IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 55 OF 2021

(Arising from Economic Case No. 86 of 2018 in the district court of Tarime at Tarime)

MWITA SIMON @ MARWA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

13th Sept and 28th Sept, 2021

F.H. MAHIMBALI, J.:

The appellant together with Marwa Rhobi @ Nyakiroto (who is not party, to this appeal) were charged and convicted by the district court of Tarime at Tarime for three counts namely; **Unlawful entry into the National Park, Unlawful possession of weapons in the National Park and Unlawful possession of government trophies.** It was alleged by the prosecution that on the 26/11/2018 within Serengeti National Park the appellant was found in the national park without any permit being in possession of weapons to wit two animal trapping wires and one machete without a permit, further he was in unlawful possession of government trophy to wit one head of wildebeest. The

appellant was arrested and then arraigned before the district court of Tarime at Tarime to answer claims in three offences where he denied all the charges levelled against him.

In order to prove its case, the prosecution paraded a total of three witnesses; Pascal Faustine @ Donald (PW1) a game ranger and Jacob Bura @ Hema (PW4) a park ranger who testified that on the 26/11/2018 while they were on patrol together with Joseph Mpangala, Tanu Malila and Osca Kapand saw the appellant and the other accused person carrying a luggage into the bush , they went after them. As they reached them, found them being in possession of two trapping wires , one machete and one head of wildebeest . They inquired from them if they had any permit to be in the national park and to possess the weapons and government trophy. They had none. They thus arrested and took them to Nyamwaga police station together with the exhibits which were labelled with the case number which is NY/7628/2018. At Nyamwaga police station on the 26/11/2018 they were attended to by G 6168 Dc Slasius (PW2). Who also prepared the charge and paraded the accused person and the appellant before the court. Furthermore, the testimony of Njonga Manko William (PW3) who is a game officer is to the effect identified the said trophy as being head of wildebeest and

thus prepared the valuation certificate. His report stated that it was one head of wildebeest and its value is 650 USD. After completion of the valuation, he handled the report to OCCID. The trophy valuation certificate was tendered and admitted in court as exhibit P1, as there was no objection from the accused person and the appellant. PW3's testimony is to the effect that on the same date, he prepared an inventory form, which was later tendered and admitted in court as exhibit P2. On the other hand, the weapons found with the accused person and the appellant were tendered by PW4 and admitted in court as exhibit P3. The appellant was found with a case to answer and he fended for himself on oath by stating that on the 27/11/2019 he was grazing his cattle along the road which is near the boundary of Serengeti National Park where he was arrested and taken to Kenyangaga Ranger post. He testified further that he was arrested alone and he found the other accused person at the ranger post and on the next day he saw wildebeest carcass in the vehicle.

In the consideration of the case's testimony, the trial court convicted and sentenced the appellant as follows; In respect of the first count the appellant was sentenced to serve one year imprisonment or to pay fine of Tshs. 50,000/=, for the second count to serve one year

imprisonment or to pay fine of Tshs. 50,000/= 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 five grounds of appeal to the effect that;

1. *That, there is no evidence which support the appellant of being apprehended in possession of weapons and the allegedly government trophy exhibit P3, P1 and P2 within the National Park rather the doctrine of recent possession / recovery was wrongly involved as it was predicated on a contrived evidence.*
2. *That, as per lacking the recovered government trophy and weapons the later identification and valuation process by PW3 was an afterthought made at Nyamwaga Police station of which emerged fears of planting evidence and exhibit in favour of undeserved party.*
3. *That, the trial magistrate erred in law and fact to convict and sentence the appellant by admitting the prosecution evidence which failed to prove the case beyond all reasonable doubts as leave a lot of doubts to rely on it for conviction and sentence against the appellant.*

4. *That, the trial magistrate erred in law and facts to pass conviction and sentence toward the appellant when he failed to consider the truth and the facts the hearing hence he ended up by making a sample of difference to it.*
5. *That, PW2 evidence was wrongly relied as corroborative regardless the material deficities in her flimsy investigation process mostly absorbed from hearsay story by PW1 and PW4 who had their interest to serve a they worked in the same field.*

This appeal was heard by way of a virtual court conference and the appellant was present in person at Musoma prison while the respondent had the legal services of Mr. Isihaka, learned state attorney who was also linked from NPS offices in Musoma.

The appellant asked the court to adopt his grounds of appeal as part of his submission for his appeal. As he had no more to add, he invited the Republic to respond first and reserved his right of rejoining.

Replying, Mr. Isihaka, learned state attorney, submitted that on the first ground of appeal he partly agrees that there were offences which were not proved beyond reasonable doubt and others have been proved. On the first count which is unlawful entry to the National Park contrary to section 21(1) (a) and (2) of the national Parks Act, there is no offence

there created by the law as per charging sections. On the second count, relying on the testimony of PW1 and PW3, he is satisfied that the offence of unlawful possession of weapons in the national park was proved as the evidence of the witnesses was intact and the offence was well established. With regards to the third count he stated that PW2 tendered the evaluation certificate and the inventory form. However, the known legal procedures of disposing of the exhibits as per the case of **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), were not complied with. He stated that the proper legal course is to expunge it upon this expunge, the third count will lack legal basis to stand.

He went on to submit on whether the offence of unlawful possession of weapons can stand in the absence of the offence of unlawful entry, and his answer was in the affirmative. The reason being, one can enter into the national park lawfully but being in unlawful possession of weapons there in is what is prohibited. In the present case it is not disputed that the accused person was found within the national park, which was not an offence as per charged offences, but being in unlawful possession of weapons there in is what the law restricts. The appellant had nothing to rejoinder.

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

This court will consider all the grounds of appeal together as they all center on the complaint that the prosecution did not prove its case beyond all reasonable doubt. Regarding the first count of unlawful entry into the National Park c/s 21(1) (a) and 29 (1) of the National Park Act, the learned state attorney was of the view that there was no offence established by the law as per these charging sections. I have gone through section 21 and section 29 of the National Park Act one can hardly say that there is a legal offence established there in, known as unlawful entry into the National park. For easy of reference, I will reproduce the section the appellant was charged with on the first count;

> ***21(1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable –***
>
> ***(a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one years or to both that fine and imprisonment;***

(b) in the case of a company, a body corporate or a body of person to a fine not exceeding one million shillings.

(2) Any person who contravenes the provisions of this section commits an offence against this Act.

29.-(1) Any person who commits an offence against this Act is on conviction, if no other penalty is specified herein, liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not 18 exceeding one year or to both.

(2) Where any person is convicted of an offence against this Act or any regulations made thereunder, the court may order that any animal, weapon, explosive, trap, poison, vehicle or other instrument or article made use of by such person in the course of committing the offence shall be forfeited to the Government.

(3) Any domestic animal found within a national park, except a domestic animal in the lawful possession or custody of an officer or servant of the Trustees or introduced into such national park in accordance with the provisions of any regulations made by the Trustees, may be destroyed by an officer or servant of the Trustees.

(4) Any vegetation introduced into a national park in contravention of any of the provisions of any

regulations made by the Trustees under this Act may, by order of the Trustees or of any officer or servant of the Trustees duly authorised by them in that behalf, be destroyed or otherwise dealt with.

With this wording, my take is, the offence known as unlawful entry into the national park is not created by these sections. The prosecution took a wrong provision to charge the appellate.

Regarding the second count, the learned state attorney submitted that the testimonies of PW1 and PW3 were enough to prove that count. I have gone through the court's record and according to the testimony of PW1 is that he found the appellant in the national park in unlawful possession of weapons to wit two trapping wires and one machete. The said weapons were tendered by PW3 and admitted as exhibit P3. The appellant did not object to the admission of the weapons. The fact that he did not object it suggests acceptance. The law is settled that when the appellant does not object to the admissibility of an exhibit when it was being tendered, the court will be deprived to consider any objection of the appellant unless it was not made voluntarily or made at all and when it is taken in violation of CPA. (See; **Nyerere Nyague vs The Republic** , Criminal Appeal No. 67 of 2010). Having stated so, I agree

with the learned state attorney that the second count was legally established as per law.

Regarding the third count of unlawful possession of government trophy, as submitted by the learned state attorney, I am at one with him. When the inventory form was being signed, the accused person was neither present nor involved in that whole process. I have gone through the inventory form and there is no where it shows the accused person was present and 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).

To be safe, magistrates are advised to open miscellaneous application to handle such a process for it to comply with the law. My understanding to this provision of the law and this case law, there must be a clear court order in relation to this legal transaction and it must be in compliance with the law.

The learned state attorney submitted that the inventory form should be expunged. As it did not comply with the law. I am at one with him, the same is hereby expunged. Upon expunging the prosecution is left with no sufficient evidence to convict and sentence the appellant on the third count. Having stated so, it is safe to state that the third count was not proved beyond reasonable doubt.

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; the appeal on the first and third counts and the trial's

court proceedings and conviction are quashed and the respective sentences set aside (on the first and third counts). In regards to the second count, this court dismisses the appeal as it is devoid of merit. The appellant should be released from prison unless held for a lawful course as he has already served the one-year imprisonment imposed in regards to the second count.

It is so ordered.

DATED at MUSOMA this 28th day of September, 2021

F. H. Mahimbali

JUDGE

28/09/2021

Court: Judgment delivered this 28th day of September, 2021 in the presence of Appellant and Mr. Frank Nchanila S/A for the Respondent and Miss Neema P. Likuga – RMA.

Right of appeal explained.

F. H. Mahimbali

JUDGE

28/09/2021