IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 4 OF 2021

(Originating from Economic case No 21 of 2018 of the District Court of Bunda at Bunda)

PETER JOHN @ NYAMBABE ..... APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

19th April & 8th July, 2021

Kahyoza, J.

According to the charge sheet, on the 26th September, 2018 at Milima Kirawira area within **Serengeti national park** in Bunda district, the appellant, **Peter John @ Nyambabe** was unlawfully found in the national park in possession of weapons and government trophies. After full trial, the district court of Bunda, found the appellant guilty, convicted and sentenced him for the offences of unlawful entry into the National Parks, in the 1st count, unlawful possession of weapons in the National Park in the 2nd count, unlawful possession of Government trophy, in the 3rd court and unlawful possession of Government trophy, in the 4th court.

The trial court sentenced the appellant to pay a fine of Tzs. 200,000/= or to serve a custodial sentence of two years for offence in the first and to pay a fine of Tzs. 100,000/= or an imprisonment of two years

for offence in the second counts; and a custodian sentence of 20 years for the offence in the third and fourth counts. The sentence was ordered to run consecutively.

Aggrieved, **Peter John @ Nyambabe** appealed to this Court. He raised six grounds of appeal spinning around the following issues-

1) Was the appellant forced to sign a certificate of seizure?
2) Did the court read and explain the charge to the appellant?
3) Did the prosecution prove the case beyond all reasonable doubt?
4) Were exhibits properly admitted?
5) Was the appellant found in the national park?
6) Was the charge sheet in congruent with the facts of the case?
7) Was the appellant's defence considered?

The District Court of Bunda at Bunda relied on the evidence three prosecution witnesses to find **Peter John @ Nyambabe** guilty and convicted him with four counts to wit; **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**; **three,** unlawful possession of Government Trophies, contrary to section 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**) and **four,** unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (b) of the **WLCA** read together with paragraph 14

of the First Schedule to and sections 57(1) and 60(2) of the **EOCCA**.

The prosecution witnesses, Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2**) deposed that on the 26/9/2018 at about 13.30hrs were on routine patrol with two other park rangers namely Lawrent Masesa and Thadeus Manonga at Milima Kirawira area within Seregenti National Park. They saw foot prints. They tracked the foot prints until they saw a person hiding in the bush. They ambushed and arrested him. They found that person, the appellant, in possession of two pieces of fresh meat of wildebeest, two fresh hind limbs and two fresh fore limbs of zebra. They deposed that they identified the meat due to the colour of the skin. They averred further, that they found the appellant in possession of one panga, one knife and four animal trapping wires.

They prepared a seizure certificate, which Julius John Nganya (**Pw1**) tendered and the court admitted and marked it as Exhibit P.E.1. Unfortunately, the contents of Exhibit P.E.1 were not read to the appellant.

Julius John Nganya (**Pw1**) tendered also the panga, knife and four animal trapping as exhibit P2, P3 and P4 respectively. The appellant stated that he did not know anything about the exhibits.

Hilary Godbless Lyimo (**Pw3**) identified and valued the trophies. He identified two pieces of meat to be of wildebeest due to the skin. The meat was left with skin. He prepared a trophy valuation and identification certificate, which he tendered as exhibit P.5. He also tendered the identification form as exhibit P. 7.

Hilary Godbless Lyimo (**Pw3**) deposed that he identified two fresh hind limbs and two fore limbs of zebra due the skin colour. He valued the

two fresh hind limbs and two fore limbs of zebra as equivalent to one zebra. He tendered the trophy identification and valuation form and the identification form as exhibit P.6 and P.8 respectively.

The appellant denied to have committed the offences he stood charged. The appellant deposed that on the 26/9/2018 was watering his garden near Rubana river bordering Serengeti National Park. One the park rangers arrested him. The added that they assaulted him and forced him to board their vehicle.

The trial court found the prosecution witnesses credible, convicted sentenced the appellant as shown above.

The appellant appeared in person unrepresented at the hearing and Mr. Temba represented the respondent. The appellant's appeal raised several issues one of them being a general one; whether the prosecution proved the case beyond reasonable doubt. It covers all the issues.

Did the prosecution prove the appellant's guilt beyond reasonable doubt?

Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2**) deposed that on the 26/9/2018 at about 13.30hrs were on routine patrol with two other park rangers namely Lawrent Masesa and Thadeus Manonga at Milima Kirawira area within Seregenti National Park. They saw foot prints and traced them and managed to arrested the appellant. The appellant denied to have been in the national park. The appellant deposed in his defence that he was arresting while watering his garden which was near Rubana river to the national park. The appellant complained in his grounds of appeal that he was arrested while looking for his cows along Rubana river.

He stated that Rubana river was the border between the village and the national park.

The trial court trusted the prosecution's evidence. It found the evidence of Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2)** credible. It trite law that witnesses must be trusted unless, there is a reason to question their credibility. The **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."*

The appellant did lay foundation me why the prosecution's witnesses should be discredited nor do I see any ground from the record to discredit the prosecution witnesses. I considered the defence and found that it was weak and shaky to raise a reasonable doubt to the prosecution's case. The appellant deposed that the parker rangers arrested him while watering his garden close to Rubana river. He complained in one of his grounds of appeal that he was arrested while looking for his cows along river Rubana which is the border between the village and the national park. I was unable to buy any of the appellant's stories. Both stories were ab after thought.

I am alive of the position of the law that credibility of the witness is the domain of the trial court as far as the demeanour is concerned. The first or second appellate court can determine credibility of the witness when assessing the coherence of that witness in relation to the evidence of other witnesses including that of an accused person. See **Shaban Daud v.**

R., Criminal Appeal No. 28 of 2001 (CAT unreported) and the case of **Byamungu s/o Rusiliba v R**. [1951] 18 EACA. 233. The Court held in the latter that; an impression as to demeanour of a witness ought not to be adopted without testing it against the whole of the evidence of the witness in question. The prosecution's witnesses were consistent. Like the trial court I have nothing to worry about their credence.

I have noted with concerned the fact the court did not comply with provisions of section 210(3) of the Criminal Procedure Act, [Cap 20 R.E. 2019] (the **CPA**) after Julius John Nganya (**Pw1**) testified. It did not read the evidence of Julius John Nganya (**Pw1**) to the appellant and indicate that it read it. This was a procedural error. As to the rest of the witnesses the trial court indicated that section 210 of the **CPA** complied with. It is not clear which provision of section 210 the trial court complied with. I will revert to this issue later as there are many other none compliance with the procedural provision of the CPA.

In relation to the first count, I find that there was ample evidence that the appellant was found in the national park.

Was the appellant found in possession of the panga, knife, and four animal trapping?

Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2)** deposed that the appellant was found in possession of the panga, knife and four animal trappings. Julius John Mganya (Pw1) tendered the panga, knife and four animal trapping as exhibit P2, P3 and P4 respectively. Julius John Nganya (**Pw1**) tendered certificate of seizure. Unfortunately, Julius John Nganya (**Pw1**) did not read the contents of the certificate of seizure, exhibit P1 to

the appellant. It is now settled that failure to read out the contents of an exhibit after it is cleared for admission is fatal and the same must be expunged from the record - see: **Mabula Mboje & Others v. Republic,** [2020] TZCA 1740 at www.tanzlii.org. I expunge the seizure certificate, exhibits P.1 from the record.

After expunging the certificate of seizure exhibit P.1 from the record, the question is whether there remains evidence to establish that the appellant was found in unlawful possession of the panga, knife and four animal trappings. It is settled that, even in the circumstance where an exhibit is expunged from the record or it is not tendered, the court can still convict if, satisfied that there is evidence on the record to establish that the accused committed the offence. See **Issa Hassan Uki v. R** [2018] TZCA 361 at www.tanzlii.org at pgs. 13 – 16. In that case, the court expunged the certificate of seizure and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit. Similarly, I find that the evidence of Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2**), whom I have already found credible, strong enough to establish that the appellant was found in possession of weapons in the national park. The appellant's defence as shown above was too weak to raise a reasonable doubt on the prosecution's case.

I find, apart from the court's failure to comply with the procedural laws, which I will discuss later, there was evidence to prove the offence in the second count.

I now, answer was the appellant found with government trophies the

issue whether the prosecution established the offences in the third and fourth counts. In doing so, I will answer a number of questions raised by the appellant. I will answer the following questions **one**, were exhibits properly admitted? **Two**, did the court read and explain the charges to the appellant? **Three**, was the charge sheet in congruent with the facts of the case? **Four**, was the appellant's defence considered?

Were exhibits properly admitted?

The appellant complained that the exhibits were not properly admitted as there was no independent witness.

The respondent's state attorney replied that it was not possible to find an independent witness in the park.

I totally agree with the state attorney that it is difficult though not impossible to find an independent witness in the national park. People do not enter in the park freely. They have to seek and obtain a permit. I am of the view that in cases like this what matters is not whether there was a person who is not a park ranger, but whether the park rangers who testified were credible. It is the credibility which matters. If courts were to hold that an independent witness, that is a witness who is not a park ranger, must be testify in order to establish that the accused was found in the national park and in possession of the trophy, then culprits would go scot-free.

I wish to associated myself with the definition of independent witness given by the Supreme Court of India in **Dalip Singh and others vs. The State of Punjab** (AIR 1953 SC 364) where it stated -

"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)*

I find no grounds to discredit the evidence of Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2)** for reason that they are not independent, as the appellant did not lay foundation to establish that the witnesses ***had cause, such as enmity against the accused or personal interest, to wish to implicate him falsely.***

Given the above finding, I am not able to buy the appellant's contention that the exhibit should not have been admitted because they were wrongly obtained in the absence of an independent witness. However, I wish to consider the way the exhibits in relation to the third and fourth counts were tendered. The appellant was facing the charge of unlawful possession of the government trophy, to wit wildebeest meat in third court contrary to section 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**).

In addition, the appellant was facing the charge of unlawful possession of Government Trophies in the fourth count, to wit; two fresh hind limbs and two fresh fore limbs of zebra, contrary to section 86 (1) and (2) (b) of the **WLCA** read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the **EOCCA**.

Before the trial commenced and the D.P.P issued consent and certificate conferring jurisdiction, the prosecution appeared in court in the presence of the appellant, with two pieces of meat alleged to be of wildebeest and two fresh hind limbs and two fresh fore limbs of zebra. It prayed to tender them as exhibit. The court gave the appellant an opportunity to object or comment. The appellant told the court that the exhibits did not belong to him. Then, the magistrate admitted the exhibits and marked them as exhibit P.1 collectively. She gave the following order-

> *"I have witness(ed) 2 pieces of meat (of) wildebeest and 2 fore limbs of zebra and 2 hind limbs of zebra(.) (T)hese are hereby admitted and marked as exhibit P.1 collectively. I order them to be disposed"*

The magistrate who composed the judgment did not consider that piece of evidence. Was that piece of evidence properly admitted? The answer is yes save for marking them collectively. The magistrate was required to admitted two pieces of meat of zebra distinctively from the two fore limbs of zebra and two hind limbs of Wilde beast. Section 101 of the **WLCA** as

amended by the **Written Laws** (Miscellaneous Amendments) **Act**, No. 2 of 2017 allows the procedure adopted. The amendment was effective from 3rd March, 2017. It stipulates-

> *"101 (1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-*
>
> *(a) prior to commencement of proceedings, order that-*
>
> *(i) any animal or trophy which is subject to speedy decay; or*
>
> *(ii)any weapon, vehicle vessel or other article which is subject of destruction or depreciation, and is intended to be used as evidence,*
>
> *be disposed of by the Director; or*
>
> *(b) (b) at any stage of proceedings, order that-*
>
> *(i) any animal or trophy which is subject of speedy decay; or*
>
> *(ii)any weapon, vehicle, vessel or other article which is subject to destruction or depreciation, which has been tendered or put in evidence before it,*
>
> *be disposed of by the Director.*
>
> *(2) The* ***order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial.*** *" (emphasis is added)*

The prosecution tendered yet other exhibits vide Hilary Godbless Lyimo (**Pw3**). It tendered the "trophy valuation and identification certificates as exhibits P5 and P6. The trophy valuation and identification

certificate marked exhibit P5 was tendered in relation to the offence in the third count whereas the one marked exhibit P6 was tendered in respect of the offence in the fourth count. In addition, the prosecution tendered what the trial court labeled as the identification forms as exhibits P7 and P8, which were in respect of the offences in the third and fourth counts respectively.

I examined exhibits P7 and P8 and found that they were inventories issued under section 101 of the **WLCA**. It is clear that the exhibits were not properly prepared. Section 101 of the **WLCA** empowers the court to make an order. Exhibits P7 and P8 were not court orders. Practice demands a court to issue an order in a court file. Thus, they were not properly prepared and tendered. Even, if they were court orders still, I would not avoid to conclude that they were not well prepared because the magistrate did not hear the appellant. If the law wanted the court to pass order in the absence of the suspect or the accused, it should have clearly stated so.

It is unfortunate, that the court did not call upon the prosecution witness to read the contents of exhibits P.5, P.6, P7 and P8 to the appellant after it cleared them for admission. The court noted that the witness gave explanation regarding the document. It did not record that explanation. I have stated above that it is fatal for the court to rely on the document whose contents were not read to the accused person. I proceed to expunge exhibits P.5, P.6, P7 and P8 from the record. They trial court was not justified to rely upon such exhibits.

Having expunged exhibits P.5, P.6, P7 and P8, I find that the

prosecution did not establish the value of the trophy in the forth and third account. However, I find that there is ample evidence to prove that the appellant was found in possession of the two pieces of meat and two fore limbs and two hind limbs of zebra, identified by Julius John Nganya (**Pw1**), and Noel Kinyunyu (**Pw2**), the park rangers and Hilary Godbless Lyimo (**Pw3**) the wildlife officer. They all deposed that the meat was fresh with skin so it was easy to identify. The court order given before trial of the case under S. 101 of WLAC proses that the appellant was found in possess of the government trophies.

Did the court read and explain the contents of changes to the appellant?

The appellant complained further that the court did read and explain the charges to him. This was wrong. I will not dwell on it. The record bears testimony. The court read that the charge read and explain fully to accused and asked to plead thereto. It read the charges to the appellant on the 7/8/2019 before the trial commenced.

The appellant complained that the charges were charge in congruent with the facts of the offence were not congruent with the facts of the case. The appellant and the respondent did not expound or contradict this ground of appeal. I was unable to comprehend the bases of the complaint. The charges, particulars of the offence or say the facts and the evidence matched. I dismiss the complaint.

Was the defence considered?

The last complaint was that, the court did not consider the appellant's defence. The respondent's stated attorney contained that the

court considered the defence.

I agree with the respondent's stated attorney despite the language challenges, the trial court considered the defence and rejected it. It found that the appellant's defence was an afterthought. It gave the reason for concluding that the appellant's defence was an afterthought. It stated that as *"he did not raise to Pw1 and Pw2 when they were testifying"*. Even if the defence was not considered, this being the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it all together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. (See **D. R. Pandya vs. R** (1957) EA 336 and **Idd Shaban @ Amasi vs. R**, Criminal Appeal No. 2006 (CAT unreported).

As shown above, the appellant's defence was too weak to raise a reasonable double. The appellant himself is not clear whether he was grazing his cows or watering his garden along river Rubuna. The appellant while defending himself he deposed that he was arrested while watering his garden along the river. He complained in the memorandum of appeal, that the trial Court did not consider his defence that he was grazing his cows along the river. I support the trial court's finding of not giving weight to the appellant's defence. The prosecution's evidence was watertight.

What are the consequences of procedural irregularities in this case?

I hinted above that trial was flawed with procedural irregularities. The trial court did not comply with section 210(3) of the **CPA**. It recorded the evidence of Julius John Nganya (**Pw1**) in total disregard of the mandatory provisions of section 210(3) of the **CPA**. After recording the

evidence of Noel Kinyunyu (**Pw2**), Hilary Godbless Lyimo (**Pw3**) and the appellant, it indicated either that section 210 of the **CPA** complied with or simply section 210 of the **CPA** without the words complied with.

In addition, the trial court failed to comply with section 231 of the **CPA**. I now produce the record of the court for sake of clarity. The record reads-

> *" S. 231 CPA*
>
> *SDG K.A. Majinge RM.*
>
> *Court. Accused (XD by Court) state*
>
> *I will offer a sworn defence testimony. I do not have a witness to call."*

It is vividly clear that the trial court did not comply with the requirements of the law. The Court of Appeal held in **Abdallah Kondo v R** Criminal Appeal No. 322/2015 (CAT unreported) observed that-

> *Statements such as "the accused have a case to answer" and "section 230 or 231 of CPA is complied with or done" leave the appellant in the dark not knowing what line of defence to adopt and what are the crucial areas to concentrate in his defence..... Further to the above, as a way of complying with the provisions of section 231 of the CPA we wish to state that it is logical to categorically inform the rights the accused have when found to have a case to answer. It is quite unsatisfactory, in our view, to simply state "done" or "complied with". That section requires the trial magistrate to categorically inform the rights of the accused. That section, for certainty provides: 231 (1) At the close of the*

evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provision of sections 300 to 309 of this. The record should show this or something similar in substance with this.

***"Court:** accused is informed of his right to enter defence on oath/affirmation or not and if he has witnesses to call in defence.*

***Accused response: ...** '[record what the accused says).*

I passionately considered the irregularities identified above and concluded that there is no indication, however, slight that the irregularities prejudiced the appellant. They are curable under section 388 of the **CPA**.

The Court of Appeal has in cases without number discussed the consequences of non-compliance with which is section 210(3) of the **CPA**. The position of the Court of Appeal has not been uniform in all cases. There are cases where it held that non-compliance with section 210(3) of CPA was fatal. See the case of **Mussa s/o Abdallah Mwiba & Two Others v. Republic**, Criminal Appeal No. 200 of 2016 (CAT unreported). However, in recent case of **Flano Alphonce Masalu @ Singu vs Republic** (Criminal Appeal No.366 of 2018) published at www.tanzlii.org, the Court of Appeal held that if the magistrate fails to read the evidence to the witness as required by section 210(3) that omission may be fatal or otherwise depending on whether the omission occasioned miscarriage justice or not. It stated-

"It is indeed true that the trial record shows that both the first and the succeeding trial magistrates did not indicate any compliance with the requirement under section 210 (3) of the CPA after recording the testimonies of PW1 through PW7 and DW1 to DW5. So, it is true that section 210 (3) of the CPA was violated. The issue, then, is what is the effect of this violation? Admittedly, in Mussa s/o Abdallah Mwiba (supra), cited by Mr. Mtobesya, the Court held such an irregularity as fatal. However, in our earlier decision in ***Jumanne Shaban Mrondo v. Republic****, Criminal Appeal No. 282 of 2010 (unreported), where we confronted an identical irregularity, we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. We, then, reasoned that:*

"In ***Richard Mebolokini v, R.*** *[2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint the learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue at least the appellant has not so complained. We think that non-compliance with section 210(3) of the CPA is curable under section 388 of the CPA."*

Lastly, I will consider the sentence imposed by the trial court. The trial court sentenced the appellant to pay a fine of Tzs. 200,000/= or to serve a custodial sentence of two years for offence in the first and to pay a fine of Tzs. 100,000/= or an imprisonment of two years for offence in the second counts; and a custodian sentence of 20 years for the offence in the third and fourth counts. The sentence was ordered to run consecutively.

The offence in the third and fourth counts are economic offences. The sentence for economic offences is prescribed under section 60(2) of the Economic and Organized Crime Control Act. [Cap. 200 R.E. 2019] to be not less than 20 years. It states-

> (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.*

I find the sentences imposed just and lawful

In the end, I dismiss the appeal in its entirety and uphold the conviction and sentence.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
8/7/2021

Court: Judgment delivered in the presence of the appellant and Ms. Haule State Attorney for the respondent.

J. R. Kahyoza,
JUDGE
8/7/2021

Court: Right of appeal explained by lodging a notice of appeal within 30 days.

J. R. Kahyoza
JUDGE
8/7/2021