IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 171 OF 2020

WANGWE MWITA WANGWE ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Originating from Criminal Case No 53/2019 of the District Court of Ta rime at Ta rime)

JUDGMENT

19h March & May, 2021

Kahyoza, J.

The district court of Serengeti convicted **Wangwe Mwita Wangwe** (the appellant) after a full trial with three offences; **one,** of unlawfully entry into the National Park; **two,** unlawful possession of the weapons in the national park; and **three,** unlawful possession of government trophies. The trial court imposed a custodial sentence of one year for each offence in the first and second count, and twenty years for the offence in the third count. It ordered the sentence to run concurrently.

Aggrieved, **Wangwe Mwita Wangwe** appealed to this Court contending that the prosecution did not prove the case against him beyond reasonable doubt. He added that he was convicted on weak and unreliable evidence of Samson Njoghomi (Pw2) and Thomas Magomo (Pw4) who were park rangers. He challenged the prosecution for failure to call an independent witness.

This is the first appellate Court; thus, tasked with a duty to rehear

and re-evaluate the evidence together with a duty to consider the appellant's grounds of appeal. **(Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported). The appellant's appeal spins around the following issues:-

1. Was the trial court justified to rely on the evidence of Samson Njoghomi (Pw2) and Thomas Magomo (Pw4) without an independent witness?
2. Did the trial court err to hold that the prosecution proved the appellant's guilty beyond reasonable doubt?

The prosecution indicted the appellant with three offences; **one,** unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the National Park Act (CAP. 282 R,E 2002) as amended by the Act No 11 of 2003,: **two** unlawful possession of weapons in the National Park c/s 24 (l)(b) and (2) of the National Park Act (CAP. 282 R.E. 2002): and **three** 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 and sections 57(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. The trial court found the appellant guilty and convicted him as charged.

The prosecution summoned four witnesses and tendered four exhibits to prove the appellant's guilt. The prosecution witnesses, Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** deposed that on the 17/08/2019 at about 07.00hrs were on routine patrol with two other park rangers namely Fred Kivuyo and Mengi Seba at Nyakitapembe within Serengeti National

Park. They saw foot prints. They tracked the foot print up to the bush where they saw the appellant. They surrounded, and arrested him.

Samson Njoghomi (Pw2) and Thomas Magomo (Pw4) deposed that they found the appellant in possession of a fresh fore limb and two fresh tails all of wildebeest. They added that the appellant was fond in possession of weapons; to wit one knife, three animal trapping wires. The appellant had no permit to enter into the national park and possess weapons and government trophy. Thomas Magomo (Pw4) prepared a seizure certificate which he tendered as Exh. P.4. They surrendered the appellant to police.

Njonga Marco William **(Pwl)** prepared and tendered a trophy valuation certificate as exhibit P.l. He also tendered the inventory P.2. The appellant endorsed a thumb print to both documents. Njonga Marco William (Pwl) deposed that the appellant took part in the process of valuing the trophy. Njonga Marco William (Pwl) identified the trophy and valued the trophy at Tzs. 2,989,200/=, which is the value of two wildebeests.

The appellant signed the inventory form by endorsing a thumb print. It is unfortunate that the trial court did not cause the contents in the trophy valuation certificate and inventory read out to the accused.

The last prosecution witness, No. G4450 CPL Nicholaus **(Pw3)** interrogated the appellant, received and marked the exhibits. He described the exhibit as one fresh fore limb and two fresh tails all of

wildebeest, one knife and three animal trapping wires. He tendered one knife and three animal trapping wires as Exh.P. 3 collectively.

Was the trial court justified to rely on the evidence of Samson Njoghomi (Pw2) and Thomas Magomo (Pw4) without an independent witness?

The appellant's complaint meant that Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4),** the park rangers were not credible.

The respondent's state attorney resisted the prayer contending that the witnesses were credible.

It is clear that the prosecution's witnesses Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** were park rangers. However, the fact that they were park rangers does not render them incredible witnesses. The appellant sought to discredit the evidence of Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** on the ground that they were not independent witnesses. They had an interest to serve. He did not explain that interest. It is trite law that every witness is entitled to credence unless there is a cogent reason to question his credibility. In **Goodluck Kyando v. R.,** [2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016 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.

There is no doubt that Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** were the prosecution's principal witnesses and both were park rangers. Does that make their evidence not credible? A witness may

be labeled an interested witness only when he derived some benefits from the result of litigation, or in seeing an accused person punished. The appellant did not explain the benefits the park rangers derived from his conviction. I find the evidence of Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** credible.

In addition, I considered the prosecution's evidence that Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** found the appellant in the National Park in the evening time. I have no reason to doubt that piece of evidence. I agree with respondent's state attorney that it was not very likely to find a person who is not a park ranger in the national park at that time.

I am of the firm view that Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** were witnesses of truth, there was no need of an independent witness and their evidence is credible. I dismiss the appellant's complaint.

Did the trial court err to hold that the prosecution proved the appellant's guilty beyond reasonable doubt?

I now consider if the appellant was found in the national park. Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** deposed that they found the appellant in the national park at Nyakitapembe within Serengeti National Park. I have found them credible witnesses. For that reason, I find there was evidence to prove that the appellant entered into the national park. Thus, the trial court properly convicted the appellant with the offence in the first count.

Was the appellant found in possession of weapons in the national park?

The prosecution tendered through G4450 CPL Nicholaus **(Pw3)** one knife and three animal trapping wires as exhibit P.3. Thomas Magomo **(Pw4)** tendered a seizure certificate as exhibit P.4. Thomas Magomo **(Pw4)** read the contents of the seizure certificate to the appellant. I find there was evidence establishing the appellant was in possession of weapons; to wit a knife and three animal trappings wires in the national park. There is enough evidence to support the offence of unlawful possession of weapons in the national park. For that reason, the trial court had justification to convict the appellant with the offence in the second count unlawful possession of weapons in the National Park c/s 24 (1)(b) and (2) of the National Park Act (CAP. 282 R.E. 2002).

Was court justified to convict the appellant with the offence of unlawful possession of government trophy?

Lastly, I, consider the whether the trial court was justified to convict the appellant with the offence of unlawful possession of government trophy. The evidence available according to Samson Njoghomi **(Pw2)** and Thomas Magomo **(Pw4)** is that they found the appellant in possession of a fresh fore limb and two fresh tails all of wildebeest. Thomas Magomo **(Pw4)** tendered an inventory form as exhibit P.2, containing the order of the magistrate to dispose the trophies. The trophies were subject to speedy delay. He also tendered a trophy valuation certificate as exhibit P.l. Unfortunately, the trial court did not invite the witness to read the contents of exhibits P.l and P.2 to the appellant. It is now settled that failure to read

out the contents of an exhibit after it is cleared for admission is fatal and the same must be expunged from the record - see: **Mabula Mboje & Others v. Republic,** [2020] TZCA 1740 at www.tanzlii.org. I expunge the seizure certificate, exhibits P.l and P.2 from the record.

Having expunged the trophy valuation report exhibit P.l and the inventory form, exhibit P.2 from the record, the question is whether there remains evidence to establish that the appellant was found in unlawful possession of the government trophy. It is settled that, even in the circumstance where an exhibit is expunged from the record or it is not tendered, the court can still convict if, satisfied that there is evidence on the record to establish that the accused committed the offence. See **Issa Hassan Uki v. R** [2018] TZCA 361 at www.tanzlii.org at pgs. 13 - 16. In that case, the court expunged the certificate of seizure and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit.

In the current case, I am not able to find that there is ample evidence for the following reasons; **one,** the prosecution did not prove the value of the government trophy for failure to tender a trophy valuation certificate. Section 86(4) of the **WLCA** requires the wildlife officer to state the value of any trophy in a certificate. It stipulates-

> *(4) In any proceedings for an offence under this section,* ***a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence*** *and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein, (emphasis is added)*

Two, the prosecution had a duty to tender the trophy as exhibit. Where the trophy is subject to speedy decay, the law allows the prosecution to tender a disposal order issued under section 101 of the **WLCA** or an inventory prepared under paragraph 25 of the Police General Order (the **PGO)** No. 229. If the prosecution cannot tender the trophy it must tender either a disposal order or an inventory. In this case, there is no exhibit after expunging the inventory and the trophy valuation certificate. In the absence of the above mentioned exhibit, I find that the prosecution failed to prove the offence of unlawful possession of government trophy.

There is yet another defect associated with the inventory, exhibit P.2. The appellant endorsed a thumb stamp on the inventory. However, it is not clear whether the magistrate who ordered the police to dispose the trophy gave the appellant an opportunity to air his opinion or comment. The Court of Appeal held, in **Mohamed Juma @ Mpakama** Criminal Appeal No. 385/2017 (CAT Unreported) before disposing exhibits under paragraph 25 of PGO No. 229, that the accused person must be present and the magistrate should hear him. 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."***

I find that the exhibit P.2 was not properly admitted as there is no evidence that the appellant was heard before the same was prepared. It was wrong for the trial court to admit it.

In the upshot, I find that there was no evidence to prove the offence

in the third count. I set aside the sentence and quash the conviction of the appellant with the offence of unlawful possession of government trophy contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 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, R.E. 2002].

I will consider whether to order a retrial. In **Fatehali Manji v R** [1966] E.A. 341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

> 7/7 *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."*

Given the nature of the fact exhibits, the trophies were destroyed and the inventory was not prepared in compliance with the law, I hesitate to

order the appellant to be tried a fresh regarding the offence in the third count.

In the end result, I partly allow the appeal by, uphold the conviction and the sentence imposed against the appellant for the offence in the first and second counts and quash the conviction and set aside the sentence in the third count. I further, order the appellant to be released after serving the sentence in the first and second count, which run concurrently, unless otherwise held for any other lawful cause.

It is ordered accordingly.

J. R. Kahyoza,
Judge
4/5/2021

Court: Judgment delivered in the presence of the appellant and Mr. Temba, State Attorney, via video link. B/C Ms. Tenga present.

J. R. Kahyoza
JUDGE
4/5/2021