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

AT MUSOMA

CRIMINAL APPEAL NO. 34 OF 2021

MWITA MARWA @ SEGENO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Arising from the decision of the District Court of Tarime at Tarime in Economic Case No. 1 of 2019)

JUDGMENT

28th July and 31st August, 2021

KISANYA, J.:

The appellant and two other persons (Singisi Daniel @Meng'anyi and Chacha Gisiri @Manoni, who are not subject to this appeal) were jointly and together arraigned before the District Court of Tarime at Tarime with three counts of offences namely, 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); unlawful possession of weapons in the National Park contrary to section 24(1)(b) and (2) of the National Parks Act (supra); and unlawful possession of Government Trophies contrary to sections 86 (1), and (2)(c) (iii) of the Wildlife Conservation Act, 2009 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 the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

The prosecution evidence was to the effect that, the appellant and other two persons were on 3rd January, 2019, found by the park rangers of Serengeti National Park at Daraja Mbili area into Serengeti National Park within Tarime District. The said park rangers were led by Emmanuel Bwire (PW1) and Tanu Malila (PW3). Upon being searched, the appellant and other accused were found with weapons to wit, three animal trapping wire and one knife. They were also found with the Government Trophies to wit, two hind legs and one front leg meat of warthog, without relevant permits. Therefore, they were arrested and taken to Nyamwaga Police Station where, G6168 DC Selesius (PW3) was assigned to investigate the matter.

On 4th Jnauary, 2019, Njonga Marco William (PW4) was summoned at Nyamwaga to identify and value the trophies alleged to have been found in possession of the appellant and other accused. He confirmed that what was found in possession of the appellant and other accused was a Government trophy namely, one fore leg and two hind legs meat of warthog. As regards the value of trophies, PW4 valued the same at Tshs. 1,840,000/=. Further to that, PW4 prepared an inventory form and sought an order for disposal of the Government Trophies on 7th January, 2109.

In support of oral evidence adduced by PW1, PW2, PW3 and PW4, the prosecution tendered three exhibits namely, the weapons (three animal trapping wires and one knife –Exhibit P1), the Trophy Valuation Certificate (Exhibit P2) and the Inventory Form (Exhibit P3). Noteworthy is that, the appellant and other accused defaulted to appear. He resurfaced when PW1, PW2 and PW3 had adduced their respective evidence. The trial court proceeded with evidence of PW4 and found him the appellant with a case to answer.

In his defence, the appellant distanced himself from the offence levelled against him. He testified that he was neither found in the National Park nor found in possession of the weapons and Government trophies.

On 15th June, 2020, the appellant and other accused were convicted of all three counts. At the end of the day, they were sentenced to one (1) year imprisonment on the first and second counts and twenty (20) years imprisonment on the third count. The trial court ordered the sentences to run concurrently.

Aggrieved by both the conviction and sentence, the appellant appealed to this Court. His petition of appeal displays the following complaints:

1. That evidence adduced by the prosecution was false.
2. That PW1, PW2, PW3 and PW4 were not credible witnesses.

3. That the evidence of park rangers who arrested him was not corroborated by an independent witness.
4. That the defence case was not considered by the trial court.
5. That the prosecution case was not proved beyond all reasonable doubts.

During the hearing of this appeal the appellant appeared in person. On the other hand, the respondent enjoyed the legal services of Mr. Nimrod Byamungu, learned State Attorney.

When invited to argue the appeal, the appellant prayed to adopt the petition of appeal and urged the Court to discharge him.

Responding, Mr. Byamungu raised an issue of law which goes to the root of the case. The learned counsel argued that the appellant was not accorded the right to be heard. His argument was based on the record that, the prosecution case proceeded in the absence of the appellant and that when the appellant re-appeared he was not asked to show the reason for his non-appearance. Therefore, it was Mr. Byamungu argument that trial was vitiated because PW1, PW2 and PW3 adduced their evidence in the absence of the appellant. In that regard, the learned counsel urged me to nullify the proceedings, quash the conviction, set aside the sentence and

discharge the appellant. He also was of the view that this was not a fit case for retrial.

Having gone through the record, I am of the view that this appeal can be disposed of by addressing the issues raised by learned State Attorney. The right to be heard is enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended) which provides for the right to a fair hearing. In this jurisdiction, the law is settled that violation of the right to be heard renders the trial a nullity. This position was well stated in **Abbas Sherally and Another v. Abdul S. H. M. Faza Iboy**, Civil Application No. 33 of 2002 (unreported) where the Court of Appeal held as follows:-

> *The right of 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."*

As far as criminal trials are concerned, an accused is entitled to be present at the hearing of the case laid against him. However, this right is not absolute. It is exercised in accordance with the law. If the accused defaults to appear without notice, the trial court is enjoined under section 226 (1) of

the Criminal Procedure Act [Cap. 20, R.E. 2019], to proceed with the hearing or further hearing of the matter in his absence.

The provisions of section 226 of the CPA do not provide for the procedure to be taken when where the accused appears after the case has proceeded in his absence but before the verdict. The settled law and practice require the Court to give him a floor to address the court on what prevented him to attend during the previous hearing. In the event the trial court is satisfied that the accused was prevented by a sufficient cause, the trial must resume at the stage when the hearing proceeded in his absence. This position was stated in **Abasi Hassani @ Sheha vs R**, Criminal Appeal No. 252 of 2017, HCT at DSM (unreported). In that case, the accused reappeared before the trial court at the time when two witnesses for the prosecution had adduced evidence in his absence. The trial court proceeded with the remaining witness without letting him to state the reasons for his non-appearance in the previous session and went on to convict him. When the matter reached this Court, my learned brother Luvanda, J had this say to say:-

> *"It was expected after the accused had attended on 19/12/2016, the trial court could give the appellant an audience to address the court as what had prevented him to attend the previous sessions and thereafter the trial Magistrate ought to afford the appellant opportunity to*

resume and participate a trial from a stage it reached, including making a finding of whether to resummon PW1 and 2 or not. Also the trial Magistrate was expectedly to rule out on a fate and aftermath of the appellant bail, given that he had surrendered himself."

Applying the above legal position in the case at hand, it is on record that, all three accused were admitted on bail pending appeal. However, they failed to appear on different dates on which the case was fixed for hearing. At last, the case proceeded in their absence whereby PW1, PW2 and PW3 testified. The appellant was arrested and brought before the trial court. The case proceeded with evidence of PW4. As rightly observed by the learned State Attorney, he was not given a chance to state the reasons for his non-appearance during the previous hearing dates.

Since the appellant was not given a chance to address the trial court on the matter, it is not known whether his absence was from the causes over which he had no control. In that regard, the trial was unfair because PW1, PW2 and PW3 gave evidence which implicated the appellant in the offences laid against him.

From the foregoing, the proceedings and judgment of the trial court are a nullity. Consequently, I hereby nullify the said proceedings, quash the conviction and set aside the sentence meted against the appellant. Having reviewed the evidence, I agree with the learned State Attorney that the third

count which carries the minimum sentence of twenty years was not duly proved because the trophy valuation was not conducted by competent person. As regards the first and seconds counts, the appellant has already served the sentence of one year imprisonment passed against him. Therefore, guided by principle stated in **Fatehali Manji vs Republic** [1966] EA 343, I am of the view that the interests of justice do not require a trial de novo.

In the end, I order for immediate release of the appellant unless he is otherwise lawfully held.

DATED at MUSOMA this 31st day of August, 2021.

E. S. Kisanya
JUDGE

Court: Court: Judgment delivered this 31st day of August, 2021 in the presence of the appellant and in the absence of the respondent. B/C Gideon present.

E. S. Kisanya
JUDGE
31/08/2021