

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

CRIMINAL APPEAL NO. 126 OF 2020

*(Originating from Economic Case No 116 of 2019 of the District Court of Serengeti at
Mugumu)*

WILI NAGARA @ KILIMU APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

15th March, – 19th April 2021

Kahyoza J,

Wili Nagara @ Kilimu, the appellant appeared together with **Sana Mabembelo @ Mboneja** before Serengenti District Court at Mugumu arraigned with three counts. The charges against **Wili Nagara @ Kilimu** and his co-accused person were; **one**, unlawful entry into the national park; **two**, possession of the government trophies, to wit; three carcasses of Thompson's gazelle, and **three**, unlawful possession of the government trophies, to wit one carcass of Grant's Gazelle. Both, **Wili Nagara @ Kilimu** and **Sana Mabembelo @ Mboneja** pleaded not guilty to the charges. Before trial commenced, **Sana Mabembelo @ Mboneja** jumped bail forcing the district court to try and sentenced him in *absentia*.

The district court found the appellant, **Wili Nagara @ Kilimu** and his co-accused guilty and convicted them as charged. It imposed an imprisonment of term of two years for offence in the first, and an

imprisonment term of twenty years for the offences in the second and third counts.

Aggrieved, **Wili Nagara @ Kilimu** appealed to this Court raising four grounds of appeal, which translate into the following issues-

1. Was proper for the trial court to admit the inventory form?
2. Was the appellant denied a right to call witness?
3. Was the trial court justified to convict the appellant without a certificate of seizure from the Director of Public Prosecutions?
4. Were the admitted exhibits irrelevant?

The background of this appeal is that; the prosecution charged appellant with three counts: **one**, unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the **National Park Act** [CAP. 282] as amended by the Act No 11 of 2003; and **two counts 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 and sections 57 (1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200, P.E 2002] (the **EOCCA**) as amended by act No 3 of 2016. It summoned four witnesses and tendered three exhibits to prove the appellant's guilt.

The prosecution witnesses, **Thadeus Manonga (Pw1)** and **Amos Ng'arita (Pw2)**, the park rangers deposed that on 22/09/2019 at about 00:00 hrs were on the routine patrol with other parker rangers namely **Kabiche Suma, Kulwa Maganga and others** at Baragate

area within Serengeti National Park. They saw a torch's light. They ambushed and arrested two people. They arrested the appellant and **Sana Mabembelo @ Mboneja**. They had no permit to enter the national park. They found the appellant and his co-accused person in possession of the government trophies, namely three carcasses of Thompson gazelle and one carcass of grant gazelle.

Thadeus Manonga (Pw1) tendered certificate of seizure, which the court admitted without objection as Exh. PE.1. The contents of Exh. PE.1 were read to the appellant.

They took the appellant and his co-accused person to **Mugumu** police station with the exhibits. **F. 6443 D/CPL Pius (Pw4)** the investigator, summoned **Wilbrod Vicent (Pw3)** to identify and value the trophies. **Wilbrod Vicent (Pw3)** identified three carcasses as of thompson's gazelle, which were reddish-brown in colour with blacklines and grant gazelle carcass, which was grey-brown in colour. **Wilbrod Vicent (Pw3)** valued the all carcasses at Tshs. 4,290,000/=. **Wilbrod Vicent (Pw3)** prepared a trophy value certificate which he tendered as Exh. PE.2.

F. 6443 D/CPL Pius (Pw4) interrogated the appellant and his co-accused person, prepared an inventory form and presented the trophies to the magistrate who ordered the trophies to be disposed. He tendered inventory as Exh. PE. 3.

The appellant denied all allegations against him in his defence on oath. He deposed that the park rangers met them on the material date asked them where they could obtain trophies. The appellant's co -

accused person answered them harshly. Aggrieved, the rangers arrested them and took them to Serengeti National Park.

It is against the above background, the appellant lodged his appeal and fended for himself before this Court, whereas Mr. Temba, the state attorney represented the respondent. The appellant, when called upon to expound his grounds of appeal, he prayed his grounds of appeal to be adopted and considered.

Mr Temba, the state attorney, opposed the appeal. I Wili refer to his submission while answering the issues deduced from the grounds of appeal.

Was it proper for the trial court to admit the inventory form?

The appellant complained the trophies were destroyed in his absence. He stated that he did not sign the inventory.

Mr Temba, the learned state attorney, negated the first ground of appeal. He submitted that the first ground of appeal was baseless because the appellant signed the inventory form and he did not object the inventory to be tendered.

I examined the inventory and the same bears the appellant's and his co-accused's thumb print. They signed it. It is also true that the appellant did not opposed the inventory to be tendered. The record shows further that the prosecution read the contents of the inventory immediately after it was admitted.

It is evident that to prove the offence of unlawful possession of government trophies, the prosecution ought to tender in court the

trophies alleged found with the appellant. In case the trophies are subject to speedy decay, the law allows to tender an inventory. The inventory must be prepared either by observing the procedure under 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 prepared under section 101 of the WLCA is by a court order. The court has to make an order in the case file, which is not the case in the appeal under consideration.

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. PE.3 and found that the appellant and his co-accused signed the inventory. However, the fact that the appellant and his co-accused, signed the inventory it does imply that they were present and that the magistrate heard them before he ordered the trophies to be destroyed. For that reason, I find that the inventory was prepared in contravention of law. The trial court was not justified to admit the same. I expunge the inventory, exhibit PE.3 from the record.

Having expunged the inventory from the record I find that the appellant was not properly convicted with the offence in the second and third counts of unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) (the **WLCA**) read together with paragraph 14 of the First Schedule to, and section 51(1) and 60(2) of 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 second and third courts.

Was the appellant denied a right to call witness?

The appellant seeks to challenge his conviction because he was denied an opportunity to call witnesses. Mr. Temba state Attorney objected to the ground of appeal. He contended that the appellant indicated that he had no witness to call.

I examined the record and found that the trial court addressed the appellant in terms of section 231 of the **Criminal Procedure Act**,

[Cap. 20 R.E 2019] and the appellant replied that he has no witness. It is recorded that the appellant replied that-

"I will give evidence on oath. I have no witness to call"

The appellant had no witness to call. Not only that but also the appellant deposed that at the time of his arrest he was **Sana Mabembelo @ Mboneja**, his co-accused. **Sana Mabembelo @ Mboneja** jumped bail. It was not possible for him to appear and defence the appellant. Like the state attorney, I am of the firm view that the appellant has no reason to complaint that he was denied an opportunity to call witness. He had none. I dismiss the second ground of appeal.

Was the trial court justified to convict the appellant without a certificate of seizure from the Director of Public Prosecutions?

The appellant complained that the trial court convicted him without a certificate of seizure from the Director of Public Prosecutions. The respondent's state attorney objected to the third ground of appeal because to tender a certificate of seizure does not require a certificate from the DPP.

He added that if the appellant meant that the trial was conducted without consent and certificate conferring jurisdiction from the DPP, the record tells a different story. He submitted that consent and certificate conferring jurisdiction from the DPP of subordinate court to try an economic and non-economic case was presented on 11th November, 2019 to trial court.

I find that this ground of appeal is baseless as submitted by the respondent's state attorney. The DPP lodged a consent and certificate conferring jurisdiction to the district court to try economic cases before

the trial commenced. I further, considered the appellant's complaint that the prosecution did not tender a certificate of seizure from the DPP. The law does not require the DPP to issue a certificate of seizure. For that reason, the complaint has no ground to stand on.

I find the third ground of appeal baseless and dismiss it for want of merit.

Were the admitted exhibits irrelevant?

The appellant challenged the exhibits which the trial court relied upon to convict him as irrelevant.

Mr. Temba, the Respondent's state attorney submitted that the fourth ground of appeal was baseless and prayed the same to be dismissed.

The appellant stood charged with three counts. In the first count, he was charged with the offence of unlawful entry into the National Park, and in the second and third counts, the appellant was charged with the offence unlawful possession the government trophies. The prosecution tendered Exh. P.E.1, the seizure certificate, tendered a trophy valuation certificate, which the court admitted and marked exh.PE.2. The trophy valuation certificate depicted the value of the identified trophies. Exhibit P.E.2 was relevant and I see no any problem with the certificate. Wilbrod Vicent (**Pw3**) explained how he identified the trophies. The last exhibit tendered by the prosecution was the inventory in lieu of the trophies as they were subject of speed decay.

I find no any problem with the exhibits tendered and admitted in relation to the second count. I dismiss the fourth ground of appeal in relation to the first and second counts.

A quick review of the evidence on record shows that the appellant and another person were found in the National park. They had no permit to enter. I have no reason to doubt the evidence of **Thadeus Manonga (Pw1)** and **Amos Ng'arita (Pw2)**, the park rangers. They explained how they found the appellant and the co-accused in the park. I find therefore, that trial court did properly convict the appellant with the offence of unlawful entry into the national park. I have already pronounced myself regarding the conviction entered by the trial court in the second and third counts.

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-

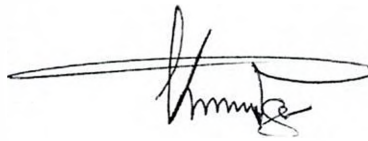
"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction 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 exhibits to prove the prosecution's case in the second and third counts were 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 count which were ordered to run concurrently, the appellant must be release after serving two years custodial sentence, unless held in prison for any other lawful cause.

I order.

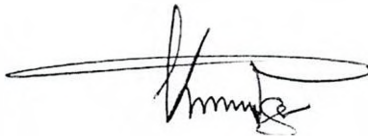


J. R. Kahyoza,

JUDGE

19/4/2021

Court: Judgment delivered in the presence of the appellant and Mr. Temba S/A via video link. B/C Catherine present.



J. R. Kahyoza,

JUDGE

19/4/2021

Court: Right of appeal explained.




J. R. Kahyoza,
JUDGE
19/4/2021