

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 03 OF 2021

JUMA MTONGORI NYANDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

***(Appeal from the decision of the District Court of Tarime at Tarime
in Economic Case No. 58 of 2019)***

JUDGMENT

4th and 31st August, 2021

KISANYA, J.:

This appeal is against the conviction and sentence meted to the appellant by the District Court of Tarime (the trial court) in Economic Case No. 58 of 2019. He was charged with the offences of unlawful entry into the National Park and unlawful possession of weapons in the National Park which were predicated under the National Parks Act [Cap 282 R.E 2002]. The appellant was also charged with the offence of unlawful possession of Government Trophies under the relevant provisions of the Wildlife Conservation Act No. 5 of 2009 and the Economic and Organized Crime Control Act [Cap 200 R.E 2002] as amended.

Upon a full trial, the appellant was convicted as charged and was sentenced as follows; fine of one hundred thousand shillings or imprisonment for six months on the first count, fine of twenty thousand shillings or

imprisonment for one year on the second count and twenty (20) years imprisonment on the third count.

Before embarking in the merit of the appeal, I have found apposite to narrate albeit a brief background of this case. It all started with a routine park rangers' patrol within Serengeti National on 29th August 2019 at 06:00hrs where PW1 Adolph Richard Magoda, PW3 Julius John Ngaya and other five park rangers were on duty. They found the appellant at Hingira area within Serengeti National Park in Tarime District. When probed to show the permit to enter into the National Park, the appellant had none. It was PW1 and PW3's evidence that, upon searching the appellant, they found him in possession of one knife, one machete, two trapping wires and the Government Trophies to wit, one hind limb fresh meat of wildebeest, without relevant permits. The said trophies were identified and valued at Tshs. 1,494,610/= by PW4 Gift Levi Sanga, a wildlife officer based in Bunda District. This incident was reported to Nyamwaga Police Station. PW2 G7499 DC Abel testified on how he investigated the matter.

To supplement oral testimonies adduced by PW1, PW2, PW3 and PW4, the prosecution tendered four exhibits namely, certificate of seizure (Exhibit P1), one knife, one machete, two trapping wires (Exhibit P2), Trophy Valuation Certificate (Exhibit P3) and Inventory form (Exhibit P4).

On his part in his defence, the appellant depended on his own sworn testimony. He did not call other witnesses to supplement his testimony. He

testified that he was arrested at Nyamakendo Machocho village within Tarime District where he was grazing cows. He also contended that he was tortured and threatened to admit the offences.

As hinted above, the trial court was of the considered view that the prosecution had established the case against the appellant beyond reasonable doubt. As a result, the appellant was convicted and sentenced as shown hereinabove.

The appellant felt aggrieved, hence this appeal which is comprised of seven (7) grounds of appeal seeking to challenge the decision of the trial court. However, having examined, they can be paraphrased and merged into two grounds thus:-

1. That, the trial magistrate erred in law and fact by basing on prosecution's evidence which did not prove the case beyond reasonable doubt.
2. That, the trial magistrate did not consider the defence evidence.

The appellant appeared in person before this Court when the appeal was called on for hearing and the respondent/Republic had the services of Mr. Tawabu Yahya, the learned State Attorney. It is noteworthy here that, the hearing was conducted through virtual court system.

When the appellant was called upon to elaborate on the grounds he had filed, he opted to adopt the petition of appeal and reserved his chance to make rejoinder after the learned State Attorney had argued the grounds of appeal

Mr. Yahya, first, supported the appeal on third count. Addressing the Court, Mr. Yahya contended that the prosecution failed to prove the third count on required standard. His contention was based on two grounds. One, that the prosecution through PW4 did not adduce evidence to prove how the items alleged to have been found in possession of the appellant were identified as Government Trophies. Two, the appellant was not accorded the right to be heard when PW4 sought the order to dispose of the Government trophies. Therefore, Mr Yahya urged the court to quash the conviction and set aside the sentence on the third count.

Thereafter, Mr. Yahya supported the conviction and sentences on the first and second counts. He was of the firm view that the offences of unlawful entry into the National Park and unlawful possession of weapons in the National Park were duly proved by PW1, PW3 and Exhibit P1. Thus, he asked the Court to dismiss the appeal on the first and second counts.

On his part, the appellant had nothing to rejoin. He urged the Court to discharge him.

Having heard the parties, I now turn to consider the merit of the appeal. I propose to start with the first paraphrased ground, whether the prosecution

proved its case beyond all reasonable doubt. This issue will be considered in the manner it was argued by the learned State Attorney.

On the third count, both parties are at one that the offence of unlawful possession of the Government Trophies was not proved. As hinted earlier, the Government Trophies subject to this count were one hind limb fresh meat of wildebeest which was said to have been found in possession of the appellant. PW4 is the sole witness paraded to give evidence on identification of the trophies found in possession of the appellant. However, he did not give any evidence on how the said hind limb meat was identified to be wildebeest. The requirement to a detailed evidence on identification of trophies was underscored in **Evarist Nyatumba vs R**, Criminal Appeal No. 196 of 2020 (unreported) when the Court of Appeal held as follows:

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."

In the instant appeal, the prosecution did not give evidence to conclude that the hind limb meat alleged to have been found in possession of the appellant was indeed a Government Trophy to wit, wildebeest.

Further to that it is common ground that the alleged Government Trophy was not tendered in evidence. The prosecution relied on the Inventory Form

(Exhibit P4) and evidence of PW4 that the trophy was disposed by an order of the Magistrate because it was subject to speedy decay. Exhibit P4 suggests that the trophy were disposed of under the Police General Orders. In terms of paragraph 25 of the Police General Orders (PGO), the accused person is entitled to be present before the Magistrate who issue the disposal order. The position of law as stated in the case of **Mohamed Juma @ Mpakama vs R**, Criminal Appeal no. 385 of 2017, CAT (unreported) is that, apart from being present, the accused must be heard before the magistrate who issues the disposal order. An Inventory Form obtained in contravention of the right to be heard cannot be relied upon to prove the charge against the accused.

In our case, I entirely agree with the learned State Attorney that PW4, Exhibit P4 and the proceedings of the trial court are silent on whether the appellant was heard by the magistrate who ordered disposal of Government trophies. Since that evidence is wanting, Exhibit P4 was not sufficient to prove the third count.

As regards the first and second counts, the evidence which implicated the appellant was adduced by PW1 and PW3. They testified to have arrested the appellant at Hingira area into Serengeti National Park. The said witnesses testified that the appellant was in possession of one knife, one machete and two trapping wires and that he had no relevant permits. That evidence implicated him in the first and second counts. The evidence by PW1 and PW3

was supported by the certificate of seizure and the traditional weapons (one knife, one machete and two trapping wires) which were admitted in evidence as Exhibits P1 and Exhibit P3 respectively. Both exhibits show that the appellant was found at Hingira area within Serengeti National Park. The appellant did cross-examine the said evidence adduced by PW1 and PW3. Further to that he did not object admission of the said exhibits which also implicated him on the first and second count. Thus, I am satisfied that the prosecution proved the second and third counts.

The appellant's complaint in the second paraphrased ground is in respect of failure by the trial court to consider his defence. The learned State Attorney did not address this complaint. The legal position as stated in the case of **Karim Jamaru @ Kesi**, Criminal Appeal No. 412 of 2018, CAT at DSM (unreported) the trial court must consider the defence case. As earlier on stated, the appellant's defence was to the effect that, he was arrested at Nyamakendo Machochi village while grazing cows and that the said fresh meat of Wildebeest is not his. He also testified that he was tortured and threatened to admit the offences. This evidence was duly considered by the trial court as reflected in pages 5, 6, 7 and 8 of the typed judgment. At the end of the day, the trial court was of the view that the appellant's evidence did not seriously shake the credibility of the prosecution witnesses. Therefore, I am also satisfied that appellant's defence was considered by the trial court.

For the reasons I have endeavored to state, I hereby dismiss the appeal on the first and second counts and allow the appeal on the third count. Consequently, I order as follows:

1. The conviction on the third count is quashed and the sentence thereon set aside.
2. Unless held for some other lawful cause, the appellant be released from the prison because he has already served the sentence of one year imprisonment meted by the trial court on the first and second counts.

It is so ordered.

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