IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 192 OF 2020

MASHAURI S/O NYAMKINDA @ NYANKONO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 72 of 2019)

JUDGMENT

21st May and 24th June, 2021

KISANYA, J.:

This is an appeal by the appellant who was convicted of offences of Unlawful Entry into the Game Reserve, Unlawful Possession of Weapons in Game Reserve and Unlawful Possession of Government Trophies, contrary to relevant laws of the land. Upon conviction, he was sentenced to imprisonment for one, two and twenty years for the first, second and third counts, respectively.

The prosecution case was premised on evidence of Hamisi Lilanga Ncheye (PW1) and Emmanuel Michael Semule (PW2), game officers who found the appellant in the Game Reserve; Wilbroad Vicent (PW3), a

wildlife officer who identified and valued the government trophies subject to this case; and G.8118 DC Warsha (PW4), a police officer who investigated the matter.

Briefly, on 27th July, 2019, the appellant was arrested by PW1, PW2 and other park rangers at Mto Manchira area in Ikorongo Grumeti Game Reserve within Serengeti District. Upon being searched, he was found in possession of one knife, one panga and eight pieces fresh meat of wildebeest without relevant permits. The said items were seized. PW1 tendered the certificate of seizure (Exh. PE1) to supplement his oral testimony on the items found in possession of the appellant. He and other park rangers reported the matter to Mugumu Police where case No. MUG/1R/2262/2019 was opened.

In the course of investigating Case No. MUG/1R/2262/2019, PW4 called PW3 to identify and value the trophies found in possession of the appellant. Pursuant to PW3 and the Trophy Valuation Certificate (Exh. PE3), the said eight pieces fresh meat of wildebeest were valued at TZS 1,430,000/=.

It is reflected from PW4 that the said trophies (eight pieces fresh meat of wildebeest) were subject to speedy decay. Therefore, he (PW4) prepared an Inventory Form of Claimed Property (Exh. PE4) and presented

the said trophies to the magistrate who issued the disposal order.

The appellant jumped bail immediately after hearing the evidence of PW1, PW2 and PW3. Therefore, the case proceeded against him under section 266(1) of the Criminal Procedure Act [Cap. 20, R.E. 2019]. Ultimately, he was convicted and sentenced as indicated earlier. Upon being arrested, the trial court was satisfied that the appellant had failed to demonstrate that he was prevented by sufficient cause when the case was called on for hearing of the prosecution. Thus, it went on to order the appellant to serve the above sentence. Feeling that justice was not rendered, the appellant filed the present appeal.

In his petition of appeal, the appellant advanced seven grounds, which can be summarized as follows:

1. That the trial magistrate erred by convicting and sentencing the appellant basing on facts and evidence of PW1, PW2 and PW4 whose evidence was limited to the arresting process.
2. That trial magistrate relied on Inventory Form which did not prove that the appellant committed the offence.
3. That an independent witness was not involved at the time of arresting the appellant.
4. That the appellant's conviction and sentence to twenty years is

contrary to the law because the charge sheet does not indicate the sentencing provision.

5. That the prosecution tendered wrong exhibits which were tendered contrary to the established procedure.
6. That the appellant was not accorded the right to call witnesses.
7. That the appellant was sentenced basing on evidence of the prosecution only.

At the hearing of this appeal, the appellant appeared in person while, Mr. Nimrod Byamungu, learned State Attorney appeared for the respondent.

When the petition of appeal was read over to the appellant and invited him to elaborate on the grounds of appeal, he asked the Court to let the respondent reply to the grounds of appeal. He reserved the right to rejoin.

At first, Mr. Byamungu indicated that he was not supporting the appeal on the ground that the prosecution case was proved by PW1, PW2, PW3 and PW4. However, upon second reflection, the learned State Attorney supported all grounds of appeal. He was of the view that the appellant was not accorded the right to be heard at the time of disposing of the trophies subject to this case.

The appellant had nothing to rejoin other than urging me to allow the appeal and set him free.

I have considered the evidence on record and submissions on the grounds of appeal. The issue for determination is whether or not the appeal is meritorious. In view of the grounds of appeal and submissions by the learned State Attorney, this appeal can be disposed of by considering whether the prosecution proved its case beyond all reasonable doubts.

As stated earlier, the learned State Attorney challenged the procedure of disposing the trophies subject to this case. In my view, he conceded to the second ground of appeal that, the Inventory Form did not prove the offence. However, it is common knowledge that evidence on disposal of trophies is intended to prove the offence of unlawful possession Government of trophies (third count). It has nothing to do with the offence of unlawful entry into the game reserve (first count) and unlawful possession of weapon in the game reserve (second count). In that regard, I will revisit the evidence on record and consider whether each count was duly proved by the prosecution.

Starting with the third count, it is common ground that the appellant

was not heard at the time of when the prosecution sought the order for disposal of trophies. In terms of PW4 and Exh. PE4, the trophies were subject to speedy decay and hence, disposed of under the Police General Orders (PGO). Failure to accord the appellant's right to be heard at that stage contravened paragraph 25 of the PGO No. 229 (INVESTIGATION - EXHIBITS) which 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."*

The law is settled that, Inventory Form resulting from the procedure in which the accused was not accorded the right to be heard cannot be acted upon to prove the offence levelled against him. This position was stated in **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 evidence of PW4 and Inventory Form at (Exh. PE4) does not suggest that the appellant was heard at the time of obtaining the order for disposal of the trophies (eight pieces fresh meat of wildebeest). Therefore, such evidence cannot be relied upon to prove the third count. In the absence of evidence of PW4 and Exh. PE4 there remains no other evidence to prove the trophies alleged to have found in possession of the appellant. In the result, I agree with the learned State Attorney that the third count.

Moving to the second count on unlawful possession of weapons in the Game Reserve, the prosecution relied on evidence adduced by PW1 and PW2. Both witnesses testified to have found the appellant at Mto Manchira area into Ikorongo Grumeti Game Reserve and that, he had one panga and one knife. PW1 tendered the Certificate of Seizure (Exh. PE1) whereby the said weapons are in the list of items seized from the appellant. He also tendered the weapons (one panga and one knife) -Exh. PE2.

According to section 17 (3) of the Wildlife Conservation Act, 2009, the prosecution, unlawful possession of weapon is not illegal unless the offence is committed in the circumstances where the weapon has been

used or intended to be used for purposes other than hunting, killing wounding or capturing of wild animals. Neither PW1 nor PW2 adduced evidence to prove the said ingredient of offence in relation to one panga and one knife found in possession of the appellant. For that reasons, I am of hold that the second count was not proved as well.

Again evidence to prove the first count was given by PW1 and PW2. As indicated earlier, their (PW1 and PW2) evidence was to the effect that the appellant was arrested at Mtoro Manchira area in Ikorongo Grumeti Game Reserve within Serengeti District. They testified further that the appellant had no permit of entering into the Game Reserve. The appellant did not raise doubt on evidence adduced by PW1 or cross examine PW2 who gave evidence which implicated him in the first count.

The ground that an independent witness was not present at the time of arresting the appellant is unfounded. What matters is whether the said PW1 and PW2 were competent witnesses. The trial court found them to be competent. Having revisited their evidence, I find no reason to fault the trial court findings on that aspect. The fact that PW1 and PW2 are park rangers does not render them incompetent. Further, there is no the law which bars persons working in one office to give evidence on the same matter or fact.

Also, pursuant to section 106 of the WCA, an independent witness is required when the search is being conducted in the dwelling house. In the present case, the accused was found in the game reserve. Therefore, it was not practicable to have independent witnesses.

The appellant complained further that he was denied the right to call witnesses and that the trial court relied on evidence adduced by the prosecution only. I have shown earlier that the case proceeded in his absence because he jumped bail when the court had heard evidence of PW1, PW2 and PW3. It is trite law that the right to be heard is not absolute. Therefore, it is exercised in accordance with the law. An accused person who absconds himself without sufficient reason forfeits his right to be heard. That is why the provision of section 226 (2) of the CPA empowers the trial court to proceed in his absence. The record shows further that the appellant failed to prove that he was prevented by sufficient cause to appear when the matter was called for hearing. In the circumstances, I am of the considered opinion that, the appellant was not denied the right to be heard or call witness.

In the end, I find that the prosecution proved its case on the first count only and that, the second and third counts were not proved. Consequently, I hereby order as follows:

1. The appellant's conviction on the second and third count is quashed and the respective sentences set aside.
2. The appeal on the first counts is dismissed for want of merit.

In consequence, the appellant shall serve imprisonment for one (1) year for the first count (from 19th October, 2020) as ordered by the trial court. It is so ordered.

DATED at MUSOMA this 24th day of June, 2021.

E. S. Kisanya
JUDGE

COURT: Judgment delivered this 24th day of June, 2021 in the absence of the appellant and in the presence of Mr. Nimrod Byamungu, learned State Attorney for the respondent.

E. S. Kisanya
JUDGE
24/06/2021