

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

CONSOLIDATED CRIMINAL APPEALS NO. 11, 12, 13 AND 14 OF 2021

MARWA S/O GITANO 1ST APPELLANT
OBADIA S/O NYANGI @ NYIRABU 2ND APPELLANT
WANKURU S/O MWITA @ KICHEHE..... 3RD APPELLANT
MARWA S/O NYAMKORA 4TH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Originating from Economic Case No. 38 of 2019 of the Serengeti District Court at Mugumu)

JUDGMENT

24th & 30th November, 2021

Kahyoza, J.:

The present appeal fostered by the four appellants, **Marwa Gitano, Obadia Nyangi, @ Nyirabu, Wankuru Mwita @ Kichere** and **Marwa Nyamkora** who are against the conviction and sentences meted to them by the District Court of Serengeti in Economic Case No. 38 of 2019.

Before the District Court of Serengeti, the appellants were charged with four counts of offence namely; **One**, Unlawful entering in the Game Reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009, **two**, Unlawful possession of weapon in the Game Reserve contrary to section 17 (1) (2) and 20 (1) (b) (4) of the Wildlife Conservation Act No. 5 of 2009 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 by section 13 and section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016, **three** and **four**, Unlawful possession of Government Trophies contrary to the relevant provisions of the Wildlife Conservation Act No. 5 of 2009 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 by section 13 and section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The prosecution paraded four witnesses and tendered four exhibits to prove the appellants guilty beyond reasonable doubt. The prosecution evidence was to the effect that, on 30th April 2019 around 12:15hrs, when **Kurwa Richard @ Maganga** (PW1), **Alphonse Mugabo @ Mahiti** (PW2), **Gina Mwatagu**, **Joseph Megora** and **Masumbuko Matandura**, the game scouts, were patrolling, arrested the appellants at Mto Gurumeti area within Ikorongo Grumeti Game Reserve. The appellants were found in possession of local weapons to wit: one panga and two knives. They were also in possession of Government trophies to wit; fifteen pieces of fresh meat of Impala and ten pieces fresh meat of Aardvark. The appellants failed to produce a permit to enter the game reserve and to possess the Government trophies, they have none.

They game scouts prepared a certificate of seizure (Exhibit PE 1) which the appellants signed and presented the appellants together with the exhibits to Mugumu Police Station where case no. MUG/IR/1344/2019 were opened and assigned to **E. 75 D/SGT Titus** (PW4). **E. 75 D/SGT Titus** (PW4) procured **Wilbroad Vicent** (PW3) a Wildlife warden, who identified and valued the government trophies

found in possession of the appellants. **E. 75 D/SGT Titus** (PW4) prepared the inventory form (Exhibit PE4) and presented it together with the government trophies before the magistrate who issued the disposal order. He also testified that; the appellants were before the magistrate who issued the disposal order.

In his testimony, **Wilbroad Vicent** (PW3) testified that he identified fifteen pieces of fresh meat of Impala by its skin colour of reddish brown under belly white and that he identified the ten pieces of fresh meat of Aardvark by its skin which was pale yellowish to grey pinkish due to borrowing in soil. He valued the trophies of Impala at Tshs. 1,716,000/= and of Aardvark at 800 Tshs. 1,452,000/=. **Wilbroad Vicent** (PW3) tendered a trophy valuation certificate (Exhibit PE 3).

On their defence the appellants denied the charges, the first appellant **Marwa Gitano @ Nyirabu** testified that he was arrested on 24th April 2019 by game scout when he went on patrolling his farm against wild animals. The second appellant **Obadia Nyangi @ Ryoba** testified that he was arrested on 27th April 2019 when he was grazing his animals at Ikorongo Game Reserve. He stated that the park rangers told him that he was grazing into the Game Reserve.

The third appellant, **Wankuru Mwita @ Kichere** his defence was that he was arrested on the 28th April 2019 around 06:00 pm when he went to keep away elephants from his farm. And the fourth appellant **Marwa Nyankora @ Msoti** testified to be arrested on the 29th April 2019 around 06:00 pm in his village. He stated that he lived near the boundary with National Park and that the park rangers arrested him for want of a permit to sell charcoal.

After a full trial, the trial court was of the view that the prosecution proved its case beyond reasonable doubt and went on convicting and sentencing the appellants to one (1) year imprisonment for the offence in the first and second counts. Regarding the third and fourth counts, the appellants were sentenced to twenty (20) years imprisonment. The sentences were ordered to run concurrently.

The appellants were not amused with the decision of the trial court and decided to file four separate petitions of appeal challenging the said decision before this Court. The petitions of appeal filed by the appellants appeared to have the cognate grounds of appeal and by order of this Court, all appeals were merged as Consolidated Criminal Appeals No. 11, 12, 13 and 14 of 2021.

In their petitions of appeal, the appellants advanced four grounds of appeal which in summary are;

1. There were no exhibits tendered before the trial court.
2. The appellants were not present when the trophies disposal order was issued and they did not sign the inventory form.
3. The appellants were not given to call witnesses.
4. That PW1 and PW2 did not state the date they arrested the appellants.

At the hearing of this appeal, the appellants appeared in person while the respondent was represented by Mr. Yese Temba, the learned State Attorney. The Court heard the appeal in the virtual presence of the parties.

Arguing their appeal, the appellants did not have much to submit. The second and third appellants contended that the prosecution failed to tender any exhibit and they prayed this Court to acquit them. The first

and fourth appellants relied on the grounds of appeal. They had nothing to add to the grounds of appeal.

Contesting the appeal, Mr. Temba was of the view that the prosecution tendered the exhibits before the trial court. He submitted that there was certificate of seizure (Exhibit PE1), panga and two knives (Exhibit PE2), inventory form and trophy valuation report. Mr. Temba contended that the appellants were present when the trophy disposal order was issued before the magistrate. And he proceeded to argue that the appellants were given the chance to call their witnesses but they failed to do so.

Arguing on the fourth ground of appeal, Mr. Temba submitted that the prosecution witnesses mentioned the date on which they arrested the appellants. He was also of the view that, Kurwa Richard @ Maganga (**PW1**) and Alphonse S/O Mugabo @ Mahiti (**PW2**) were the experienced persons so they were a competent witness to identify the boundaries of the game reserve. Having submitted that, Mr. Temba implored this Court to dismiss the appeal.

In rejoinder, the second and third appellants insisted that there was no exhibit tendered, only papers. They added that the prosecution witnesses did not state when they were arrested.

This being the first appellate court, am duty bound to analyse and re-evaluate the evidence adduced before the trial court and draw the conclusion. See the case of **Dinkerrai Ramkrishna Pandya v. R** (1957) EA 336. And in exercising such duty, am called upon to determine whether the prosecution case was proved beyond reasonable doubt. I will consider the grounds of appeal and parties' submission in resolving the raised issue.

Did the PW1 and PW2 state in their evidence the date they arrested the appellants?

I will not waste much time on this issue as the trial court records speaks for itself. I am at one with Mr. Temba's submission that Kurwa Richard @ Maganga (**PW1**) and Alphonse S/O Mugabo @ Mahiti (**PW2**) did mentioned the date on which they arrested the appellants. Referring to pages 22 and 30 of the typed proceedings of the trial court, it is vividly shown that they arrested the appellants on 30th April 2019 around 12:15 pm. Thus, I found the fourth ground of appeal devoid of merit and I dismiss it.

Were the appellants denied the right to call witnesses?

I would like to say that the right of fair hearing is not only a fundamental procedural aspect in the court proceedings, but it is also a fundamental constitutional right in Tanzania by virtue of Article 13(6) (a) of the Constitution. It is in this consideration that in the case of **Mbeya - Rukwa Auto parts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 251, the Court stated as follows:

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of the equality before the law.

After scrutinizing the trial Court proceedings, I see no reasons not to join hands with Mr. Temba's argument that, the principle of natural justice was not contravened as the appellants were present during the whole trial and were given right to cross examine the prosecution, right

to defend themselves and right to call witnesses. At page 49 of the trial court typed proceedings, it shows that the appellants prayed to close their defence and stated that they have no any witnesses to call. Therefore, the third ground of appeal is unfounded and I dismiss the same.

Did prosecution tender exhibit?

The appellants complained that the prosecution did not tendered exhibits. The second and third appellants added during the hearing that the prosecution tendered papers.

The respondent state attorney submitted that the prosecution tendered exhibits. He submitted that there was certificate of seizure (Exhibit PE1), panga and two knives (Exhibit PE2), inventory form and trophy valuation report.

Looking at the trial court records, it is clearly shown that the prosecution tendered four exhibits. The prosecution tendered certificate of seizure (Exhibit PE1), one panga and two knives (Exhibit PE 2), trophy valuation report (Exhibit PE 3) and inventory form (Exhibit PE4). And when the appellants were asked to comment on the said exhibits, they did not object. That means the appellants' arguments that there were no exhibits tendered before the trial court is baseless and I dismiss it.

Were the appellants present when the disposal order was issued and did sign the inventory form?

On my party, am aware of two procedures of disposing of exhibit subject to speed decay. The first procedure is provided for under section 101 of the Wildlife Conservation Act (supra). Pursuant to the above cited provisions, the trial court may on its own motion or on application made by the prosecution, order that the trophy subject to speed decay be disposed of.

The second procedure is provided for under paragraph 25 of the Police General Orders (PGO) which is reproduced hereunder for ease of reference:

"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 Court of Appeal had an opportunity to consider the procedure of disposing exhibit subject to speed decay under paragraph 25 of Police General Orders (PGO) No. 229 in **Mohamed Juma @ Mpakama vs R**, Criminal Appeal no. 385 of 2017, CAT (unreported). The Court of Appeal stated the need of hearing the accused before disposing the exhibit. 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**....."*

*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**." (Emphasis is added)*

Regarding the prosecution evidence adduced by **E. 75 D/SGT Titus** (PW4) the disposal of the government trophies was made under paragraph 25 of PGO No. 229. There is no evidence that the magistrate heard the appellants before he ordered the disposal of the

government trophies. Thus, the order to dispose the trophies subject to the third and fourth counts was obtained in a manner that prejudiced the appellants. Therefore, I agreed with the appellants that the prosecution failed to prove the third count and fourth counts.

In the upshot, I dismiss the appellants' appeal regarding the first and second counts and allow the appeal regarding the third count. Consequently, I quash the conviction and set aside the sentence on the third and fourth counts of unlawful possession of government trophies. The appellants shall be released after serving the sentence in the first and second counts.

It is so ordered.

DATED at MUSOMA this 30th day of November, 2021.



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J. R. Kahyoza
JUDGE
30/11/2021

Court: Judgment delivered in the presence of the appellants and Ms. Agma Haule, learned state attorney for the respondent, virtually. B/C Mr. Makunja RMA, present.

A handwritten signature in blue ink, identical to the one above, consisting of a long horizontal stroke followed by a stylized, cursive name.

J. R. Kahyoza
JUDGE
30/11/2021