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

CRIMINAL APPEAL NO. 108 OF 2020

JOSEPH CHACHA @ MGANGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Arising from Economic Case No. 11/2019, in the District court of Serengeti at Mugumu)

JUDGMENT

7th Dec., 2020 – 9th Feb., 2021

Kahyoza J,

Joseph s/o Chacha @ Mgango, the appellant stood charged and convicted of the offence of entry into the National Parks, in the 1st count, unlawful possession of weapons in the National Park in the second count and unlawful possession of Government trophy, in the third court. The trial court sentenced the appellant to serve a custodial sentence of six months, one year and 20 years for the offences in the first, second and third counts respectively.

Aggrieved by the conviction and sentence, **Joseph s/o Chacha** appealed to this Court raising four grounds of appeal which are paraphrased as follows:-

1. The trial court failed to consider his defence.

2. The trial court erred in law and fact to convict him in the absence of an independent witness.
3. The trial magistrate erred to convict him in the absence a certificate of seizure from the Director of Public Prosecutions (DPP).
4. The trial magistrate heard the evidence of one side and admitted it.

This is a first appeal. The rule of practice requires a first appellate court to re-hear or re-evaluate the evidence. I will commence with the ground that the trial court erred to convict the appellant in the absence of a certificate of seizure from the DPP. The appellate unrepresented did not elaborate this ground of appeal.

The respondent's State Attorney contended that there is no law requiring the DPP to issue a certificate of seizure. He prayed the third ground of appeal to be dismissed.

I am in total agreement that the third ground of appeal is a misdirection. There is no law requiring the DPP to issue a certificate of seizure. The law governing economic cases, like the accused's case, requires the DPP to issue consent and a certificate conferring jurisdiction on a subordinate court to try economic cases. Economic offences are validly tried after obtaining a consent from the DPP as per section 26(1) of the Economic and Organized Crime Control Act [Cap. 200, R.E 2019] (the **EOCCA)**, which stipulates that-

> "26 (1) *Subject to the provisions of this section,* ***no trial in respect of an economic offence may be commenced under***

this Act save with the consent of the Director of Public Prosecutions. *" (emphasis added)*

On the part of subordinate courts, like the trial court, they can competently try economic offences provided DPP was issued consent as per section 26(2) of the **EOCCA** and a certificate of transfer in terms of section 12(3) or (4) of the **EOCCA** which provides as follows:

> "12 (3) *The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest; by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the high Court as he may specify in the certificate."*

The above apart, section 12(4) of the same **EOCCA** provides for the issuance of a certificate of transfer of a case involving an economic offence in combination with a non-economic offence. It states -

> *"12(4) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public Interest; by a certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence/ be instituted in the Court."*

I examined the trial court record and discerned that the prosecution did on the 23rd October, 2019 submitted the DPP's consent and certificate conferring jurisdiction to the trial court. Trial commenced on the 20th

November, 2019 after consent and certificate were lodged. I dismiss the third ground of appeal for want merit.

Was the defence ignored by the trial court?

The appellant complained in the first ground of appeal that the trial court did not consider his defence. He alleged also in the fourth ground of appeal that the trial court considered only the prosecution's evidence. I will consider the two grounds of appeal jointly.

The appellant had nothing to add on his grounds of appeal.

On the other hand, Mr. Temba, the respondent's State Attorney, submitted that the trial court did consider the defence. He prayed that should this Court to find that the trial court did not consider the defence, being the first appellate, to consider the defence.

I examined the judgment and found that the trial court framed three issues, that is one issue to each count. The trial court answered all issues in favour of the prosecution. In answering the first and second issues the trial court did not make a reference to the accused defence. However, in answering the third count the trial court did consider the appellant's defence. It stated, I quote

> *"As it has been testified by Pw1, Pw2, Pw3 and Pw4 their evidence are very corroborative and there is no doubt that the accused person was found being in possession of Government Trophies which were identified by Pw3. On his part, the accused person testified that he was farming where the park rangers arrested him.*

In cross-examined he told the court that he have no quarrel with the park rangers. This means that the park rangers cannot arrest him without the reasons. It shows that the accused person committed the offence. His defence did not raise any doubt on the part of the prosecution case.

On the basis of the foresaid reasons, I do find that the prosecution side has successfully proved the case against the accused person beyond reasonable doubt on all offences charged and I hereby convicted the accused person as he is charged."

I find that the appellant's complaint is baseless regarding the offence in third count, which is a serious offence. As to the first and second count, I concur with the appellant that the trial court did not make a reference to his defence. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/ or biased conclusions or inferences resulting in miscarriages of justice. It is the position of the law that trial court may consider the appellant's defence if the same was not considered by the trial **Ismail Shabani v. R,** Cr. Appeal No. 344/2013 the Court of Appeal held that

"In the light of the holding in Desiderio case ***(supra) (Desiderio Kawunyo vs Reginam [1953] 20 EACA281)*** *to which we subscribed fully, what the High Court has done is within its powers. (The High Court considered the defence which was not considered by the trial court) This is because one of the functions of a higher court on appeal is to re-appraise the entire evidence on record with a view to seeing whether justice prevailed. In Hussein case the*

Court neither considered nor discussed the option we have just explained in that the higher court can step into the shoes of a lower court to entertain an appeal if there is sufficient material on the record to act. In view of the explanation we have given above, the case of Hussein (supra) is distinguishable.

I wish to point out at the outset, that a glimpse at the appellant's defence which was too brief, I am enable to fault the trial magistrate. The appellant's defence was that one person **Thomas Makomba** a park ranger found him grazing cattle, asked him if he had seen a person who was grazing in the Nation Park. The appellant refused to have seen any. It was at that time that person arrest him took him to Machochwe Range Park.

The prosecution's evidence was that Pw1**, Salum Ahmad, Pw2 Saba Mahimbo, Salima Kiteme** and **Clement Kigaira**, all park rangers on their nature patrol on the 7th February, 2019 at 08:30PM saw a personal Mto Mara within Serengeti National Park. They surrounded and arrested him. They found that person with pieces of Hippopotamus skin. They arrested him. That person was found in possession of a panga. The appellant had no permit to enter into the Nation Park, to possess a weapon and government trophy therein.

They prepared a certificate of seizure, which **Pw1, Salum** tendered as exh. PE1. The appellant's cross-examination did not indicate that he had any complaint as to the place he was arrested. He did not object to the seizure certificate. I have no reason to fault the trial court to hold that the

prosecution did prove that the appellant was found in the National Park without permit and the he was found in possession of a panga without any leave.

I partly uphold the first and fourth grounds of appeal. However, after reviewing the appellant's evidence, I hold that the appellant was properly convicted with the offence in the first and second counts.

The trial court erred to convict the appellant without or independent witness?

The appellant without substantiating his complaint, he lamented that the trial court convicted him without the prosecution pareding an independent witness.

The respondent's State Attorney, Mr. Temba submitted that the law did not require the prosecution to call an independent witness.

It is true that all prosecution principal witnesses were park rangers. The prosecution's evidence was that the appellant was found in the National Park whilst in possession of government trophy and a weapon to wit a panga. A National Park is not place a person visits or enters freely. A person visiting or entering the National Park must seek and obtain a permit to enter. It is not possible to find a person in the National Park at 7:30PM who is not a park ranger. It is beyond dispute that the appellant's demand for an independent witness implies that the prosecution's witnesses were not credible.

I am unable to find any ground to discredit their evidence. It is settled law that witnesses must be trusted unless, there is a cogent reason to question their credibility. See **Goodluck Kyando v. R.**, [2006] TLR 363 and in **Edison Simon Mwombeki v. R.**, Cr. Appeal. No. 94/2016 CAT unreported) 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."*

I am unable to find any cogent and good reason to disbelieve the prosecution witnesses. **Pw1, Salum Ahmad** and **Pw2 Saba Mahimbo, Salima Kiteme** found the appellant in the National Park. I considered the prosecution's witness **Pw1, Salum Ahmad** and **Pw2 Saba Mahimbo, Salima Kiteme** to find out if there was any reason to discredit them. The record showed that the appellant replying to the cross-examination, stated that he had no bad blood with any prosecution witness. Thus, the prosecution's witnesses had no reasons to fabricate evidence against him. Not only that but also, the appellant did state grounds why the trial court should not have relied upon the prosecution witness to convict him.

I further scrutinized the evidence to find out if there was any of prosecution witnesses who had personal interest to prosecute the appellant. I must confess, I did not find any such interest on the prosecution's witness a part from the appellant's conviction.

Basing on the above finding I find that the appellant's ground of appeal that the trial court erred convict him in the want of an independent witness, baseless. I dismiss it.

That done, this being the first appeal, I will consider if the prosecution did prove the appellant's guilt. I will not consider the offence in the first and second counts, I have already done so. I found in relating to the offences in the first and second counts that the prosecution did establish the offence, and upheld the conviction and sentence for the offence of 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] Act No. 11 of amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003, and the offence of unlawful of weapons in the National Park Contrary to section **24(1) (b)** and **(2) of the National Parks Act** [Cap. 282 RE 2002].

I now consider whether the offence in third count of unlawful possession of the government trophy was proved.

The respondent's State Attorney Mr. Temba submitted that he was partly supporting the appellant's appeal. His ground for not supporting the appeal was that the inventory tendered as Exh. PE4 was prepared in violation of the law. For that reason, it was wrong for the trial court to admit it. To buttress his argument, he cited the case of **Mohamed Mpakama V. R.** Criminal Appeal No. 385/2017 (CAT Unreported).

It is evident that to prove the offence of unlawful possession of government trophy, the prosecution should tender in court the trophy alleged found with the appellant. In case the trophy is perishable, the law allows to tender an inventory. The inventory must be prepared either by observing the procedure under S. 101 section 101 (1) of the **Wildlife**

Conservation Act, Cap 283 as amended by the **Written Laws Miscellaneous Act**, No.2 of 2017 (the WLA) or under paragraph 25 of the Police General Orders (PGO) No. 229.

I examined the inventory in this case found that the same was purported to be made under the PGO, as an inventory can be prepared under section 101 of the the WLA after the Court has given an order. In this case, there is no court order.

The procedure of disposing of exhibits subject to speedy decay under the Police General Orders (PGO) was considered by the Court of Appeal in the case of **Mohamend Juma @ Mpakama v. R** (supra). The Court made a reference to Paragraph 25 of the PGO which states that-

> *25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.*

The Court of Appeal held that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits. It stated-

> *"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail)* ***to be present before the magistrate and be heard****." (Emphasis added)*

I scrutinized Exh PE4 and found that it does not presuppose that the appellant was preset and had an opportunity to air his comment before the order to dispose the trophy was issued. The inventory was prepared in

contravention of law. The trial court was wrong to admit the same. I expunge the inventory, exhibit PE4 from the record.

Having expunged the inventory from the record I find that the appellant was not properly convicted with the offence in the third count of unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (the **WLCA**) (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 by act No 3 of 2016. 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 exhibit, which would be used to prove the prosecution case in the third count was destroyed and the inventory prepared contrary to the law. Thus, there is no evidence on record to

support the prosecution's case. In the circumstance, I will hastate to order a retrial.

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 two years' custodial sentence. The appellant was sentenced on the 6th May, 2020, he must be released after serving the two years' sentence, unless held there for any other lawful cause.

It is ordered accordingly.

J. R. Kahyoza, J.

9/2/2021

Court: Judgment delivered in the presence of the appellant and Mr. F. Nchala S/A via video link.

J. R. Kahyoza, J.

9/2/2021

Court: Right of appeal explained.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.

9/2/2021