

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

CRIMINAL APPEAL No 16 OF 2021

(Originating from District Court of Serengeti at Mugumu on Economic Case No 149 of 2019)

SIMON S/O NYAMHANAGA.....APPELLANT

Versus

REPUBLICRESPONDENT

JUDGMENT

13th September & 11th October, 2021

Kahyoza, J.

Simon Nyamhanga @ Marwa (the appellant) was arraigned before the District Court of Serengeti charged with three counts; **one**, unlawful entry into the national park; **two**, unlawful possession of weapons to wit; two panga and one spear; and **three**, unlawful possession of government trophies. After full trial, Serengeti district court, found the appellant guilty, convicted and sentenced him to serve a custodial sentence of one (01) year for each offence in the first and second counts and twenty years' imprisonment for the offence in the third count. It ordered the sentence to run concurrently.

Aggrieved, **Simon Nyamhanga @ Marwa** appealed to this Court. He raised five grounds of appeal, which resulted to the following issues

- 1) Did the prosecution prove the case beyond reasonable doubt?
- 2) Was the inventory properly prepared and tendered?

The District Court of Serengeti at Mugumu relied on the evidence of four prosecution witnesses to find **Simon Nyamhanga @ Marwa** guilty and convicted him with three counts to wit; **one**, unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the National Park Act, [CAP. 282 R. E 2002]; **two**, unlawful possession of weapons in the National Park c/s 24(l)(b) and (2) of the National Park Act and **three**, unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (the **WLCA**) read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200, R.E. 2019] (the **EOCCA**).

The appellant had nothing to elaborate on the grounds of appeal raised.

The Respondent's State Attorney, Ms. Agma declined to support the conviction of the appellant with the offence in the first and third count. She submitted regarding the first count that she does not support the conviction in the first count as the section 21 of the National Park Act, [Cap. 282 R.E. 2002] (the **NPA**) does not create the offence of unlawful entry into the national park, which the appellant stood charged with.

The appellant had nothing to comment on this issue.

I examined the law, section 21 of the **NPA**, to find out if it creates the offence of unlawful entry into the national park. It stipulates that-

21(1) Subject to the provisions of section 15, it shall not be lawful for any person other than–

(a) the Trustees, and the officers and servants of the Trustees;

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

I am in total agreement with the learned state attorney that section 21 of the NPA, is not clear. It does not create the offence of unlawful entry into the national park or restrict entry into the National Park. It is obvious that there some intended words are missing. A person can be charged and convicted of the offence which does not exists or is ambiguous. I find as submitted by the state attorney that the appellant was wrongly charged and convicted with the offence which does not exist. I, therefore quash the conviction and set aside the sentence in the first count.

Is the appellant's conviction for the offence of unlawful possession of the government trophies justifiable?

The respondent state attorney declined also to support the trial court's conviction and sentence for the offence in the third count of unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the **WLCA** read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the EOCCA. She submitted that it was not clear from record and from Exh. PE. 4 whether the appellant appeared before and had an opportunity to comment before the magistrate ordered the government trophy to be disposed. She added that the law is clear as to what ought to be observed when preparing the inventory as stated in the case of **Mohamed Juma Mpakama V R**

Criminal Appeal No 385/2017 CAT (Unreported) at Page 22- 25. She prayed to this Court to expunge Exh. PE. 4 from the record. She concluded that once this Court expunges Exh. PE. 4, there remains no evidence to prove the offence in the third count.

I passionately examined the record of trial court. Indeed, it is not clear whether the magistrate who ordered the police to dispose the trophy gave the appellant an opportunity to air his opinion or comment. The Court of Appeal held, in **Mohamed Juma @ Mpakama** (supra) that before disposing exhibits under paragraph 25 of PGO No. 229, that the accused person must be present and the magistrate should hear him. It stated-

*"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail) **to be present before the magistrate and be heard.**"*

I find that the exhibit P.E 4 was not properly admitted as there is no evidence that the appellant was heard before the same was prepared. It was wrong for the trial court to admit it. Consequently, expunge Exh.P.E. 4 from the record. I concur with the learned state attorney, that once I expunge Exh.P.E. 4, there is no evidence to prove the offence in the third count.

In the upshot, I find that there was no evidence to prove the offence in the third count. I set aside the sentence and quash the conviction of the appellant with the offence of unlawful possession of government trophy contrary to section 86 (1) and (2) (c)(iii) of the **WLCA** read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the **EOCCA**.

The respondent state attorney supported the conviction of the appellant in the second count of unlawful possession of weapons in the National Park c/s 24(l)(b) and (2) of the **NPA**. She prayed the conviction to be upheld.

The appellant did not elaborate his ground of appeal. Among the appellant's grounds of appeal was a general ground of appeal that the prosecution did not prove the case against him. The Court of Appeal discouraged the practice of raising general ground of appeal and specific ones. It stated however, that when the appellant raises the general ground of appeal together with specific it is proper for the appellate court to consider the general ground of appeal only to determine the appeal. The Court of Appeal pronounced that position of the law in **Rutoyo Richard vs R.**, (Cr. Appeal No.114 of 2017), published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that: -

"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."

I will consider whether the prosecution proved beyond reasonable doubt that the appellant was guilty of the unlawful possession of weapons in the national park c/s 24(l)(b) and (2) of the **NPA**. The prosecution witnesses, **Ezekiel Kulwa @ Petro (Pw1)**, and **Paulo Ochieng'i (Pw2)** deposed that while on their routine patrol on 14/11/2019 at about 18:15 hrs with other four park rangers namely Joseph Thomas, Jumanne Makwaye, Nurdin Bawaziri and Thadeus Maronge at Makorongo ya Machochwe area within Serengeti National Park saw two people working.

Those people had luggage. They ambushed and arrested them. They had no permit to enter the National Park. They possessed weapons to wit: two panga and one spear. The appellant and his co-accused person possessed also the government trophies to wit: Two hind limbs, two fore limbs and neck joined with a head all of zebra.

Paulo Ochieng'i (Pw2) tendered and to the trial court a certificate of seizure as exhibit P.E.1 and weapons as Exhibit P.E.2. The appellant did not object the prosecution witnesses to tender the exhibits. He stated that little did he know about the exhibits.

The appellant's defence was that between 13 & 14 November, 2019, he slept at his home place, at around 19hrs elephants entered his potatoes farm. He took a torch to drive them away. The parker rangers arrested him while he was in the process of driving away elephants. He deposed that if he committed any the offence, it was the first one and not the offences in the second and third counts.

I passionately considered the prosecution and the defence evidence. The prosecution's evidence was that the appellant was found in the national park in possession of weapon. The appellant does not dispute to have been arrested whilst in the national park. He refutes to be found in possession of weapons and government trophy. Let us accept the appellant's version that he entered the national park while driving away elephants from his potatoes' farm. Is it likely that a person would drive elephants and do so alone and without any weapon? The answer is that it is not likely. For that reason, I find that the appellant's defence did not punch holes on the prosecution's evidence that the appellant was found in possession of weapons in the national park.

In the end, I uphold the conviction of the appellant with the offence of unlawful possession of weapons in the national park c/s 24(l)(b) and (2) of the **NPA** and the sentence imposed one year imprisonment.

For the reasons stated above, I quash the conviction and sentence for the offence of unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the **NPA** in the first count and for offence of unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the **WLCA**, read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the **EOCCA**, in third counts.

The appeal is partly allowed. The appellant shall be released immediately upon completion of the sentence in the second count of one year.

I so order.



J. R. Kahyoza,

Judge

11/10/2021

Court: The Judgment delivered in the absence of the appellant and in the presence of Mr. Temba, S/A virtually. B/C Ms. Neema present.

J. R. Kahyoza

JUDGE

11/10/2021