

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA

CONSOLIDATED CRIMINAL APPEALS NO. 25 AND 26 OF 2021

MAZOYA KITONYO @ DADDI 1ST APPELLANT

MANONGU MAKOYE @ MANONGU 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

***(Arising from the decision of the District Court of Serengeti at
Mugumu in Economic Case No. 15 of 2020)***

JUDGMENT

4th August and 14th September, 2021

KISANYA, J.:

Before the District Court of Serengeti, the appellants, Mazoya Kitonyo @ Daddi and Manongu Makoye @ Manongu were jointly and together charged with three counts. These were, one count of unlawful entry into the Game Reserve, contrary to section 15(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA); and two counts of unlawful possession of Government Trophies contrary to section 86(1) and (2) (c) (iii) of the WCA read together with paragraph 14 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap 200 R.E 2002] as amended.

It was the prosecution case through, Paineto Mafwele (PW1), Ephraim Brown Mwanjala (PW2) that, the appellants were, on 2nd April 2020, around 04:00hrs, found at Manzimobi area within Ikorongo Grumeti Game Reserve.

Upon being searched they were found with the Government trophies to wit; fresh neck of Impala, one fresh head of Impala, one fresh fore limb of Impala, one fresh neck of Topi, one fresh head of Topi and one hind limb of Topi. PW1 and PW2 adduced further that the appellants had no permit to enter into the game reserve and the permit as to possession of the Government Trophies. A Certificate of Seizure (Exhibit PE1) was tendered by PW1 to supplement his oral testimony that the said Government Trophies were seized from the appellants.

The prosecution went on to parade Wilborad Vicent (PW3) who identified and valued the said fresh neck of Impala, one fresh head of Impala, one fresh fore limb of Impala, one fresh neck of Topi, one fresh head of Topi and one hind limb of Topi. According him, the fresh neck of impala, fresh head of impala and fresh limb of impala had value of Tshs. 897,000/= while the fresh neck of Topi, fresh head of Topi and fresh limb of Topi were valued at Tshs. 1,840,000/=. PW3's evidence was supported by the Trophy Valuation Certificate (Exhibit PE2).

The last prosecution witness PW4, a police officer who investigated the matter. He testified among other that the Government Trophies subject to this Court were disposed by an order of the magistrate. He tendered the inventory form (Exhibit PE3) to support his evidence.

In their respective defence, the appellants denied to have committed the offence levelled against them. Both appellants testified that they were arrested when they were fishing at Mto Rubana and taken to Camp by the park rangers.

After a full trial, the appellants were convicted of all counts and were sentenced to one (1) year imprisonment on the first count and twenty (20) years imprisonment on the second and third counts. The sentences were ordered to run concurrently.

Aggrieved, each appellant filed his own petition of appeal to challenge the decision of the trial court. For convenience purposes, both appeals were merged as Consolidated Criminal Appeals No. 25 and 26 of 2021. Noteworthy is that, the four grounds of appeal raised in both appeals hinge on the complaint that the prosecution did not prove its case beyond all reasonable doubts.

At the hearing of this matter, the appellant appeared in person while the respondent was represented by Mr. Tawabu Yahya, the learned State Attorney.

The first appellant commenced his submission by adopting the petition of appeal. He went on to submit that the prosecution case was not proved because the government trophies were not tendered in evidence. He also contended that, he was not found in possession of weapons and that, PW1 and PW2 contradicted each other on their respective testimonies.

On his part, the 2nd appellant submitted that PW2 did not state the place or location where the appellants were arrested. He went on to contend that

they did not sign the Inventory Form (Exhibit PE3) tendered by PW4. Therefore, he was of the view that the offence of unlawful possession of the government trophies was not proved.

For the foregoing submission, the appellants prayed this Court to allow the appeal and discharge them.

Mr. Yahya resisted the appeal. He was of the view that the prosecution proved its case beyond reasonable doubt. The learned State Attorney submitted that all exhibits tendered by the prosecution were not objected by the appellants. He went on to contend that the appellants did not cross-examine the prosecution on the said exhibits.

Referring to the evidence of PW1 and PW2, Mr. Yahya argued that the prosecution proved that the appellants were arrested at Manzimobi area within Ikorongo Grumeti Game Reserve. He conceded that the government trophies subject to this case were not tendered in evidence during trial. However, he was of the view that the Inventory Form (Exhibit PE3) tendered by PW4 proved that the said trophies were disposed of by an order of the magistrate. When probed by the Court, Mr. Yahya further conceded that, the appellants were not accorded the right to be heard before the issuance of the order for the disposal order of trophies. However, he maintained his stance that the prosecution case was duly proved. Therefore, he concluded by urging the Court to dismiss the appeal for want of merit.

Rejoining, the appellants reiterated their contention that the case levelled against them was not proved.

In view of the submission by the parties and the evidence on record, the issue that I am called upon to decide is whether the prosecution proved its case beyond all reasonable doubts. This being the first appellate court, I will re-examine and re-evaluate the evidence adduced to prove each count.

Starting with the first count of unlawful entry into the Game Reserve, I am at one with Mr. Yahya that the evidence which implicated the appellants in that offence were adduced by PW1 and PW2. These are park rangers who arrested the appellants. In their respective testimonies, PW1 and PW2 testified that the appellants were found at Mto Manzimabi area into Ikorongo Grumeti Game Reserve on 2nd April, 2020 around 0430 hours. This evidence was corroborated by the certificate of seizure (Exhibit PE1) which was signed by both appellants. As rightly argued by Mr. Yahya, the appellants did not cross-examine PW1 and PW2 or ask them on the contents of Exhibit PE1. In that regard, they were taken to have admitted the evidence adduced by PW1 and PW2 and the contents of Exhibit PE1. As a result, their defence that they were arrested at Mto Robana was an afterthought. This Court finds no reason to disbelieve PW1 and PW2. It is therefore my considered opinion that the first count was duly proved.

With regard to the second and third counts of unlawful possession of Government Trophies, it is common ground that the trophies subject to the said counts were not tendered in evidence. Mr. Yahya urged me to consider the evidence of PW4 and the inventory form (Exhibit PE3) that the trophies were subject to a speedy decay and thus, were disposed of by an order of the magistrate. However, the learned counsel readily conceded that neither PW4 nor Exhibit PE3 shows that the appellants were heard when the magistrate issued the order for disposal of the said trophies.

Reading from the evidence of PW4 and Exhibit PE3, it is clear that the said trophies were disposed of under the Police General Orders (PGO). Failure to hear the appellant at the time of issuing the order for disposal of exhibit which cannot be preserved until the case is heard contravenes paragraph 25 of the PGO No. 229 (Investigation-Exhibits) which provides as follows: -

"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."

In the case of **Mohamed Juma @ Mpakama vs R**, Criminal Appeal no. 385 of 2017, CAT (unreported), the Court of Appeal underscored on the need of hearing the accused before disposing perishable exhibits under the PGO by holding as follows: -

"While the police investigator, Detective Corporal Salmon (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.

That being the position, the evidence of PW4 and Exhibit PE3 that the Government Trophies subject to the second and third counts were disposed of by the order of magistrate cannot be proved against the appellants who were not accorded the right to be heard by the said magistrate. In the absence of the evidence as to the whereabouts of the trophies alleged to have been found in possession of the appellants, I hold that the second and third counts were not proved beyond all reasonable doubts.

In the event, I dismiss the appellants' appeal on the first count and allow the appeal on the second and third counts. Consequently, the appellants' conviction on the second and third counts of unlawful possession of Government Trophies are hereby quashed and the sentences thereon set aside.

It is so ordered.

DATED at MUSOMA this 14th day of September, 2021.




E. S. Kisanya
JUDGE

Court: Judgement delivered this 14th September, 2021 in the presence of the first appellant and Mr. Nimrod Byamungu, learned State Attorney for the respondent and in the absence of the second appellant. B/C Mr. Gidion present.




E. S. Kisanya
JUDGE
14/09/2021