IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 125 OF 2020

(Originating from Criminal Economic Case No 146 of 2018 of District Court of Serengeti at Mugumu)

KOBOKO GIBOMA MAGIGE..... 1ST APPELLANT

MWITA BURURE.....2ND APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

19th April & 28th June, 2021

Kahyoza, J:

The district court of Serengeti convicted **Koboko Giboma Magige** (the 1st appellant) and **Mwita Burure** (the 2nd 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, the appellants appealed to this Court contending that the trial court erred in law and fact by not considering that the alleged search and arrest were conducted in the absence of an independent witness, that the charge sheet did not disclose penal provisions, that their conviction was based wrong exhibits from park rangers and that the trial court did not consider the appellant's defences, it relied on hearsay evidence from

the prosecution and finally that the trial court relied on the inventory form to convict the appellants.

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 search and arrest of the appellants without an independent witness unlawful?
2. Did the trial court rely on hearsay evidence?
3. Did the charge sheet disclose the penal provisions?
4. Did the trial court admit wrong exhibits?
5. Did the trial court consider the defence?

A brief background is that; the prosecution arraigned the appellants 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] (the **NPA**); **two,** unlawful possession of weapons in the National Park c/s 24 (l)(b) and (2) of the **NPA** and **three,** unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (the **WLCA**) 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. 2019] (the **EOCCA**). The trial court found the appellants guilty and convicted them as charged.

The prosecution summoned four witnesses and tendered four exhibits to prove the appellants' guilt. The prosecution witnesses, Thadeus s/o Michael (**Pw1**) and Waziri Athuman (**Pw2**) deposed that on the 14th

December 2018 at about **13.00hrs** were on routine patrol with other park rangers namely Magambo s/o Marato, Paulo Achieng and Moses Kaijage at Korongo la Machochwe within Serengeti National Park. They saw three persons with luggage. They arrested them. They found the appellants in possession of two fresh fore limbs, one fresh hind limb and two fresh ribs all of wildebeest; and a weapon to wit; one panga. The appellants had no permit to enter into the national park and to possess weapon and government trophies. Thadeus s/o Michael (**Pw1**) and Waziri Athuman (**Pw2**) prepared a certificate of seizure, which indicated the weapon and government trophies seized from the appellants. The trial court admitted the certificate of seizure and the Panga as exhibits P.E 1 and P.E 2 respectively.

Wilbroad s/o Vicent (**Pw3**) prepared and tendered a trophy valuation certificate as exhibit P. E 3. He further deposed that he identified the trophies to be of wildebeest by the colour of the skin, which was slightly grey to dark brown hair. He also determined the value of the trophy as Tzs. 1,430,000/=.

G. 4209 C/CPL Steven (**Pw4**), the investigating officer deposed that after Wilbroad s/o Vicent (**Pw3**) identified and valued the trophy, he prepared an inventory and submitted it to the magistrate. He tendered the inventory as exhibit P.E 4.

The appellants appeared in person at hearing of the appeal and Mr. Temba, the state attorney represented the respondent. The appellants had nothing substantive to submit during the hearing. The respondent's state attorney made submission, which I will refer to while answering the issues.

Were the search and arrest of the appellants in the absence of an independent witness unlawful?

The appellants contended that they were searched and arrested unlawfully because there was no independent witness.

Replying to the first ground of appeal Mr Temba, the learned state attorney, opposed the appeal and stated that the appellants were arrested in the national park, it was therefore difficult to find an independent witness.

The prosecution's evidence is that its witnesses Thadeus s/o Michael (**Pw1**) and Wazir s/o Athuman (**Pw2**) arrested the appellants in the national park. The law requires a person before entering the national park to obtain a permit. It is not therefore a place persons enter at their will. I agree with the respondent's state attorney that it is difficult though not impossible to find an independent person at any given time within the park. Thus, if this Court were to decided that no arrest and search should be conducted without an independent witness in the national parks, culprits would go scot-free.

The supreme court of India in **Dalip Singh and others vs. The State of Punjab** (AIR 1953 SC 364) defined an independent witness that-

> *"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness* ***has cause, such as enmity against the accused, to wish to implicate him falsely.*** *Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that*

there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, ***but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth****. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts." (emphasis is added)*

Before discrediting a witness for reason that he is not independent, foundation must be laid to establish that the witness ***has cause, such as enmity against the accused or personal interest, to wish to implicate him falsely.*** No doubt that the prosecution's principal witnesses were park rangers and are the ones who searched and arrested the appellants. Being the park rangers, that fact does not render them incredible and independent witnesses. The appellants did not lay down the foundation of discrediting the witnesses. I am unable to buy the appellants' contention to discard the evidence of Thadeus s/o Michael (**Pw1**) and Wazir s/o Athuman (**Pw2**) simply because they are park rangers, thus entrusted to protect flora and fauna of the national park.

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."

In the end, I find, like the trial court, that Thadeus s/o Michael (**Pw1**) and Wazir s/o Athuman (**Pw2**) are credible witnesses. Thus, non-availability of what the appellants considered to be independent witness did not vitiate the proceedings and the conviction, as there was no such a need and given the circumstances of the case it was not easy to find witness, who is not a park ranger in the national park. I dismiss the first ground of appeal.

Did the trial court rely on hearsay evidence?

The appellants complained that the trial court relied on hearsay to convict them.

It is an established principle of evidence that hearsay evidence is inadmissible. Hearsay evidence is evidence based not on a witness's personal knowledge but on another's statement not made under oath. In this case, the prosecution's witnesses did not give hearsay evidence. their evidence is based on their personal knowledge. Thadeus s/o Michael (**Pw1**) and Wazir s/o Athuman (**Pw2**) testified that they saw, arrested and found the appellants in the national park in possession of the government trophy and a weapon. That evidence is no way is hearsay evidence. Not only that but also the evidence of Wilbroad s/o Vicent (**Pw3**) and G. 4209 C/CPL Steven (**Pw4**) is not hearsay. Wilbroad s/o Vicent (**Pw3**) saw, identified and value the meat, which the appellants were found with. While, G. 4209 C/CPL Steven (**Pw4**) prepared an inventory as the meat, which was intended to be an exhibit was subject of speedy decay. There is no witness who gave hearsay evidence.

I find the appellants' complaint baseless and I dismiss it for want of merit.

Did the trial court admit wrong exhibits?

The appellants complained that exhibits tendered by park ranges was wrong exhibits.

Mr Temba, the learned state attorney, argued that the exhibits tendered were relevant to the facts in use. He submitted that the meat properly identified and valued. Wilbroad s/o Vicent (**Pw3**) a competent witness prepared a trophy valuation report, which he tendered as exhibit P.E.3. he added that Thadeus s/o Michael (**Pw1**) tendered the certificate of seizure and the weapon, which the trial court marked as exhibit P.E.1 and P.E.2 respectively. Eventually, G. 4209 C/CPL Steven (**Pw4**) prepared an inventory as the meat, which was intended to be an exhibit was subject of speedy decay.

I considered the exhibits P.E.1, P.E.2 and P.E.3 and formed an opinion that the same were properly tendered, admitted and relevant to the facts in issue. I also noted that after the court cleared exhibits P.E.1 and P.E.3 for admission, their contents of were read to the appellants. There is nothing to complain about those exhibits. I dismiss the appellants' complaint regarding the exhibits P.E.1 and P.E.3.

I passionately considered the procedure G. 4209 C/CPL Steven (**Pw4**) adopted to prepare an inventory. He tendered the inventory as exhibit P.E 4. He deposed that he submitted the meat (the trophy) and the accused persons to the magistrate who ordered G. 4209 C/CPL Steven (**Pw4**) to dispose of the meat. He contended that the appellant signed on the blank page of the document. It is true the appellant singed the blank page. I was dumbfounded as to why did the police lead the appellants to sign on an empty page.

It is not clear whether the magistrate who ordered the police to dispose of the trophy gave the appellants an opportunity to air their opinion or comment. I will resolve the doubts in the appellants' favour that the magistrate did not hear them before he ordered meat, the trophy to be disposed of. 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 trial court did improperly admitted the inventory, exhibit P.E 4, as there is no evidence that the magistrate heard appellants before he ordered meat/ the trophy to be disposed of. Subsequently, I expunge the exhibit from the record of the court.

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-

"In 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 fact that the exhibit, the government trophies, were destroyed and the inventory was not prepared in compliance with the law, I hesitate to order the appellants to be tried a fresh regarding the offence in the third count.

Was the defence evidence was considered

The appellants contended that the trial court convicted and sentenced them without considering their evidence instead, it relied on the prosecution's evidence.

Mr. Temba submitted that the trial court considered the appellant's defence.

I had cursory look at the judgment of the trial court and found that the appellants' defence was considered. The trial court referred to the defence while answering the issues. The trial court while considering the defence, it stated

"Dw1 contended that he was not found with the said weapon, the same to Dw2. When the prosecution's side prayed to tender the

said exhibits one panga and a certificate of seizure, both accuseds objected not. Thus, the court admitted a certificate of seizure as exhibit PE.1 and one panga as exhibit PE. 2. Since at first the accuse persons were found in unlawful entering within the national park, and they denied to have been found with one panga as alleged by the prosecution, and they did not have any quarrels with the park rangers, I find them to be guilty to the second count"

I am of the firm view that the appellant's complaint that the trial court did not consider the defence has not merit. I dismiss it.

Did the charge sheet disclose the penal provisions?

Lastly, the appellants contended that the magistrate erred to impose a sentence on them in the circumstance where charge sheet did not disclose the penal provision regarding the offence in third count.

The respondent's state attorney submitted that the sentence was proper.

I will not dwell on this ground of appeal for two reasons; **one**, having quashed the conviction and set aside the sentence in the third count, which was complained of there is no more urge to consider the complaint; **two**, it is obvious the charge sheet included the penal section. The charge sheet referred to among other section of the law, to section 60(2) of the **EOCCA**. Section 60(2) stipulates that-

(2) Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall ***be liable to imprisonment for a term of not less than twenty years but not exceeding***

thirty years, or to both such imprisonment and any other penal measure provided for under this Act;

Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence.

Finally, I find the complaint that the prosecution did not specify the penal section in the third count baseless and dismiss it.

Eventually, I partly allow the appeal by, uphold the conviction and the sentence imposed against the appellants 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 appellants 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
28/6/2021

Court: Judgment delivered in the presence of the second appellant and Mr. Temba, the state attorney virtually. The first appellant absence. Mr. Mofuga, the Judge's assistant present. Right of appeal explained.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza
JUDGE
28/6/2021