IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 69 OF 2021

(Arising from Serengeti District court at Mugumu Economic case No. 120 of 2019)

MASUNGA KISURA @ MASUNGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

1st October& 27th October, 2021

F. H. MAHIMBALI, J.:

The appellant, Masunga Kisura @ Masunga together with Sai Saba @ Thobi (not party to this appeal) were arraigned before the district court of Serengeti at Mugumu charged with four 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 20th day of September, 2019 at Mbalagei area within Serengeti Natonal Park, the appellant together with the other accused person were found in the National Park without any permit and were found in unlawful possession of weapons and government trophies.

The brief material facts leading to this appeal are summarized as

follows; On the 20th day of September, 2019 at about 22:00 hours Wilson Adamu (PW1) together with other park ranges , Emmanuel Mrisha , TanuMalira and ThadeusManonga while on patrol they saw a torch light and they followed it and they saw two people. They searched them and found them in unlawful possession of weapons in the National Park to wit one knife, one panga and one spear. They also found them in unlawful possession of government trophies to wit; one fresh carcass of warthog, ten fresh carcasses of Thomson gazelle. They had no permit to be in possession of the weapons and the government trophies. As a result, they were arrested by PW1 and the other park rangers. The appellant and the other accused person also introduced themselves to the park rangers.

PW1 together with the other park rangers prepared a certificate of seizure and it was signed by the appellant and the other accused person. The certificate of seizure was tendered, admitted and marked exhibit P.E.1 without any objection. They then took the exhibits to Mugumu police station. On the next day, 21/09/2021 they wrote their statements and opened case file with Ref. No. MUG/IR/2896/2019. He also tendered the above mentioned weapons in court and they were admitted and marked exhibit P.E.2 .

The testimony of PW1 was corroborated by ThadeusManonga

(PW2) a park ranger who also testified to finding the appellant together with the other accused person in the National Park and in unlawful possession of weapons and government trophies mentioned herein above.

At the Police station where the appellant and the other accused person were taken after being arrested. Their case was assigned to G. 4209 DC Steven (PW4). He read the case file which the appellant and the other accused person were charged with the above-mentioned counts. He then called WilbrodVicent(PW3) to identify and value the trophies. After, identifying the trophies its value was tshs. 11,990,000/= and he handled the trophy valuation certificate to PW4. PW4 took the said government trophies before the magistrate for disposal order. PW4 testified that the disposal order was issued before the accused person. He also tendered the inventory form in the court and it was admitted and marked exhibit P.E.4 without any objection.

Having heard the prosecution side, the court found the appellant with a case to answer and he was accorded his right to testify under the provision of section 231(1) of the CPA on the manner of testifying and whether he had witnesses to call and exhibits to tender. The appellant fended for himself that he remembers on the 18/09/2019 at his village place he was working at his boss's house. He was grazing

cattle. At about 09:00 hours he took the cattle from the cowshed and at about 13:00 hours he took the cattle to a river known as Warajoro which heads to Serengeti National Park. The cattle were grazing besides the river.The Park rangers came and interrogated him on the cattle and he told them they belong to his boss, one NgololoMaduhu. They arrested him and took him to Serengeti National Park where two other people were arrested. He slept at their camp and on the 22/09/2020 he was taken to Mugumu Police station and on the 22/09/2020 he was not found with any of the exhibits tendered in court.

Having heard the parties, the trial court found the appellant guilty, convicted and sentenced him in respect of the first count to one year imprisonment, two years imprisonment in respect of the second count, 25 years imprisonment in respect of the third count and 20 years imprisonment in respect of the fourth count.

This decision did not amuse the appellant hence he filed his petition of appeal to this court containing four grounds of appeal. The grounds of appeal are summarized as follows;

1. That, the trial court erred by admitting wrong exhibit tendered in court by the prosecution side.
2. That, the trial court erred as he was not present during the disposal order at the magistrate and he did not sign the certificate

of seizure.

3. That, the trial magistrate erred as he was not given a chance to call his key witnesses.
4. That, the trial magistrate erred as his defense was not considered.

During the hearing of this appeal, the appellant was present and unrepresented while the respondent was also presented but enjoying the legal services of Miss. Agma Haule, learned state attorney. This matter was heard by way of audio teleconference.

Submitting in support of this appeal, the appellant prayed that his grounds of appeal be adopted as part of his submission. He further submitted that the testimony of PW3 is not reliable and the trial court asked essential questions. Furthermore, he added that he was not involved in the destruction of the said trophies. He prayed his appeal be allowed.

Replying, the learned state attorney partly supported the appeal and partly objected to the appeal being allowed. She submitted that the appellant and the other accused person were charged, convicted and subsequently sentenced for four offences.

Regarding the third count it is a trite law, that the procedure of filing the inventory form has a legal procedure and it has to be complied with. In the case of **Mohamed Juma @ Mpakama v Republic,**

Criminal Appeal No. 385 of 2017 CAT at Mtwara, held that it is the accused's person right to be present before the magistrate and be given a right to be heard. However, in the instant case at page 23 , there is no evidence that the appellant was given a right to be heard. That was a violation of the legal procedure. Hence, non- compliance leads to expunging of the inventory form. Upon this expunge,the offences in the 3rd and 4th counts miss legal evidence to link them with the accused person.

With the first count, it was the respondent's submission that the charging section does not create the said offence. Section 21(1),(2) and section 29(1) of the National Parks Act does not create that offence , they are charged with. Therefore, as the appellant was wrongly charged, unlawfully convicted and the subsequent sentence.

On the second count it was the submission of Miss. Haule that the said count has been proved as per the law (see testimonies of PW1 and PW2). It is clear that the appellant was arrested being in possession of the said weapons within the National Park unlawfully. There was a certificate of seizure dully signed that the said offence was well established.

In regards to ground no. 1,3 and 4 , she was of the firm view that the said weapons were properly seized and stored and later tendered in

court. PW1 and PW2 testified on how they arrested the appellant with the said exhibits , presented them at the Police and the same were properly labelled and subsequently tendered in court. It was her humble view that the chain of custody has not been broken though not clearly stipulated who they were handed over to. Those being physical exhibits, she wondered if they could be any tempering.

It was the appellant's 3rd grief that his witnesses, the ones who were present when he was arrested were not called to testify in court. It was the respondent's submission that as per page 36 of the proceedings it is clear that the appellant was duty bound to call his witnesses and it is not the respondent's legal task to call witnesses for the appellant. The records are clear that the appellant was dully explained of his right but did not elect to call witnesses for his defense case.

With ground no. 4 of the appeal, it was the respondent's submission that that ground is baseless. The appellant was duty bound to cross examine the prosecution's witnesses, but he decided not to ask any questions (see page 22 and 25 of the typed proceedings). It is trite law that failure to cross examine is agreeing to what has been submitted (see; **MartilieMissala v Republic** , Criminal Appeal No. 428 of 2016 CAT -Mbeya at page 7-8).

Finally, she stated that grounds no. 1, 3and 4 of the appeal are

baseless and the same be dismissed in respect of count no. 2 of the charge sheet and ground no. 2 has been established, therefore the conviction and sentence be maintained.

Rejoining, the appellant had nothing further to add, she left it to the court to rule out as per the law.

Having heard the rival submissions of the parties and gone through the court's records the bail is now to the court to tackle and determine if this appeal has merits.

It was the appellant's first grief that the trial court admitted wrong exhibits. This ground was objected by the respondent. In this case the exhibits admitted in court were certificate of seizure (P.E.1); that shows the appellant was present and he kept his thumbprint. The other exhibit tendered and admitted was the inventory form (P.E.4), that was also signed by the appellant by thumbprint and it is a prove that he was in the court but there was no hearing conducted. The prosecution also tendered the trophy valuation report that was tendered and admitted as exhibit P.E.3. The weapons were also tendered in court as exhibit P.E.2. At the trial court the appellant did not object to the admission of any of the exhibits and did not cross examine the prosecution witnesses on those exhibits so as to shake their credibility. It is settled law that failure to cross examine a witness implies the acceptance of the truth of the

witness's evidence.Inthe case of **Damian Ruhele V. Republic**, Criminal Appeal No. 501 of 2007 (unreported) this Court stated;

"It is trite law that failure to cross examine a witness on an important matter ordinarily implies the accepts of the truth of the witness.

In that regard, it is the holding of this court that the exhibits save for exhibit P.E.4 were properly admitted in court. This court also agrees with the learned state attorney's submission that exhibit P.E.4 should be expunged as it did not comply with the legal requirement as per the case of **Mohamed Juma @ Mpakama v R** (supra). In that regard this court expunges the inventory form and holds that the third and fourth counts were not proved beyond reasonable doubt.

The issue on whether the chain of custody was broken, it is the holding of this court that it was not broken. The appellant and the other accused person were arrested with the weapons and the rangers prepared the certificate of seizure that was signed by the appellant. Then they were taken to Mugumu police station where the said weapons were labelled with the case file no. MUG/IR/2896/2019 and they were the same weapons tendered and admitted in court. It is my humble view that there was no room to tamper with the exhibits.The law is settled that if the witnesses who handled the exhibits testified on how they

handled such exhibits, it is sufficient to establish the chain of custody and there is no need of paper trail. In the case of **Anna Jamaniste Mboya v. R ,**Criminal Appel No. 295 of 2018 CAT at Dar es Salaam at page 32 held;

> *"The Court has held times without number that if the witnesses who handled the exhibit testified on how they did handle such exhibit, sufficiently establishes the chain of custody and no need of paper trail - see: Moses Mwakasindile v. Republic, Criminal Appeal No 15 of 2017 (unreported) and Marceline Koivogui (supra)".*

Having stated the above the first ground of appeal is devoid of merit and it is dismissed.

The second complaint of the appellant is about not being present when the disposal order was issued before the magistrate. This ground has already been addressed above; the appellant was present but he was not heard. In that regard, this ground has merit and it is allowed.

The third complaint is that he was not given a chance to call his witnesses who were present when he was being arrested. This court agrees with the respondent's submission that this ground is baseless. The appellant was addressed of his rights as per section 231 of the Criminal Procedure Act [Cap. 20 R.E. 2002] and he stated that he would

give evidence under oath and call two witnesses (page 35 of the typed proceedings). On the 17/12/2020 the appellant informed the court that his witnesses are nowhere to be found and on the same day he closed his defense case. Therefore, it is safe to hold that the appellant was given an opportunity to call his witnesses. Therefore, this ground is bankrupt of merits.

The last grief of the appellant is that his defence was not considered. I have gone through the trial court's judgment and it is safe to hold that the appellant's defence was not considered. The court just considered the prosecution's evidence. This court will be guided by what was held in the case of **Goodluck Aloyce v The Republic**, Criminal Appeal No. 459 of 2019 CAT at Dar es Salaam, from page 11 held;

"*...We are also aware that in some cases when confronted with a similar situation, the Court has considered it necessary to remit the case to the High Court for it to perform its duty or ordered a retrial, like in the case of Kaimu Said vs. Republic, Criminal Appeal No. 391 of 2019 (unreported). And in other cases, the Court has taken that omission as a denial of fair trial on the part of the appellant, rendering the trial a nullity. For this, see the cases of Moshi HamisiKapwacha vs. Republic, Criminal Appeal No. 143 of 2015 and Yusuphamani vs Republic, Criminal Appeal No. 255 of 2014 (both unreported). We think the decision as to what should be done, will entirely depend on the peculiar circumstances of each case because in yet other situations, the Court has tended to*

step into the shoes of the High Court to do what ought to have been done. We did that in a number of our previous decisions such as in Joseph Leonard Manyota vs. Republic, li Criminal Appeal No. 485 of 2015 cited in Karimu Jamary @ Kesi vs. Republic, Criminal Appeal No. 412 of 2018 and; Julius Josephat vs. Republic, Criminal Appeal No 03 of 2017 (all unreported). Perhaps we should add, that this position is not ail too new".

For the interest of justice , this court will step into the shoes of the trial court and consider the defence of the appellant. The appellant alleged that he was grazing cattle that belonged to his boss at Warajoro river which heads to Serengeti National Park, that is when he was arrested and taken to the National Park and later the police station. When cross examined, he stated that the other person who was present did not come to testify in court as he had worried.

It is my humble view that the prosecution did not state specifically, where they found the appellant as the appellant alleged he was at Warajoro river and he was grazing his boss's cattle. They did not say where that river starts and ends and whether Warajoro river is within the statutory boundaries of the Serengeti National Park. Therefore, they did not prove beyond reasonable doubt that the appellant was found within the National Park. In that regard this court is steered by the decision of the Court of Appeal in the case of **Dogo Marwa @ Sigana**

and Another v. The Republic, Criminal Appeal No. 512 of 2019 , CAT at Musoma at Page 15 where it stated;

" *...Mr. Mayenga conceded the MilimaSoroi area where the park rangers supposedly arrested the appellants, does not appear under the First Schedule marking boundaries of the national park. We need not reemphasize that the prosecution evidence on record , did not prove beyond reasonable doubt that the park rangers arrested the appellants within the statutory boundaries of the Serengeti National park".*

Equally, the offence of being in unlawful possession of weapons in the National Park can hardly stand in the absence of a clear evidence that where the appellant was arrested was within the statutory boundaries of the Serengeti National Park as alleged.

Regarding the issues raised by the court, on the first count whether the charging section creates the said offence, this court is at one with what the learned state attorney submitted. Section 21(1) and (2) and section 29(1) of the National Park does not create the offence of unlawful entry into the National Park.

In fine, this court finds that the offence charged were not proved beyond reasonable doubt. Therefore, this appeal is allowed in respect of all four counts for conviction and sentence meted out against the appellant. Unless lawfully held by other causes, the appellant is hereby discharged.

It is so ordered.

DATED at MUSOMA this 27th day of October, 2021.

F. H. Mahimbali

JUDGE

27/10/2021

Court: Judgment delivered this 27th day of October, 2021 in the presence of Mr. Tawabu state attorney for the respondent, Mr. Gidion Mugoa, RMA and appellant is being absence.

Right of appeal explained.

F. H. Mahimbali

JUDGE

27/10/2021