IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MSOMA

CRIMINAL APPEAL NO. 01 OF 2021

(Original Criminal Case No. 84 of 2019 of the District Court of Tarime District at Tarime)

SAMSON NYAMHANGA MTATIRO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30/6/2021 & 12/7/2021

MKASIMONGWA, J

This appeal emanates from the judgment of the District Court of Tarime District in Economic Crime Case No. 84 of 2019. In the case the Appellant one Samson Nyamhanga Mtatiro was charged with and convicted of three counts, namely:

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

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

3rd Count: Unlawful Possession of Government Trophies Contrary to Section 86 (1) and (2) (b) of the Wildlife Conservation Act NO. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with Paragraph 14 of the First Schedule to and Sections 57 (1) and 60 (2) the Economic and Organized Crime Control Act [Cap. 200 R.E 2002] as amend.

He was accordingly sentenced to suffer imprisonment terms of one year in default of payment of Tshs. 50,000/= fine for each of the first two counts and a mandatory imprisonment term of twenty years in respect of the third count.

The Appellant is dissatisfied by both conviction and sentences imposed on him hence this appeal a petition of which lists seven grounds which can be wrapped into the following three:

1. That, the case against the Appellant was only cooked against him by the Park Rangers
2. That, the evidence given by PW1, PW2, PW3, and PW4 on which the trial court based the conviction was not credible
3. That, the trial Court failed to properly scrutinize the evidence, rejected the defence, hence reached at an improper finding.

4. That the allegations leveled against the Appellant were not proved beyond reasonable doubt.

At this stage, I find it material worth to state, though briefly, the facts of the case one can lean from the evidence adduced. They are as that: Bulemo Kasika (PW1) and Adolf Richard @ Magoda (PW2) are the Park Rangers stationed at Kenyangaga Ranger Post. On 25/10/2019 they were on Patrol at Tindigani within Serengeti National Park together with two other fellows namely Paulo Nzuho and Noel Kinyunyu. As such, they found the Appellant Samson Nyamhanga Matatiro within the National Park. The later was in possession of government trophies namely; one fore limb fused with its ribs fresh Topi meat. He was again in possession of a machete and two trapping wires. On being asked, the Appellant said that he had no any permit allowing him entering into the National Park or even that permitting him to possess the government trophies and weapons. They seized the possessions and PW2 prepared a Certificate of Seizure on which, he appended his signature as again, the Appellant and witnesses did. The appellant was consequently arrested and brought to Nyamwaga Police Station where the matter was reported, a case filed opened and the Appellant was surrendered along with the Exhibits to PW3

one G. 8319 D/C Nicolaus who was there at the Charge Room Office. The exhibits were labeled in accordance with the Police Case Number which was NYW/IR/2420/2019. On 28/10/2019, one Njonga Marco @ William (PW4) a Game Officer working with Tarime District Council was summoned by the TANAPA Prosecutor to attend to Tarime District Court where he identified a fore leg fused with its ribs fresh meat to be that of Topi. He valued it and then prepared a Trophy Valuation Certificate which he signed together with the suspect. On 29/10/2019 when he was at Tarime District Court, PW4 prepared an Inventory Form as a prayer to the Court for an Order disposing of the meat. The Appellant was then brought to the Court on 30/10/2019 charged with the offences as shown above.

On the date the appeal was placed before me for hearing, the Appellant appeared in person whereas Ms. Haule, State Attorney, appeared on behalf of the Respondent Republic. When he was invited to argue his case the Appellant had nothing to state in expounding the grounds of appeal. He only asked the court to consider the grounds and determine the Appeal in his favour.

On the other hand, Ms. Haule (SA) partly supported the Appeal. The learned State Attorney sought to argue the first and seventh grounds of

appeal only. In the first place Ms. Haule submitted that Section 21 of the National Parks Act under which the Appellant was charged with in the First Count does not create any offence. As such the Appellant was wrongly charged with and convicted of Unlawful Entry into the National Park as charged under the First Count. Consequently the he wrongfully sentenced.

The learned State Attorney submitted further that going by the evidence on record the Prosecution did not prove beyond doubt the offence with which the Appellant was charged under the Third Count. She said, in proving the offence, the prosecution ought to have exhibited to the court the seized government trophies. These were not physically tendered to the court. Instead PW4 tendered an Inventory Form (Exhibit P4) which shows that the Resident Magistrate at Tarime District Court ordered for destruction of the meat. Ms. Haule (SA) stated that in the case of **Mohamed Juma @ Mpakama v. R:** Criminal Appeal No. 385 of 2017, CAT at Mtwara, the Court of Appeal of Tanzania, narrated the procedure required in procuring an Inventory Form which the Court can act upon against the Accused. In the case at hand that procedure was never adhered with which fact rendered the Inventory of no any evidential value.

Ms. Haule expounded that, although the Exhibit shows that the Appellant had signed it, it is not shown if the he was heard in the process.

As regards to the Second Count Ms. Haule submitted that the Prosecution did prove the same beyond doubt against the Appellant. She contended that going by the record there was ample evidence proving that the Appellant was found within a National Park in possession of weapons which were tendered to the Court and admitted in evidence as **Exhibit P2**. The oral evidence given by witnesses to that effect was confirmed by the Certificate of Seizure **(Exhibit P1).** In that premise of the case the Appellant was properly found guilty hence convicted of being in an Unlawful Possession of Weapons in the National Park charged as the Second Count. She prayed the court that it upholds both the conviction and sentence imposed under the second count. She Submitted

When the Appellant was invited for a rejoinder he had nothing to say and that marked the end of submissions advanced to the court by the parties.

I have considered the submissions attentively. As said earlier, in the first count the Accused/Appellant was charged with an Unlawful Entry into the National Park contrary to Sections 21 (1) (a), (2) and 29 (1) of the

National Parks Act [Cap. 282 R.E 2002]. Section 21 (1) (a) which is on Restriction on entry into national parks read as follows: -

> *"21.- (1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable -*
>
> *(a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one years or to both that fine and imprisonment;*
>
> *(b) in the case of a company, a body corporate or a body of person to a fine not exceeding one million shillings.*
>
> *(2) Any person who contravenes the provisions of this section commits an offence against this Act."*

Section 29 (1) of the Act again reads as follows:

> *"29 (1) Any person who commits an offence against this Act is on conviction, if no other penalty is specified herein, liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both."*

As it was submitted by Ms. Haule (SA) neither Section 21 (1) (a) and (2) nor 29 (1) of the Act establishes the offence with which the Appellant was charged under the first count and consequently punished as foreshown.

Since the appellant was charged under the provision of law which does not establish the offence he was facing in Court, I share views with the learned State Attorney that the Appellant was wrongly charged. As such the conviction entered against the appellant in respect of the first count in this case is quashed and the sentence imposed is accordingly set aside.

As regards to the second count, the prosecution in terms of the testimonies of PW1 and PW2, the Park Rangers, amply showed that on 25/10/2019 the Accused was met within Serengeti National Park and that he was possessing a machete, two trap wires and Topi fresh meat, which were seized and a Certificate of Seizure was prepared signed by, among others, the Appellant. In his defence, the Appellant admitted that on the material day he was arrested by the Park Rangers. He said that he was so arrested when grazing cattle within the geographical area of his village that is Kibeyo village. He also admitted signing a Certificate of Seizure upon being arrested. Going by the record the Certificate of Seizure was tendered to the court by PW2 to be exhibit and the appellant did not object hence it was admitted and marked **Exhibit P1.** When the Appellant was invited to cross examine the witness, he was heard asking questions from which PW2 answered as follows:

"We arrested you with one fore leg fresh meat of topi, one machete and two trapping wires. We arrested you within Serengeti National Park. We arrested you at Tindigani Area".

Part of **Exhibit P1** reads as follows in Kiswahili:

"Mimi, ***Adolf s/o Richard Magoda*** *wa* ***Hifadhi ya Taifa Serengti*** *nimemkamaya/nimefanya upekuzi katika mazingira/eneo:* ***Tindigani ndani ya Hifadhi ya Serengeti,*** *Ndugu:* ***Samson s/o Nyamhanga Mtatiro*** *tarehe:* ***25*** *mwezi* ***October*** *mwaka* ***2019****.*

Ukamataji/upekuzi umefanyika mbele ya mashahidi wafuatao

1. ***Marwa Nyamhanga***
2. ***Paul Nzuho***
3. ***Noel Kinyunyu***

Vitu/vifaa/nyaraka/nyara za Serikali zimechukuliwa/ zinashikiliwa kwa ajili ya upelelezi:

1. ***Mguu mmoja wa mbele ulioungana na mabvu (nyemela)***
2. ***Panga 1***
3. ***Waya 2***

Jina na sahihi ya ofisa aliyepekua/Aliyekamata

Jina: ***Adolf Magoda****. Sahihi:* ***Sgd.*** *Tarehe:* ***25/10/2019*** *..."*

Having considered the prosecution evidence adduced in respect of the second count and again the defence case, this Court was not left with any doubt that on 25/10/2019 at Tindigani area within Serengeti National Park, the Appellant was found by PW2, among others, in possession of a

machete and two trap wires and in the circumstances of the case, the weapons were intended to be used for purpose of hunting, killing, wounding or capturing an animal. As such, the Appellant was guilty of the offence and in my opinion the trial Court did rightly convict the Appellant.

As far as the sentence imposed by the court in respect of the offence is concerned, Subsection (2) of Section 24 of the National Parks Act [Cap 282 R.E 2002] provides that:

> *"Upon person who contravenes any of the provision of this section corrects an offence and is liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding to two years or both".*

It is evident from the subsection that when the trial court imposed a fine of fifty thousand shillings to the Appellant, it acted ultra vires. As such the fine sentence is revised in which case it is reduced to a tune of twenty thousand shillings.

Ms. Haule (SA) did not support the conviction and the sentence imposed on the Appellant in respect of the third count. She was of that stand on ground that the Inventory Form **(Exhibit P4)** in the case was not procedurally procured in that, the Appellant was not involved in the process under which the Form was procured. She said that the Appellant

was not heard. The learned State Attorney referred to the Court to the decision in the case of **Mohamed Juma @ Mpakama** (Supra). In the case, the Court of Appeal of Tanzania was caught into the situation we are now in this case and it referred to and quoted Paragraph 25 of the Police General Order (PGO) No. 229 which states that:

> *"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 Paragraph, in a mandatory manner requires that where a perishable exhibit is brought before the Magistrate for him to note and order immediate disposal has to be brought together with the suspect/prisoner. In the case at hand the oral evidence as adduced by PW4 one Njonga Marco @ William is mute as to whether the exhibit under at issue was brought to the magistrate together with the Appellant. The witness was recorded stating in evidence that:

> *"On 29/10/2019 when I was at Tarime District Court, I prepared Inventory Form as a prayer before the court to destroy Government Trophy which was fresh meat one fore front leg of Topi which fused by ribs"*

I had an opportunity of going through **Exhibit P4**. The same bears the following Remarks of the Court:

> *"The government trophy one fore limb fused with its ribs meat (fresh) of Topi be destroyed prayer granted.*
>
> *Sgd.*
> *Resident Magistrate*
> *29/10/2019*
>
> *Remarks the accused asked whether he was found with the said trophy he replied the trophy were not found with him/he did not found possessing them.*
>
> *Sgd.*
> *Resident Magistrate*
> *29/10/2019"*

In the case of **Mohamed Juma @ Mpakama** (Supra) clearly stated 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"* (Emphasize supplied).

The issue that cropped into my mind is whether the appellant was heard. I have considered as pointed out earlier that PW4 who prepared the

Inventory Form and brought it to the Magistrate did not mention in evidence if the Appellant was there before the Magistrate when the Order for destruction of the Exhibit was sought and issued. Secondly there is no mention in the Form **(Exhibit P4)** of the appellant's presence before the Magistrate. In the Remarks the Court made it is shown that the appellant denied if he was met in possession of the trophies. This purports that he was present and accorded with an opportunity to be heard in the process. Going by the Inventory Form **(Exhibit P 4)** it is clear that the accused was heard (if indeed he was heard) after the Court had issued the order for disposal of the exhibit. This in my view evidences that the hearing, if any, came as an afterthought. In the light of the oral evidence of PW4 and the fact that there was no a meaningful hearing of the accused in procurement of **Exhibit P4,** I find that the exhibit was not obtained in accordance with the law. As such it cannot be proved against the Appellant. With such an approach, I associate myself with Ms. Haule (SA) that the Prosecution did not prove the offence under the Third Count to the standard set by the law.

In the event, whereas appeal against conviction and sentences imposed on the Appellant in the First and Third Counts is allowed in its

entirety, save for the fine sentence which is reduced to twenty thousand shillings, that preferred in respect of the Second Count is dismissed. It is ordered that, as far as imprisonment sentences imposed for the First and Second Counts, the appellant should be immediately released from jail.

DATED at **MUSOMA** this 12th day of July, 2021

E. J. Mkasimongwa

JUDGE

12/7/2021