IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 100 OF 2021

(Arising from Serengeti District court at Mugumu Economic case No. 41 of 2021)

NYAMHANGA CHACHA KINYABU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5th October, 2021 and 25th October, 2021

F. H. MAHIMBALI, J.:

Nyamhanga Chacha Kinyabu, the appellant was charged before the district court of Serengeti at Mugumu for three counts namely; Unlawful entry into the National Park, unlawful possession of weapons in the National Park and Unlawful possession of government trophy.

It was alleged by the prosecution that on the 22nd day of June, 2020 at Nyakogati area within Serengeti national park the accused person was found in the national park without permit and in unlawful possession of weapons and government trophy. The appellant denied to have committed the said offences.

The material facts leading to this appeal are as follows;

On the 22nd day of June, 2020 at Nyakogati area within Serengeti National Park Patrick Gidbson Chelewa (PW1) together with Joseph Mpangala, and Yahya Self were on patrol and they saw the appellant walking in the national park. They inquired from him if he had any permit regarding his presence within the National Park, he had none. They also found him being in unlawful possession of weapons to wit; one knife, one panga and five trapping wires and government trophy to wit; one knack of zebra, one head of zebra and one hind limb of zebra as he too had no any authorization permit regarding possession of the same. They arrested him and during interrogation he introduced himself as Nyamhanga Chacha and that he is a resident of Nyamantare village within Tarime district . They prepared the certificate of seizure and during the hearing of this matter he tendered it in court and it was admitted without objection and marked exhibit PE1. They took the appellant to Mugumu police station and filed case no. MUG/IR/1609/2020 and the weapons were labelled with the case file no.MUG/IR/1609/2020.The said weapons were admitted and marked exhibit PE2. His testimony was corroborated by PW3.

At the police station the case file was assigned to F.6443 D/sgt Pius (PW4) who investigated the case on possession of government

trophy. He called Wilbrod Vicent (PW3) to prepare the trophy valuation report. PW3 testified in court that he was able to identify the government trophy through their slier color black to white strips, the head had no horns and the tail had black hair color. The value of the trophy was tsh. 2,760,000/= equal to one willed zebra valued at USD 1,200/= And after completion of the valuation he gave PW4 the certificate. He also tendered it and it was admitted in court without any objection as exhibit PE3.

PW4 also prepared the inventory form and took the appellant together with the trophy to the magistrate so as to get a disposition order. The appellant signed the inventory form using his right thumb. PW4 also tendered and admitted the inventory form in court as exhibit PE4 without any objection from the appellant.

The court found the appellant with a case to answer and he was accorded his right to defend in terms of section 231(1) of the CPA. The appellant fended for himself; he had no witnesses to call nor exhibits to tender. In his sworn testimony, he testified that he was at his house on the 22nd May, 2020 and he later went to Nyigoti village where he met with Mr. Rosho Tito and Kibosho. They started mining gold at Nyigoti gold mines. They worked and they were stopped by the heavy rains.

On the 1st of June, 2020 they shifted to another place after they were connected by Kibosho's relatives who were rangers at TANAPA. They went to their camp on the 2nd of June, 2020 and they worked there. On the 21st June, 2020, Kibosho escaped with gold stones. The rangers told them they had conspired to steal from them. The rangers took his 150,000 (cash) and he was isolated and tortured. He was later taken to Mugumu police station and later arraigned before the court.

Upon hearing of the case, the trial court was dully satisfied that the prosecution's case was proved beyond reasonable doubt, thus convicted the appellant as charged in all three offences and sentenced him to one year imprisonment in respect of the first count, one year imprisonment in respect of the second count and 20 years imprisonment in respect of the third count.

The trial court's decision aggrieved the appellant hence he is appealing to this to Court contesting for his innocence. The grounds of appeal in verbatim are as follows;

1. That, the trial magistrate erred in laws and fact to convict and sentence the appellant because during disposing of Government trophies, I was not there to see how that government was disposing , also there were no any evidence which produced by

the prosecution side to support that at the time of disposing that government trophies I was there.

2. That, the trial magistrate erred in laws and fact to convict and sentence the appellant that while there were no exhibits tendered on the first date of his appearance in the trial court.
3. That, the trial magistrate erred in laws and fact to convict and sentence the appellant while the court did not give him a chance to call his key witness who was there at the time when I was arrested by the park rangers , but the court did not see that issue.
4. That, the trial magistrate erred in laws and fact in convicting and sentencing the appellant by admitting wrong evidences by PW1 and PW2 (the rangers)

When this appeal came for hearing, the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr Malekela, learned state attorney. The matter was heard vide audio teleconference.

Submitting in support of the appeal, the appellant prayed his grounds of appeal be adopted and be part of his submission and be considered for the outcome of his appeal.

Opposing this appeal, Mr. Malekela submitted on the first ground that it is bankrupt of merit. He submitted that as per the proceedings in respect of the said destruction of the said government trophy as per the inventory form, the appellant was present and dully involved. Hence, this ground lacks merits.

Regarding the second ground of appeal, it was his submission that the exhibits are not legally tendered in court on the first appearance in court but when the case's investigation is complete and it is ripe for hearing. Only when, the exhibits are tendered in court in a prescribed manner. In this case they were tendered at the right time. He referred the court to the trial proceedings at pages 23, 24, 32 and 40 of the typed proceedings.

On the third ground he submitted that the appellant was granted the right to call witnesses. At page 42 of the court's proceedings, it is clear that the appellant was informed of his rights and that he opted not to call any witness and he had no any exhibit to tender. With this reflective record, it is clear that the appellant's ground of appeal is misplaced and out of context.

On the fourth ground, it is his submission that the trial magistrate did not error when it considered the testimonies of PW1 and PW2 who

were park rangers and were at the crime scene. He stated that it could not be possible to have other witnesses apart from the park ranger. This ground is devoid of merits. He finally prayed that this court finds this appeal bankrupt of merits and dismisses it, thus conviction and sentence meted out by the trial court be upheld.

Submitting on the issue raised by the court's suo motto on the legality of the first count as per the charge sheet, Mr. Malekela stated that the charging section does not establish the offence of unlawful entry into the national park . He prayed it be expunged as the appellant was improperly sued, convicted and sentenced.

Responding on the second issue raised by the court on whether there was proper documentation on handling of exhibits in respect of this case, it was his submission that the record is silent and it does not show if the legal procedure was well complied with by the arresting officers (PW1 and PW2 to PW3 and PW4). He stated that the testimony of PW1 and PW2 do not state who the custodian of the said exhibits was after the seizure by PW1 and PW2. There ought to be a clear record of evidence as he was sent to the police station who kept the said exhibits. He found the evidence wanting and he left it to the court to decide on that.

Rejoining, the appellant had nothing to add and he stated justice was not done to him in respect of this case. He thus prayed his appeal be allowed.

Having heard the rival submissions of the parties and gone through the court's record the matter is now to be tackled by the court on whether this appeal has merits.

In respect of the first ground, it was the appellant's grief that the legal procedure was not followed during disposition of the said government trophy. The respondent objected to this ground. Having gone through the inventory from (exhibit PE4) the accused person was present and hearing was conducted and the appellant denied to have been found in possession of the said government trophy. The trial court's records feature out the following as regards exhibit PE4:

Date: 23/6/2020

Before: Ginene – RM

Suspect: Nyamhanga Chacha Kinyabu

Court: A suspect is asked whether he was found being in possession of Government trophies to wit: fresh meat of zebra

Sgd

Ginene – RM

23/6/2020

***Nyamhanga Chacha Kinyabu**:*

I was arrested at Nyabogati area (Mianzini) within Serengeti National Park with my fellow who ran away and we were conducting mining activities. I still insist that I was not found in possession of Government trophies mentioned.

Order:

i) A suspect has denied to be found in possession of Government Trophies mentioned.

ii) The trophies to be disposed of as cannot be stored for a long time.

Sgd

Ginene – RM

23/6/2020

As per paragraph 25 of the Police General Orders, it 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."

What is to be done when the intended accused person in the intended charge is brought before the magistrate with the property to be tendered as exhibit in the intended case the law is settled that 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).

In my consideration, the procedure of its disposition prior to the hearing of the case in this case was well adhered to and it is in compliance with the law. The only anomaly with this proceeding, is none appearance of the police officer in the proceedings. However, the inventory form being descriptive, it suffices the purpose of it. Hence this ground is devoid of merits and it is dismissed.

The appellant's second complaint is that the exhibits were not tendered in court on the first day he was taken to court. The respondent

demurred to this ground and stated that the exhibit has to be tendered by a competent witness and in this case the legal procedure was followed. This court is at one with the learned state attorney, that there is no specific time of when the exhibit has to be tendered. The law is clear that it has to be tendered by a competent witness who was the custodian of the exhibit or a witness who at one point in time possessed any item that is a subject matter of a trial. In that regard, this ground of appeal is devoid of merits and it is dismissed.

On regard to the third ground of appeal, it was the appellant's moan that he was not given a chance to call key witnesses. I have gone through the trial courts record, though the trial court's records is not fully reflective that the appellant was addressed of his rights in terms of section 231 of the Criminal Procedure Act [Cap. 20 R.E. 2019] as required, yet he is recorded to have stated that he would give his evidence under oath and that he had no witness to call, neither any exhibit to tender. That said, this ground is devoid of merits.

The appellant's last grief is that the court admitted wrong evidence of PW1 and PW2. The appellant has not shown how the evidence of the park rangers was wrong evidence. PW1 together with PW2 found the appellant in the National Park without any permit and in unlawful possession of weapons and government trophy. The appellant never

objected to the inventory form and the certificate of seizure being admitted in court. He also never denied to being arrested by PW1 or PW2. Nevertheless, in a deep digest to the prosecution case, considering the testimony of PW1 and PW2 it raises more doubts on their truthfulness of what they testified. Considering the prosecution evidence of this case that the On the 22nd day of June, 2020 at Nyakogati area within Serengeti National park Patrick Gidbson Chelewa (PW1) together with Joseph Mpangala, and Yahya Self were on patrol and they saw the appellant walking in the national park. They inquired from him if he had any permit regarding his presence within the park, he had none. They also found him being in unlawful possession of weapons to wit; one knife, one panga and five trapping wires and government trophy to wit; **one kneck of zebra, one head of zebra and one hind limb of zebra** it is inquisitive to know how the same were carried by one single man together with the said alleged weapons. Unless he had a wheel barrow means, it raises doubt if really the appellant was found with the alleged trophies as charged. With this doubt ground number four is allowed as it is meritorious.

Regarding the two issues raised by the court. On the issue of the first count, this court is at one with the learned state attorney that the section the appellant was charged with in regards to the first count does

not establish the offence of unlawful entry into the national park. The legal provision under section 21 (1) of the National Park Act, Cap 282 R.E 2019 is worded this way as per amendment brought by Act No. 11 of 2003:

(1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable - Act No.11 of 2003

(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.

That said, it is my humble view that the prosecution did not prove the first count against the appellants beyond reasonable doubt as it is none – existent in the said section. The marginal notes "*restriction of entry into the National Park"* under section 21 (1) of the National Park Act cannot be part of the law. With all due respect marginal notes are not part of the law and they do not create an offence.Section 26 (2) of the Interpretation of Laws Act (Cap. 1 R. E. 2002), which says that, I quote: -

"A marginal note or footnote to a written law and, notwithstanding subsection (1), a heading to a section, regulation, rule, by law, or clause of a written law shall be taken not to be part of the written law."

The Court of Appeal of Tanzania in its recent decision (in the case of ***Dogo Marwa @ Sigana and Another V. Rep, Criminal Appeal no. 512 of 2019 at page 13***) commenting on the wording of section 21(1) of NPA had this to say:

"It is now apparent that the amendment brought under Act No. 11 of 2003 deleted the acts reus (illegal entry or illegal remaining in a national park) and got confusion in section 21(1) of the NPA. As far as we are concerned, the appellants were charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park"

The second issue was whether there was any proper documentation on handling of the exhibits. It was the respondent's submission that the record is silent. I have gone through the court's record and it is evident that when the appellant was arrested with the weapons and the government trophies, the park rangers prepared the seizure certificate in regards to the weapons and they took it to the police station and at the police station, police prepared the inventory form that he tendered at the court. The critical survey of this evidence, it is not clear on the chain of custody of the said custody from the park

ranger (PW1) to police officers. In the cerebrated case of PAULO MADUKA AND ANOTHER v. R Criminal Appeal NO. 110 of 2007 (unreported) where the Court of Appeal stated as follows;-

> *"By chain of custody we have in mind the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition o f evidence be it physical or electronic. The idea behind recording the chain o f custody, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty....the chain of custody requires that from the moment the evidence is collected its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."*

From the above wordings of the decision, the principle of proper chain of custody applies in both physical and electronic evidence. The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused. However, in this case, the Court of Appeal insisted the proper sequence of events in the handling of an exhibit from the time it is seized, how it is controlled, transferred, stored until it is tendered and admitted in court at the trial.

In consideration of the testimony with the case at hand, though there is no paper trail evidence on the handling of the said exhibits, the law is now 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 (see the case of **Jamaste Mboya vs Republic,** Criminal Appeal No 295 of 2018, and **Moses Mwakasindile vs Republic,** Criminal Appeal No 15 of 2017).

Having stated the above, I am satisfied that the chain of custody in the circumstances of this case was complied with.

Before I wind up, there is still a crucial point in which I have found it important to consider in this appeal. Whether the defense witness was accordingly considered by the trial court. It is true that conviction of the accused person is solely based on the strength of the prosecution case, however it is important that in the analysis there should be an equal consideration of the defense testimony as well. The defense testimony in any prosecution is not there just to make the completeness of the trial of the case, but rather be accorded an equal weight in the case analysis (See ***Dogo Marwa @ Sigana and Another V. Rep, Criminal Appeal no. 512 of 2019 at page 14).***

In this case, we have seen the appellant in his defense testimony testified that on the 22nd May, 2020 he was at his home and later went to Nyigoti village where he met with Mr. Rosho Tito and Kibosho. They started mining gold at Nyigoti gold mines. While there, they were prevented by heavy rains from continuing with the mining activities. They then on the 1st of June, 2020 shifted to another place after they were connected by Kibosho's relatives who were rangers at TANAPA. They went to their camp on the 2nd of June, 2020 and they worked there and, on the 21st June, 2020, Kibosho escaped with gold stones. The rangers told them they had conspired to steal from them. The rangers took his 150,000 (cash) and he was isolated and tortured. He was later taken to Mugumu police station and later arraigned before the court. There was no any cross examination by the Republic on this fact. The law is settled that failure to cross examine on the crucial point suggests acceptance to the fact. Thus, raising a very reasonable doubt on the prosecution case it being a defence testimony. Should the trial magistrate had considered the defence testimony and made a thorough reasoning, the findings of guilty was wanting merit in this case.

In fine, coupled with all these faults, this appeal is allowed; the conviction and sentence meted out in respect of the first and third counts are quashed and set aside for want of proof beyond reasonable

doubt. In fine, this court orders the appellants to serve one year imprisonment from the date of the trial court's decision, that is from 28/06/2021.

It is so ordered.

DATED at MUSOMA this 25th day of October, 2021.

F. H. Mahimbali
JUDGE
25/10/2021

Court: Judgment delivered this 25th day of October, 2021 in the presence of Appellant, Agma Haule state attorney for the respondent and Mr. Gidion Mugoa, RMA.

Right of appeal is explained.

F. H. Mahimbali
JUDGE
25/10/2021