

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

AT SHINYANGA

CRIMINAL APPEAL NO. 73 OF 2020

(Arising from Economic Case No. 46 of 2019 of the District Court of Bariadi at Bariadi)

LIMBU NGAGI.....1ST APPELLANT

DAUDI MAZUNGU @SHAURI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28th April & 21st May, 2021

MKWIZU, J.

The appellants were jointly and together charged in the trial court on three counts. On the first count, they were charged of unlawful entry into the National Park contrary to section 21 (1) (2) (a) of the National Parks Act, Cap 282 R: E 2002 as amended by Act No 11 of 2003 read together with GN No. 235 of 1968. It was alleged that on the 1st day of September, 2019 appellant were found at Handajega ya zamani area in Serengeti National Park within Bariadi District in Simiyu Region without any written permit from the Director of the National park.

In the second count, appellants were charged with unlawful possession of weapons with intent to commit an offence contrary to section 103 of the WCA No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 60 (2) of the Economic and Organized Crime Control Act [Cap 200 RE 2002] (EOCA) as amended by Act No. 3 of 2016. Prosecution alleged that appellants were found, on the same date, time and place stated in respect of the first count, possessing weapons to wit three machete and ten animal trapping wires in the circumstances which raises presumption that they has used or intends or is about to use the same for purposes of commission of an offence.

The offence in respect of the third count was for unlawful possession of Government Trophies contrary to section 86(1), (2) (b) of the WCA No 5 of 2009 as amended by Act No. 4 of 2016 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the EOCA as amended by Act No. 3 of 2016. On the same date, time and place appellants were found with two fresh hind legs of wildebeest equal to one wildebeest killed valued at usd 650 equivalent to Tsh 1,493,765/=

The prosecution case was based on the testimonies of four witnesses. It was on the testimonial records that on 1/9/2019 while on the normal park patrol Valley Silvery, (PW1) and Dickson Muro (PW2), Park rangers at Handajenga ya zamani area in Serengeti National park saw three people hiding in the bush. They surrounded the area and managed to arrest them with three machetes and ten (10) animal trapping wires. Appellants had also in their possession government trophies to wit two hind limbs of wildebeest without any permit.

PW3 is an investigator, he confirmed to have investigated over the matter and that he involved PW4 Michael Shirima a wildlife officer who identified the seized government trophies as a hind limb of the wildebeest. He made evaluation and the valuation certificate and the inventory forms were tendered as exhibit in court.

Appellants denied the accusations. After a full trial appellants were convicted and accordingly sentenced. On the 1st and 2nd counts the appellants were sentenced to pay fine to the tune of 100,000- or one-year imprisonment in default and 20 years imprisonment in respect the 3rd count. Dissatisfied,

appellants lodged a joint petition of appeal with four grounds of appeal which essentially boils down into one ground that prosecution case was not proved beyond reasonable doubts.

At the hearing of this appeal, both appellants were in person without any legal representation. When invited to submit in support of their appeal, appellants had nothing to say, they only adopted their grounds of appeal to form part of their submissions and nothing more.

Mr. Enosh Gabriel Kigoryo, learned State Attorney for the republic/ respondent partly supported the appeal. His support was on the appeal against the 3rd count while he supported the conviction on the 1st and 2nd count with few reservations on the sentence imposed on the appellants on the 2nd count.

The learned State Attorney submitted that, the 1st and 2nd count were proved. PW1 and PW2 gave direct evidence. They found the appellants in the National Park. PW3 confirmed that on 2/9/2019 appellants were taken to the police station with three machetes, ten (10) animals trapping wires and

a fresh meat. Though the record is silent on who received the exhibits at the police station, stated learned State Attorney, PW3 found the exhibits at the exhibit room and the seizure certificate shows clearly the items that were found with the appellants. He argued that, the seized items are not the one that would easily change hands and therefore the evidence on the record proved the 1st and 2nd count.

As to the third count, he argued that, the offence of unlawful possession of the government trophies was not proved beyond reasonable doubt. His contention was that PW4 at page 21 of the proceedings filed an inventory report suggesting that the government trophies found in possession of the appellants was disposed of but the records are silent as to who supervised the destruction of the said trophies and whether the appellants participated in that exercise. He said, section 101 of the WCA, Act No 5 of 2009 requires the inventory Form to be filled by a magistrate in the presence of the appellants. He cited the case of **Mohamed Juma @ Mpakani V Republic**, Cr. Appeal No 385 of 2017. He invited the court to dismiss the appeal on the 1st and 2nd count and allow the appeal on the 3rd count.

In addition to the above, the learned State Attorney urged the court under the provisions of section 388 of the CPA, cap 20 R:E 2019 to investigate into and revise the sentence imposed on the appellants on the 2nd count. He said, on conviction for the offence of unlawful possession of weapons, appellant were supposed to be sentenced to twenty years imprisonment.

As hinted herein above, the appellants grounds of appeal raise one pertinent issue, this is whether the offence was proved to the required standards. I have revisited the records and parties' submissions. I propose to begin with the supported part of the appeal in relation to the irregularity of the procedure adopted by PW4 in destroying the decaying Trophies. Indeed, the offence in the third count was not proved. In this count, appellants were charged with unlawfully possession of government trophy. To prove this offence, prosecution must lead evidence establishing that accused persons were found in unlawful possession Government trophies.

In this case, PW1 and PW2 are the arresting officers, they all participated in arresting the appellants and said they found them with the alleged

government trophies namely fresh hind limb legs of the wildebeest. PW1 produced as exhibit P1, the seizure certificates at page 14 of the records. However, the said exhibit was received without its contents being read to the appellants. PW1 prayed to read the said document but no indication on the records whether his prayer was granted or not. That exhibit, for that reasons, lacks evidential value and therefore it is hereby expunged from the records.

However, the above is not the only evidence adduced in support of the 3rd count. PW4, is the officer of the wild life who identified and valued the trophies. He tendered in court two more exhibits, the valuation report and the inventory forms. In his evidence at page 31 of the records of proceedings, PW4 said he filled and signed the inventory form and handled the same to the investigation officer because the trophies were about to decay. As rightly argued by the learned State Attorney, PW4 was not a proper officer to fill in the inventory forms. In **Mohamed Juma @ Mpakama** (supra), Court of appeal emphasized on the compliance of the provisions of law concerning the destruction of the speedy decaying trophies. The court said, the perishable goods can be destroyed during investigation

by the police officers or after the matter has landed to the court. In both situations magistrates are involved particularly in the issuance of an order to dispose of perishable exhibit.

In all the two circumstances above, presence of the accused person at the time of disposing of exhibits which cannot be kept due to speedy decay was emphasized. In the case under scrutiny, the court is not told the stage under which PW4 filled the inventory but in whatever the case, the appellants were not involved and no disposal order by a magistrate as required by the law. That being the case, the Inventory Form (exhibit P4) has no evidential value in this matter. It is hereby expunged from the records. Without the trophies or the valid inventory forms, there is nothing in this case that justifies conviction on the 3rd count. The appeal is, thus allowed as against the 3rd count as suggested.

I now move to evaluate the evidence in support of the 1st count. PW1 and PW2 are the arresting officers. They arrested the appellants inside the National park without a permit. PW3, the investigator confirmed that appellants were brought to Bariadi police station on 2/9/2019. Though the

appellants defence is that they were arrested by the Game reserve officers, they all denied to have been arrested in the National park. The trial court Considered the evidence by both sides. It concluded that the prosecution's evidence on how appellants were arrested was credible, she was not convinced by the 1st appellant's defence that he was arrested while he was about to take bath at the river and 2nd appellants defence that he was arrested in the village while making charcoal. I understand that credibility of witnesses is within the scope of the trial court. I have revisited the appellants defence , I do not find anything any reasonable doubts being raised against the prosecution's evidence. I for that reason find the 1st count proved to the required standard.

On the 2nd counts, prosecution alleges that appellants were found with weapons named three machetes and ten (10) animal trapping wires. PW1 and PW2 said, they took the said weapons together with the appellants, to Bariadi police station. PW3 and PW4 found the weapons in the exhibit room at Bariadi police station. However, on who received the said weapons at Bariadi police stations, how the weapons looked like, who kept the said weapons in the police exhibit rooms, how they were kept, marked and so on

is not on the records. PW1 appeared with the alleged weapons on 5/11/2019 when he tendered them as exhibit in court. Again, the record is silent on where he got them from.

Looking at the above order of events and the chain of custody of the said weapons, one cannot certainly be sure whether the weapons retrieved from the appellant by PW1 and PW2 on 1/9/2019 are the same exhibits P2 and P3 tendered in court. Machetes and animal trapping wires are things that can change hands easily and therefore can easily be swapped or introduced into the case strangely. Having expunged the seizure certificate while dealing with the 3rd count and taking into account the way the weapons were handled in this matter I find the proof of the 2nd count doubtful. The chain of custody was broken and it could not be established with certainty whether appellants were found with any weapon or not. This being the position, exhibit P2 and P3 deserves to be expunged as I hereby do. Once these exhibits are expunged, there is no evidence to link the appellant with the commission of offence in the 2nd count.

Consequently, the appeal is partly allowed. Appellants appeal against conviction and sentence on the 1st count is dismissed. On the other hand, I

allow the appeal, quash the conviction and set aside the sentences mated against the appellants on the 2nd and 3rd counts.

However, Appellants have been in custody for a year now since 22nd May, 2020 when they were convicted and sentenced by the trial court. This means that they have already completed serving their one year custodial sentence imposed on them as an alternative to fine on the 1st count resulting to an immediate release of the appellants from prison forthwith unless held therein for other lawful cause. It is so ordered.

DATED at SHINYANGA this 21st day of May, 2021.


E.Y MKWIZU
JUDGE
21/5/2021

Court: Right of appeal explained.



E.Y MKWIZU
JUDGE
21/5/2021