IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MUSOMA

CRIMINAL APPEAL NO. 185 OF 2020

(Original Economic Case No. 152 of 2018 of the District Court of Serengeti District at Mugumu)

RYOBA MSOGORE MARWA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

29/6/2021 & 5/7/2021

MKASIMONGWA, J

In the District Court of Serengeti District at Mugumu, the Appellant one Ryoba Msogore @ Marwa stood charged with three counts, namely:

1st Count: Unlawful Entering in the National Park Contrary to Sections 21 (1) (a) and (2) and 29 (1) of the National Park Act [Cap 282 R.R 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003.

2nd Count: Unlawful Possession of Weapon in the National Park Contrary to Section 24 (1) (b) and (2) of the National Park Act [Cap 282 R.E 2002]

3rd Count: Unlawful Possession of Government Trophy Contrary to Section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 65 of 2009 as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 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] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

He was convicted of the offences in all counts as charged and sentenced to one year, one year and twenty years imprisonment, respectively. Sentences were ordered to run concurrently.

The Appellant is aggrieved by the conviction and sentences imposed by the court. He therefore preferred this appeal challenging the two. In the Petition of Appeal filed, the Appellant listed five grounds as follows:

1. That, the trial Magistrate erred in law and fact when he convicted the appellant by relying on a shaky, weak and uncorroborated evidence adduced by PW1 and PW2 people working in same office.

2. That, the learned trial magistrate erred in law and fact when he relied on exhibit P. E2 which was not tendered by an expert from the Government Chemist's office.
3. That, the appellant's conviction and sentence was illegal because the prosecution and trial of the case were without the consent of the Director of Public Prosecutions.
4. That, the trial court grossly erred in law and fact when it convicted and sentenced the appellant without taking into consideration the defence case.
5. That, the prosecution side did not prove the case beyond all reasonable doubt as required by law.

On the date the Appeal came for hearing before me, whereas the Appellant appeared in person, Mr. Nimrod Byamungu, leaned State Attorney, appeared on behalf of the Respondent Republic. Before stating their submissions supporting their respective cases, let though briefly, the facts of the case be shown. They are as that: the Appellant Ryoba Msogore @ Marwa is a peasant resident of Merenga village in Serengeti District. On 19th of December, 2018, he was arrested by Ezekiel Kukwa Petro (PW1) and Julius Kisanga (PW2) the Park Rangers working with TANAPA at

Serengeti National Park. He was so arrested at Toberane area within the Park on being found in possession of a Machete and four pieces of dried meat which was identified to be that of Wildebeest. On being asked, the Appellant stated that he had no permit to enter into the National Park nor had he a permit for possession of the weapon and the government trophies. Eventually he was brought to the Police Station where he was charged with offences as shown above.

When the Appellant was invited to argue his case, he only asked the court that it considers the grounds of appeal as presented and determine the appeal in his favour. On his part, Mr. Byamungu (SA) partly supported the appeal. He submitted that the Appellant was wrongly convicted of the Third Count. The learned State Attorney added that the record shows that the Appellant was found in possession of four pieces of dried wildebeest meat. The meat was not physically tendered to the court as exhibit. Instead there was tendered by H. 2331 D/C Massawe (PW4) and admitted in evidence by the Court, marked as **Exhibit PE. 3** an Inventory Form which evidenced the fact that the Magistrate had ordered for destruction of the meat. In his testimony, PW4 did not tell the court if on the date he proceeded to the magistrate with the exhibit seeking for the necessary

disposal order the Appellant was there before the Magistrate and accorded with an opportunity to be heard before the order was made. Getting support from the decision in the case of **Mohamed Juma @ Mpakama v.** R. Criminal Appeal No. 385 of 2017, CAT, (unreported) Mr. Byamungu submitted that the Inventory was not properly procured which fact rendered it of no any evidential value. As such Mr. Byamungu prayed the court that it allows in its entirety the appeal in respect of the third count.

Mr. Byamungu (SA), however, objected the Appeal in respect of the first and second counts. He said in the appeal, the Appellant faulted the judgment of the trial court on ground that the testimonies of Ezekiel Kukwa Petro (PW1) and Julius Kisanga (PW2) needed to be corroborated for the two witnesses hail from one office and work together. The learned State Attorney submitted that the evidence as adduced by the two witnesses shows that PW1 and PW2 are the ones who arrested the Appellant. Their evidence was the direct oral evidence which needed no corroboration. In additional to that, upon being invite to cross examine the witnesses; the Appellant had no any question to put against the testimonies of the two witnesses, which meant that he agreed with the evidence as being nothing but the truth. The Appellant's attempt to challenge the evidence at this

stage is an afterthought and the same should be dismissed. To cement his argument Mr. Byamungu referred the court to the decision in the case of **Nyerere Nyague v.** R Criminal Appeal No. 62 of 2010; CAT (Unreported). He reiterated that the law does not bar several people working in one and same office from testifying on a fact. What matters is the credibility of such witnesses as it was held in the case of **Popart Emmanuel v. R** Criminal Appeal No. 20 of 2010; CAT (unreported) which credibility the court found in favour of the two witnesses.

Regarding to the complaint that the prosecution against the Appellant was not consented by the DPP which complaint constituted the Third ground of appeal, Mr. Byamungu stated that this was misconceived as going by the proceedings of the Court; on 11/4/2019 before when the hearing commenced, there were filed in Court both the Consent of the State Attorney In-charge and the Certificate Conferring Jurisdiction on a Subordinate Court to try an Economic and Non-Economic cases. As such the ground is devoid of merit and it should be dismissed.

Mr. Byamungu (SA) admits that indeed the trial Court did not take into consideration the evidence given in defence by the Appellant which fact forms the basis of the forth ground of this appeal. The court, however,

in concluding the matter stated that the defence case did not raise doubt on the part of the prosecution case. The learned State Attorney submitted that, this being the first appellate court it is entitled to re-evaluate the evidence and come up with the decision it thinks to be proper. He invited the court therefore to look into the evidence and re-evaluate it.

Mr. Byamungu concluded that it is true that the prosecution did not prove its case in respect of the third count beyond doubt. The prosecution however proved beyond reasonable doubt the case against the appellant in respect of the first and second counts. He prayed the court that it dismisses appeal against the conviction and sentences imposed in the first two counts.

The Appellant had nothing to submit by way of rejoinder. He only asked the Court that it allows the appeal.

I have attentively considered the submissions as well as the evidence on record. From the evidence on record I find there is ample evidence that on 19/12/20218 at or about 18:00hrs the appellant was at Toberane area within Serengeti National Park walking and carrying a luggage of four pieces of dried wildebeest meat. He was also in possession of a machete.

He had neither a permit to allow him entering into the National Park nor that for possession of the machete and the government trophies (four pieces of dried wildebeest meat). In defence, this is denied by the Appellant. The later told the court in evidence that on 18/12/2018 he was at Mugumu Police Station where he was arrested by a Game Scout when he was outside the Station and that no reason was given as to why he was arrested. In essence the defence case purports to show that on 19/12/2018 the Appellant was not at Toberane area within Serengeti National Park. In evidence however, the Appellant did not tell the Court what happened with him upon his arrest. Was he released or left under custody? Suppose, on 19/12/2018 he was under custody, his defence is then that of alibi which was then governed by the provisions of Section 194 (4), (5) and (6) of the Criminal Procedure Act [Cap 20 R.E 2002]. Where the Appellant intended to rely on the defence of alibi he mandatorily ought to have given to the Court and the prosecution notice of his intention to rely on such defence. Where the Appellant thought of not giving such a notice, he was obliged under the law to furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed. Going by the record, the proceedings are silent if the Appellant

gave to the court and the prosecution notice of his intention to rely on the defence of alibi. It is also silent if the Appellant furnished the prosecution with the particulars of the alibi at any time before the case for the prosecution was closed. In such a situation what the court has to do, subsection (6) of the Section gives an answer. The subsection reads that:

> *"If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this Section the Court may in its discretion accord no weight of any kind to the defence"*

In the case at hand, the trial Court found that accused's defence did not raise any doubt on the part of the prosecution case. I think the finding was justified. There is ample evidence to the effect that the appellant was on 19/12/2018 at 18:00hrs at Toberane area within Serengeti National Park. There he was met in an unjustified possession of a machete which machete was admitted in evidence and marked **Exhibit PE1.** As it is stated by Mr. Byamungu (SA) that evidence given by PW1 and PW2 did not suffer any tribulations during cross-examination by the appellant for the Appellant did not ask any question in cross-examination when he was invited to do so. His silence to that effect meant his agreement to the truthfulness of the evidence

As stated herein above, it was alleged that the Appellant was met in possession of four pieces of wildebeest dried meat. The pieces, as rightly stated by the leaned State Attorney on behalf of the Respondent, were not actually tendered to the Court as Exhibit. In liew of that the prosecution produced an Inventory Form to Exhibit that the meat seized in possession of the accused being a perishable item was ordered by the Magistrate to be destroyed. According to the Inventory Form **(Exhibit PE. 3)** four dried wildebeest meat pieces valued at Tshs. 1,430,000/= found by Julius Kisanga, which were not fit for human consumption, were sometime on 20/12/2018 ordered by the Resident Magistrate to be destroyed. This, in my view, was possible under the law and in particular Paragraph 25 of the Police General Order (PGO) No. 229 which is about the way the Police officer are required to handle perishable exhibits at the stage of Criminal Investigation. The Paragraph states:

> *"Perishable exhibit 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"*

This paragraph of the PGO was sometime considered by the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama** (Supra) where it was expounded that it (paragraph) emphasized the mandatory right of an accused person (if he is is in custody or out on police bail) to be present before the magistrate and be heard. In our case the proceedings are silent if the accused was brought before the Magistrate when the Police Officer (PW4) brought the exhibit to the magistrate seeking for an order disposing of the exhibit. The proceedings, even going by **Exhibit PE. 3,** do not show if the Appellant was heard in the process. In the **Mohamed Juma @ Mpakama** case (supra) our Superior Court was heard saying 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 ... Our conclusion on evidential probity of Exhibit PE3 ultimately concides with that of the learned counsel for the respondent. Exhibit PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies Mentioned in the charge sheet".*

Evidently, the facts of this case in that particular issue fall squarely within those in the case before the Court of Appeal. It remains therefore that **Exhibit PE. 3** in the case at hand could not be relied on to prove that the Appellant was found in an Unlawful Possession of Government trophies namely; four pieces of dried wildebeest meat.

From what is discussed herein above I will associate myself with the submission by Mr. Byamungu (SA) that the 3rd count in the charge sheet was not proved by the prosecution. In event whereas the appeal against the conviction and sentence imposed in respect of the first two counts in the charge sheet is dismissed in its entirety, that brought against the third count is allowed in its entirety. The conviction under the third count is quashed and the sentence imposed is set aside. It is ordered that subject to the sentences imposed on the first and second courts, the Appellant shall be released out of jail if he is not therein for other lawful cause.

DATED at **MUSOMA** This 5th day of July, 2021.

THE HIGH COURT OF TANZANIA
MUSOMA

E. J. Mkasimongwa
JUDGE
5/7/2021