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

AT MUSOMA

CRIMINAL APPEAL NO. 120 OF 2020

JOHN MAHENDE @ MWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 53 of 2018)

JUDGMENT

14th April and 2nd June, 2021

KISANYA, J.:

The appellant, John @ Mahende Mwita, was arraigned before the District Court of Serengeti at Mugumu with three (3) counts. The first count was unlawful entry into the National Park contrary to sections 21 (1) (a), (2) and 29 (1) of the National Parks Act, Cap. 282, R.E 2002 (the NPA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003. The second count was unlawful possession of weapons in the National Park contrary to sections 24 (1) (b) and (2) of the NPA. The third count was unlawful possession of Government Trophy contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act, 2009 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 (the

WCA) read together with paragraph 14 (d) of the First Schedule to the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016 (the EOCCA).

On **28th June, 2019**, the appellant was convicted as charged and was sentenced to serve one (1) year imprisonment for the first and second count and twenty (20) years imprisonment for the third count. The trial court ordered that the sentence should run concurrently.

Briefly, the facts as gleaned from the record are to the effect that; on **8th July, 2018**, Justine Manyasi (PW1), Manfred Mapunda (PW2) and Sharif Kenyaluke, all park rangers at Serengeti National Park, while on patrol at Meza area within Serengeti National Park, they found the appellant in the bush. In their testimony, PW1 and PW2 testified that the appellant had one panga, two animal trapping wires and two pieces dried meat of wildebeest without relevant permits. PW1 tendered the certificate of seizure (Exhibit PE1) as to the items found in possession of the appellant. He also tendered the real exhibits to wit, one panga, two animal trapping wires (Exhibit PE2) to supplement his oral evidence. PW1 and PW2 went on to tell the trial court that the appellant was taken to Mugumu Police Station where the matter was reported.

At the police station, G. 736 DC Egwaga (PW4) was assigned to investigate the case. He called a wildlife warden namely, Wilbroad Vicent (PW3) to identify and value the trophy alleged to have been found in possession of the appellant. In his evidence, PW3 stated that he identified two dried pieces meat of wildebeest by its colour slightly grey to darker and white oil. As regards the value of trophy, PW3 deposed that it was USD 560 equivalent to TZS 1,417,000/=. He tendered the trophy valuation certificate which was admitted in evidence as Exhibit PE3.

PW4 testified further that the trophy was subject to a speedy decay. Therefore, he prepared the inventory which was signed by the magistrate who ordered that the said trophy be disposed of. The inventory form duly signed by the magistrate was admitted in evidence as Exhibit PE4.

The appellant, in his sworn defence, told the trial court that he was arrested at Ndisiata area within Serengeti National Park and that he had fifty six (56) pieces dried meat of wildebeest. He then prayed for the trial court's mercy on the ground that he had been in prison for a long time.

The trial court was satisfied that the prosecution had proved its case beyond all reasonable doubts. It went on to convict and sentence the appellant as stated herein.

Protesting his innocence, the appellant filed a petition of appeal consisting of five grounds. Considerably, his complaints centers on the following points:

1. That, the trial was conducted without the consent of the Director of Public Prosecutions (DPP) and Certificate Conferring jurisdiction on a subordinate court to try the economic and non-economic offence.
2. That the trial court erred in convicting the appellant basing on fabricated evidence adduced by the park ranger and game warden who work in the same station.
3. That the trial court erred in law and fact in admitting and relying on exhibits fabricated by the prosecution' witnesses.
4. That the defence case was not considered by the trial court.
5. That the prosecution failed to prove its case beyond all reasonable doubts.

As was the case before the trial court, the appellant appeared in person when the appeal was called on for hearing. On the other hand, the respondent; Republic had the services of Mr. Nimrod Byamungu, learned State Attorney.

When called upon to submit in support of the appeal, the appellant had nothing to say. He just urged the Court to consider the grounds of appeal and discharge him.

Mr. Byamungu partly commenced his submission by indicating that he was supporting the appeal on the third count and resisting the appeal on the first and second counts.

Reacting to the fifth ground of appeal, the learned State Attorney contended that the third count on unlawful possession of Government trophy was not proved beyond all reasonable doubts. His contention was based on the fact that the trophy subject to the third count was not tendered in evidence. The learned State Attorney argued that the Inventory Form tendered by the prosecution did not prove the offence of unlawful possession of Government trophy because the appellant was not present at the time of disposing the two pieces dried meat of wildebeest. Therefore, he was of the view that the sentence in respect of the third count was illegal

Thereafter, Mr. Byamungu argued the appeal against the first and second counts. As regards the first ground of appeal, the learned state attorney submitted that the consent of the DPP and Certificate Conferring jurisdiction on the subordinate court to try economic and non-economic

offences were duly filed before the commencement of the trial. He therefore, urged me to dismiss this ground.

In relation to the second ground that the trial court relied on evidence of park rangers and game warden who work in the same station, Mr. Byamungu asked me to dismiss that ground. He argued that the said witnesses (PW1 and PW2) were reliable. He went on to contend that there was no need of an independent witness because the appellant was arrested in the National Park.

Responding to the third ground on reliability of exhibits tendered by the prosecutions, the learned State Attorney argued that Exhibits PE1 and PE2 were relevant to the second count on unlawful possession of weapons in the National Park. He submitted that the appellant is estopped from challenging the said exhibits because he failed to cross-examine PW1 who tendered them. The learned State Attorney submitted further that, both PW1 and PW2 were not cross examined on their evidence that the appellant was found National Park and in possession of the said one panga and two animal trapping wires without permits.

Replying to the fourth ground that the defence case was not considered, Mr. Byamungu referred me to page 5 of the judgment of the trial court where the defence case was duly considered. He therefore

asked the Court to dismiss this ground.

On the fifth ground, the learned State Attorney argued that the prosecution proved its case on the first and second counts. He was of the view that both counts were proved by PW1 and PW2 whose evidence was not challenged by the appellant. He also contended that evidence of PW1 and PW2 was not fabricated as claimed by the appellant in his appeal.

In view of the above submissions, the learned State Attorney moved me to dismiss the appeal on the first and second counts and allow the appeal on the third count.

I have examined the grounds of appeal, record and submissions by the learned State Attorney. In the circumstances of this case, I am of the view that, like the learned State Attorney, I should first consider whether the third count was proved beyond all reasonable doubts.

It is common ground that the trophy (two pieces dried meat of wildebeest) subject to the third count was not tendered in evidence by the prosecution. As rightly argued by Mr. Byamungu, the prosecution relied on evidence of PW4 and the Inventory Form (Exhibit PE4) to the effect that the trophy was disposed of by order of the magistrate because it could not be preserved. Was the trophy disposed according to the law?

There are two procedures of disposing of exhibit that is subject to speedy decay. The first procedure is provided for under section 101 of the Wildlife Conservation Act, 2009 as amended by the Written Laws (Miscellaneous Amendments) Act, 2017. Pursuant to the above cited provisions, the trial court may on its own motion or on application made by the prosecution, order that the trophy subject to speedy decay be disposed of.

The second procedure is provided for under paragraph 25 of the Police General Orders (PGO) which is reproduced hereunder for ease of reference: -

> *"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."*

In terms of evidence adduced by PW4, I find that the trophy in the case at hand was disposed under the PGO and not section 101 of the WCA. However, as rightly observed by Mr. Byamungu, PW4 did not depose whether the appellant was taken to the magistrate court and heard before the issuance of the order for disposal of trophy. This irregularity

contravened the above provisions of the PGO and prejudiced the appellant because he was not accorded the right to be heard. In the case of **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), where the Court of Appeal had this to say on the need of hearing the accused before disposing the exhibit: -

> *"While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because* ***he was not given the opportunity to be heard by the primary court Magistrate****.*

Therefore, since the appellant was not heard by the magistrate, the trophy subject to the third count was disposed of in the matter that prejudiced the appellant. For that reason, I am at one with Mr. Byamungu that the third count was not duly proved by the prosecution.

I will therefore proceed to determine the merit of this appeal on the first and second counts.

The first ground of appeal calls us to determine whether the trial was vitiated for want of the consent of the DPP and Certificate conferring jurisdiction on a subordinate court to try an economic and non-economic offence. It is common ground that the first and second counts are

non-economic offence and that the third count is economic offence. In that regard, the trial was required to commence after obtaining the DPP's consent or a person duly authorized by him; and the certificate conferring jurisdiction to the subordinate to try the said offences under sections 12(4) and 26(1) of the EOCCA respectively. Any trial that is conducted without the DPP's consent and or certificate conferring jurisdiction is a nullity

In the case at hand, the State Attorney In-Charge signed the consent and certificate conferring jurisdiction on the Serengeti District Court to try the offence levelled against the appellant. It is on record that both documents were duly filed on 8/04/2019. That was before the commencement of the preliminary hearing and trial. Therefore, the first ground is meritless.

The second ground raises the issue whether evidence of PW1 and PW2 needed corroboration. The appellant is of the view that much as PW1 and PW2 work in the same office, their evidence required corroboration. It is trite law that every person is entitled to credence and his evidence accepted unless there is good and cogent reasons for not believing him as held in **Goodluck Kyando vs. R** (2006) TLR 363. The law does not bar person from the same office to give evidence on the same fact. What matters is whether they are competent and reliable witnesses. That issue

is within the domain of the trial court as held in the case of **Popart Emanuel vs R**, Criminal Appeal No 200 of 2010, CAT at Iringa (Unreported) where the Court of Appeal stated: -

> *"As regard to reliance of evidence from one office, we know of no law which imposes restriction. .....The three police officers were competent to testify. The question whether they had said true or not was the domain of the trial Court."*

It is on record that the trial court was satisfied that PW1 and PW2 are credible witnesses. As rightly argued by Mr. Byamungu, the appellant did not discredit credibility of PW1 and PW2. Therefore, I find no reason of faulting the trial's court finding. Having considered further that the appellant was found in the National Park, there was no need of an independent witness at the time of arresting, searching and seizing the items found in his possession. Thus, the second ground is unfounded as well.

Pertaining to the third ground, the appellant challenges exhibits tendered by the prosecution. Exhibits related to the first and second grounds are the Certificate of Seizure (Exhibit PE1) and the weapons (Exhibit PE2) found in possession of the appellant in the National Park. Both exhibits were tendered by PW1. The appellant did not object admission of the said exhibits, cross-examine PW1 and PW2 on those

exhibits or adduce evidence to prove that the said exhibits were fabricated. It follows that this ground is a mere afterthought. I accordingly dismiss it for want of merit.

The fourth ground is to the effect that the appellant's case was not considered by the trial court. I am alive of the settled law that the trial court is bound to consider the defence. See for instance, the case of **Karim Jamary @ Kesi**, Criminal Appeal No. 412 of 2018, CAT at DSM (unreported) in which the Court of Appeal underscored on the need of considering the defence case.

The question is whether the defence case was not considered by the trial court. I have shown herein that the appellant's defence was to the effect that he was found at Ndisiata area within the National Park. He went also deposed to have been found with 56 pieces dried meat of wildebeest and urged the trial court to have mercy on him. This evidence was duly considered by the trial court as reflected at page 5 of the judgment. The trial court was of the view that the appellant's defence did not raise doubt on the prosecution. It is also my considered view that, as far as the first and second counts are concerned, the appellant did not give evidence which was not considered by the trial court. I therefore, dismiss the fourth ground.

The last ground is whether the second and third counts were proved beyond all reasonable doubts. Upon examining evidence of PW1, PW2 and Exhibits PE1 and PE2, I am at one with Mr. Byamungu that the first and second counts were proved on the required standards. As stated earlier, PW1 and PW2 testified to have found the appellant at Meza area within Serengeti National Park and that he had one panga and two animal trapping wire (Exhibit PE2) without relevant permits to such effect. They adduced direct evidence which implicated the appellant in the first and second counts. In the circumstances, the fifth ground is not meritorious.

That said and done, I dismiss the appellant's appeal on the first and second counts and allow the appeal on the third count. In consequence, I quash the conviction and set aside the sentence on the third count of unlawful possession of government trophy. Since the appellant has already served the sentence of one year imprisonment meted by the trial court on the first and second counts, I order for his immediate release unless held on some other lawful cause. It is so ordered.

DATED at MUSOMA this 2nd day of June, 2021.

E. S. Kisanya
JUDGE

COURT: Judgment delivered this 2nd day of June, 2021 in the presence of Mr. Nimrod Byamungu, learned State Attorney for the respondent. The appellant failed to appear due to technical challenge in the virtual court system.

A copy of judgment be transmitted to the appellant through Mugumu Prison.

E. S. Kisanya
JUDGE
02/06/2021