IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 72 OF 2021

SAMWEL CHACHA @ NKORI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Arising from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 43 of 2019)

JUDGMENT

10th and 25th August, 2021

KISANYA, J.:

The appellant was arraigned before the District Court of Serengeti with three counts of offences. The first count was unlawful entry into the National Park contrary to section 21(1)(a) and (2) and 29 (1) of the National Parks Act [Cap. 282, R.E. 2002] as amended. The prosecution alleged that, on 19th August, 2018 at Korongo la Hingira area into Serengeti National Park within Serengeti District, the appellant entered into Serengeti National Park without permit

The second count was unlawful possession of weapons in the National Park which were predicated under section 24(1)(b) and (2) of the National Parks Act (supra). It was stated that, on 19th August, 2018 at Korongo la Hingira area into Serengeti National Park within Serengeti District, the appellant was found in unlawful possession of weapons to wit, two panga without permit.

He was also charged with an offence of unlawful possession of Government Trophies contrary to sections 86 (1), and (2)(c) (iii) of the Wildlife Conservation Act, 2009 (WCA) as amended by the Written Laws (Miscellaneous Amendments) 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 Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. The particulars of offence were to the effect that, on 19th August, 2018 at Korongo la Hingira area into Serengeti National Park within Serengeti District, the appellant was found in unlawful possession Government Trophies to wit, three fresh fore limb of wildebeest and two fresh hind limb of wildebeest valued TSHS 1, 860, 000/= the properties of the United Republic of Tanzania.

In a bid to prove its case, the prosecution called three park rangers (PW1, PW3 and PW4) who arrested the appellant, a wildlife warden (PW2) who identified and valued the Government Trophies and a police officer (PW5) who investigated the matter. Further to that, four exhibits were tendered by the prosecution. These were two panga (Exhibit PE1), the trophy valuation certificate (Exhibit PE2), the certificate of seizure (Exhibit PE3) and the Inventory of Claimed Property (Exhibit PE4). On the other side, the appellant relied on his sworn evidence. He distanced himself from the offences laid against him.

Ultimately, the trial court was convinced that the prosecution had proved its case beyond all reasonable doubts. It went on to convict him as charged and sentence him to serve one (1) year imprisonment on the first and second counts and twenty (20) years imprisonment on the third count. All sentences were ordered to run concurrently from 30th April, 2020.

Aggrieved, the appellant lodged the present appeal which hinges on the following grounds:

1. That the trial court did not accord the appellant with a right to be heard and defend himself.
2. That the trial court erred in considering that the appellant was found in possession of government trophies.
3. That the third count on unlawful possession of Government Trophies was not proved because the said trophies were not tendered in evidence.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney. I will consider the parties submissions in the course of determining the grounds pertaining to this appeal.

The first ground give rise to the issue whether the appellant was denied the right to be heard and defend himself. The appellant adopted this ground. He did not explain further. On the other hand, Mr. Byamungu did not address

the Court on this ground. On my part, the right to be heard is a constitutional right. It is guaranteed under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). The law is settled that any trial in which the right to be heard is violated is a nullity. See for instance the case **M/S Darsh Industries Limited vs M/S Mount Meru Milleers Limited,** Civil Appeal No. 144 of 2015 [2016] TZCA 144, where the Court of Appeal cited with approval its decision in **Abbas Sherally and Another v. Abdul S. H. M. Faza Iboy**, Civil Application No. 33 of 2002 (unreported) that:-

> *The right o f a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

The record in the case at hand speaks louder that, the appellant was present during the hearing of this case. He was invited to cross examine the five witnesses called by the prosecution. Further to that, he was asked whether he had an objection to the exhibits sought to be tendered. As that was not enough, the trial court informed him of his rights to defend himself and call the witnesses of his choice as required under section 231 of the Criminal Procedure Act [Cap. 20, R.E. 2019]. He exercised those rights by giving his evidence on oath without calling witness to supplement his testimony. Therefore, the

complaint that the appellant was denied the right to be heard and defend himself is unfounded. It is accordingly dismissed.

With regard to the first and second grounds, the issue is whether the third count on unlawful possession of Government Trophies was proved. The appellant submitted that he was not found in possession of the trophies stated in the charge. He also moved the Court to consider that the trophies subject to this case were not tendered in evidence. Mr. Byamungu, readily conceded that the third count was not proved.

As stated earlier, the Government Trophies subject to the third count were three fresh fore limb and two fresh hind limb of wildebeest. It is not disputed that the said trophies were not tendered in evidence. The prosecution relied on the Inventory of Claimed Property (Exhibit PE4) which indicates that the trophies subject to the third count were disposed of by an order of the court. According to PW4 the order for disposal of trophies was sought because the said exhibit was subject to a speedy decay.

It is settled law that an accused is entitled to be present and heard at the time of making an order of disposing of a trophy subject to a speedy decay. This requirement is premised on the provision of section 101 of the WCA (as amended) and paragraph 25 of the PGO No. 229 (INVESTIGATION - EXHIBITS). The law is also settled that, an order (Inventory Form) obtained without observing the right to be heard cannot be considered to prove the offence. See

the case of **Mohamed Juma @ Mpakama vs R,** Criminal Appeal No. 385 of 2017, CAT (unreported) where the Court of Appeal held 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***. (Emphasize supplied).

As rightly submitted by Mr. Byamungu, PW4 did not tell the trial court whether the appellant was heard by the magistrate who issued the order for disposal of Government Trophies. Indeed, such fact is not reflected in the disposal order (Exhibit PE4) which reads:

> *"Nimeziona na ziteketezwe.*
>
> *SGD*
> *RM*
> *19/8/2019"*

Reading from Exhibit PE4, nothing suggesting that the appellant appeared before the learned Resident Magistrate who issued the order for disposal of Government Trophies. Even if he appeared, it was not shown that he was heard on the matter. Therefore, I agree with both parties that Exhibit PE4 cannot be used to implicate the appellant in the offence of unlawful possession of Government Trophies.

That aside, I am also at one with the learned State Attorney that the prosecution did not prove that the hind limb and forelimb found in possession

of the appellant were Government Trophies namely, wildebeest. It is settled law that the identifying witness must give explanation as to peculiar features which conclude that the item alleged to have been found in possession of the accused was a Government Trophy. This position was stated in **Evarist Nyatemba vs R**, Criminal Appeal No. 196 of 2020 (unreported) referred to by the learned State Attorney, where the Court of Appeal held:

> *As rightly submitted by the learned State Attorney, PW5 gave a generalized statement that Exhibit PI was elephant tusks with no further explanation as to the peculiar features of it that led him to conclude that Exhibit PI was truly elephant tusks hence a Government Trophy."*

I have reviewed evidence of Wilrod Vicent (PW2), who testified on identification of trophies. He did not give details or description to prove that the alleged hind limb and forelimb were wildebeest and not any other animal. His evidence on the issue under consideration is reproduced hereunder:-

> *"On 19th August, 2019, I was called by Det. Egwaga at Mugumu Police Station to identify and value trophies. I identified three fresh forelimb of wildebeest and fresh of hind limb of wildebeest."*

In my view, the said evidence was too general and thus, failed to show how the items found in possession of the appellant were Government Trophies, let alone wildebeest.

I have noted that the details on identification of the trophies were stated in the Trophy Valuation Certificate (Exhibit PE2). However, as rightly observed by Mr. Byamungu Exhibit PE2 was not read over after being admitted in evidence. Guided by the trite law the proper recourse is to expunge such exhibit because it denied the appellant to know the contents thereto to enable him make a proper defence. See the case of **John Mghandi @ Ndovo vs R**, Criminal Appeal No. 352 of 2018 (unreported) in which the Court of Appeal held that:-

> "*We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr; Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence.*"

Therefore, guided by that position of law, Exhibits PE2 and PE4 are hereby expunged from the court's record. In consequence, the remaining evidence is not sufficient to prove that appellant was found in unlawful possession of Government Trophies.

In his oral submission, the appellant added a new ground that he was arrested in the village. In other words, the appellants challenged the trial court's findings on the first and second counts. Responding, Mr. Byamungu argued that

the said counts were proved by PW1, PW3 and PW4 and Exhibits PE1 and PE3 He went on to argue that the appellant's complaint was an afterthought because he did not cross-examine PW1, PW3 and PW4 who gave evidence which incriminated him in the two offences.

As earlier on stated, the particulars of offence on the first and second counts were to the effect that the appellant was, on 19/08/2018, found at Korongo la Hingira area into Serengeti National Park within Serengeti District and that he was in possession of two panga without relevant permits. In their evidence, PW1, PW3 and PW4 testified to have arrested the appellant at Korongo Hingira area into Serengeti National Park in possession of two panga without permits. That evidence was not challenged by the appellant during cross-examination. He did not cross-examine at all PW1, PW3 and PW4 who gave evidence which implicated him in the first and second counts. Further to that the prosecution tendered a certificate of seizure (Exhibit PE3) which shows that the appellant was found at Korongo la Hingira area with the said two panga which were also tendered in evidence as Exhibit PE1.

It was in his defence when the appellant raised the defence of alibi. He told the trial court that he was arrested in the village with other person who were discharged. However, the appellant did not call the said persons to support his defence of alibi. Therefore, I am of the view that the appellant did not raise

doubt on the evidence adduced by the prosecution in respect of the first and second counts.

In the event and for the foresaid reasons, I dismiss the appeal on the first and second counts and allow the appeal on the third count. Consequently, the appellant's conviction on the third counts is hereby quashed and the sentence thereon set aside. Since the appellant has already served the sentence on the first and second counts, I order for his immediate release from the prison unless he is otherwise lawfully held.

DATED at MUSOMA this 25th day of August, 2021.

E. S. Kisanya
JUDGE

Court: Court: Judgment delivered this 25th day of August, 2021 in the presence of the appellant and Mr. Nimrod Byamungu, learned State Attorney for the respondent. B/C Gidion present.

E. S. Kisanya
JUDGE
25/08/2021