the CPA. Thus, he was informed of his right to give evidence on oath and to call witnesses. The appellant replied that he would give his evidence on oath. He did not indicate as to whether he would call any witness. Therefore, since he had not indicated that he wanted to call witnesses, I am of the considered view that, the appellant was not prejudiced when the Court closed his case after giving his evidence. I think that is why he did not raise that issue as one of the grounds of appeal.

Now, as to the grounds advanced in the petition of appeal, the first ground is to the effect that evidence of PW1 and PW2 was not corroborated. This argument is based on the fact that PW1 and PW2 work in the same office. According to section 127(1) of the Evidence Act, Cap. 6, R.E. 2019, every person is competent to testify in court unless the court is of the view that he cannot understand the questions put to him or give rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause. PW1 and PW2 are game scouts who were on patrol on the fateful day. The trial court found them to be competent witnesses. They testified how they found the appellant and the second accused in the game reserve with 20 pieces of dried wildebeest. As evidence of PW1 and PW2 was direct, it required no corroboration. Further, the law does bar witnesses from the same office to testify on the same matter. This position was stated in the case **Popart Emanuel** (supra) 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 the instant appeal, the trial Court was satisfied that PW1 and PW2 are competent witnesses. Therefore, the first ground has no merit as the law does not restrict them from giving evidence.

For the sake of sequence, I move to address the third ground of appeal that this case was instituted without the consent of the Director of Public Prosecutions (DPP). The record shows that the Consent of the Stated Attorney In-charge and the Certificate Conferring Jurisdiction on a subordinate court to try an economic and non-economic offence were filed

in the Court on 8 August, 2018. According to section 26(1) of the Economic and Organized Crimes Control Act, R.E. 2002, the State Attorney In-Charge is mandated to file the consent on behalf of the DPP. Thus, this ground has no merit.

Returning to the second ground, the appellant was of the view that the Trophy Valuation Certificate (Exhibit P-1) was tendered by PW3 in lieu of an expert from the Government Chemist and that it was impossible to identify the meat of animals by color only. Mr. Byamungu did not address the issue of identification of trophy by colour. His submission was limited to the competence of PW3 who identified and valued the government trophies. Pursuant to section 86(4) of the Wildlife Conservation Act, 2009 (as amended), certificate on the value of trophy is required to be signed by the Director or wildlife officers from the rank of wildlife officer and not the Government Chemist. The trophy in the case at hand was valued by PW3 who tendered the Trophy Valuation Certificate (Exhibit P-1). PW3 is a wildlife warden. According to section 3 of the Wildlife Conservation Act, 2009 (as amended) wildlife warden is considered as wildlife officer. He was then authorized by the law to value the trophy.

However, as rightly argued by the appellant, the said PW3 testified that he identified the meat brought before him by colour as quoted hereunder:

> *"I was called to identify and value government trophies. I identified 20 dried pieces of wildebeest meat. I identified them by colour, it had slightly gray to darker brown, the meat contained compacted fibre."*

It is my considered opinion, the said evidence was not sufficient to prove that the meat found in possession of the appellant was of wildebeest. In other words, identification by colour alone is not sufficient unless there is

other evidence to corroborate such evidence. It was not established and proved that there is no other dried meat which can be "slightly gray to darker brown" and have compacted fibre except wildebeest. Any possibility of having other meat which are "gray to darker brown" and with fibre, raises doubt as to whether the alleged meat was of wildebeest because the identification was not well stated. Offence of possession of government trophy is a serious offence which carries the minimum sentence of twenty years. Prosecution should ensure that identification of government trophy is well testified in evidence.

As to the fourth ground of appeal, I am in agreement with the appellant and the learned State Attorney that the evidence of the appellant was not evaluated by the trial court. In its jugdement, the trial Court summarized evidence of one Michael Machamba @Mohega and not the appellant. However, the defect is on the name only. The summaryof evidence reflects what was testified by the appellant. Therefore, the defect did not occasion failure of justice. But, the trial court did not evaluate the appellant's defence at all in addressing the framed issues. As rightly argued, by Mr. Byamungu, this being the first appellate Court, it has the power to step into the shoes of the trial court and evaluate the appellant's defence accordingly.

I will consider the appellant's defence when addressing the last ground on whether the prosecution case proved beyond all reasonable doubts. It is a principle of law that the prosecution is duty bound to prove its case beyond all reasonable doubts. Any doubt ends in the favour of the accused. The offences preferred against the appellant were unlawfully entry into the game reserve and unlawful possession of government trophies.

The prosecution evidence on the first count of offence was given by PW1 and PW2. These witnesses testified that they found the appellant and the second accused within Ikorongo/ Grument Game Reserve and that they had no permit with them. The appellant did not cross examine PW1 and PW2. However, in his defence, he testified that he was arrested at open area used for grazing when he was tracing his goats and then taken in the game reserve. The prosecution did not cross-examine the appellant on the said evidence. It is trite law that, the accused person is not required to prove his innocence. Therefore, he cannot be convicted only because he failed to cross-examine PW1 and PW2. His duty was to raise doubt on the prosecution case. I find that he raised the doubt on the first count when he gave unchallenged evidence to the effect that he was arrested at the open area used for grazing. This is especially when it is considered that, PW1 and PW2 did not prove on the exact area where the appellant was found within the Ikorongo/ Grumeti Game Reserve.

On the other hand, the evidence which implicated the appellant in second count on unlawful possession of government trophy is deduced from PW1, PW2, PW3 and PW4. Evidence of PW1 and PW2 was to the effect that the appellant was found in possession of 20 pieces meat of dried wildebeest. That is when PW3 came in to identify the alleged meat as wildebeest meat. I have shown herein the doubt on how the said meat was identified to be Government Trophy. Further, there is contradiction on the value of trophy. While PW3 and Exhibit P-1 show that the said 20 dried pieces of wildebeest had value of Tshs.4, 142,000/, PW4 stated that the trophy had value of Tshs. 2,180/=. This is reflected in the handwritten and typed proceedings. Such contradiction goes to the root of the case because value of the trophy is an important element to prove the offence of unlawfully

possession of government trophies. The said doubts end in the favour of the appellant.

All the above considered, therefore, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I also order that, unless the appellant is lawfully held, he should be set free forthwith. Order accordingly.

DATED at MUSOMA this 3rd day of June, 2020.

E. S. Kisanya
JUDGE
6/3/2020

COURT: Judgement is delivered through video conference this 3rd day of June, 2020 in the presence of the appellant and Mr. Yesse Temba, learned State Attorney for the Republic/ Respondent.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
3/6/2020