

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MUSOMA)**

AT MUSOMA

HIGH COURT CRIMINAL APPEAL NO. 191 OF 2020

(Original Criminal Case No. 65 of 2018 of the District Court of Serengeti
District at Mugumu)

JOSEPH NYANTORI WAIBE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

28/6/2021 & 2/7/2021

MKASIMONGWA, J

Joseph Nyamtori @ Waibe (Appellant) stood before Serengeti District Court at Mugumu charged with three counts, as follows:-

1st Count: Unlawful entry into a Game Reserve Contrary to Section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009.

2nd Count: Unlawful possession of weapons in a Game Reserve Contrary to Section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap 2002 R.E 2002] as amended by Act No. 3 of 2016.

3rd Count: Unlawful possession of Government Trophies contrary to Section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by Act No. 2 of 2016 read together with Paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap 200 R.E 2002] as amended by the Witten Laws (Miscellaneous Provisions) Act No. 3 of 2016.

He was convicted of all the offences and accordingly sentenced to two years, two years and twenty years imprisonment, respectively. Sentences were ordered to run concurrently.

The Appellant was aggrieved by both conviction and sentences imposed hence this appeal a Petition of which lists five grounds for which he prays the court that it allows the appeal and quash the conviction and sentence imposed by the trial court and that an order be issued releasing him free from the jail. The grounds of appeal are as follows:-

- 1. That, the trial Magistrate erred in law and fact to convict and sentence the appellant basic exhibit P.2 which was not tendered by an expert from Government Chemist it is impossible to identify the meat of animal by using colour only it needs further expertise.*

2. *That, the trial magistrate erred in law and fact to convict and sentence the appellant by relying on shack and weak evidence adduced by PW1 and PW2 which was uncorroborated in addition this witness were same people from the same office and working hence their evidence needs more corroborated.*
3. *That, the appellant's conviction and sentence was illegal because the prosecution side lack legal basis and the trial magistrate trial the case at hand without the consent from Director of Public Prosecutions as the case fall under Economic and Organized Crime control Act (Cap 20 RE 2002.*
4. *That, the prosecution grossly erred in law and fact to convict and sentence the appellant without taking into consideration the defence adduced by appellant during his defence within the trial Court.*
5. *That, the prosecution side did not prove the case beyond all reasonable doubt as required by law.*

The appeal not was contested by the Respondents and on the date, the same was placed before the Court for hearing and by way of a video link, there appeared the appellant in person and Mr. Isihaka Ibrahim (SA) for the Respondent.

Before I state the submission made by the Appellant and Mr. Isihaka in support of their respective cases, let though briefly, the facts of the case

as they can be comprehended from the record be stated. They are as brief as that: Mwatani Gilale (PW1) and Gidion Tumaini (PW2) are Game Scouts working at Ikorongo Game Reserve. On 16/7/2018 at about 18:00hrs PW1 and PW2 were on duty patrolling along Park Rangers area within Ikorongo Game Reserve. As such, they saw a smoke somewhere within the Reserve. They proceeded to and surrounded the place where they found and arrested the Appellant. The later, who identified himself to be Joseph Nyamtori of Bonchungu village, was found in possession of a spear and Government trophies namely; three pieces of dried wildebeest and that he had no any permit allowing him enter into the reserve and also possessing the weapon and government trophies. He was, therefore, taken to the Police Station at Mugumu along with the seized weapon and government trophies. Wilbroad Vicent (PW3), the Wildlife Warden was consulted and on 17/7/2018 in the morning, the later came to Mugumu Police station. According to PW3, he came there upon being called by G. 763 D/C Egwaga (PW4) a Police Officer duly assigned to conduct investigation on the case. At the Police Station PW3 was shown three pieces of dried meat which he identified to be that of the Wildebeest and upon conducting a valuation he valued it at USD 630 which was equivalent to Tshs. 1, 417,000/=. PW3

prepared a Trophy valuation Certificate which was tendered to the Court and admitted in evidence marked as Exhibit PE. 2.

In his investigation, G. 763 D/C Egwaga (PW4) again, prepared an Inventory of Exhibit/Unclaimed Property which he on 18/7/2018 submitted to the Resident Magistrate for necessary order disposing the seized Government trophies and that the later ordered for destruction of trophies in accordance with the law.

When the Appellant was invited by Court to argue his case, he had nothing material to state in expounding the grounds of appeal. He instead, requested the court it only considers the grounds and eventually determine, the Appeal in his favour.

On the other hand, Mr. Isihaka (SA), as shown above did not contest the Appeal. He supported it particularly on the fifth grounds of appeal under which the Appellant faulted the judgment of the lower court alleging that the prosecution case was not proved beyond all reasonable doubt. Mr. Isihaka did on the first place refer the court to the testimonies of Gine Mwatani (PW1) and Gidion Tumaini (PW2) the Game Scouts working at Ikorongo/Grumeti Game Reserve which was to the effect that on

16/7/2018 they were on patrol at Ikorongo Game reserve where they arrested the Appellant whom they found in possession of a spear and three pieces of dried wildebeest meat. They took the Appellant with his possessions to a Police Station at Mugumu where a Police case file was opened and that they labeled marking the pear with the Police Case Number. Mr. Isihaka continued that the evidence is silent as to where and under whose custody the exhibits were left after the labeling. On 18/7/2018 there was prepared an Inventory of Exhibit/Unclaimed property in respect of the seized three pieces of dried wildebeest meat. The Inventory was eventually produced to the court and it was admitted in evidence marked **Exhibit PE. 3**. Going by it, it is not shown if the Accused, now appellant, was invited to sign it with a view to showing his involvement in the destruction of the exhibit process for him to be certain that what was destroyed was actually the same what he was met in possession of. Mr. Isihaka (SA) submitted that the evidence on record left the claim of custody of the exhibits shaking and that since the Accused/Appellant did not sign on the Inventory, under the law, the same deserves an order expunging it from the record. Had the trial Court

considered the matter that way it could not have found the Appellant guilty of the second and third counts.

As regards to the first count, Mr. Isihaka (SA) submitted that conviction of the Appellant of the first count depended on the credibility of the witnesses which from their conduct he could not find if PW1 and PW2 were credible witness. Mr. Isihaka hence agreed with the Appellant who alleged in the fifth ground of appeal that the case was not proved beyond doubt. With such approach and upon considering that the fifth ground of appeal suffices disposing of the appeal, the learned State Attorney did not argue on the first four grounds of Appeal and the Appellant had nothing to say by way of rejoinder.

I have considered the submission by Mr. Isihaka. I have again considered the record as a whole. Indeed, in their testimonies PW1 and PW2 stated that on 16/7/2018 at or about 18.00hrs when they were on patrol along Ikorongo Game Reserve they found the Appellant therein the Reserve and that the later was possessing a spear and three pieces of the wildebeest dried meat. The evidence shows that, the witnesses took the Appellant with his possession to Mugumu Police Station. In their testimonies PW1 and PW2 did not tell if or not they left the spear and the

meat there at the Police Station. The testimony by PW4, one G. 763 Dc Egwaga, a Police Officer who was, on 17/7/2018, assigned to conduct investigations on the case is to the effect that, on 18/7/2018 he called the Wildlife Warden one Wilbroad Vicent (PW3) to the Police Station for the later to identify and evaluate the alleged seized meat. This evidence evidences the fact that the trophies were left there at the Police Station. Since PW1 and PW2 did not tell as to whom the trophies were left with there at the Police Station and that PW4 was silent as from whom the trophies were passed into his hands hence passed into PW3 for analyses, one can successfully allege that it is not certain if the trophies PW3 had analyzed are the same seized in possession of the Appellant. In my view the uncertainty could only be cleared where the prosecution could have observed the of exhibits chain of custody principle which was well expounded on the case of **Paulo Maduka and 4 others** V. R Criminal Appeal No. 110 of 2007 CAT (Unreported) to be:

"... the chronological documentation and/or paper trail, showing the seizure custody, control, transfer, analysis, and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime rather than for

instance having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected its very transfer from one person to another must be documented and that it be provable that no body else could have accessed it"

This principle can however be relaxed as it was held in the case of **Kadiria Said Kimaro v. R:** Criminal Appeal No. 301 of 2017 CAT (unreported) that the principle can be relaxed in cases relating to items which cannot change hands easily and therefore not easy to temper with. The Court was of such view adopting its earlier decision in the case of **Joseph Leonard Manyota v. R:** Criminal Appeal No. 485 of 2015 CAT (unreported where it was stated:

"... it is not every time that when the chain of custody has broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/as on any way tempered with. Where the circumstances may reasonably show the absence of such dangers, the Court may safely receive such evidence despite the fact that the chain of custody may have been broken. Of

course, this will depend on the prevailing circumstances on every particular case”.

I have considered the above authorities and admit that **Exhibit PE. 3**, the three pieces of dried meat, did not constitute items which could not change hands easily. In the circumstances of this case, I find it difficult to relax the principle stated in **Paul Maduka** case (Supra). This is because; **One:** that apart from the fact that the seizure, custody, control, transfer and deposition of the exhibits was not documented, there was no even mention by the witnesses who testified to the court as to how the exhibit was handled after when it was seized. **Two:** there is an allegation that the exhibit was destructed as it evidenced by **Exhibit PE 3**. Going by the exhibit the alleged meat was found by one Alphonce Mugabo, the TANAPA Security Officer at Grumeti. Again, going by the court proceedings, the later was not known in the case. According to PW1 he seized the exhibit when he was accompanied by Gidion Tumaini (PW2), Peter Gorobani and Joseph Magora. In the circumstance, it is doubtful if what the magistrate had ordered for destruction were the three pieces of the wildebeest meat met in possession of the Appellant or someone else. Suppose it was the same item found in possession of the Appellant. It is in black and white

that **Exhibit PE. 3** does not throw light on the involvement of the Appellant in the exhibit destruction process. It is not shown if the Appellant was brought to the Magistrate together with the exhibit and that he was heard. When the court in the case of **Mohamed Juma @ Mpakama v. R.** Criminal Appeal No. 385 of 2017 CAT (Unreported) was caught into the situation we are now in this case, referred to and quoted Paragraph 25 of the Police General Order (PGO) No. 229 which deals with investigation-Exhibits. There it is stated:

"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 the case at hand the evidence is mute as to whether the exhibit under contest was brought to the magistrate together with the Appellant. In such circumstance the court in the case above held that:

"While the Police investigator ... was fully entitled to seek the disposal order from the primary court magistrate, the resulting inventory form cannot be proved against the Appellant because he was not given the opportunity to be heard by the primary court magistrate ... Exhibit PE.3 cannot be relied on to prove

that the Appellant was found in unlawful possession of Government trophies mentioned in the charge sheet”

Based on the above discussion, and upon considering the evidence on record, I find the credibility of the prosecution witnesses questionable hence agree with both parties that this case was not proved beyond doubt. In event I allow the appeal. All proceedings of the case in the trial Court are quashed and the conviction and sentence imposed in respect of all counts are set aside. Consequently, it is ordered that the appellant be released out from jail if he is not therein for other lawful causes.

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



E. J. Mkasimongwa

JUDGE

2/7/2021