IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTRY)

AT MUSOMA

CRIMINAL APPEAL NO. 151 OF 2019
(Originating from Economic Case No. 107/2018 in the District Court of Serengeti at Mugumu)

CHACHA S/O MATARI @NYARASI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

12th & 24th February, 2020

KISANYA, J.:

The appellant herein, was arraigned before the District Court of Serengeti at Mugumu for three counts. The first count was Unlawful Entry into the National Park, contrary to section 21 (1) (a), (2) and 29(1) of the National Parks Act [Cap. 282, R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003. It was alleged that, on the 3rd day of October, 2018, at Mto Grumet area within Serengeti National Park, the appellant did unlawfully enter into Serengeti National Park without permission.

The second count was on the offence of Unlawful Possession of Weapon in the National Park, contrary to section 24 (1) (b) and (2) of the National Parks Act [Cap. 282, R.E. 2002], where it was alleged that, on the 3rd day of October, 2018 at Mto Grumet area in

Serengeti National Park, the appellant was found in unlawfully possession of weapon to wit one panga, one knife and two animal trapping wires, without permission from the authorized authority.

The last count was on the offence 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 the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] (as amended). The Prosecution alleged that, on the 3rd day of October 2018, at Mto Grument area in Serengeti National Park, the appellant was found in unlawfully possession of one dried skin of wildebeest and two pieces of fresh meat of Wildebeest valued at Tshs.2, 824,000/=, the property of the United Republic of Tanzania.

The accused pleaded not guilty to all offences. Thereafter, the prosecution paraded four witnesses to prove its case. Also, three exhibits were tendered and admitted as evidence. The prosecution witnesses (PW1 and PW2) testified that the accused was found at Mto Grumeti within Serengeti National Park. He was searched and found in possession one panga, one knife, two animal trapping wires possession of one dried skin of wildebeest and two pieces of fresh meat of wildebeest. Furthermore, it was the prosecution case that the appellant had no permission from the relevant authority.

The appellant denied the charges. His defence was to the effect that

he was arrested at his house and not in Serengeti National Park. He stated further that, the game officer who searched his house did not find anything to incriminate him.

After hearing the prosecution and defence case, the appellant was convicted of all offences as charged. He was sentenced to serve one year imprisonment in jail for the first and second counts. As for the third count, the appellant was sentenced to serve twenty years imprisonment.

Aggrieved by the judgement, conviction and sentence, the appellant has appealed to this Court on the following grounds:

1. *That, the trial magistrate had erred in law and fact in convicting and sentencing the appellant by receiving wrong exhibits issued before the court by prosecution side there was no any evidence with the allegation.*
2. *That, the trial magistrate erred in law and facts by admitting the wrong exhibits tendered before the court side, the exhibit tendered before the court were wrong and the prosecutor failed to verifying to the crime alleged.*
3. *That, the trial magistrate had erred in law and the facts in convicting and sentencing the appellant without using an independent witnesses apart from the park rangers and the game scouts as required by the law, this did not open the principle of right to be hard and the principle of natural justice and also this is contrary to the law of evidence.*

4. *That, the trial magistrate erred in law and fact to convicting and sentence the appellant without allow the appellant to call his key witness to defend his case but the trial magistrate progress to adjudicate the case and convict the appellant.*
5. *That the trial magistrate had erred in law and fact in convicting and sentence the appellant, the prosecution side failed to prove the case beyond reasonable doubt as required by the law of evidence but the court admitted the hearsay evidence which is contrary.*

When this appeal was called on for hearing, the applicant appeared in person, unrepresented while the Republic had the services of Mr. Nimrod Byamungu, learned State Attorney. In addition to the above grounds, the Court, *suo motu*, asked parties to address whether the accused was given the right to cross-examine PW2.

In his submission in chief, the appellant requested to adopt his Petition of Appeal. He submitted further that, the trial court denied him the right to call witnesses. In addition, the appellant blamed the trial court for declining to record questions put to the prosecution witnesses during cross examination. Therefore, he urged me to allow the appeal, quash the conviction and sentence, and set him free.

On his part, Mr. Nimrod Byamungu, learned State Attorney, did not support the appeal. Starting with the issue whether the appellant was given time to cross examine PW2, Mr. Byamungu conceded that the appellant was denied the right to cross examine PW2. He urged me

to expunge evidence of PW2 from the record because it was taken contrary to the law and principle of fair hearing. However, Mr. Byamungu submitted that, even if evidence of PW2 is expunged, the remaining evidence proved its case beyond reasonable doubts. Citing section 143 of the Evidence Act and the case of **Johannes Msigwa vs R** [1990] TLR 148, the learned Stated Attorney argued that no particular number of witness is required to prove the fact.

On the first and second grounds of appeal that the trial court admitted wrong exhibits, Mr. Byamungu specified that exhibits tendered by the prosecution are Exhibit P-1 (one panga, one knife and two animal trapping wires); Exhibit P-2 (Trophy Valuation Certificate); and Exhibit P-3 (Inventory). The learned State Attorney argued that all exhibits were tendered respectively by competent witnesses namely, PW1 (game officer), PW3 (Game warden) and PW4 (Police officer) who are competent witnesses to tender each exhibit. He submitted further that the said exhibits were tendered without any objection from the appellant.

As for the third ground, that the appellant was convicted in absence of "independent witnesses apart from the park rangers and the game scouts", Mr. Byamungu argued that the law does not bar witnesses from the same office to testify. What is required is credibility and reliability of the respective witness. The learned State Attorney cited section 127(1) of the Evidence Act and the case of **Popart Emanuel vs R**, Criminal Appeal No 200 of 2010, CAT at Iringa (Unreported) to

support his argument.

On the fourth ground, that the appellant was denied the right to call defence witnesses, Mr. Byamungu submitted that the said right was accorded to the appellant. The was informed by the appellant that his witnesses were not available. Thereafter, the appellant requested to proceed with the defence case before closing his case.

In respect of the fifth ground, the learned State Attorney argued that the prosecution proved its case at the required standard. He submitted that PW1 testified how the appellant found in Serenegti National Park and caught red-handed with weapons which were tendered and admitted as Exhibit P-1. Mr. Byamungu argued further that the appellant was found in possession of government trophy which was valued by PW3. A Certificate of Value was tendered as Exhibit P-3. As the appellant failed to cross examine the prosecution witnesses who gave evidence which incriminate him, he cannot raise that issue during appeal. That said, Mr. Byamungu advised me to dismiss the appeal for want of merit.

In his rejoinder, the appellant insisted that he was not found with any exhibit and that he was arrested at his house. The appellant claimed further that what is recoded in the proceedings is contrary to what happened during trial.

Having gone through the record, petition of appeal and submissions of both parties, I will dispose this appeal by addressing the grounds stated in the petition of appeal and the issue raised by this court on

irregularity noted during trial.

Starting with the issue on denial of right to cross examine PW2, it is important to emphasize that the order of examining witnesses is governed by the Evidence Act [Cap. 6, R.E. 2002]. Pursuant to section 147 of the Evidence Act, an adverse party if so desires, is entitled to cross examine witness called by the other party. The said provisions provide:

> *"147.-(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined"*

It is during cross-examination, when witness is asked questions which test his veracity or shake his credit. Further, questions may asked to discover the witness in dock and his position. This is provided under section 155 of the Evidence Act, which provides that;

> *"155. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-*
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> *(a) to test his veracity;*
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> *(b) to discover who he is and what is his position in life; or*
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> *(c) to shake his credit, by injuring his character,*
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> *although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."*

In order to ensure that, a party to proceedings exercises the right to cross-examine witnesses called to testify against him, the trial court is required to address him/her on whether he/she desires to cross-examine the witness in question. If the party does not wish to cross examine the witness, his reply should be recorded and/or reflected in the proceedings. Otherwise, it can be taken that the party was not given the right to cross-examine the witness and hence, denied the right to test the veracity and credit of such witness. In such a case, evidence of such witness has no value and need to be expunged from the record.

In the matter hand, upon giving his evidence, PW2 was not cross-examined by the appellant. The proceedings do not show that the appellant was asked to cross examine the said PW2. I take that the appellant was not accorded with time to test the veracity and credibility of PW2. Therefore, I agree with Mr. Byamungu that evidence of PW2 should be expunged from record because it was taken contrary to the law.

Regarding the grounds of appeal, the first and second grounds relate to whether the trial court admitted wrong exhibits and whether the said exhibits do not implicate the appellant in the charged offences. It is important to note that exhibits are evidence. The conditions for admission of evidence including exhibits is competency of the witness who requests to tender it; and its relevancy to the case. This is based on section 127(1) of the Evidence Act and decision of the Court of

Appeal of Tanzania in the case of **Republic vs Charles Abel Gesirabo @ Xgarles Gazilabo and Others**, Criminal Appeal No. 358 of 2019, CAT at Dar es Salaam, where it was held:

> *"..The basic prerequisite of admissibility of evidence in the court of law are relevance, materiality and competence of the person tendering the respective exhibit, In addition, competence of witness to tender an exhibit must be tested along the set of guidelines reaffirmed by this Court in* ***DPP vs Mizal Pirbakhishi @ Hadji & Three Others*** *(supra, where the Court with approval cited the case of Hamis Said Adam vs Republic, Criminal Appeal No 429 of 2016 (unreported) and stated that:*
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> > *"A person at one point in time possess anything, a subject matter of trial, as we said in Kristina's case, is not only a competent witness to testify but could also tender the same ....The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some in time albeit shortly. So, a possessor or custodian is an actual owner or alike are legally capable of tendering the intended exhibit in question provided he has the knowledge of the thing in question.""*

The record in the matter hand shows that, exhibits tendered during trial are, one panga, one knife and two animal trapping wires (Exhibit

P-1), (Trophy Valuation Certificate (Exhibit P-2) and Inventory of Claimed Property (Exhibit P-3). These exhibits were respectively tendered by PW1, PW3 and PW4. All witness testified how they came across or dealt with each exhibit. Further, each exhibit was relevant to the charges against the appellant and tested before being admitted.

As stated herein, the appellant was found in possession of one panga, one knife, two animal trapping wires possession of one dried skin of wildebeest and two pieces of fresh meat of wildebeest. But, what was tendered in court is one panga, one knife and two animal trapping wires (Exhibit P-1), (Trophy Valuation Certificate (Exhibit P-2) and Inventory of Claimed Property (Exhibit P-3). The said exhibits will have relevancy to case if the procedure of tendering each exhibit was followed.

It is now settled that where a document is admitted as exhibit, it must be read over to the accused person. The essence of this procedure is to enable the accused to understand nature of evidence given against him. He can be in a good position of cross-examining the respective witness and or prepare his defence only if the document is read over to him. The effect of failure to read over document after its admission was stated in the case of **Florence Athanas @ Baba Ali and Another vs The Republic**, Criminal Appeal No. 438 of 2016, CAT at Mbeya (unreported) when the Court of Appeal held thatz:

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

In the present case, the Trophy Valuation Certificate (Exhibit P-2) and Inventory of Claimed Property (Exhibit P-3) are documentary evidence. The proceedings do not show that the said Exhibit P-2 and P-3 were read over to the accused person, immediately after being admitted as evidence. Thus, the content thereto was not revealed or made clear to the appellant thereby causing failure justice. I think that is why the appellant argues that the court admitted wrong exhibits. For the aforesaid reasons, the Trophy Valuation Certificate (Exhibit P-2) and Inventory of Claimed Property (Exhibit P-3) cannot be relied upon and should be expunged from the record.

The next issue then is, whether in absence of evidence of PW2, Exhibit P-2 and Exhibit P-3, all counts were proved against the appellant.

Starting with the third count on offence of Unlawful Possession of Government Trophies, there is no evidence to prove that what was found in possession of the appellant is a government trophy namely, dried skin of wildebeest and fresh meat of wildebeest. Further, value of the said dried skin of wildebeest and fresh meat of wildebeest was not proved. Moreover, there is no evidence to show that the respective Government Trophy, if any, was disposed in accordance with the law. In the circumstances, I find that, in absence of Exhibit

P-2 and P-3, the offence of Unlawful Possession of Government Trophy was not proved.

As for the first second counts, evidence to prove these offences is deduced from PW1. This is a Park Ranger. He testified how the appellant was found and arrested at Mto Grumeti within Serengeti National Park. Furthermore, PW1 testified how the appellant was found in possession of one panga, one knife, two animal trapping wires, one dried skin of wildebeest and two pieces of fresh meat of wildebeest. The said panga, knife and animal trapping wires were tendered and admitted as Exhibit P-1.

The appellant argues in the petition of appeal that there was a need of an independent witnesses apart from Park ranger. This ground lacks merit. As rightly argued by Mr. Byamungu, the law does not bar persons from one office to give evidence. What matter is whether the person giving evidence is competent person to testify as provided for under section 127(1) of the Evidence Act. In the case at hand, the trial court was satisfied that PW1 is a competent witness. Further, his evidence was not challenged by the appellant during cross-examination.

The appellant claims further that he was denied the right to call witnesses. It is a law that every accused is entitled as of right to call witness of his choice. In order to ensure that this right is exercised accordingly, the trial court is duty bound to address and inform the accused of his right to defend himself to call witnesses. This is

pursuant to section 231 of the Criminal Procedure Act, Cap. 20, R.E. 2002.which provide:

> *"231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*
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> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
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> *(b) to call witness in his defence,*
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> *and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

Further, if the accused's witnesses are not available, the Court can adjourn the case and issue summons to compel attendance of witnesses required by the accused person as provided for under section 231(4) of the Criminal Procedure Act.

The record herein shows clearly that section 231(1) of the Criminal Procedure Act was complied with. The appellant indicated that he

was to give his evidence oath and call one witness namely, Jones Nyamhanga of Mbilikiri Village. Further, section 231(4) of the Criminal Procedure Act was complied with because the case was adjourned and the court ordered the defence witness to be summoned. When the case came for defence hearing on 22/8/2019, the appellant prayed for an adjournment as his witness was not on attendance. His request was granted. Finally, when the case was called on for hearing on 19/9/2019, the appellant stated that "My witness is nowhere to be found, I pray to proceed with my defence". Thereafter, he prayed to close the defence case immediately after giving his evidence. Therefore, I find that this ground has no merit. The appellant was not denied of his right to call witnesses.

As to the appellant's allegations that the trial court rejected questions which asked the prosecution witnesses during cross examination and that what is recorded in the proceeding is not what transpired in the trial court, I have noted that the said grounds were not stated in the petition of appeal. This Court cannot consider grounds which were not specified in the petition of appeal.

In the light of the above findings, I am of the considered views that PW1 and Exhibit P-1 proved the first and second counts against the appellant. Evidence of PW1 was direct and not hearsay as argued by the appellant.

To this end, I hold that the appeal is partly allowed. Thus, appeal against the first and second counts is hereby dismissed. As for the

third count, I hereby hold that appeal is allowed. The said offence was not proved beyond reasonable doubt due to irregularity after admission of Exhibit P-2 and P-3. I revise the trial court's proceedings by expunging Exhibits P-2 and P-3 from the record, quash the conviction on the third count and set aside the sentence arising thereto.

The Prosecution is at liberty to institute a fresh case in respect of the third count. But for this case, the appellant should serve the sentence imposed for by the trial in respect of the first and second counts only (that is, one year imprisonment from 23/09/2019 when he was convicted by the trial court).

Order accordingly.

Dated at **MUSOMA** this **24th** day of **February, 2020**.

E. S. Kisanya
JUDGE
24/2/2020

Court: Judgement is delivered this **24th** day of **February, 2020** in the presence of the Appellant, in person, and Mr. Nimrod Byamungu, learned State Attorney for the Respondent.

E. S. Kisanya

JUDGE
24/2/2020