IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 139, 141 AND 142 OF 2020

1. **JOSEPH S/O MATARO @KIBURE ..... 1ST APPELLANT**
2. **MWIKWABE S/O MWIKWABE @ MNANKA .... 2ND APPELLANT**
3. **MARWA S/O MWIKWABE @ MASUBO ..... 3RD APPELLANT**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 110 of 2019)

JUDGMENT

5th May and 3rd June, 2021

KISANYA, J.:

This consolidated appeals emanate from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 110 of 2019. In that decision, the above named appellants were convicted of three counts preferred against them. These were unlawful entry into the National Park, unlawful possession of weapons in the National Park and unlawful possession of Government Trophy contrary to relevant laws of the land.

Before proceeding further, I find it appropriate to highlight brief facts gathered from the evidence on record. Antony Mwisemi (PW1), Princhpius Alexander (PW4), Ezekiel Kulwa and Nyakere Mruto are park

rangers stationed at Serengeti National Park. On the 6th September, 2019 around 1600 hours, they were on patrol at Korongo la Sonzo area within Serengeti National Park, Serengeti District when they found the appellants. PW1 and PW4 testified that the appellants had six trapping wires, one knife, one machete, one spear and six fresh pieces of wildebeest meat.

It was adduced by PW1 and PW4 that the appellants had no relevant permits of entering into the National Park and possession of weapons in the National Park and Government trophies. In that regard, the said items were seized. PW1 tendered the Certificate of Seizure (Exhibit PE1) the said weapons (Exhibit PE2).

The prosecution also called Wilbroad Vicent (PW2), a wildlife warden who identified and valued the trophy subject to this case. His evidence was to the effect that, the said six fresh pieces of wildebeest meat had value of USD 650 equivalent to TZS 1,430,000/=. PW2 tendered the trophy valuation certificate (Exhibit PE3) to supplement his oral testimony.

The last prosecution witness was WP5665 DC Sijali, a police officer who investigated the matter. Apart from calling PW2 to identify and value the trophy, PW3 prepared an Inventory Form for purposes of seeking an order for disposal of the trophy. He adduced that the trophy e was disposed of by order issued by the magistrate on 7th September, 2019, in

the presence of the appellants. The said Inventory Form was tendered by PW1 and admitted as Exhibit PE4.

In their defence, the appellants disassociated themselves with the charges levelled against them. They stated that on the fateful day (6th September, 2019) they were Tabora B, Ranger Post to claim for their payment of the work of slashing grasses. It was the appellants' case, the park rangers arrested them on the allegation of stealing sickle and took them to Mugumu Police Station on 7th September, 2019.

In view of the evidence the above evidence, the trial court was satisfied that the prosecution had proved its case. It went on to convict and sentence the appellants to a custodial sentence of one (1) year for the first and second counts and twenty (20) years for the third count. The sentence was ordered to run concurrently.

Believing that justice was not rendered to them, the appellants lodged their respective appeals to this Court. In order to maintain consistency in its decision, the Court consolidated the appellants' appeals. However, it is noteworthy that the appellants' grounds are: -

1. 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. The appellants were denied the right to call witnesses.
3. The trial court erred in law and fact to admit the Inventory Form which was not signed by the appellants and the trophy disposed of in the absence of the appellants.
4. The trial court erred in law and fact in admitting wrong exhibits tendered by PW1, PW2 and PW3.

The appellants appeared in person when the appeal was called on for hearing. They were connected through virtual court services from the High Court of Tanzania Musoma Registry. On the other hand, the respondent was duly represented by Mr. Nimrod Byamungu, learned State Attorney.

Submitting in support of the appeal, the appellant contended that the prosecution witnesses contradicted each other as follows. One, while one witness testified that the appellants were arrested in 2018, another witness told the trial court that it was 2019. Two, PW1 deposed that the appellants were taken to the police station on 6th September, 2019 contrary to the evidence of PW3 who stated that it was 7th December, 2021. It was the appellants' view that, the said contradictions raise doubt on the prosecution case.

The appellants went on to submit that they were not taken to the magistrate who issued the order for disposal of the trophy. They also contended that the magistrate was not in the office because 7th September, 2019 was Saturday.

In conclusion, the appellants adopted the petition of appeal as part of their submissions and asked the Court to quash the conviction, set aside the sentence and discharge them.

Mr. Byamungu contested the appeal. Starting with the appellants complaint that the trophy was disposed in their absence, the learned State Attorney conceded that the said trophy was not tendered in evidence. However, he submitted that the trophy could not preserved until the trial and that it was disposed of by order of the magistrate as per evidence of PW3 and Exhibit PE4. The learned State Attorney went on to contend that the magistrate was not barred from working on Saturday.

When probed by the Court on whether the appellants were heard by the magistrate who issued the disposal order, Mr. Byamungu reply was to the effect that such fact is not reflected in the proceedings. However, he was of the view that the said omission did not prejudice the appellants.

As regards the contradictions on the prosecution case, the learned

State Attorney submitted PW1 and PW4 deposed that the appellants were arrested on 6th September, 2019. Thus, he was of the view that the arresting witnesses did not contradict each other on the year of arresting the appellants. Mr. Byamungu conceded that PW1 and PW4 differed on the date of taking the appellants to the Mugumu Police Station. However, he was of the view that the contradiction did not go to the root of the case because the difference from one day to another was one hour.

Responding to the first ground of appeal, Mr. Byamungu submitted that the consent of the DPP and Certificate Conferring jurisdiction on the subordinate court to try economic and non-economic offences duly signed by the State Attorney In-Charge were filed before the commencement of the trial.

In relation to the second ground, the learned State Attorney argued that the appellants were not denied the right to call witnesses. He pointed out that, the first appellant did not indicate whether he wanted to call a witness and that the trial court issued summons to the witnesses named by the second and third appellants. The learned State Attorney went on to submit that the defence case was closed at the instance of the appellants who decided not to call witnesses.

Pertaining to the third ground of appeal on admission of the Inventory Form, Mr. Byamungu adopted his submissions in reply to ground raised orally by the appellants.

In respect of the fourth ground, the learned State Attorney submitted that all exhibits tendered by the prosecution were relevant to prove the charges preferred against the appellants. He also submitted that the exhibits were tendered by competent witnesses.

In view of the above submissions, Mr. Byamungu urged me to dismiss the appeal for want of merit.

In rejoinder, the appellants reiterated that they were not present at the time of disposing the trophy and that PW1 and PW4 contradicted themselves on the year of arresting the appellants.

I have considered the grounds of complaint, submissions of the parties and the record. This being a first appeal, I am duty bound to evaluate evidence adduced before the trial court, subject it to a scrutiny and arrive at my own conclusion where need arises. I will do so by addressing each grounds and issues pertaining to this appeal.

For the reasons to be noticed herein, I prefer to start with the issue of disposal of trophy subject to third count on unlawful possession of

Government Trophies. This issue was stated in the third ground of appeal and the appellants' oral submissions. As stated earlier, the learned State Attorney does not dispute that the appellants were not heard before the issuance of the order for disposing the trophy.

I have read evidence of PW3 and the Inventory Form (Exhibit PE4). It is clear that the said trophy was disposed in accordance with the procedure established under paragraph 25 of the Police General Orders. This provision requires, among others, the accused person to be presented before the magistrate who issues the disposal order of exhibit which cannot easily be preserved until the case is heard. It provides: -

> *"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."*

It is not enough to present the accused before the magistrate who issue to the disposal order. The law is settled the accused must be heard as well. See **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), where it was held that: -

> *"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.*** (Emphasize supplied)

In the instant case, the prosecution evidence though PW4 was to the effect that the appellants were presented before the magistrate who issued the order for disposal of trophy. However, as rightly observed by Mr. Byamungu, it was not deposed whether the appellants were given the right to be heard. Such evidence is wanting. The law is settled that decision made in violation of the right to be heard is a nullity. For that reason, I am of the humble view that the said omission prejudiced the appellants and that the third count was not duly proved.

In that regard, the remaining grounds and complaints shall be considered but, in relation to the first and second counts.

The first issue is whether there are contradictions on the prosecution case. It was the appellants' contention that the arresting witnesses contradicted each other on the year of arresting the appellants and the date of taking the appellants to the police. The arresting officers in the case at hand are PW1 and PW4. Both witnesses testified that the appellants were arrested on 6th September, 2019. I see no contradiction

on this fact. As regards the date of taking the appellants to the police station, it is not disputed that PW1 deposed that it was 6th September, 2019 while PW4 mentioned 7th September, 2019. However, I am at one with Mr. Byamungu that the said contradiction does no go to the root of the case. This is so when it is considered that the appellant stated on oath that they were taken to the police station on 7th September, 2019.

The next issue is whether the trial commenced without the DPP's consent and Certificate Conferring jurisdiction to the subordinate court to try economic and non-economic offences. The DPP's consent to the prosecution of the accused charged with an economic offence is issued under section 26(2) of the Economic and Organized Crimes Control Act, Cap. 200, R.E. 2002 (the EOCAA). On the other hand, if the case involves both economic and non-economic offence, the DPP or an officer authorized by him is required to file a certificate conferring jurisdiction on the trial court to try the case under section 12(4) of the EOCCA. Both documents must be lodged before the commencement of trial. The law is settled that a trial conducted without the DPP's consent and/or certificate conferring jurisdiction is a nullity.

I went through the record. As rightly submitted by the learned State Attorney, the consent and certificate conferring jurisdiction duly signed by

the State Attorney In-Charge on behalf of the Republic and filed and admitted in the trial court on 19th November, 2019. Thereafter, the preliminary hearing was conducted on 2nd April, 2020 and the hearing (trial) commenced 2nd April, 2020. For that reason, I find no merit in this ground.

Another issue is whether the appellants were denied the right to call witnesses. The right to call witnesses is premised on the right to a fair hearing, including the right to be heard. This right is guaranteed under Article 12(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). It is trite law that decision made on the proceedings which violated the right to be heard is a nullity.

In our case, the record tells it all. When addressed on whether they intended to call witnesses, the first appellant informed the trial court that he had none. On their part, the second and third appellants indicated that they were going to call one and two witnesses respectively. Therefore, the trial court summoned the appellants' witnesses. However, each appellant closed his defence case without parading any witness. Thus, this ground fails as well. It cannot be said that the appellants were denied the right to call witnesses.

The last issue requires this Court to determine whether the prosecution tendered wrong exhibits. As regards, the first and second counts, the documents tendered by the prosecution are Certificate of Seizure (Exhibit PE1) and the weapons to wit, one knife, one spear, one machete and six animal trapping wires (Exhibit PE2). Both exhibits were tendered by PW1 and evidence related to them adduced by PW1, PW3 and PW4. It is on record that the appellants did not object admission of the said exhibits or discredit evidence adduced by the PW1, PW3 and PW4 in relation to Exhibits PE1 and PE2. Further, the appellants have not stated at all on how Exhibits PE1 and PE2 were wrong exhibits. I therefore dismiss the fourth ground of appeal.

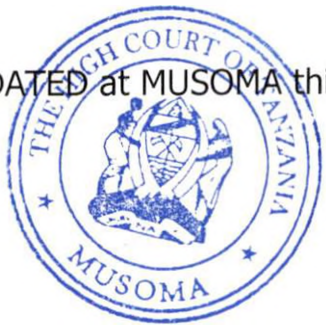
In the final analysis, the Court finds that prosecution proved its case on the first and second counts only. Consequently, the Courts orders as follows:

1. The appeal succeeds on the third count which was not proved by the prosecution.
2. The conviction on the third count is quashed and its sentence set aside.
3. The appeal on the first and second counts is dismissed for want of merit.

4. The appellants should serve one year jail term for the first and second counts, from 29th June, 2020, as ordered by the trial court.

Ordered accordingly.

DATED at MUSOMA this 3rd day of June, 2021.



E. S. Kisanya
JUDGE

COURT: Judgment delivered this 3rd day of June, 2021 in the absence of the appellants due to technical challenge in the virtual court system and in the presence of Mr. Nimrod Byamungu, learned State Attorney for the respondent.

E. S. Kisanya
JUDGE
03/06/2021