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

AT SHINYANGA

CRIMINAL APPEAL NO. 28 OF 2020
(Arising from Economic Case No. 69 of 2016 of the District Court of Bariadi at Bariadi)

MASANJA KADANGAMILE .....1ST APPELLANT

MADUHU GAMBANADI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

3rd March, 2021 to 5th March, 2021

MKWIZU, J.:

The appellants named above were arraigned at the District Court of Bariadi at Bariadi charged with ten counts of unlawful entry into the Game Reserve (1st count) contrary to section 15 (1) and (2) of the Wildlife Act No. 5 of 2009 read together with Government Notice Number 275 of 1974, unlawful possession of weapons in a Game Reserve (2nd count) contrary to section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with Government Notice Number 275 of 1974 and paragraph14 of the first schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Organized Crimes Control Act, (Cap 200 RE 2002) as amended by section 13

and 16 of the Written Laws (Miscellaneous amendments) Act No. 3 o 2016, unlawful hunting (3rd, 4th, 5th, & 6th counts) contrary to sections 47 (a) and (2), 19 (1) & (2) of the Wildlife Conservation Act No. 5 of 2009 read together with Government Notice Number 275 of 1974 and paragraph 14 of the first schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Organized Crimes Control Act, (Cap 200 RE 2002) as amended by section 13 and 16 of the Written Laws (Miscellaneous amendments) Act No. 3 o 2016 and unlawful possession of Government trophies (7th, 8th, 9th & 10th counts) contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Government Notice Number 275 of 1974 and paragraph 14 of the first schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Crimes Control Act, (Cap 200 RE 2002) as amended by section 13 and 16 of the Written Laws (Miscellaneous amendments) Act No. 3 of 2016.

Particulars of the offence show that on 18th October 2016, at about 22.45 hrs appellants were found is possession of a panga, a knife and fourteen (14) animal trapping wires at Mto Senu located at Maswa Game Reserve within Bariadi District in Simiyu Region without permission from the Director of wildlife. It was also alleged that the appellant hunted one zebra, one

Warthog, three buffalo and one vulture all valued at valued at USD 7380/- equivalent to Tshs. 15,612,543/- the property of Tanzania Government. The particular of offence in the 7th to 10th counts were elaborative that, appellants were found in possession of three fresh tails of buffalo, two teeth of Warthog, one fresh skin of zebra head and two legs of vulture.

Backgrounds facts of this case are that; while on a normal game reserve patrol, on 18/10/2016, PW1, PW3 and another Game Reserve officer found the appellant at Seni River inside the gave reserve without a permit. In their possession, appellants were found with items itemized in the charge sheet. Kenedy Francis (PW2) valuated the seized trophies on 20/10/2016 and prepared a report in respect of the seized trophies. According to his evidence, all the Government trophies were worth USD 7380/- equivalent to Tshs. 15,612,543/- /=. He tendered in court the valuation and inventory reports which were admitted in evidence as exhibits P.2 collectively.

PW4 is a police officer and investigator of the case. She re-counted on how she received instruction to investigate the matter on 20/10/2016. She arranged for the identification and valuation of the trophies by PW2. She is the one who handled the trophies to PW2 on 20/10/2016.

Appellants denied the charge. After hearing the evidence from both sides, the trial magistrate found the appellants not guilty on the 3rd count. Nothing was said on the 4th, 5th and 6th counts. However, the trial court found the appellants guilty on the 1st, 2nd 7th, 8th 9th and 10th counts, convicted and sentenced them to pay Tsh. 200,000/= fine or serve one-year imprisonment in respect of the illegal entry in the Game reserve in the 1st count, twenty years imprisonment in respect of unlawful possession of weapons in the game reserve in respect of the 2nd counts and again to serve 20 years imprisonment for unlawful possession of Government trophies in respect of 7th to 10th count.

Aggrieved with conviction and sentence, the appellants have lodged six grounds of appeal complaining that:

1) There was no search warrant tendered before the court to prove whether appellants were arrested in possession of the aledged weapons.
2) The prosecution evidence was not corroborated by independent witnesses.

3) Appellants conviction was founded on a weak evidence by the prosecution.
4) Trial magistrate failed to properly evaluate the evidence.
5) Defence evidence was not considered.
6) Prosecution failed to prove the offence beyond reasonable doubts.

At the hearing of the appeal, the appellants appeared in person, unrepresented. The Republic was represented by Mr. Enosh Gabriel Kigoryo, learned State Attorney.

Appellants submissions were short. They essentially adopted their grounds of appeal and prayed to be set free.

On his side, Mr. Enosh supported the 1st 3rd, 4th and part of the 6th ground of appeal. He categorically supported the appeal against the conviction and sentence on the 7th to 10th counts. He said, there are contradictions and inconsistencies on the prosecution evidence that goes to the root of the offences in the mentioned counts. Pointing to the said inconsistencies, Mr. Enosh said, while PW1 and PW3 are all arresting officers, their evidence on what appellants were found with is at variance. Pointing to pages 18 to 20

of the trial courts records, Mr. Enosh submitted that while PW1 mentioned three fresh tails of buffalo, two teeth of Warthog and one fresh skin of zebra head as trophies seized, in his evidence PW3, mentioned two legs of vulture in addition to the trophies mentioned by PW1. He doubted how could the arresting officers, who were at the same point arresting the same people have different information on what was retrieved from the persons they arrested.

In addition to that, the learned State Attorney stated that, PW2 Game Reserve officer, testified to have identified and prepared valuation report on the trophies in connection of this case. He in addition described how he identified each one of them. Unfortunately, Mr. Enosh insisted, Exhibit P1 was not shown to PW2 for identification and say whether the tendered trophies are the same trophies he evaluated. In his view, the omission is fatal as is not certain whether the trophies tendered in court as the same trophies that were evaluated by PW2. Mr. Enosh, invited the court to find the contradiction major, and proceed to conclude that prosecution failed to prove the offences in counts 7 to 10. He cited in support of his submissions, the case of **Mohamed Said V The Republic**, (1995) TLR, 3.

Apart from the above, it was the learned State Attorney's view that 1 and 2 counts were proved. He argued that, the evidence on the records sufficiently established that appellants were found in the game reserve without a permit and that they had in their possession weapons mentioned in the second count. Submitting on the appellants' defence, the learned State Attorney said, the appellant's defence did not raise any doubts on the prosecution evidence.

Having being probed by the court on the validity of sentence imposed by the trial court on the 2nd count, Mr. Enosh, was quick to submit that the sentence is illegal. He said, appellants were charged under section 17 (1)(2) of the Wildlife Conservation Act according which provides a punishment of fine of not less than Tsh.200,000/= but not exceeding Tshs.500,000/= or imprisonment not less than one year and not more than 3 years in default. He added that sentenced of 20 years imprisonment imposed by the trial court is illegal. He on that reason invited the court to vary the same and impose proper sentence provided for under the law.

On what should be the fate of the appellants after pronunciation of a proper sentence, Mr. Enosh said, the substitution of the sentence should result into

an immediate release of the appellants as they have been in jail for more than three (3) years beyond the time they would have spent in court had they been in a legal maximum sentence.

I have dispassionately considered the grounds of appeal, parties' submissions and the lower court's records. The pertinent issue is whether prosecution managed to prove the case beyond reasonable doubt. This is the essence of the appellant's six grounds of appeal. To avoid confusion, I propose to go by the State Attorney's mode. I will start with the analysis of the appeal in respect of the 7th to 10th counts, followed by the analysis on the 3rd -6th counts and finally I will do the analysis on the 1st and 2nd counts.

As hinted above, on 7th to 10th counts, appellants were charged with unlawful possession of Government trophies contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Government Notice Number 275 of 1974 and paragraph 14 of the first schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Crimes Control Act, (Cap 200 RE 2002) as amended by section 13 and 16 of the Written Laws (Miscellaneous amendments) Act No. 3 o 2016.

In those counts, prosecution was required to prove that appellants/ accused persons for that matter were found in possession of the alleged Government trophy. As per the records, these counts are explained by the evidence of PW1, PW2, PW3 and PW4. I have revisited their evidence. As correctly submitted by the learned State Attorney, there are inconsistencies and contradictions on the prosecution evidence with regards to what exactly was found in possession of the appellants. I will evaluate this issue while in mind of the principle that in case of any contradictions or inconsistencies in the evidence the court is duty bound to evaluate the contradictions and inconsistencies and see if they are serious and go to the root of the matter or not. This was observed in the case of **Dikson Elia Nsamba Shapwata & Another v. Republic (supra), where** the court said:

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter".*

In this case, PW1 and PW3 are arresting officers. They testified on how they arrested the appellant, when, where and mentioned different trophies they seized in that exercise. In his evidence, PW1 mentioned a fresh tail of

buffalo, two teeth of Warthog and one fresh skin of zebra head as trophies found with the appellants and tendered them as exhibit in court. PW3 added another trophy that is two legs of Vulture. This was not part of the trophies mentioned by PW1 and therefore did not form part of exhibit P1 tendered by PW1. It should be stressed here that, both PW1 and PW3 were present at the point, time and place of the arrest. The variance in their evidence on the items/trophies they found the appellants with raises doubts to their credibility.

Another inconsistency is brought in by PW2 and exhibit P2. PW2, a game reserve officer and valuer testified on the types of the trophy allegedly found with the appellants and he did the valuation. He tendered in court the valuation as well as the inventory reports as exhibit P2. In his evidence plus the exhibit P2, two legs of Vulture were among the trophies evaluated. These were not mentioned by PW1 and did not form part of exhibit P1. This is not a minor contradiction.

As if that is not enough, there is a missing link between the trophies allegedly found with the appellants and the one tendered in court as exhibit P1. During the trial, PW2 the valuer, who did the valuation of the trophies and tendered

in court the valuation and inventory reports, did not identify the trophies he worked on before the court apart from his bare explanations that he evaluated the trophies he mentioned and prepared the reports. Under normal circumstances, the prosecution was required to cause exhibit P1 be shown to the valuer so as to confirm to the court on whether the trophies tendered are the same trophies he evaluated. This was not done. The trial court therefore, was not in a position to gauge whether the tendered trophies (exhibit P1) include the same trophies allegedly found with the appellants, evaluated by PW2 and whose details are incorporated in exhibit P2.

In addition to that, the evidence on the record is to the effect that after the arrest and dispossession of the trophies from the appellants, PW1 and PW3 handled both the appellants and the alleged trophies to unnamed person at the police on the same day that is 18/10/2016. PW4, the investigator got hold of the case file on 20/10/2016 two days after the incident, took the trophies again from undisclosed person and handled them to PW2 for valuation and where the trophies were taken to thereafter. In **Onesmo Mlwilo vs. R.,** Criminal Appeal No. 213 of 2010 (unreported) the Court found no proof of the chain of custody of the items found regarding the

person who took care of them from where they were found up to the point when they were tendered as exhibits in the trial court. The Court concluded that without such proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence.

Given the series of events above, the obvious is, there is no proof of the chain of custody of the government trophies seized as it is not explained who took care of the seized exhibit from where it was found at the appellants' hand up to the point when they were tendered in the trial court as exhibit. This, in my view, raises doubt as to the authenticity of the trophies tendered in court. Therefore, the conviction entered into in the 7th to 10th counts is doubtful.

In counts 3-6 appellants were charged with unlawful hunting in the game reserve. My perusal of the records show that, appellants were acquitted on count 3. Trial magistrate findings were that there was no evidence presented to indicate that appellant were found in the game reserve hunting. The proceedings however, do not indicate any statement by the trial magistrate in respect to the 4th, 5th and 6th count. By their contents, all these counts were for unlawful hunting. And as correctly found by the trial magistrate,

prosecution did not lead evidence to prove that appellants were found hunting. This alone justified an acquittal of the appellants on the 4th 5th and 6th count.

Lastly, is my analysis on the 1st and 2nd counts. The learned State Attorney urged the court to sustain conviction and sentence on the 1st and 2nd counts on the ground that the evidence on the record proved the said offences to the required standards. As the record stands, in the 1st and 2nd counts, appellants were charged, convicted and sentenced for unlawful entry and possession of weapons in a game reserve.

According to the evidence by PW1 and PW3, appellants were arrested in the game reserve with weapons to wit, panga, a knife and 14 animal trapping wires without a permit. In their defence, appellants said they were arrested near the Game reserve. Nothing seriously was presented in defence denying that tthey had the alleged weapons. In its judgement, the trial court was of the view that, such a defence was an afterthought because the appellants failed to counter the prosecutions evidence during cross examination. In its conclusion, trial court said, prosecution proved that appellants were unlawful found in a game reserve with weapons. My assessment of the evidence given

by PW1 and PW3 prove that the appellants were arrested in the game reserve. They consistently testified that they arrested the appellants in the game reserve where they were patrolling. Their evidence on this aspect was not discredited anyhow during cross examination and no doubt was raised during defence. In his defence, for instance, at page 39 of the trial court's typed proceedings, 1st appellant made it clear that they had no grudges with the prosecution witnesses. Given the evidence on the records, I find nothing to faulty the trial magistrate. Prosecution's evidence on the record proved the offence in the 1st and 2nd count.

Before I pen off on this issue, perhaps I should say a word on the appellants complaint that their defence wasn't considered. At page 7 of the typed judgment, trial magistrate considered the defence. She remarked that, appellant's defence was that they were arrested near the game reserve but concluded the trial magistrate that, that defence was an afterthought as appellants failed to counter PW1 and PW3's evidence during cross examination. I for that reason find the complaint without merit. The offence in count 1st and 2nd were proved beyond reasonable doubts against the accused persons.

Next for consideration is the issue of sentence. I agree with the learned State Attorney that the sentence of twenty-year imprisonment imposed to the appellants in the second count is contrary to the law. Subsection (2) of section 17 of the Wildlife Conservation Act No.5/2009 imposes a penalty of not less than Tsh.200,000/= but not exceeding Tshs.500,000/= or imprisonment not less than one year and not more than 3 years in default.

As hinted above, having convicted the appellants on the second count, the trial magistrate imposed 20 years imprisonment. This was an error, a serious one. The sentence imposed is not provided for under the law. In **Benedetha Paulo V. Republic** (1992) TLR. 97 the court of Appeal stated that:

> *"The court have power to interfere with the sentence imposed on an appellant by trial subordinate court if it find that the sentence is excessive, inadequate and if the sentence was unlawfully imposed"*

That being the position, I set aside the illegal sentence of twenty years imprisonment imposed on the appellants in respect of the 2nd count and substitute thereto to a statutory sentence of fine of Tshs. 200,000/- each or

one year imprisonment in default under section 17 (2) of the Wildlife Conservation Act No.5/2009. I would have ended there, however, it is evident from the records that, appellants were sentenced on 15/11/2017 meaning that the one-year sentence has already elapsed, in other words, by this date, appellants have completed serving their sentence resulting into an immediate release of the appellants **MASANJA KADANGAMILE and MADUHU GAMBANADI** from custody unless otherwise lawful held.

The appeal is partly allowed to the extent indicated above.

It so ordered.

DATED at **Shinyanga** this **5th day** of **MARCH,** 2021.

E.Y.MKWIZU
JUDGE
05/03/2021

COURT: Right of appeal explained.

E.Y.MKWIZU
JUDGE
05/03/2021