

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
CRIMINAL APPEAL NO.03 OF 2021**

MASUNGA TANO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Bariadi-Nyangusi RM)

Dated the 9th of October, 2020

In

Economic Case No.8 of 2019

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JUDGMENT

9th June & 23rd July, 2021

MDEMU, J.:

In the District Court of Bariadi, the Appellant who was the 2nd accused and one Samson Mahongo were jointly and together charged with four counts. The 1st count was unlawful entry into the National Park contrary to section 21(1)(2)(a) of the National Parks Act, Cap.282 as amended by Act No.11 of 2003 read together with GN No.235 of 1968. In the 2nd count they were charged with unlawful possession of weapons to wit: one spear, two knives and one motorcycle contrary to the provisions of section 103 of the Wildlife Conservation Act, Cap. 283 read together with Paragraph 14 of the First Schedule to and section 60(2) of the Economic

and Organized Crime Control Act, Cap.200 as amended by Act No.3 of 2016.

With regard to the 3rd and 4th counts, the two were found in unlawful possession of government trophies, to wit: four pieces of meat and four hind legs of zebra valued at Tshs.5,544,000/= and one skin of eland valued at Tshs. 3,927,000/= contrary to the provisions of section 86 (1) (2)(c) (ii) of the Wildlife Conservation Act, Cap.283 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 as amended by Act No.3 of 2016. The offences were committed on 13th day of February 2020 at Mbuga ya Ndoha area in Serengeti National Park. On that day, Salum Ahamed and Yusuph Namwadila PW1 and PW2 respectively, while on patrol, arrested the Appellant and his colleague in the National Park without permit and while in possession of the said weapons and government trophies.

After a full trial, the Appellant was found guilty in all counts and upon conviction, the trial District Court sentenced him to fine of tshs.100,000/= or one year prison term in default thereof in respect of the 1st and 2nd counts. As to the 3rd and 4th counts, the Appellant was sentenced to twenty

years imprisonment. This was on 9th of October, 2020. Aggrieved, the Appellant filed the following grounds of appeal to this court:

- 1. That, the prosecution on their side failed to prove the truthfulness of their story that truly they found him in the National Park possessing the said trophies and other exhibits as alleged, it could be prudently if at the first instance prudently I was brought before the court they could show the said trophies and exhibits to clear doubts.*
- 2. That, the learned trial magistrate misdirected himself for holding conviction on weak evidence given by the prosecution side.*
- 3. That, the learned trial magistrate misdirected himself for holding conviction on weak evidence of PWs without any independent witness.*

On 9th of June, 2021, I heard the Appellant who appeared in person and the Respondent Republic represented by Ms. Salome Mbughuni, Learned Senior State Attorney. The Appellant had nothing useful in his submissions save for his request to have his grounds of appeal be adopted as his submissions and then asked to be released.

Ms. Salome Mbughuni supported the appeal in the first and second counts on unlawful entry and possession of weapons in the National Park. In this, her view was that, PW1 and PW2 who arrested the Appellant did not state if Ndoha area where the Appellant was arrested is within the National Park. She thus thought the prosecution have not proved that, the Appellant was found in the National Park while in possession of the said weapons.

As to unlawful possession of government trophies, it was her submissions that it is immaterial where a person was found possessing government trophies. The question according to her should be that, the Appellant was found in possession of government trophies without permit. She added that, the Appellant signed in the certificate of seizure and as per exhibit P4, the inventory, and the evaluation form all are evident that, the offence in the 3rd and 4th counts have been proved. The Appellant did not rejoin.

Going through the grounds of appeal, the main complaint of the Appellant is that, the prosecution evidence did not prove their case beyond reasonable doubt. In the first place, I am in agreement with the learned Senior State Attorney that PW1 and PW2 who apprehended the Appellant

have not specifically stated if the area they arrested the Appellant is within the National Park. The provisions of law on unlawful entry into the National Park under the provisions of section 21(1)(2)(a) of the National Parks Act, Cap.282 as amended by Act No.11 of 2003 read together with GN No.235 of 1968 require presence of the Appellant in the prohibited area without permit. This is a question of evidence which must be proved by those who arrested the Appellant.

So was in the 2nd count on unlawful possession of weapons in the National Park which, also require a person to be in a prohibited area without permit while possessing prohibited weapons. This again is a question of evidence of which as submitted by Ms. Salome Mbughuni, the prosecution witnesses (PW1 and PW2) have not done that job.

In essence, the learned Senior State Attorney found the two counts on unlawful possession of government trophy to have been proved. I agree with her in one aspect that the place where a person is found possessing government trophy is immaterial. The issue as she submitted, should be that, in such possession of the trophies, the said person had no permit or license to do so. Where this remain a correct observation, the question in the instant appeal is whether there is ample evidence to hold the Appellant

responsible for the two counts of unlawful possession of government trophies. As said, this is a question of evidence.

According to the record, the Appellant was arrested by PW1 and PW2 while on patrol within the National Park. It is their evidence that, the Appellant with the then 1st accused was found in possession of weapons and government trophies. As they were together, it is expected the evidence of PW1 and PW2 to be consistent and should conform with the charge. In the charge, particularly in the 3rd and 4th counts, the Appellant was found in unlawful possession of four pieces of fresh zebra meat, four legs of zebra and one skin of eland. In evidence, **one**, PW1, PW2, PW3 and PW4 testified that the Appellant was found with five pieces of zebra meat. There is therefore variance between the charge and the evidence.


Two, PW1, PW2 and PW3 have different accounts on number of zebra legs, leave alone if they are fore or hind legs. PW1 said the Appellant was found with four legs whereas PW2 is silent regarding numbers. On his part, PW3 said they were two hind legs of zebra. **Three**, in evidence, PW1 and PW2 testified to have arrested the Appellant possessing one skin of eland. One H.8359 DC Riziki, PW3 who received all trophies never

mentioned the said skein and therefore it is not known where PW4 got the said skin for valuation purposes as per exhibit P5.

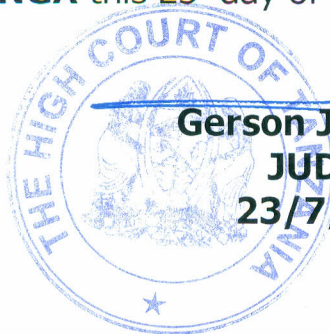
Having this contradictions and inconsistencies, in my view, those who witnesses the search could have been called in evidence to corroborate the evidence of the prosecution witnesses. Of course, there are a lot of doubts in this case. If the prosecution case is believed that the Appellant was arrested in the National Park, where did PW1 and PW2 secured attendance of Salum Kitime and Saidi Mkumbila to witness search and seizure as per exhibit P1? I thus agree with the Appellant that the prosecution evince is tainted with contradictions and inconsistencies. Where this is the case, it was directed in **Mohamed Said Matula vs Republic (1995) TLR 3** that:

Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter.

The trial court did not execute that duty. The way I see, such contradictions and inconsistencies as noted above are grave and has gone to the root of the matter, thus rendering the prosecution case not proved beyond reasonable doubt. Accordingly, the appeal is allowed. Conviction is thus quashed and the sentence of twenty years' prison term is set aside. I thus order release of the Appellant from prison unless he is held for lawful causes. It is so ordered.


Gerson J.Mdemu
JUDGE
23/7/2021

DATED at **SHINYANGA** this 23rd day of July, 2021



Gerson J.Mdemu
JUDGE
23/7/2021