IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 36 OF 2021

(Arising from Economic Case No.1 of 2020 in the District Court of Tarime at Tarime)

CHEGERE MWITA @ MEGOKO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

2nd Aug and 27th Aug, 2021

F. H. MAHIMBALI, J.:

The appellant in this case was charged and convicted by the District Court of Tarime at Tarime of three counts namely; Unlawful entry into the National Park, unlawful possession of weapons and unlawful possession of Government trophies. The prosecution alleged that on the 18th day of January, 2020 at Mto Mara area in Serengeti National Park the appellant was found to have entered into the National Park without permit and in possession of weapons to wit one knife and two trapping wires without permit. Also, he was found in possession of Government trophies to wit two hind limbs joined with it pelvic girdle

fresh meat of common waterbuck. The appellant was arrested and arraigned before the district court of Tarime at Tarime. The appellant denied the charges levelled against him.

In order to prove its accusations, the prosecution brought a total of four witnesses; Antony Mwisemi (PW2) together with Julius Nganya (PW3) who are conservation officers, who testified that on the 18/10/2020 while on normal duty patrol with Paulo Nzuho at Mto Mara within Serengeti National Park, they saw fresh footprints leading to the forest and they followed them and eventually reached the appellant in the bush. The appellant was found in possession of weapons to wit one knife and two trapping wires and government trophies to wit two hind limbs joined with its pelvic girdle fresh meat of common waterbuck. He had no permit to possess the weapons, government trophies and to be in the national park. As a result, he was arrested. PW2 filed a certificate of seizure that was admitted in the court as exhibit P2. They took the accused person to Gibosa police station where they lodged their complaint against the accused person. At the police station they were received by E.8439 CPL Peter (PW1) a police officer. They informed him of what had transpired in the National Park that led them to arrest the appellant. PW1 after taking the statements of PW2 and PW3 he opened

a police case report with reference: GIB/IR/7/2020 and marked the weapons GIB/IR/7/2020. The weapons were later admitted in court as exhibit P1. Njonga William (PW4) was called at the police station to identify the government trophy and prepared a trophy valuation certificate that was later admitted in court as exhibit P.3. He also took the trophy before a magistrate so as to file an inventory form and for the court to issue a disposal order. He alleges that the appellant was present when the disposal order was made and he had signed it by affixing his thumb print.

On the other hand, the appellant fended himself by testifying that on the material date he had gone to his farm in the morning and a TANAPA vehicle passed in his farm and when he inquired as to why they did so, they insulted and eventually arrested him. He denied to have been found with weapons and government trophies as alleged. He was thus taken to court on the 23/01/2020.

The trial court heard the matter and upon satisfaction, the appellant was dully convicted and sentenced as follows; In respect of the first count the appellant was sentenced to pay fine of tshs. 200,000/= and in case of default to serve one year imprisonment, for the second count he was sentenced to pay a fine of tshs. 200,000/= and

in default to serve two years imprisonment and on the third count to serve twenty years imprisonment.

The appellant was aggrieved by the decision and orders of the trial court hence he filed an appeal before this court consisting of six grounds of appeal. The grounds of appeal in verbatim are to the effect that;

1. That, the trial magistrate misdirected herself in her findings to hold that the prosecution side has proved its case beyond all reasonable doubts while the evidence adduced by the same side was insufficient to prove its case to the required standards.
2. That the trial magistrate erred in point of law and fact to find that the appellant was fount (sic) in possession of the alleged government trophy in issue and that was found in possession of weapons in the said Serengeti National Park.
3. That the trial magistrate failed to discover that this case was planted against innocent appellant by the said park rangers for their own interest due to the fact that during the arrest there was no any independent witness who was present to prove and discovered if there was anything found in my possession during the whole process of arresting, searching and even to appear to

adduce his or her evidence before the court of laws as the prosecution's witness for the interest of justice.

4. That, the trial magistrate erred in law and fact to neglect my defense that I was found with nothing during my arrest when I was in my farm alone cultivating the same farm.
5. That, PW1,PW2, PW3 and PW4 are liars and they are not credible witnesses due to their character of formulating a case and adducing false and cooked evidence against the appellant which they used to mislead the court to convict the innocent appellant.
6. That the trial magistrate failed to evaluate the entire evidence, hence reached in wrong judgment.

This appeal was heard by way of virtual court conference whereas the appellant was live linked from Musoma prison while the respondent who had the legal services of Mr. Tawabu, learned state attorney was live linked from NPS offices in Musoma.

The appellant asked the court to adopt his grounds of appeal as part of his submission and reserved his to right to rejoin incase there be a need of that after the Republic had a made the reply.

Replying, Mr. Tawabu learned state attorney starting with the sixth ground of appeal submitted that, that ground was misconceived by the appellant as the trial court evaluated the evidence extensively. He stated that at page 8 of the trial court's judgment, the trial court summarized the evidence and eventually analyzed it well. Therefore, the appellant's complaint is baseless.

Regarding the fifth ground of appeal, the appellant's complaint was that the witnesses were not credible and they had cooked evidence. The learned state attorney resisted this ground of appeal. He submitted that the appellant has not shown how they were not credible and their testimony cooked.

As regards to the fourth ground of appeal, the appellants complaint was that the trial court did not consider his defense as he was not arrested with anything to implicate him with the charge. The learned state attorney refuted this ground as baseless. So long as the appellant has not shown how his evidence was not considered whereas the judgment is clear on how the appellant is implicated with the charge, the allegation on this ground of appeal as argued barely is baseless.

On the third ground the appellant's grievance is on independent witness. The learned advocate submitted that the appellant has failed to

establish how those witnesses were not independent witnesses. Considering the fact that anyone can be a witness as per the law, the appellant ought to have established how the said witnesses though not civil witnesses were not credible as well.

On the second ground of appeal, the appellant's grief is that the trial magistrate erred in law in convicting the appellant of being in unlawful possession of government trophy. The learned state attorney submitted that this ground is baseless as everything was in compliance as per the law.

On the first ground of appeal the appellant's concern is that the prosecution case was not proved beyond reasonable doubt, the learned state attorney objected this ground by submitting that the prosecution's testimony / evidence was water tight and thus conviction and sentence were justified as per the law.

When the appellant was invited to make a rejoinder submission, he just reiterated his grounds of appeal as he had submitted earlier and prayed that this court determines this appeal in his favour.

Having considered the submissions of the parties and the evidence on record, the issue to be determined by this court is whether this appeal is meritorious.

Starting with the sixth ground of appeal, the appellant's concern is that the trial magistrate failed to evaluate the evidence of the case. I have gone through the court's record particularly the judgement of the trial court and from page 3 of the typed judgment the trial magistrate evaluated the evidence in relation to the all counts levelled against the appellant and came up with the conclusion that all offences were dully established. Perhaps the issue could be a wrong conclusion/finding, I am in agreement with the learned state attorney that the evidence was clearly evaluated and in that regard this ground of appeal is devoid of merits.

In relation to the fifth ground of appeal, the appellant's grief is that the witnesses were not credible and that they had a cooked evidence. I have gone through the court's record and I have not seen anywhere how the allegation that the evidence is cooked is founded as per trial court's records, unless specifically established by the appellant to contradict the averment in record. As it is a settled principle that he who alleges must prove his claim, the elements of cooked evidence have not been any how explicated. In relation to the credibility of the witnesses, it is settled law that the trial court's finding on the credibility of a witness is binding on the appellate court. This is as held in the case

of **BAKIRI SAIDI MAHURU vs THE REPUBLIC,** criminal Appeal no. 107 of 2021 at page 6 that cited the case of **OMARY AHMED v. THE REPUBLIC** (1983) TLR 32 (CAT);

> *"The trial court's findings as to the credibility of the witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a reasement of credibility...".*

Also, in the case of **Goodluck Kyando** vs. **R** (1996) TLR 263, it was held that every witness is entitled to credence. Unless there are good and cogent reasons for not believing him, he must be believed and his testimony accepted as held in **Alyoce Maridadi vs R,** Criminal Appeal No. 208 of 2016, CAT (unreported). The reasons for not believing a witness include: One, contradictions, discrepancies or conflicting statement in the witnesses' evidence; Two, failure by the witness to name the suspect at the earliest opportunity possible; Three, giving implausible or hearsay evidence; Four; giving evidence basing on suspicion.

Having stated the above, I adopt the principle held in the above cited cases. As the trial court had the advantage of observing the demeanor of the witnesses, therefore it was in a better position to hold

that they were credible. Therefore, this ground is also devoid of any merit and it is dismissed.

As regards to the fourth ground, the appellant's concern is that the trial court did not consider his defense as he was not arrested with anything to implicate him with the charge. I have gone through the court's record and particularly the judgement. I have noted that his defense was considered, to be specific at page 4 of the typed judgment. The trial court found it to be weak. This ground is also devoid of merits and it is dismissed.

On the third ground of appeal, the appellant's concern is that there were no independent witnesses during his arrest. According to the court's record, the incidence occurred in the National Park and he was arrested by conservation officers. It is a settled law that an independent witness is required when an appellant is arrested in a dwelling place. In the case at hand the appellant was not in a dwelling place and the witnesses who arrested him were competent as per law (section 127 and 61 of the Tanzania Evidence Act, cap 6 R.E. 2019). There is no known law that a park ranger is prohibited from testifying on account of what he is knowledgeable even if in the course of performance of his

duties. Therefore, it is my humble view that this ground is also devoid of merits and it is dismissed.

Lastly, this court will discuss the second and the first ground of appeal together. The appellant's grief on this is that, the trial court has not proved its case beyond reasonable doubt. In criminal cases, the burden of proof always lies on the prosecution to prove the case beyond reasonable doubt (section 3(2) (a) of the Evidence Act, Cap 6 R.E. 2019). This burden never shifts. Regarding the first count of unlawful entry into the national park, the conservational officers (PW2) and (PW3) testified before the trial court how while they were patrolling at Mto Mara area within Serengeti National Park they found the appellant there in without any permit. The appellant did not object to this testimony during the trial. He did not cross examine the witnesses on this issue. It is a settled law that failure to cross examine is acceptance, this was held in the case of **BONFANCE ALISTEDES vs THE REPUBLIC**, Criminal Appeal No. 346 of 2016 at page 10 where they produced what was held in the case of **DAMIAN RUHELE v. THE REPUBLIC** , Criminal Appeal No. 501 of 2007 (unreported) the court stated ;

"It is trite law that failure to cross examine a witness on an important matter ordinarily implies the accepts of the truth of the witness".

For the above stated reason this court holds that the prosecution side proved its case in the required legal standard (that is beyond reasonable doubt) in respect of the first count.

Regarding the second count of unlawful possession of weapons in the National Park, it is my finding that this count as well was proved beyond reasonable doubt. This is because when the prosecution tendered and the court admitted the certificate of seizure as exhibit (exhibit P2), trophy valuation certificate (exhibit P3) and the weapons (exhibit P1). The appellant did not object to the admission of those exhibits neither did he cross examine the witnesses. Therefore, it is safe to state that the appellant admitted to be found in unlawful possession of the weapons as per the case of **DAMIAN RUHELE v. THE REPUBLIC,** (supra).

In relation to the third count; on unlawful possession of government trophies, I have a different view. PW4 testified how he went to the court on 20/01/2020 to take an inventory form before a magistrate for disposal orders and that the accused person is reported to have been present. The said inventory form was admitted and

marked as exhibit P.4. I have gone through this exhibit P.4, there is a thumb print of the accused person. That could be held as if it is sufficient to state that the appellant was present. However, that is not the only legal requirement to be met so that the disposal order to be issued. There is no where as per suggestion in the inventory showing that the appellant was heard as per paragraph 25 of the Police General Orders. This provision requires, among others, the accused person to be presented before the magistrate who may issue the disposal order of exhibit which cannot easily be preserved until the case is heard. It provides: -

> *"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 law is settled the accused must be heard as well. See **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), where it was 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).

For avoidance of doubt, such an application must be done formerly and the records must explicitly state so. In the absence of clear Court's order on that the procedure is flawed.

Having stated the above, it is safe to state that the third count was not proved beyond reasonable doubt. All said and done, this appeal is partly allowed in respect of the third count. Conviction based on the third count is hereby quashed and the resulting sentence is thus set aside. In regards to the first and the second count, this court dismisses the appeal as being devoid of any merit. The appellant shall serve the sentence in regards to the first and second counts from 18/01/2021 when he was sentenced by the trial court.

It is so ordered.

DATED at MUSOMA this 27th day of August, 2021.

F. H. Mahimbali

JUDGE

27/08/2021